CONQUERING INJUSTICE: An Analysis of Sexual Violence in Indian Country and the *Oliphant* Gap in Tribal Jurisdiction

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"The prevalence of non-Indian crime on today's reservations … [has] little relevance to the principles which lead us to conclude that Indian tribes do not have inherent jurisdiction to try and to punish non-Indians."[1]

"But this one—my father teased a particularly disgusting bit of sludge from the pile with the edge of his fork—this one is the one I'd abolish right this minute if I had the power of a movie shaman. Oliphant v. Suquamish. *He shook the fork and the stink wafted at me. Took from us the right to prosecute non-Indians who commit crimes on our land."*[2]

"In the Standing Rock Sioux Reservation … many of the women who agreed to be interviewed could not think of any Native women within their community who had not been subjected to sexual violence."[3]

"Before asking 'what happened,' police ask: 'Was it in our jurisdiction? Was the perpetrator Native American?'"[4]

In the United States today, Native American[5] women suffer from a disproportionate amount of violence in comparison to the rest of the population. On average, 1 in 3 Native American women are raped at least once in their lifetime, and the murder rate of Native women is 10 times higher than the national rate.[6] While some of the perpetrators who rape, injure, and kill Native women are Native American, many others are not. There is not yet sufficient, quantitative data to know exactly how many Native American women are attacked by perpetrators outside of domestic violence, but the statistics that do exist on race and the rape of Native American women are striking.

U.S. Department of Justice (DOJ) statistics from 2004 affirm that 86 percent of the perpetrators of (reported) rape and sexual assault against Native women are non-Native men.[7] In direct contrast, the DOJ's statistics on sexual violence among other races shows that sexual assault is most likely to occur within an individual's own race.[8] According to the DOJ, white perpetrators made up 65.1 percent of the rapists who raped white women in the United States in 2004, and African-American perpetrators made up 89.8 percent of the rapists who raped African-American women.[9] Thus, the statistics on perpetrators of sexual violence against Native American women directly conflict with what the DOJ states is most likely to occur—only 14 percent of perpetrators of rape and sexual assault against Native women are Native American men, while 86 percent are other races. There are currently no studies that explain this discrepancy, but there is a likely hypothesis. Men who target women for sexual violence are more likely to look outside their own race if they can attack a racially separate group of women who are not protected by the law. It is likely that many of the men who choose to rape Native American women know that they will probably not be arrested or punished for their crime.

Unlike most jurisdictions in the United States that have the authority to prosecute perpetrators of sexual violence, tribal jurisdictions do not have the authority to prosecute non-Indian perpetrators for any violent crimes, including crimes of sexual violence. So, tribal jurisdictions cannot prosecute approximately 86 percent of the perpetrators of rape and sexual assault committed in Indian country.[10] Some tribes in the United States do not yet have a structured legal system that could prosecute perpetrators, while other tribes do have that structure; however, the state of a tribe's legal system is a moot point under current federal law, which does not allow any tribe to prosecute any non-Indian offender of a violent crime.

Domestic violence in Indian country is a significant problem. In February 2013, Congress passed the reauthorization of the Violence Against Women Act (VAWA) that included legislation helpful to tribal courts in combating domestic violence in Indian country.[11] The previous version of VAWA expired in 2011, but renewal of the law was held up in Congress for two years.[12] One of the main reasons for this delay was the inclusion of a return of limited jurisdiction for tribal courts over non-Indian domestic violence offenders.[13] Even though the revised VAWA reinstated a limited, special jurisdiction to tribes to prosecute non-Indian offenders only for domestic violence and violation of protection orders, the main group of senators in Congress who opposed the revised VAWA did so based on the argument that allowing tribes jurisdiction over non-Indians for any reason would deny "constitutional rights to certain American citizens."[14]

The passage of the renewed VAWA was a step in the right direction in combating the incredibly high rates of violence against Native American women.[15] Three years before VAWA was renewed, Congress also passed the Tribal Law and Order Act (TLOA), in 2010, which gave back to tribes expanded sentencing authority over Indian defendants and addressed some of the issues and difficulties that tribal police and courts face on a daily basis when dealing with the problem of federal versus tribal jurisdiction.[16] Like VAWA, TLOA is a step in the right direction in helping tribes combat crime in Indian country, but unlike VAWA, TLOA does not give back to tribes any jurisdiction over non-Indians.

Currently, tribes still do not have jurisdiction over sexual assault cases where the perpetrator is non-Indian and does not have an intimate relationship with the victim. Thus, if a stranger rapes a Native American woman in Indian country, the federal DOJ office in whatever state where the rape occurred has jurisdiction over the case. Federal DOJ offices are not generally set up to tackle individual cases of rape:

> Few cases of sexual assault in Indian country make it to the courthouse. In the 1978 case *Oliphant vs. Suquamish*, the U.S. Supreme Court ruled that only federal prosecutors can prosecute crimes on Indian land. But those federal prosecutors are also responsible for terrorism cases, white-collar crime, and drug racketeering. Rape cases are often shuffled aside. Many officials [say that a case] involving the rape of a single woman on a reservation just [does not] hold the kind of prominence those other cases do.[17]

Both TLOA and the revised VAWA are encouraging signs that Indian tribes may, in the future, regain more power and ability to deal with crimes of violence against Native American women in Indian country, but there is still much work to be done.

The best way for tribes to gain criminal jurisdiction over non-Indian perpetrators of sexual violence in Indian country would be for Congress to overturn the 1978 case *Oliphant v. Suquamish Indian Tribe*. In *Oliphant*, the Supreme Court ruled that Indian tribes do not have inherent criminal jurisdiction over non-Indians and tribes may not assume this jurisdiction unless Congress expressly grants it.[18] The *Oliphant* ruling was extremely detrimental to tribes and their ability to control crime within their jurisdictions; in ruling that tribes do not have inherent criminal jurisdiction over non-Indians, the Supreme Court's opinion was in direct contradiction to the rulings of the lower courts that heard the case and ruled in favor of the tribes and it was in direct contrast to the tribes in the United States that were already exercising their inherent criminal jurisdiction over non-Indians through their court systems.

This article examines the problems with the *Oliphant* decision and argues for a congressional overturning of the decision. Part I discusses TLOA and VAWA and identifies both their positive aspects and where the laws fall short in working to solve the problem of violence, specifically sexual violence, in Indian country. While TLOA and VAWA are both a step in the right direction, they cannot do enough without the congressional overturning of *Oliphant*. Part II discusses the Supreme Court's decision in *Oliphant v. Suquamish Indian Tribe* and identifies where the Court's analysis falls short in creating sound, doctrinal law based on *stare decisis*.[19] Part III discusses the importance of overturning *Oliphant* and how it is crucial for tribes to have criminal jurisdiction over perpetrators of sexual violence in Indian country.

Part I. The Basics of TLOA and VAWA

Key Provisions in TLOA

From a criminal justice standpoint, when a Native American woman suffers violence and abuse from a domestic or dating partner, from an acquaintance, or from a stranger, who the attacker is matters. Before TLOA became law in 2010, tribes were limited by the Indian Civil Rights Act of 1968 (ICRA) to sentencing Indian offenders of any crime to a maximum of one year in jail, a $5,000 fine, or both.[20] TLOA modified ICRA so tribes that choose to adopt TLOA can sentence Indian offenders to up to a maximum of three years in jail, a $15,000 fine, or both (tribes are also allowed to stack up to three sentences for a maximum of nine years).[21] In order for a tribe to enact TLOA and utilize this enhanced sentencing power, it must first show the DOJ that it provides the following: (1) effective assistance of counsel to any defendant facing more than a year in jail, (2) counsel that is licensed by any jurisdiction, (3) a presiding judge who is law trained and licensed in any jurisdiction, (4) publicly available laws (including rules of evidence and criminal procedure), and (5) a maintained record of court criminal proceedings.[22]

The federal government enacted TLOA in 2010 in response to the problem of heightened gang activity and sexual violence in Indian country.[23] In a case of sexual assault, whether it is within a domestic relationship or not, a tribe that adopts TLOA could sentence an Indian offender to up to three years in jail, with the ability to stack up to three sentences, for a total of nine years in jail. In addition to enhanced sentencing, TLOA gives tribal law enforcement agencies greater access to the National Criminal Information Center (NCIC) database,[24] and it requires improved communication between federal and tribal law enforcement.[25] TLOA also "provides for concurrent federal jurisdiction in Public Law 280 states upon tribal consent."[26]

For cases that go to the state DOJ office that tribes do not handle, TLOA mandates that federal investigators and U.S. attorneys must communicate with tribes and update them on the status of current investigations and prosecutions, and U.S. attorneys who decline to prosecute cases must notify the tribe and share evidence in case the tribe has jurisdiction over the defendant and can pursue the case in tribal court.[27]

Another important aspect of TLOA is that it allows tribal law enforcement officers to be deputized as federal law enforcement officers.[28] If a tribe takes this step, then tribal police can arrive on scene at a crime and arrest a suspect without first having to determine whether the victim and the perpetrator are Indian or non-Indian because the tribal officer has the same power as a federal officer to arrest anyone who is a suspect in a crime. Allowing tribal police officers to make an arrest when they arrive on scene to a sexual assault incident is a vast improvement from what was previously the status quo: tribal police would arrive on scene but would not be able to arrest the perpetrator because he was non-Indian. However, the ability to make an arrest is just a first, important step in a tribe's regaining their right to jurisdiction over non-Indian perpetrators on Indian land. As the law stands now, a tribal police officer may arrest a non-Indian suspect for a rape or sexual assault, but the tribal court cannot prosecute him unless he is in a domestic or dating relationship with the victim and has ties to the tribe.[29] If the offender is unknown to the victim and a non-Indian, the tribal court must release him and hand the case over to U.S. attorneys who may or may not charge the offender.

TLOA has the potential to develop into an important tool that gives tribes more power to fight crime in Indian country than they previously could exercise, but there is still much more that needs to happen in order for tribes to effectively reduce crime. Enhanced sentencing under TLOA is a good step forward for tribal courts, but many tribes lack the financial resources to provide counsel for all defendants; thus, despite TLOA, many tribes will still be constrained to the one-year sentencing limit.[30] Mandating that U.S. attorneys communicate with tribes and hand the case back to a tribe if the federal government decides not to prosecute is a positive change, but this change does not help in cases that involve non-Indian offenders (outside of domestic or dating violence cases) because no tribe has jurisdiction over them.

Key Provisions in VAWA

Congress' reauthorization of VAWA in 2013 included the return of limited, special criminal jurisdiction to tribal courts over domestic violence, dating violence, and criminal violations of protection orders where at least one of the parties is Indian.[31] In order to enforce this special criminal jurisdiction under VAWA, a tribe must take specific steps within its justice system and apply to the DOJ for approval. There were five tribes in the United States that applied and were accepted into a DOJ pilot program to exercise this jurisdiction before special domestic violence criminal jurisdiction opened to all tribes in March 2015.[32]

A tribe's special criminal jurisdiction over non-Indians under VAWA does not apply where both the victim and the defendant are non-Indian, where the non-Indian defendant lacks sufficient ties to the tribe, where the sexual assault physically took place outside of the tribe's jurisdiction, or where the tribe chooses to not exercise this expanded power of jurisdiction.[33] VAWA specifies that "sufficient ties" to the tribe means that the non-Indian defendant must either live in the Indian country of the participating tribe; be employed within the Indian country of the participating tribe; or be a spouse, intimate partner, or dating partner of a tribal member or of an Indian who resides within the Indian country of the participating tribe.[34]

In order for a tribe to enact VAWA and exercise jurisdiction over non-Indian domestic violence offenders, the tribe must first show the DOJ that it provides all of the requirements under TLOA along with the following additional requirements: (1) tribes may not exclude non-Indians from jury pools and they must show that there is a fair cross section of the community in a tribe's jury pool, (2) tribes must inform detained defendants of their right to file a federal habeas corpus petition, and (3) tribal courts must ensure that "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant" are provided.[35] The third requirement was likely a result of congressional deal-making in order to pass VAWA. Due to its broad language, it may provide the best opportunity for a defendant to challenge the law with the aim of reaching the Supreme Court.

When VAWA passed in February 2013, the DOJ initiated a pilot program for tribes to apply in order to begin the process of exercising criminal jurisdiction over non-Indian domestic violence offenders.[36] The five tribes that were accepted into the program were the Confederated Tribes of the Umatilla Indian Reservation in Oregon, the Pascua Yaqui Tribe of Arizona, the Tulalip Tribes of Washington, the Sisseton Wahpeton Oyate Tribe of South Dakota, and the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation in Montana.[37] All federally recognized tribes were then able to enact VAWA after March 7, 2015.[38]

With the reauthorization of VAWA in 2013, one of Congress' intentions was to reduce sexual violence in Indian country. The majority of men who attack, rape, and/or kill Native American women are non-Indian, so the ability for tribes to exercise special domestic violence criminal jurisdiction over all offenders in Indian country, whether the offender is Indian or non-Indian, is an important step for tribes to reclaim their inherent authority over crimes within their jurisdiction. However, VAWA will not help women in Indian country who are attacked by men who are not their partners.

As of December 2017, 16 tribes have implemented special domestic violence criminal jurisdiction over non-Indian offenders and together have made over 120 arrests.[39] One main issue that has arisen for many of the tribes is that VAWA does not extend tribal jurisdiction to any of the crimes that often occur at the same time as partner abuse in a domestic violence incident. Because of this, many tribes have arrested and charged an offender for domestic violence against their partner but were not able to charge the same offender for concurrent incidents of child abuse or assault of law enforcement personnel.[40] Three senators recently introduced a bill[41] that would extend tribal jurisdiction to include incidents of child abuse and violence against law enforcement.[42] While any expansion of tribal jurisdiction is a positive step for tribes as they work to combat violence in their jurisdictions, limited expansions of jurisdiction also limit tribes' ability to truly make tribal communities safer. Only a full congressional overturning of *Oliphant* would enable tribes to make progress in this fight.

Special domestic violence criminal jurisdiction for tribes under

VAWA is a crucial tool in the effort to stop the mass violence, sexual assaults, and rape of Native American women. But VAWA does not do enough to actually end the epidemic. Allowing tribal courts to regain the ability to prosecute perpetrators of sexual violence who are in a domestic or dating partnership with the woman they attack is certainly an important step, but there will still be a significant number of men who attack Native women who do not have an intimate relationship with the woman. Extending jurisdiction to include crimes that often occur alongside partner domestic violence is also a valuable tool for tribes, but it is not enough to stem the tide of violent crime in Indian country.

Non-Indian men who attack Native women outside of a domestic or dating relationship currently remain immune from tribal prosecution. They remain under the jurisdiction of U.S. attorney offices and the majority of them will not be prosecuted for their crimes. The best and most effective tool needed in order to combat the crisis of sexual violence against Native women would be for Congress to overturn *Oliphant* and return the tribes' right to exercise criminal jurisdiction over all perpetrators of sexual violence in Indian country.

Part II. An Analysis of *Oliphant v. Suquamish*

A Short Background of Treaty Law and the Development of Criminal Jurisdiction in Indian Country

The criminal justice system that currently exists in Indian country was established over the past 200 years through a patchwork of treaties, federal laws, and U.S. Supreme Court decisions. Beginning in 1778, the United States and Indian tribes created treaties to establish each nation's rights in relation to the other.[43] The tribes ceded millions of acres of their lands to the federal government in exchange for the government's protection.[44] The treaty era ended in 1871,[45] and much of the law that was established by treaty has been eroded by federal laws and court decisions. Specifically, U.S. Supreme Court decisions and congressional federal laws now limit tribal government authority over reservation crime, and they give much of the responsibility to investigate and prosecute reservation crimes to the federal government and some state governments.[46] But this was not always the case.

Although the federal government no longer enters into treaties with tribes, the treaties that were created between 1778-1871 are still considered to be "the supreme law of the land,"[47] and tribes today can still exercise their treaty rights as valid under federal law. In a treaty with the Comanche and other Indian Nations in 1846 there is clear language that any "citizen of the United States" (Native Americans were not yet considered citizens in 1846) who committed murder or robbery against an Indian was to be punished according to the law of the state or territory where the crime occurred.[48] In contrast, a treaty with the Cherokee in 1785 states that any non-Indian who settles on Indian land and does not leave after six months "forfeit[s] the protection of the United States, and the Indians may punish him or not as they please."[49]

Before the Supreme Court's decision in *Oliphant*, tribes that had tribal court systems assumed that they had jurisdiction over non-Indians who committed misdemeanors and minor felonies on Indian land based on their status as sovereign nations and, as an essential piece of that sovereignty, on the necessity to keep the peace within their borders. If a tribe did not have a treaty with the United States that clearly gave the tribe jurisdiction over non-Indian offenders, the tribe could assume jurisdiction based on the canons of construction[50] and on the Supreme Court cases that applied the canons. Thus, the decision that the Supreme Court handed down in *Oliphant* came as a surprise in that it did not apply the canons and it did not rely on settled law. Rather, it created a significant shift in federal Indian law that has had extremely dire effects on Indian tribes and their ability to combat crime in Indian country.

The *Oliphant* Opinion

In 1973, Mark David Oliphant was a non-Indian resident of the Suquamish Tribe's Port Madison Reservation. During the annual Chief Seattle Days celebration, Suquamish tribal police arrested him for assaulting a tribal officer and resisting arrest.[51] Oliphant applied for a writ of habeas corpus first to a federal district court and then to the Ninth Circuit Court of Appeals. Both courts denied the writ. The Ninth Circuit held that "tribes were independent sovereign nations at one time and retain powers not expressly taken away by Congress either through treaty or law."[52] The court noted that Congress had not made any relevant law to remove this power from the tribes, and it held that "the power to preserve order on the reservation is a necessary element of sovereignty."[53] The court wrote into its opinion the fact that the Suquamish Tribal Council had asked for additional police officers to help at Chief Seattle Days, but it had received only one county deputy for an eight-hour period for the entire weekend.[54] The Federal Bureau of Indian Affairs told the tribe that they would need to provide their own police for the event.[55]

Oliphant appealed to the Supreme Court, and the Court accepted the case. In 1978, when the Supreme Court handed down the *Oliphant* decision, there were 127 tribal court systems functioning in the United States.[56] Of those, 33 exercised criminal jurisdiction over non-Indian offenders and 12 others had enacted ordinances permitting the assumption of criminal jurisdiction over non-Indians.[57] In 1973, the Suquamish Indian tribe had adopted a law and order code that listed a number of offenses that confirmed Suquamish tribal jurisdiction over any offender—either Indian or non-Indian—who committed one of the named crimes. Rape was included on the list.[58]

Oliphant was a 6-2 decision, with one justice (William Brennan Jr.) not taking part. Justice Thurgood Marshall, joined by Chief Justice Warren E. Burger, dissented. Justice William Rehnquist wrote the opinion for the majority. At the beginning of the opinion, the Court framed the issue as a relatively new one because "few Indian tribes maintained any semblance of a formal court system" until the mid-20th century.[59] While the Court was correct that neither the federal government nor the Supreme Court had ever expressly dealt with the issue for all tribes, the Court was quite mistaken when it referred to tribal law as "usually handled by social and religious pressure and not by formal judicial processes."[60] One need only look to the 1883 Supreme Court case *Ex Parte Crow Dog*[61] to see evidence of a tribe enacting its formal judicial process in dealing with the murder of one Native American by another. The subsequent congressional action that created the Major Crimes Act is further evidence that a tribe (in this case, the Sioux) had a formal judicial process, but that the United States found it an unsatisfactory process in comparison to the U.S. judicial system.

In its *Oliphant* analysis, the Court acknowledged that a few tribes did have formal criminal systems in the 19th century, but the Court asserted that "from the earliest treaties with these tribes, it was apparently assumed that the tribes did not have criminal jurisdiction over non-Indians absent a congressional statute or treaty

provision to that effect."[62] The Court used the example of the 1830 treaty with the Choctaw Indian tribe as evidence that tribes knew they did not have inherent criminal jurisdiction over non-Indians based on tribal sovereignty. In that treaty, the Choctaws "express[ed] a wish that Congress may grant to the Choctaws the right of punishing by their own laws any white man who shall come into their nation and infringe any of their national regulations."[63]

The Court used the 1830 treaty with the Choctaw to support its position that all tribes knew that they did not possess criminal jurisdiction over non-Indians because a single tribe, the Choctaw, asked Congress to grant it in 1830. In its analysis, the Court did not discuss the history of the Suquamish court system. It did not mention how long the court had exercised jurisdiction over non-Indians, nor did it discuss what effect that system had on participants in Suquamish tribal court. These are crucial factors that should be found in a Supreme Court analysis of another court's jurisdiction; yet, while there is an analysis of past treaty language between the federal government and other tribes, there is no mention of the Suquamish tribal judicial history. The Court discussed language from a 1786 treaty with the Choctaws where the federal government relinquished protection over any U.S. citizen who chose to remain in Indian country, but there is no acknowledgement that this was recognition of tribal jurisdiction over non-Indians. Rather, the Court found the treaty's language was intended only to discourage whites from settling on Indian land, and the Court opinion broadly states that "later treaties dropped this provision."[64]

The Court reasoned that "by acknowledging their dependence on the United States, in the Treaty of Point Elliott, the Suquamish were in all probability recognizing that the United States would arrest and try non-Indian intruders who came within their reservation."[65] The language spoken during the creation of the treaty that the Court refers to was a language called Chinook Jargon, which is a trade language made up of several different languages.[66] One dictionary compiled in the late 1800s lists just under 500 words in the entire language.[67] The Court's assumption that the Suquamish likely recognized, at the time of treaty making, that the United States would assume criminal jurisdiction over non-Indians on the reservation is inappropriate because it fails to acknowledge three incredibly important realities: (1) there would not have been any language in Chinook Jargon to convey that concept; (2) whether the whites at the treaty making intended that is irrelevant if the canons of construction are utilized; and (3) the Suquamish tribe clearly did not recognize that as a truth because it had a criminal court system in place when it charged David Oliphant with assault and resisting arrest.

The Court's majority stated that "while not conclusive on the issue … the commonly shared presumption of Congress, the executive branch, and lower federal courts [is] that tribal courts do not have the power to try non-Indians." The Court held this despite the fact that the two lower courts in the case found that the Suquamish tribe *did* have jurisdiction. And the Court found support for its opinion based on what the federal government presumed, rather than on what the tribe presumed.

This was a serious misstep and a fundamental flaw in the Court's analysis because settled law dictated that, under the canons of construction, treaties were to be interpreted in favor of the tribes. Clearly, the Suquamish believed that they had criminal jurisdiction over non-Indians when they passed their 1973 law and order code. But rather than relying on settled law and the canons of construction, the Court relied on other provisions in the treaty and on a federal law that, read together, implied that the tribe did not have jurisdiction. What is clear is that the Court wrote its opinion based on what the laws and treaties meant from the conqueror's perspective, and the Court did not consider, as the canons of construction mandated, what the laws and treaties meant to the tribes.[68]

Near the end of the opinion, the Court discussed the broader perspective of tribal status in relation to the federal government and the limitations of tribal authority. The Court used a U.S. Supreme Court case from 1810, *Fletcher v. Peck*, to make the point that, from the beginning, the federal government intended that Native Americans would only have the right to govern themselves.[69] The Court's analysis was faulty here because this support comes from Justice William Johnson's dissent in *Fletcher v. Peck*. While Johnson does not specifically call his different opinion a dissent (at the time, the Court did not use the terms "concur" and "dissent"), he does say he differs from the majority; so, the plain meaning of his words make his separate writing a functional dissent.[70] Although Johnson did vote with the majority, he wrote to explicitly express where he had a difference of opinion.

In *Oliphant*, the Court cited to Justice Johnson's separate statement in *Fletcher* as though it was a part of the Court's majority opinion and relied on Johnson's statement as *stare decisis* that tribal sovereignty is limited and that tribes do not possess "the right of governing every person within their limits except themselves."[71] Johnson's dissent was dicta—he did not use citations in his opinion when he explained why he believed that a state had the right to take tribal land away from Native Americans. Justice Johnson did not refer to any treaties or federal law, but in its *Oliphant* decision the Court still relied on Johnson's words as a point of settled law.

In its closing, the Court took the Suquamish tribe's argument that it had jurisdiction based on sovereignty unless Congress expressly took it away from them and flipped it, so the tribe would only have sovereignty and jurisdiction if Congress expressly granted it. This logic flowed from the Court's reliance on an 1887 Supreme Court case, *United States v. Kagama*, where the Court held that tribal sovereignty is subordinate to federal and state sovereignty.[72] At the end of its opinion, the Court acknowledged that the opinion it wrote would not help the tribes fight the "prevalence of non-Indian crime on today's reservations" but the Court stated that this was something for Congress to consider, not the Court.[73] According to the Court, considerations such as non-Indian crime on reservations "have little relevance to the principles which lead [the Court] to conclude that Indian tribes do not have inherent jurisdiction to try and punish non-Indians."[74]

The Supreme Court's *Oliphant* opinion held that the crime that occurred on reservations was less important than the need to assert the legal principle that tribes are subordinate governments and should properly lack any power that Congress did not expressly grant to them. In its opinion, the Court did not mention the victims of reservation crime and, in stating that non-Indian crime had "little relevance" to the issue, the Court exposed its perspective that Native American people who would now suffer enhanced crime were not the concern. That was something for Congress to worry about.

Justice Marshall's dissent in *Oliphant* is just one paragraph. Justice Marshall simply stated that he agreed with the lower court that the "power to preserve order on the reservation … is a sine qua

non of the sovereignty that the Suquamish originally possessed."[75] Justice Marshall stated that "in the absence of affirmative withdrawal by treaty or statute" by Congress, the tribes retained their right to exercise criminal jurisdiction, as a necessary aspect of sovereignty, over anyone who committed a crime on Indian land.[76]

Part III. Making Crime in Indian Country Relevant: Congress Must Overturn *Oliphant*

In *Oliphant*, the Supreme Court concluded "that Indian tribes do not have inherent jurisdiction to try and to punish non-Indians." This is the heart of the matter, and it shows the split in core beliefs at work in this debate. The Court majority in *Oliphant*, along with the senators who tried to block VAWA until it passed in 2013, held the opinion that tribes do not have inherent tribal sovereignty to try and to punish non-Indians who commit crimes on tribal lands. This perspective could have value except that it is a legal conclusion that is not based on legal fact, history, or process. The majority's opinion in *Oliphant*, like too many other federal Indian law Court decisions, was based on the perspective of what would best serve the conqueror and reflects a disturbing trend from the Supreme Court in recent decades of undermining tribal sovereignty. The opposing view to the majority in *Oliphant* is held by tribes and by the vast majority of anyone who has studied federal Indian law: Tribes have always had inherent tribal sovereignty and, until *Oliphant*, they had the right to try non-Indians for crimes committed on tribal lands.

Both before and after *Oliphant*, the Supreme Court upheld the inherent authority of tribes to govern on tribal land unless there was an express removal of that authority by treaty or by Congress.[77] In a case that the Court handed down two weeks after *Oliphant*, the Court stated that "until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or by statute, or by implication as a necessary result of their dependent status."[78] The case, *United States v. Wheeler*, involved a Navajo defendant who had been found guilty in a Navajo court.[79] A federal court then indicted the defendant for the same crime, but both the district court and the Ninth Circuit held that the defendant could not be put in jeopardy twice for the same crime.[80] The Supreme Court overruled the lower courts, reasoning that the Navajo "tribe's power to punish tribal offenders [was] a part of inherent tribal sovereignty."[81]

The distinction that the Court made between *Oliphant* and *Wheeler* was that one defendant was Native American and one was not. Where the defendant was Indian, the Court found that the tribe had never relinquished its sovereign power to try a criminal defendant. Where the defendant was non-Indian, the Court found that the tribe had never had sovereign power to try a criminal defendant. From the conqueror's perspective, this makes sense. A conquered people cannot have jurisdiction over the conquerors, but the conquering courts may have dual jurisdiction alongside the conquered courts. But from an access to justice perspective, this would appear to be blatantly unfair at best, and racist at worst. In keeping with the second perspective, the Supreme Court in *Oliphant* enacted actual and widespread harm to vulnerable populations of Native Americans by exposing them to heightened crime, and it did this in order to cement the principle that tribal courts were subordinate to federal and state courts.

The Court's decision in *Oliphant* rested on implication because there was no treaty or statute that took away tribal authority from the Suquamish. Thus, a decision that rests on implication must answer the question: Who interprets what is implied? In *Oliphant*, the Court did not want tribes to maintain authority and criminal jurisdiction over non-Indians, so it interpreted language from past treaties, government officials, and Supreme Court justices to imply that this power did not exist as a necessary aspect of sovereignty. The Court applied the conqueror's law. In *Wheeler*, the Court likely wanted to see the defendant face trial outside of a tribal courtroom, so it interpreted past treaties and law to imply that sovereignty existed until a tribe gave it up and then declared that the federal government could try the same defendant for the same crime without violating double jeopardy. Again, the Court took the conqueror's perspective.

The Court's decision in *Oliphant* is clearly erroneous. It does not follow prior Court decisions that deferred to tribal sovereignty to preserve peace and order in Indian country, it does not mention or apply the canons of construction, it does not examine the Suquamish tribal court system, it does not do an analysis of how the tribe had applied its 1973 law and order code, and it does not mention the results of Suquamish tribal justice. The Court decided that tribal criminal jurisdiction was not a necessary aspect of sovereignty because it focused on the rights of U.S. citizens that could possibly be abrogated if subjected to a justice system they could not participate fully in (only tribal members can sit on Suquamish juries) or that would not have the same due process guarantees as the U.S. justice system. This is faulty reasoning because Suquamish tribal members are also U.S. citizens, and, by focusing on the rights of Oliphant, the Court did not consider the rights of other U.S. citizens to remain safe and adequately protected from harm.

Since the *Oliphant* decision, U.S. citizens who are also tribal members and who live in Indian country have been subjected to incredibly high rates of crime, gang activity, and sexual violence. The inability of tribes to prosecute non-Indian offenders is not the only reason for the high crime rates, but it is a key roadblock that tribes need to bypass in order to combat the problem. TLOA and VAWA are important and helpful tools for tribes to use in the effort to stop the epidemic of sexual assault and rape in Indian country, but they are not enough to effectively end it.

While TLOA and VAWA are commendable and will help the problem, they are only a beginning and Congress must do more to help tribes fight crime in Indian country. A 2011 report from the U.S. Government Accountability Office discusses what the DOJ should do to help strengthen tribal court systems and summarizes the best way to maintain law and order in Indian country:

> In total there are [567] federally recognized tribes; each has unique public safety challenges based on different cultures, economic conditions, and geographic location, among other factors. These factors make it challenging to implement a uniform solution to address the public safety challenges confronting Indian country. Nonetheless, tribal justice systems are considered to be the most appropriate institutions for maintaining law and order in Indian country. Generally, tribal courts have adopted federal and state court models; however, tribal courts also strive to maintain traditional systems of adjudication such as peacemaking or sentencing circles.[82]

Where a tribe does not have a court system or the means to exercise criminal jurisdiction over a non-Indian offender, it is import-

ant that U.S. attorneys have the training to step in and prosecute offenders. But where tribal courts are capable of doing so, they are the most appropriate and effective institutions to maintain the law and order in their jurisdictions.

The perspective that prevailed in *Oliphant* was that allowing tribal courts to exercise criminal jurisdiction over non-Indians would expose U.S. citizens (those who are non-Indian) to the dangers of arbitrary legal processes. The decision insulated non-Indian offenders from facing tribal criminal jurisdiction, but it exposed other U.S. citizens (those who are Indian) to the dangers of elevated crime, sexual assault, and rape by offenders who know there is little chance that they will be punished.

Considering the crisis of violence, and specifically sexual violence, in Indian country today, it is imperative that Congress overturn the *Oliphant* decision and allow tribal courts to fill the law and order vacuum that *Oliphant* created. Returning the tribes' right to exercise criminal jurisdiction over perpetrators of sexual violence in Indian country is the best and most effective tool that tribes need in order to combat the incredible level of injustice and sexual violence currently taking place in Indian country.

Conclusion

The congressional overturning of *Oliphant* is a crucial part of the effort to stop the epidemic of sexual violence against women in Indian country. If Congress and the federal government do not overturn this decision, their non-action is at best irresponsible and unacceptable, and at worst inimical and nefarious, toward the continuing existence of Native American and Alaska Native tribes in the United States.

The recent steps that the federal government has undertaken in the effort to stop the sexual violence against Native American women are positive signs that could potentially have a profound impact. They are also a good sign that the government's intentions toward tribes are not nefarious and that the injustice that the government has allowed to continue unabated in Indian country is not intentional. However, if Congress leaves the power to prosecute non-Indian perpetrators of rape in Indian country solely in the hands of federal prosecutors, then whether it intends to devastate the tribes or it passively allows the injustice to occur becomes one and the same end result. ⊙

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Endnotes

[1]*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212, 98 S.Ct. 1011, 1023 L.Ed.2d 209 (1978).

[2]Louise Erdrich, The Round House 229 (2012).

[3]Amnesty International, Maze of Injustice: The Failure to Protect Indigenous Women From Sexual Violence in the USA 2 (2006), https://www.amnestyusa.org/pdfs/mazeofinjustice.pdf.

[4]*Id.* at 8. Support worker for Native American survivors of sexual violence, May 2005.

[5]The term Native American, Indian, tribal member, tribe, and Native are used interchangeably in this article to refer to the many and diverse American Indian and Native Alaskan peoples residing in the United States.

[6]*Violence Against Native Women Gaining Global Attention*, Indian L. Res. Ctr., http://www.indianlaw.org/safewomen/violence-against-native-women-gaining-global-attention (last visited Jan. 13, 2018).

[7]Amnesty International, *supra* note 3, at 4.

[8]*Id.*

[9]*Id.* at 4-5.

[10]18 U.S.C. § 1151 (2010). This statute defines "Indian country." Summarily, Indian country includes the land within all reservations, Indian allotments, and dependent Indian communities inside the borders of the United States.

[11]Recent Legislation Comment, *The Violence Against Women Reauthorization Act of 2013: Congress Recognizes and Affirms Tribal Courts' Special Domestic Violence Jurisdiction over Non-Indian Defendants*, 127 Harv. L. Rev. 1509, 1511 (2014).

[12]*Id.* at 1510.

[13]*Id.* at 1511.

[14]*Id.* at 1510, n.15.

[15]Unfortunately, VAWA special domestic violence criminal jurisdiction for tribes does not include Alaskan tribes. There is one exception—the Metlakatla tribe, which is the only tribe in Alaska with a reservation. A discussion of the reasons why Alaskan Native women were left out of VAWA is outside the scope of this article, but *see* Natalie Landreth, *Alaska Native Women Lose in Violence Against Women Act Renewal*, Anchorage Daily News (Mar. 12, 2013; updated Sept. 29, 2016), http://www.adn.com/article/20130312/alaska-native-women-lose-violence-against-women-act-renewal.

[16]*Tribal Law and Order Act*, Dep't of Justice (updated Oct. 20, 2016), http://www.justice.gov/tribal/tloa.html.

[17]Laura Sullivan, *Lawmakers Move To Curb Rape On Native Lands*, NPR (May 3, 2009, 12:11 AM), http://www.npr.org/templates/story/story.php?storyId=103717296.

[18]*Oliphant*, *supra* note 1, at 191.

[19]This is a Latin phrase that is used in a legal context to mean that a court should follow precedent and not disturb settled matters.

[20]Michelle Rivard Parks, Associate Director, Tribal Judicial Institute, UND School of Law; M. Brent Leonhard, Attorney, Confederated Tribes of the Umatilla Indian Reservation; & Norena Henry, Senior Policy Adviser for Tribal Affairs, Bureau of Justice Assistance, U.S. Department of Justice, The Tribal Law and Order Act: Enhanced Sentencing Provisions, Webinar Slideshow (Nov. 26, 2013), http://www.appa-net.org/eweb/Training/TCCLA/TLOA_Webinar_slides.pdf.

[21]*Id.* at 3.

[22]*Id.* at 4.

[23]Gideon M. Hart, *A Crisis in Indian Country: An Analysis of the Tribal Law and Order Act of 2010*, 23 Regent Univ. L. Rev. 139 (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1777271.

[24]*Id.* at 171.

[25]*Id.* at 166.

[26]*Id.* at 141. Congress enacted Public Law 280 in 1958 to help with the perceived breakdown of law enforcement in Indian country. The law gave criminal jurisdiction in Indian country to nine states, but it largely failed in subduing crime because most states did not have the additional funding or will to prosecute Indian country crimes.

Ten years later, in 1968, Congress passed the Indian Civil Rights Act (ICRA), which limited tribal court authority to sentence individuals to no more than one year in prison, a $5,000 fine, or both. Both Public Law 280 and the ICRA are important pieces of the puzzle of limited tribal authority, but they are complex issues that are outside the scope of this article.

[27]U.S. Gov't Accountability Office, GOA-11-252, Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts 28 (2011) http://www.gao.gov/new.items/d11252.pdf.

[28]*Id.* at 26.

[29]*Violence Against Women Act (VAWA) Reauthorization 2013*, Dep't of Justice (updated Mar. 26, 2015), http://www.justice.gov/tribal/vawa-tribal.html.

[30]Dep't of Justice & Dep't of Interior, Tribal Law and Order Act (TLOA): Long Term Plan to Build and Enhance Tribal Justice Systems 2 (2011), http://www.justice.gov/tribal/docs/tloa-tsp-aug2011.pdf.

[31]*See VAWA, supra* note 29.

[32]*See VAWA 2013 Pilot Project*, Dep't of Justice (updated Mar. 13, 2015), http://www.justice.gov/tribal/vawa-pilot-2013.html.

[33]Violence Against Women Reauthorization Act § 904 (2013).

[34]*Id.* at (b)(4)(B).

[35]*Id*. at (d)(4).

[36]*See VAWA, supra* note 29.

[37]*Id*.

[38]*Id*.

[39]Press Release, Tom Udall Senator for New Mexico, Udall, Murkowski, Cortez Masto Bill Would Restore Tribal Jurisdiction Over Domestic Violence Incidents on Tribal Land to Children and Law Enforcement (Dec. 14, 2017), https://www.tomudall.senate.gov/news/press-releases/udall-murkowski-cortez-masto-bill-would-restore-tribal-jurisdiction-over-domestic-violence-incidents-on-tribal-land-to-children-and-law-enforcement.

[40]*Id.*

[41]Native Youth and Tribal Officer Protection Act, S. 2233, 115th Cong. (2017-2018).

[42]*Supra,* note 39.

[43]*Frequently Asked Questions*, Dep't of the Interior, Bureau of Indian Affairs, http://www.bia.gov/FAQs/index.htm (last visited Jan. 13, 2018).

[44]*Id*.

[45]*Id*.

[46]The historical development of criminal jurisdiction in Indian country is quite complex, and a thorough analysis is beyond the scope of this article. For a brief but helpful summary, *see* Philip J. Prygoski, *From Marshall to Marshall: The Supreme Court's Changing Stance on Tribal Sovereignty*, 12 GPSolo Mag. (Fall 1995), http://www.americanbar.org/content/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/marshall.html.

[47]*Id*.

[48]Treaty with the Comanche, et al., art. 7 (Mar. 8, 1847), *available at* http://digital.library.okstate.edu/kappler/Vol2/treaties/com0554.htm#mn10.

[49]Treaty with the Cherokee, U.S.-Cherokee, art. 5 (Nov. 28, 1785), *available at* http://digital.library.okstate.edu/kappler/Vol2/treaties/che0008.htm#mn5.

[50]Felix S. Cohen, Handbook of Federal Indian Law 221-22 (1982 ed.). Early on in federal Indian law, U.S. federal courts developed the canons of construction in federal court cases that involved treaties with tribes. The canons dictate that treaties, and ambiguous language within treaties, should be interpreted in favor of the tribes.

[51]*Oliphant*, *supra* note 1, at 194.

[52]*Tribal Powers Issue Due High Court Study*, Spokane Daily Chron., June 13, 1977, at 1.

[53]*Id*.

[54]*Id*.

[55]*Id*.

[56]*Oliphant*, *supra* note 1, at 196.

[57]*Id*.

[58]*Id*. at 193.

[59]*Oliphant*, *supra* note 1, at 197.

[60]*Id*.

[61]*Ex Parte Kan-Gi-Shun-Ka*, 109 U.S. 556, 3 S.Ct. 396 (1883). A short, concise summary of *Crow Dog* can be found online, *see Ex Parte Crow Dog*, Encyclopedia of the Great Plains, http://plainshumanities.unl.edu/encyclopedia/doc/egp.law.016.

[62]*See id*.

[63]*Id*. at 197-98.

[64]*Id*. at n.8.

[65]*Oliphant*, *supra* note 1, at 207.

[66]George Gibbs, Dictionary of the Chinook Jargon, or, Trade Language of Oregon [Abridged] (1863), http://www.washington.edu/uwired/outreach/cspn/Website/Classroom%20Materials/Curriculum%20Packets/Treaties%20&%20Reservations/Documents/Chinook_Dictionary_Abridged.pdf.

[67]*Id*.

[68]While the canons of construction are well established in federal Indian law, recent Supreme Court decisions have weakened this establishment by not relying on, or sometimes not even mentioning the existence of, the canons. *See, e.g.,* Jeremy Stevens, *Of Justice Sotomayor and the Jicarilla Apache Nation: Slouching Toward Intellectual Honesty and the Canons of Construction*, 0 Am. Indian L. J 56 (2012), https://digitalcommons.law.seattleu.edu/ailj/vol0/iss1/5.

[69]*Fletcher v. Peck*, 6 Cranch 87, 10 U.S. 87, 147, 3 L.Ed. 162 (1810).

[70]*Id*. at 143.

[71]*Id*. at 147.

[72]*United States v. Kagama*, 118 U.S. 375, 379, 6 S.Ct 1109, 30 L.Ed. 228 (1886).

[73]*Oliphant*, *supra* note 1, at 212.

[74]*Id*.

[75]*Id*.

[76]*Id*.

[77]*See, e.g., United States v. Wheeler*, 435 U.S. 313, 323, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978); *and McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 170-71, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973).

[78]*Wheeler*, 435 U.S. at 323.

[79]*Id*.

[80]*Id*.

[81]*Id*.

[82]GOA Report, *supra* note 27, at 5.