

## The Two-Tiered Program of the Tribal Law and Order Act

Seth Fortin



### ABSTRACT

The Tribal Law and Order Act of 2010 was intended to significantly expand the sentencing powers of tribal courts, raising the maximum sentence for a given offense from one year to three. But the Act requires courts that would take advantage of these new powers to provide significant procedural protections to criminal defendants, while failing to provide the funding most tribal courts would need to make those protections a reality. Moreover, the Act leaves vague and open to interpretation the precise form those protections should take, which is an open invitation to federal courts to scrutinize tribal court procedure; this, in turn, may put tribal courts in the position of choosing between longer sentences and retaining their traditional character. These two obstacles—lack of funding, and the danger to tribal courts' unique character—mean that the Act is likely to sort tribes into two “tiers”: wealthier or more assimilated tribes will be able to take advantage of the longer sentences, while tribes that cannot afford (whether financially or culturally) to change their practices will be left unable to adequately sentence serious offenders. And because of the way the Act resolves a longstanding ambiguity in Indian law, some tribes in the latter group may be left with less sentencing power than they had previously.

### AUTHOR

Seth Fortin is a third-year law student at UCLA. He would like to thank Carole Goldberg, Angela Riley, and Stan Molever for reading drafts of this article. He would also like to thank the staff of the *UCLA Law Review* for their hard work, and his wife and son for their patience and support.

## TABLE OF CONTENTS

INTRODUCTION.....	90
I. “SOMETHING IS SERIOUSLY WRONG . . .”: CONTEXT LEADING TO THE ACT’S PASSAGE .....	91
II. “COMPETENCE AND PROFESSIONAL RESPONSIBILITY”: THE ACT AND ITS PROVISIONS .....	95
III. “I DON’T THINK WE NEED TO BE LAW-TRAINED”: FUNDING, TRIBAL SOVEREIGNTY, AND TLOA’S HARSH DEMAND .....	96
A. Funding.....	97
B. Tribal Sovereignty and the Right to Culturally-Specific Justice Systems ...	99
1. Advocates.....	100
2. Judges.....	104
3. The Larger Stakes.....	106
CONCLUSION .....	108

## INTRODUCTION

In 1968, the U.S. Congress essentially divested tribal courts of the right to hand down felony sentences.<sup>1</sup> For forty-four years, those courts could sentence defendants to no more than a year in jail,<sup>2</sup> hamstringing the efforts of tribal governments to punish and deter crime on their reservations.<sup>3</sup> In 2012, however, four Indian tribal governments became the first to implement new sentencing powers under the Tribal Law and Order Act of 2010<sup>4</sup> (the TLOA or the Act). Enacted at the urging of tribal leaders,<sup>5</sup> the TLOA allowed tribal courts to sentence offenders to up to three years for any individual offense and up to nine years in any single proceeding.

The new sentencing powers, however, come with certain strings attached—requirements to which the tribal courts must adhere, framed as a series of protections for defendants facing longer sentences. For example, courts

- 
1. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended in scattered sections of 18 and 25 U.S.C. (2006)).
  2. Initially, the limit was six months. *See infra* notes 6–7 and accompanying text.
  3. *See generally Tribal Law and Order Act of 2009: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 1–3 (2009) [hereinafter *TLOA Hearing*] (discussing provisions of proposed bill H.R. 1924 that would later become the TLOA); *id.* at 66 (testimony of Marcus Levings) (“On some reservations violent crime is more than 20 times the national average. . . . Many reservations are viewed as places with weak law enforcement . . . [which] breeds crime and violence.”).
  4. Pub. L. No. 111-211, 124 Stat. 2258. The tribal governments that have adopted the new sentencing powers are the Eastern Band of Cherokee Indians, Hopi, Tulalip, and the Confederated Tribes of the Umatilla Reservation. *See* Matthew L.M. Fletcher, *Eastern Band Cherokee Ordinances Implement TLOA Higher Sentencing Authority*, TURTLE TALK (Oct. 11, 2012), <http://turtletalk.wordpress.com/2012/10/11/eastern-band-choerokee-ordinances-implement-tloa-higher-sentencing-authority>; Anna King, *Northwest Tribes Begin to Try Reservation Crime Cases Under Tougher Laws*, NORTHWEST PUB. RADIO (Nov. 26, 2012, 5:37 PM), <http://www.nwpr.org/post/northwest-tribes-begin-try-reservation-crime-cases-under-tougher-laws>; Anne Minard, *A Leader Emerges: Hopi Tribe Adopts New Criminal Code According to Tribal Law and Order Act Standards*, INDIAN COUNTRY TODAY MEDIA NETWORK (Sept. 3, 2012), <http://indiancountrytodaymedianetwork.com/2012/09/03/a-leader-emerges-hopi-tribe-adopts-new-criminal-code-according-to-tribal-law-and-order-act-standards-132160>; *see also* E-mail from Judge Theresa Pouley (Dec. 17, 2012, 08:30 PST) [hereinafter Pouley E-mail] (on file with author).
  5. *TLOA Hearing*, *supra* note 3, at 66 (testimony of Marcus Levings, Great Plains Area Vice-President, National Congress of American Indians) (urging “Congress to move swiftly to pass” TLOA).

exercising the sentencing powers must provide defense counsel for the indigent, law-trained judges, and defendants with a record of the proceedings.<sup>6</sup> These requirements add significantly to the cost of operating a tribal justice system, and they force tribal courts to give up some of their independence and cultural distinctiveness. More problematic still, tribal governments that either cannot or will not abide by the Act's requirements actually *lose* sentencing powers that they may have previously exercised. This is because some courts, to deal with the most serious offenders, have stacked short sentences for separate charges to create total sentences longer than one year. The Act now prohibits that workaround.

Part I of this Essay presents the limitations on tribal court sentencing prior to the passage of the Act and discusses sentence stacking. Part II briefly diagrams the Act's sentencing provisions and the procedural requirements imposed on tribes that wish to use them. I show that the statute cuts off the tribal courts' workaround even if they do not adopt the Act's sentencing powers. Part III discusses the two chief reasons why tribal governments may not meet the Act's stringent requirements: lack of funding and a desire to maintain a more traditional or otherwise distinctive approach to justice. The cumulative effect of these factors is to sort tribes into two categories—those who are positioned to take advantage of the greater sentencing powers offered by the Act, and the great majority of tribes that will now have even less sentencing authority than they did before.

## I. “SOMETHING IS SERIOUSLY WRONG...”: CONTEXT LEADING TO THE ACT'S PASSAGE

The Indian Civil Rights Act of 1968<sup>7</sup> (the ICRA) limited tribal sentences to six months' imprisonment and not more than \$500 in fines “for conviction of any 1 offense.”<sup>8</sup> In 1986 this was amended to allow sentences of up to one year and up to \$5000 in fines.<sup>9</sup>

Such a radical curtailment of the tribes' inherent right to punish<sup>10</sup> was premised on the notion that the federal government would take responsibility for

---

6. For a list of the conditions imposed, see Part II.

7. Pub. L. No. 90-284, tit. II, 82 Stat. 73, 77–78 (codified at 25 U.S.C. §§ 1301–1303 (2006)). For a list of the conditions imposed, see Part II.

8. *Id.*

9. Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, Pub. L. No. 99-570, § 4217, 100 Stat. 3207-137, -146 (codified as amended at 25 U.S.C. § 1302(a)(7)(B) (2006)).

10. See *United States v. Lara*, 541 U.S. 193, 220–21 (2004) (Thomas, J., concurring) (noting that “Indian tribes possess inherent sovereignty to punish *anyone* who violates their laws,” although a conflict with federal policy “can operate to prohibit the exercise of this sovereignty”).

prosecuting many—if not most—serious crimes in Indian country.<sup>11</sup> But federal investigation and prosecution of crime in Indian country has fallen far short of the mark, in part because of logistical difficulties. Federal courthouses, FBI field offices, and U.S. Attorneys’ offices are often hundreds of miles from the site of an on-reservation crime, which means it may be difficult to interview witnesses or to bring them to court to testify.<sup>12</sup> And prosecution of ordinary crime in Indian country has often been seen as low-status work for federal prosecutors.<sup>13</sup> Indeed, expending resources on Indian country justice may even hurt federal prosecutors’ careers.<sup>14</sup> The result is that crimes that do not fall within the usual federal law enforcement mission tend to be wildly underinvestigated and underprosecuted.<sup>15</sup>

Given all of this, it is no surprise that the Navajo Supreme Court has said that “Indian nations cannot rely upon others to address” crime in Indian country.<sup>16</sup> But, as noted above, the ICRA drastically limits the kinds of sentences a tribal court may impose. The ICRA’s maximum prison sentence of one year means that essentially all tribally defined and tribally prosecuted crimes are misdemeanors—even murder, rape, kidnapping, and robbery. Thus constrained, some tribes have engaged in sentence stacking, the imposition of multiple one-year sentences for various charges arising from the same incident. For example, a defendant who held his spouse down and beat her might receive a one-year

- 
11. Criminal jurisdiction in Indian country is knotty, but the general rule is that the federal government has concurrent jurisdiction with the tribes over serious crimes committed by Indians against Indians and exclusive jurisdiction over crimes by non-Indians against Indians. 18 U.S.C. §§ 1152, 1153 (2006).
  12. *Examining Federal Declinations to Prosecute Crimes in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 1 (2008) [hereinafter *Federal Declinations*] (statement of Sen. Byron Dorgan, Chairman, S. Comm. on Indian Affairs); see, e.g., Michael Riley, *Promises, Justice Broken*, DENVER POST, Nov. 11, 2007, [http://www.denverpost.com/news/ci\\_7429560](http://www.denverpost.com/news/ci_7429560) (“One hundred fifty miles away in Spokane, an assistant U.S. attorney—faced with a distant case and a 7-year-old witness—simply declined to prosecute . . .”).
  13. See Riley, *supra* note 12 (“I’ve had (assistant U.S. attorneys) look right at me and say, ‘I did not sign up for this,’ . . . “[T]he vast majority of the judges feel the same way. They will look at these Indian Country cases and say, ‘What is this doing here? I could have stayed in state court if I wanted this stuff.’” (internal quotation marks omitted)).
  14. See *Federal Declinations*, *supra* note 12, at 1–2 (noting that some U.S. Attorneys under the Bush administration had testified that their career prospects would be harmed if they devoted too much time to Indian country prosecutions and that at least one was nearly fired for his “preoccupation with Indian affairs issues”).
  15. Pouley E-mail, *supra* note 4 (“There is no area where the federal government [has been] adequately policing and prosecuting criminal activity on the reservation.”); E-mail from Jason Smith, Tribal Prosecutor, Eastern Band of Cherokee Indians (Nov. 19, 2012, 08:31 PST) [hereinafter Smith E-mail] (on file with author) (“The federal government has largely withdrawn from investigating crime in Cherokee other than homicides and drug and firearms crimes. Tribal government has found the federal response to the investigation of other major crimes insufficient over the last 5 years.”) (emphasis omitted)).
  16. *Means v. Dist. Court of the Chinle Judicial Dist.*, 26 INDIAN L. REP. 6083, 6085 (Navajo 1999).

sentence for domestic abuse, another year for battery, and a third for false imprisonment.

Is stacking lawful under the ICRA? The statute limits the sentence imposed for “any 1 offense” to not more than one year.<sup>17</sup> But did Congress intend for tribal courts to be able to apply multiple charges to a given criminal incident? Or did it intend a maximum sentence of one year for the *entire* incident? Federal courts have heard habeas challenges on this very point.

Consider the 2010 case *Romero v. Goodrich*, in which petitioner Ronald Romero reportedly refused to leave his mother’s house, “yelled profanities,” spit in someone’s face, “threatened to kill everyone in the house,” shoved a recliner chair into his mother, swung a punch at her (almost hitting someone else), rampaged through the house breaking things, prevented the occupants from leaving or calling the police, pinned one girl against the refrigerator, and threatened to burn the house down.<sup>18</sup> The tribal court found Romero guilty on twelve separate counts, including assault, battery, and false imprisonment; he was sentenced to a total of eight years in prison and fined \$7050.<sup>19</sup>

Noting that Romero was not represented by counsel at trial,<sup>20</sup> a New Mexico federal magistrate judge declared that such stacking of sentences violates the intent of the ICRA provision.<sup>21</sup> But the case was later rendered moot when the Pueblo commuted the sentence,<sup>22</sup> and generally the trend prior to the TLOA seems to have been toward finding stacking permissible. A Minnesota federal district court and the Ninth Circuit both affirmed judgments involving stacking, and the Supreme Court denied certiorari on the issue.<sup>23</sup>

Against this background, the TLOA was signed into law on July 29, 2010.<sup>24</sup> It allowed for up to three-year sentences for individual offenses. In hearings, Marcus Levings, Great Plains Area Vice-President of the National Congress of American Indians and chairman of the Three Affiliated Tribes of

---

17. 25 U.S.C. § 1302(a)(7) (2006).

18. *Romero v. Goodrich*, No. 1:09-CV-232 RB/DJS, 2010 WL 8983216, at \*1 (D.N.M. Mar. 9, 2010), *withdrawn*, No. 1:09-CV-232 RB/DJS, 2010 WL 9450759 (D.N.M. Sept. 22, 2010).

19. *Id.* at \*2.

20. *Id.*

21. *Id.* at \*10.

22. *Romero v. Goodrich*, 480 F. App’x 489, 490 (10th Cir. 2012).

23. *Miranda v. Anchondo*, 684 F.3d 844 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 256 (2012); *Spears v. Red Lake Band of Chippewa Indians*, 363 F. Supp. 2d 1176 (D. Minn. 2005). *Miranda* was decided after the passage of the TLOA, but the crime involved occurred before it.

24. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat 2258; Lynn Rosenthal, *The Tribal Law and Order Act of 2010: A Step Forward for Native Women*, WHITEHOUSE.GOV (July 29, 2010, 5:13 PM), <http://www.whitehouse.gov/blog/2010/07/29/tribal-law-and-order-act-2010-a-step-forward-native-women>.

the Fort Berthold Reservation, noted the lack of federal prosecutions—“Something is seriously wrong with the Federal law enforcement response.”<sup>25</sup> He also shared the story of his own daughter’s experience with sexual assault on Fort Berthold.<sup>26</sup>

Associate Attorney General Thomas J. Perrelli said that tribal leaders had made clear to the DOJ that “tribal sovereignty and self-determination should be central [and] . . . solutions developed by the tribes themselves will best effect change.”<sup>27</sup> It was his opinion that the bill enjoyed “strong support . . . from the tribes.”<sup>28</sup>

The TLOA raised eyebrows in some quarters, though. The chief concern was that constitutional and procedural protections taken for granted in most American courtrooms are not necessarily available in tribal courts. For example, individual protections in the Bill of Rights do not apply to Indians in Indian country,<sup>29</sup> except as provided for statutorily in the ICRA. And tribes often cannot afford to provide all the procedural machinery available in other courts.<sup>30</sup>

Tova Indritz, speaking for the National Association of Criminal Defense Lawyers, and Professor Barbara L. Creel, a member of the Pueblo of Jemez, argued that the Sixth Amendment right to counsel ought to apply to “Native Americans, who are, after all, U.S. citizens.”<sup>31</sup> They called on Congress to “authorize funds for appointed counsel in tribal prosecutions”<sup>32</sup> and called for “balancing distribution of resources among the judges, the prosecutors, and defender services.”<sup>33</sup>

---

25. *TLOA Hearing*, *supra* note 3, at 67

26. *Id.* at 134.

27. *Id.* at 48.

28. *Id.* at 51.

29. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (“As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.”).

30. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-658R, TRIBAL LAW AND ORDER ACT: NONE OF THE SURVEYED TRIBES REPORTED EXERCISING THE NEW SENTENCING AUTHORITY, AND THE DEPARTMENT OF JUSTICE COULD CLARIFY TRIBAL ELIGIBILITY FOR CERTAIN GRANT FUNDS 8 (2012) [hereinafter GAO-12-658R] (“[I]n our indigent defense review, 52 percent (24 of 46) of tribes that reported they did not provide indigent defense services in any year from fiscal years 2005 through 2010 also reported that they did not have sufficient funding to provide these services.”).

31. *TLOA Hearing*, *supra* note 3, at 79 (testimony of Tova Indritz, Chair, National Association of Criminal Defense Lawyers, Native American Justice Committee); *see also id.* at 127, 131 (testimony of Barbara L. Creel, Assistant Professor of Law, Southwest Indian Law Clinic, University of New Mexico School of Law).

32. *Id.* at 81; *see also id.* at 131.

33. *Id.* at 82.

Indritz also asked that Congress require defense counsel in tribal courts to be attorneys admitted to the bar of at least one state or the District of Columbia,<sup>34</sup> to require that tribal judges be licensed attorneys,<sup>35</sup> and to put an end to sentence stacking.<sup>36</sup>

## II. “COMPETENCE AND PROFESSIONAL RESPONSIBILITY”: THE ACT AND ITS PROVISIONS

As finally passed, the TLOA allows tribes to impose somewhat lengthier sentences in exchange for providing certain protections to defendants who are subject to such sentencing. These provisions can be summarized as follows:

- (1) The defendant may be sentenced to a maximum of three years for any one offense and a maximum of nine years total in any given court proceeding.<sup>37</sup>
- (2) The defendant must have already been convicted of the same or a comparable offense by any court in U.S. jurisdiction, or be accused of a crime that is comparable to a felony under federal or state law.<sup>38</sup>
- (3) The defendant is entitled to effective assistance of counsel at least equivalent to that guaranteed by the U.S. Constitution. If the defendant is indigent, an “attorney,”<sup>39</sup> licensed by a jurisdiction whose standards ensure “competence and professional responsibility,” must be provided at the tribe’s expense.
- (4) The presiding judge must have “sufficient legal training to preside over criminal proceedings” and be licensed to practice law.<sup>40</sup>
- (5) The tribe’s laws must have been made publicly available prior to the defendant being charged.<sup>41</sup>

---

34. *Id.* at 83.

35. *Id.* at 89.

36. *Id.*

37. 25 U.S.C. § 1302(a)(7)(D) (2006); *id.* § 1302(b)

38. *Id.*

39. The statute requires that defense counsel be an “attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.” *Id.* § 1302(c)(2). What this somewhat confusing requirement means is the subject of Part III.B.1.

40. *Id.* § 1302(c)(3)

41. *Id.* § 1302(c)(4)



- (6) The proceedings must be recorded.<sup>42</sup>
- (7) If convicted, the defendant may be housed only in “tribal correctional facilities” approved by the Bureau of Indian Affairs (BIA) for longterm incarceration, federal prison, state prison, or an “alternative rehabilitation center” operated by the tribe.<sup>43</sup>

These requirements are important not only in their own right but also because they are tied to the way Congress chose to resolve the stacking question. 25 U.S.C. § 1302(e) now defines the previously ambiguous term “offense” to mean “a violation of a criminal law.”<sup>44</sup> This seems to definitively eliminate the “criminal transaction” interpretation, and thus the statute might appear to allow stacking.

Section 1302(c), however, mandates that the requirements of that section (indigent counsel, law-trained judges, and so on) shall be met in any “criminal proceeding in which an Indian tribe . . . imposes a total term of imprisonment of more than 1 year on a defendant.”<sup>45</sup> So even tribal courts that are not exercising the new sentencing powers—that is, those not attempting to impose sentences of more than a year for individual charges—are bound by their prerequisites. This effectively forecloses stacking—even of shorter sentences—for tribes that have not met the requirements. Indeed, a federal district court in Arizona has already ruled that the TLOA requirements were binding on a tribal court that sentenced a defendant to two 365-day sentences.<sup>46</sup>

### III. “IDON’T THINK WE NEED TO BE LAW-TRAINED”: FUNDING, TRIBAL SOVEREIGNTY, AND TLOA’S HARSH DEMAND

There are at least two significant reasons why tribes may not meet the TLOA’s requirements: lack of funding and a desire to maintain a fundamentally different approach to criminal law and social problem solving.

---

42. *Id.* § 1302(c)(5).

43. *Id.* § 1302(d)(1).

44. *Id.* § 1302(e).

45. *Id.* § 1302(c). TLOA also caps the “total” number of years to which a defendant may be sentenced in any “criminal proceeding” to nine. *Id.* § 1302(a)(7)(D).

46. *Johnson v. Tracy*, No. CV-11-01979-PHX-DGC, 2012 WL 4478801, at \*3 (D. Ariz. Sept. 28, 2012) (“It . . . is clear that the procedural protections of 25 U.S.C. § 1302(c) were applicable to Petitioner’s trial . . . . Petitioner’s ‘total’ prison term of two years, resulting from a single ‘criminal proceeding,’ clearly falls within this provision.”).

### A. Funding

The TLOA does take some steps to provide funding for tribes to meet its requirements. It amends the statute regulating the federal Legal Services Corporation to allow the organization to provide grants for defense services for defendants in tribal courts.<sup>47</sup> It clarifies that grants for legal assistance under 25 U.S.C. § 3663 should be used for criminal defense counsel.<sup>48</sup> It amends a general grant of money for tribal justice development to include salaries for public defenders and appointed defense counsel, among other “tribal court personnel.”<sup>49</sup> It also requires the newly-created Office of Justice Services (OJS) within the BIA to submit reports to Congress of the number of tribal public defenders, how much OJS spends on indigent defense, and any unmet needs for funding, including for indigent defense.<sup>50</sup>

But compare these small expansions to the large block grants in the TLOA for research and education in drug enforcement,<sup>51</sup> grants to hire and train law enforcement officers,<sup>52</sup> grants to build jails,<sup>53</sup> grants for delinquency prevention,<sup>54</sup> and grants to improve information sharing systems between law enforcement agencies,<sup>55</sup> and it becomes apparent that providing tribes with the resources to meet the Act’s requirements was not a high priority for Congress. Much of the focus of the TLOA, naturally, is on crime prevention and law enforcement. But along with those two elements, sentencing is the third leg in the TLOA scheme. And because the Act makes indigent defense counsel such a critical component of felony sentencing powers, Congress should provide adequate funding to make it a reality.

Even the funding that is available is often inefficiently distributed. Evidence is strong that tribes either do not know money is available or are using nominally available funds for other purposes. The Government Accounting Office (GAO) explains: “Both BIA and DOJ provide funding that tribes could use to help meet the necessary requirements for exercising the new sentencing authority . . . . In addition, DOJ and BIA provide training and other assistance to

---

47. 42 U.S.C. § 2996f(b)(2) (2006).

48. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 242(b), 124 Stat. 2258, 2292.

49. *Id.* § 242(a)(1); *see also* 25 U.S.C. § 3613(b)(2) (2006).

50. Tribal Law and Order Act of 2010, § 211(b)(16)(A)–(C).

51. *Id.* § 232.

52. *Id.* §§ 232, 247; *see also* 42 U.S.C. § 3796dd (2006).

53. Tribal Law and Order Act of 2010, § 244.

54. *Id.* § 246.

55. *Id.* § 252; *see also* 42 U.S.C. § 3796h.

tribes, which could assist them in exercising the new sentencing authority.”<sup>56</sup> But “tribes do not always have a clear understanding about their eligibility for federal funding sources available to help them exercise the new sentencing authority.”<sup>57</sup> This may be because, unlike, say, the DOJ’s Community Oriented Policing Services program, which provides funds for community policing,<sup>58</sup> there is no single, well-defined funding program devoted exclusively to helping tribal courts meet the TLOA’s requirements.

Moreover, as Judge Pouley notes, “while the Act gives tribal courts the responsibilities and requirements of its state and federal counterparts, one thing has not changed—there has been no increase in *base funding* for tribal courts.”<sup>59</sup> Without an increase in overall funding, tribes are forced to choose between shortchanging other programs in order to meet the TLOA’s requirements and forgoing felony sentencing powers altogether.<sup>60</sup>

Of course, some tribes may find creative ways to meet the requirements. The Tulalip Tribes, for example, have partnered with a clinic at the University of Washington Law School to provide its indigent defendants with counsel.<sup>61</sup> But such programs, though admirable, are not universally available. Moreover, the evidence suggests that even creative solutions take many years and significant resources to implement. Significantly, both the Eastern Band of Cherokee Indians and the Tulalip were already offering the procedural protections mandated by the TLOA long before the Act was passed,<sup>62</sup> so these tribes could move quickly to implement the new sentencing power.

---

56. GAO-12-658R, *supra* note 30, at 9–10.

57. *Id.* at 3.

58. U.S. DEP’T OF JUSTICE, COPS OFFICE REPORT TO CONGRESS AS REQUIRED BY TRIBAL LAW AND ORDER ACT OF 2010, at 5 (2010) (“[T]he COPS Office has awarded over 2,000 grants for more than \$400 million to help Native American communities hire more than 1,700 new or redeployed law enforcement officers, and has aided tribal jurisdictions in obtaining necessary training, equipment, vehicles, and technology.”).

59. *Tribal Law and Order Act One Year Later: Have We Improved Public Safety and Justice Throughout Indian Country?: Hearing Before the S. Comm. on Indian Affairs, 112th Cong. 59* (2011) [hereinafter *One Year Later*] (testimony of Hon. Theresa M. Pouley, Chief Judge, Tulalip Tribal Court) (emphasis added).

60. The GAO noted in 2011 that many tribal courts were already unable to meet their current staffing needs: “[O]fficials at 11 of the 12 tribes we visited noted that their tribal courts’ budgets are inadequate to properly carry out the duties of the court; therefore, the tribes often have to make tradeoffs, which may include not hiring key staff.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-252, INDIAN COUNTRY CRIMINAL JUSTICE: DEPARTMENTS OF THE INTERIOR AND JUSTICE SHOULD STRENGTHEN COORDINATION TO SUPPORT TRIBAL COURTS 21 (2011) [hereinafter GAO-11-252].

61. See *Defense Counsel*, TULALIP TRIBES, <http://www.tulaliptribes-nsn.gov/Home/Government/Departments/TribalCourt/Attorneys/DefenseCounsel.aspx> (last visited July 20, 2013).

62. See Pouley E-mail, *supra* note 4; Smith E-mail, *supra* note 15.

Conversely, the GAO has found that tribes that did not already offer such protections are taking longer to use their new authority and facing more obstacles. In its 2012 report on the TLOA, the GAO found that “64 percent of selected tribes (70 of 109) reported implementing at least half of the requirements necessary for exercising the new sentencing authority, but reported challenges in implementing other requirements.”<sup>63</sup> Unsurprisingly, the least costly requirement—maintaining a record of the proceedings—was the one tribes had most frequently already met, while they were least likely to have met the requirement of competent defense counsel for the indigent.<sup>64</sup> This suggests that tribes that did not have the resources to provide indigent defense counsel before the TLOA’s passage still lack those resources after it.

In the long term, of course, development of tribal courts need not—and indeed should not—depend solely on federal appropriations. Likely, the development of tribal court capacity will go hand-in-hand with sustained tribal economic development. Tulalip, for example, benefited from the Indian gaming wave; gaming provided the income that enabled the tribe to develop a mature justice system. But Judge Pouley, who works at Tulalip, does not consider gaming among the “reliable revenue sources that traditionally fund government justice systems.”<sup>65</sup> Congress can work to enhance more reliable (nongaming) sources of revenue by, for example, liberalizing rules related to tribal enterprises<sup>66</sup> and the use of tribal resources in promising areas like sustainable energy development.<sup>67</sup> But such development can take years, if not decades. In the meantime, hundreds of tribes lack adequate felony sentencing powers.

## B. Tribal Sovereignty and the Right to Culturally-Specific Justice Systems

Some tribal governments, however, may be reluctant to try to meet the TLOA’s requirements for reasons beyond the perpetual funding crisis. Tribal

---

63. GAO-12-658R, *supra* note 30, at 3.

64. *Id.*

65. *One Year Later*, *supra* note 59, at 59.

66. Unlike states, tribes often generate a significant portion of their income through governmental or collectively-owned business ventures. *Compare State Taxes*, CAL. ST. CONTROLLER’S OFF., [http://www.sco.ca.gov/state\\_finances\\_101\\_state\\_taxes.html](http://www.sco.ca.gov/state_finances_101_state_taxes.html) (last visited July 20, 2013) (showing that in FY 2011–12, personal income tax, corporate income tax, and sales and use taxes comprised 94 percent of revenue), *with* DIV. OF ECON. DEV., NAVAJO NATION, COMPREHENSIVE ECONOMIC DEVELOPMENT STRATEGY 12 (2010) (showing that in 2008, the Navajo Nation collected \$70.9 million in taxes, but also \$62.4 million in coal mining revenue).

67. See Ryan D. Dreveskracht, *Alternative Energy in American Indian Country: Catering to Both Sides of the Coin*, 33 ENERGY L.J. 431, 440–46 (2012) (arguing that tribal energy projects are hindered by federal regulation and inefficient oversight).

governments, whose mandate often includes the maintenance of ways of life that predate the Constitution, have been understood as having substantial leeway to arrange the organs of governance in ways forbidden to states and the federal government.<sup>68</sup> The cultivation of traditional and quasi-traditional legal systems is one aspect of that mandate.<sup>69</sup>

### 1. Advocates

Prior to the passage of the TLOA, many tribal courts allowed lay advocates to act as defense counsel, even in criminal cases. Lay advocates have certainly filled a practical need in Indian country where “law-trained” defense attorneys may be in short supply.<sup>70</sup> But their use raises anxieties in the non-Indian defense bar: “[S]ome tribal bars allow people to be a member of the bar who have not graduated from law school and maybe not even graduated from high school.”<sup>71</sup> Accordingly, the TLOA likely bans lay advocates in criminal cases. It requires that the tribe provide indigent defendants with “a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.”<sup>72</sup> These terms are not defined by the statute, but it is likely that federal courts hearing habeas petitions will read this requirement as eliminating nonlawyers from the criminal defense bar, at least where indigent defendants are concerned.<sup>73</sup>

Yet in a court setting informed by tribal customary law, some lay advocates may be more effective litigators than a law school graduate who is well grounded in Anglo-American criminal justice theory. The Navajo Nation’s statutory code,

---

68. For example, Congress has declined to create a statutory analog of the Establishment Clause for tribes because to do so would “threaten[] destruction of tribal theocracies far older than the Constitution itself.” Robert Laurence, *Federal Court Review of Tribal Activity Under the Indian Civil Rights Act*, 68 N.D. L. REV. 657, 665 (1992).

69. Nell Jessup Newton, for example, argues that “ICRA’s language, the legislative history, and the sovereign status of Indian tribes” all combine to suggest that tribes should have “some leeway in interpreting the majestic generalities of constitutional phrases in culturally appropriate ways.” Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003, 1041 (1995).

70. See, e.g., *TLOA Hearing*, *supra* note 3, at 75 (statement of Tova Indritz) (“[A]ll 19 pueblos in New Mexico do not have any kind of public defender system. One of the two Apache tribes does and the Navajo tribe[, the largest tribe in the United States,] has a public defender that represents well less than 10 percent of the people who go to court with a staff of only two professional lawyers . . .”).

71. *Id.* at 76.

72. 25 U.S.C. § 1302(c)(2) (2006).

73. Most defendants in tribal court are indigent. See *TLOA Hearing*, *supra* note 3, at 136 (testimony of Tova Indritz).

for instance, appears very American, but it uses a parallel set of customary principles—the Navajo Common Law—to guide decisions interpreting and enforcing that code. Despite its name, the Navajo Common Law does not map neatly onto the American precedential system. Indeed, Raymond Darrel Austin has argued that the Navajo Common Law is used by judges to “counter the imbalance in Navajo Nation law; the result of an over-reliance on American law” by non-Indian code drafters.<sup>74</sup> And its principles are infused with Navajo concepts of interlocking spiritual relationships among the community members and with the world at large. The book explaining the Navajo Common Law published by the Navajo courts is adorned, on the first page, by a complex diagram of various planes of existence in Navajo cosmology, and the interior text refers more to spiritual principles and traditional relationships than to what American lawyers would recognize as legal rules or doctrinal principles.<sup>75</sup>

This difference in approach translates into meaningful differences in legal outcomes in areas ranging from child custody and parental rights<sup>76</sup> to criminal jurisdiction<sup>77</sup> to the abrogation of criminal sentencing.<sup>78</sup> This reliance on a culturally specific framework is not limited to the Navajo courts—other tribal courts similarly employ the spiritual and philosophical views of their society to reach decisions on questions as weighty as the reasonableness of police stops<sup>79</sup> and whether a facially discriminatory statute denies equal protection under the law.<sup>80</sup> Given all of this, would it be surprising if an American-educated lawyer without knowledge of Navajo (or other tribal) culture ended up somewhat lost at sea in

---

74. Raymond Darrel Austin, *Navajo Courts and Navajo Common Law* 62 (Apr. 6, 2007) (unpublished Ph.D. dissertation, University of Arizona).

75. HENRY BARBER, *NAVAJO NATION COUNCIL, NAVAJO COMMON LAW PROJECT* (2002).

76. *See, e.g., In re J.J.S.*, 11 INDIAN L. REP. 6031 (Navajo D. Window Rock 1983) (granting adoptive custody of a neglected child to an extended family member in light of traditional Navajo views of family duties).

77. *See, e.g., Means v. Dist. Court of the Chinle Judicial Dist.*, 26 INDIAN L. REP. 6083, 6087 (Navajo 1999) (holding that a criminal defendant had submitted to Navajo court jurisdiction by taking on certain family obligations within the Navajo community).

78. *See, e.g., Navajo Nation v. Begay* (Navajo D. Crownpoint 1997), *available at* <http://www1.spa.american.edu/justice/documents/807.pdf> (holding that in suspending a criminal sentence, a lower court could consider the familial relationships involved, the victim's satisfaction with the outcome, and the fact that the defendant and victim were engaged in traditional dispute resolution).

79. *See, e.g., Hopi Tribe v. Kahe*, 21 INDIAN L. REP. 6079 (Hopi Tribal Ct. 1994) (holding that, in a small, close-knit community, a police officer could stop a citizen's car to perform a “welfare check” at the request of the citizen's family).

80. *See, e.g., Winnebago Tribe of Neb. v. Bigfire*, 25 INDIAN L. REP. 6229, 6233 (Winnebago 1998) (“[T]raditional [gender] differentiations . . . without pejorative or discriminatory implications . . . must be sustained as involving the compelling tribal governmental interest of preserving tribal traditions and culture.”).

tribal court, while an experienced lay advocate could in fact obtain a favorable result for his client?

This is not to say that a criminal defense attorney will never be useful in a tribal court. Indeed, the Navajo Nation requires members of its bar to pass a Navajo-specific examination,<sup>81</sup> which probably reduces the likelihood that a licensed lawyer would walk into a Navajo court knowing nothing about Navajo common law. But pushing tribal courts to employ only defense counsel trained by ABA-approved law schools will almost certainly tend to marginalize arguments rooted in culturally specific law in favor of those rooted in Anglo-American thought. And even if tribal courts are able to resist such pressures, such a policy ignores the fact that knowledgeable lay advocates may offer real advantages to their clients in a criminal court that applies traditional tribal principles to its legal decisionmaking.

In fact, this may be especially true in a system like the Navajo courts, where even criminal cases may be diverted to a nonadversarial “peacemaking” process.<sup>82</sup> While a lawyer would likely focus on winning the case, a lay advocate might perceive that it could be in her client’s best interest to enter the peacemaking system instead. Even more to the point, a lay advocate might recognize that diversion could also be in the best interest of peaceful relationships within the community—which is to say that a lay advocate might be capable of channeling Navajo values rather than the values of the Anglo-American bar.

Of course, the TLOA allows for “any jurisdiction” to license attorneys, so it is possible that tribes could simply license lay advocates as attorneys—perhaps upon the completion of an exam. But the statute requires that the licensing program apply “appropriate professional licensing standards” and “effectively ensure[] . . . competence and professional responsibility.”<sup>83</sup> Who interprets those provisions? During habeas proceedings, a federal court can interpret the ICRA and the TLOA according to its own lights.<sup>84</sup>

Unfortunately, we can likely expect a strong cognitive bias on the part of federal judges in favor of a traditional American definition of lawyerly

---

81. See *Courts & Peacemaking in the Navajo Nation: A Public Guide*, NAVAJO COURTS, <http://www.navajocourts.org/publicguide.htm> (last updated May 16, 2013).

82. See *The Peacemaking Program of the Navajo Nation*, NAVAJO COURTS, <http://www.navajocourts.org/indexpeacemaking.htm> (last visited July 20, 2013).

83. 25 U.S.C. § 1302(c)(2) (2006).

84. See, e.g., *Duro v. Reina*, 495 U.S. 676, 676 (1990) (“The [district] court granted the writ, holding that assertion of jurisdiction by the Tribe over a non-member Indian would constitute discrimination based on race in violation of the equal protection guarantees of the Indian Civil Rights Act of 1968 . . .”), *superseded by statute*, Act of Nov. 5, 1990, Pub. L. No. 101-511, 104 Stat. 1856, 1892–93, *as stated in* *United States v. Lara*, 541 U.S. 193 (2004).

competence and against unfamiliar definitions arising from tribal law. Anxiety about the exercise of sovereign power by tribal governments repeatedly taints federal Indian law, starting at least with the angry public reaction in the 1880s to *Ex parte Crow Dog*, which held that Indians could not be tried in federal court for intratribal crimes.<sup>85</sup> Supreme Court justices, sometimes writing for the majority, have repeatedly flirted with the idea that tribes are not sovereign at all, especially in the exercise of criminal jurisdiction.<sup>86</sup> They also continue to use language and invoke imagery suggesting at least past, if not implicitly present, savagery on the part of Indian tribes.<sup>87</sup> And in the Ninth Circuit, at least, tribal court decisions are not given the “full faith and credit” that state court decisions would be, but are reviewed under the freer standard of “comity.”<sup>88</sup> Given all of this, B.J. Jones has suggested that tribal judges are under enormous pressure to make tribal justice look more “anglo,” so that it will be recognized and accepted by federal judges.<sup>89</sup>

Thus, it seems likely that federal courts will be more comfortable with (and so tribal governments will feel pressured to provide) “attorneys” that look and act like attorneys in the U.S. system. Indeed, at least one district court has already

- 
85. *Ex parte Crow Dog*, 109 U.S. 556 (1883). See generally SIDNEY L. HARRING, *CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY* (1994).
86. See, e.g., *Duro*, 495 U.S. at 685 (asserting in dicta that “tribes can no longer be described as sovereigns” in the sense of exercising territorial criminal jurisdiction); *United States v. Kagama*, 118 U.S. 375, 379 (1886) (“The soil and the people within these limits are under the political control of the government of the United States, or of the states of the Union. There exists within the broad domain of sovereignty but these two.”); see also *Lara*, 541 U.S. at 227 (Souter, J., dissenting) (“[T]ribal exercise of criminal jurisdiction . . . is not akin to a State’s congressionally permitted exercise of some authority that would otherwise be barred by the dormant Commerce Clause. It is more like the delegation of lawmaking power to an administrative agency, whose jurisdiction would not even exist absent congressional authorization.” (internal citation omitted)).
87. See, e.g., *United States v. Sioux Nation of Indians*, 448 U.S. 371, 437 (1980) (Rehnquist, J., dissenting) (citing historians who believed that Plains Indians “lived only for the day, recognized no rights of property, robbed or killed anyone if they thought they could get away with it, [and] inflicted cruelty without a qualm”). For a fuller description of this tendency, see Ann E. Tweedy, “Hostile Indian Tribes . . . Outlaws, Wolves, . . . Bears . . . Grizzlies and Things Like That?": How the Second Amendment and Supreme Court Precedent Target Tribal Self-Defense, 13 U. PA. J. CONST. L. 687, 711–23 (2011), which details the use of “savage” imagery in federal opinions.
88. *Wilson v. Marchington*, 127 F.3d 805, 812–13 (9th Cir. 1997) (“The court may, in the exercise of its discretion, choose not to honor a tribal judgment for one of [several] enumerated reasons.”); *id.* at 809 (“In absence of a Congressional extension of full faith and credit, the recognition and enforcement of tribal judgments in federal court must inevitably rest on the principles of comity.”).
89. B.J. Jones, *Tribal Courts: Protectors of the Native Paradigm of Justice*, 10 ST. THOMAS L. REV. 87, 92–93 (1997) (describing “the onus on tribal courts to adjudicate disputes which inevitably will be reviewed by the federal courts utilizing the anglo paradigm of justice”).



ruled, in *U.S. v. Alone*, that the TLOA does not, of its own force, elevate lay advocates to the level of “licensed attorneys,” but rather draws a clear distinction between them.<sup>90</sup> That determination is not wrongheaded in light of the legislative history discussed in Part I and in light of the fact that tribal members often choose lay advocates more for their knowledge of tribal law than for their qualifications in the American criminal justice system.<sup>91</sup> But the clear purpose of § 1302(c)(2) is to provide defendants with competent representation, and as described, a lay advocate may at times be just the person to provide such representation. If a tribe created a licensing scheme and called its advocates attorneys even if they had not attended law school, would a federal court examine the system to see whether those advocates provided competent representation within the tribe’s own justice scheme? Or would the court scrutinize such a system only within the narrow confines of its own understanding of legal competence?<sup>92</sup>

## 2. Judges

Many tribes have also deliberately created justice systems that involve the active participation of elders or other lay judges.<sup>93</sup> Indeed, some judges in Indian

---

90. *United States v. Alone*, No. CR 11-50031-JLV, 2011 WL 2708732, at \*4-6 (D.S.D. July 12, 2011).

91. *See, e.g.*, MISS. BAND OF CHOCTAW INDIANS TRIBAL CODE § 1-4-3, *available at* [http://www.choctaw.org/government/tribal\\_code/Title%201-%20General%20Provisions.pdf](http://www.choctaw.org/government/tribal_code/Title%201-%20General%20Provisions.pdf) (requiring that lay advocates “demonstrate[] to the court a thorough knowledge” of Choctaw laws); Application for Approval to Advocate Before the Cherokee Nation Courts, *available at* <http://www.cherokeecourts.org/LayAdvocates.aspx> (Click “CNLA application with oath”) (last visited June 15, 2013) (requiring advocates to affirm that they are “familiar with” the Cherokee Constitution and laws and the Federal Rules of Civil and Criminal Procedure). *But see* Lay Advocate Application for Admission to Practice, San Manuel Tribal Court, *available at* <http://www.sanmanuel-nsn.gov/CourtForms/2010-08-Updates/Lay%20Advocate%20App%20Practice.pdf> (asking applicants if they have “any legal or law-related work experience” and whether they are “familiar with the basic principles of Federal Indian Law”).

92. This is not purely a matter of prejudice. Some courts may erroneously feel compelled to hold tribal courts to federal standards, even where doing so effectively makes the tribal court’s ruling a nullity. *See, e.g.*, *United States v. Ant*, 882 F.2d 1389, 1393 (9th Cir. 1989) (holding that a guilty plea in tribal court, made without the access to defense counsel that would be required in a similar hearing in federal court, may not be used as evidence of guilt in a federal trial for the same crime).

93. *See, e.g.*, ST. REGIS MOHAWK TRIBAL COURT AND JUDICIARY CODE, TRIBAL COUNCIL RESOLUTION 22, at Section VIII (2008), *available at* [http://www.srmt-nsn.gov/\\_uploads/site\\_files/TribalCourtAndJudiciaryCode.pdf](http://www.srmt-nsn.gov/_uploads/site_files/TribalCourtAndJudiciaryCode.pdf) (requiring that the chief judge be an attorney but allowing persons with good moral character who satisfy certain criteria, including “previous experience as a magistrate or lay judge” to fill the other positions in the judiciary); S.D. UNIFIED JUDICIAL SYS., SOUTH DAKOTA TRIBAL COURT HANDBOOK 15 (2006) (noting that the Northern Plains Intertribal Court of Appeals appellate panel “is to be made up of . . . at least one lay judge or person who is a member of a participating tribe and is

country feel that legal training is not necessary for many of the roles a tribal judge is called on to play. In the words of Judge David Raasch of Stockbridge-Munsee, “I think tribal judges are more problem-solvers than, say, state judges. I don’t think we have to be law-trained to be problem-solvers. I don’t think we have to be law-trained to be healers. I don’t think we have to be law-trained to administer justice or provide due process.”<sup>94</sup>

The idea of non-law-trained judges being able to effectively provide due process is likely to be met with skepticism in the nontribal legal community. Yet the skepticism runs both ways. An Oglala Sioux court put it succinctly: “It should not have to be for the Congress of the United States . . . to tell us when to give due process. Due process is a concept that has always been with us. . . . [It] means nothing more than being fair and honest in our dealings with each other.”<sup>95</sup>

This does not, of course, mean that Indian tribal governments will reach the same conclusions as the U.S. federal courts or even Congress about how best to ensure that a judge is fair and honest. During discussions with Congress about the scope of the ICRA, for example, one representative of the Navajo Nation stated that it was “difficult for Navajos to participate in a system where fairness required the judge to have no prior knowledge of the case.”<sup>96</sup> In the Navajo view of things, the overarching policy goal of promoting social harmony demands that factfinders have an intimate understanding of the needs of the parties and their social relationships. And William Zuger, a tribal court judge, has pointed out that tribal courts, like any other judiciary, are checked by democratic safeguards: The judge is under pressure to make sure her decisions are “accepted as fair and equitable” by the community.<sup>97</sup> In a tribal context, however, this means that the court must “remain culturally responsive to its constituents.”<sup>98</sup>

Congress, in drafting the TLOA, appears to have understood this principle, at least when it comes to judges, and provided a somewhat flexible statutory standard: Judges need only have “sufficient legal training to preside over criminal

---

familiar with Indian customs and traditions and at least one professional attorney”); UNIV. OF N.M. SCH. OF LAW TRIBAL LAW JOURNAL, TRIBAL COURT HANDBOOK: PUEBLO OF ISLETA APPELLATE COURT AND TRIBAL COURT (2012) (listing the chief judge of the Pueblo’s tribal court as “not law trained,” although the two other judges on the court are “law trained”).

94. Aaron Arnold, *Interview: David Raasch, Judge, Stockbridge-Munsee Tribal Court, Bowler, Wisconsin*, 2 J. CT. INNOVATION 381, 383 (2009).

95. *Bloomberg v. Dreamer*, No. 90-348, at 5–6 (Oglala Sioux Nation 1991), *quoted in* FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 135 (1995).

96. Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 840 (2007).

97. William P. Zuger, *A Baedeker to the Tribal Court*, 83 N.D. L. REV. 55, 62 (2007).

98. *Id.*

proceedings.”<sup>99</sup> But here again, such an undefined standard subjects tribal judges to having their qualifications scrutinized by federal district court judges in habeas proceedings. Federal judges will often be unfamiliar with the culturally specific values informing the tribal government’s choice to use elders or lay judges. And as professional lawyers trained in the modern<sup>100</sup> American system, federal judges may recoil from the idea that nonlawyers could justly adjudicate criminal cases. Thus, in striving for flexibility, Congress may have inadvertently opened the door to inflexible federal court interpretations.

### 3. The Larger Stakes

Sentencing power in the tribal context is not always used to incarcerate. Indeed, for some tribes, a great increase in the number of incarcerated citizens would create huge logistical problems. State governments may spend “over 70 percent of their general fund resources on law and justice expenses, and jails are the largest line item in that budget. Few Tribes will be willing or able to divert those types of resources from funding sources desperately needed for housing, education, and healthcare.”<sup>101</sup> The GAO confirms this: “Officials . . . reported that they do not have adequate detention space to house offenders convicted in tribal courts and may face overcrowding at tribal detention facilities.”<sup>102</sup>

But not every sentenced felony offender need be incarcerated. Sometimes, the mere threat of prison time can be used as leverage to achieve socially desirable results. As Judge Pouley explains: “Tulalip Court . . . suspends most jail time to insure a client [will] comply with the services required by the Court . . . [such as] chemical dependence and mental health evaluations . . . [and] classes appropriate to the crime (i.e. theft awareness or victims impact panels or domestic violence treatment).”<sup>103</sup> The court can also monitor offenders to ensure they “abstain from the use of alcohol or illegal drugs, continue working on their education and/or employment, obtain proper licensing and complete community service.”<sup>104</sup> Judge Pouley adds that even in the rare pre-TLOA cases in which she likely would have

---

99. 25 U.S.C. § 1302(c)(3) (2006). There is also a licensure requirement, but this would be easily satisfied by a tribal government’s own licensing scheme.

100. Until recently, American law also employed lay judges with some frequency, albeit usually not in the felony criminal context. See *Evolution of Lay Judges: From Kitchens to Courts*, N.Y. TIMES, Oct. 23, 1994, <http://www.nytimes.com/1994/10/23/nyregion/evolution-of-lay-judges-from-kitchens-to-courts.html>.

101. *One Year Later*, *supra* note 59, at 56 (testimony of Hon. Theresa M. Pouley, Chief Judge, Tulalip Tribal Court).

102. GAO-11-252, *supra* note 60, at 18.

103. Pouley E-mail, *supra* note 4.

104. *Id.*

imposed longer sentences if they had been available, “the longer sentencing would have allowed me to properly balance the needed jail time with the needed after jail supervision.”<sup>105</sup>

This kind of careful intervention can reduce crime. After instituting its own unique set of programs, Tulalip reported a steep drop in crime, from 1172 criminal filings in 2003 to just 493 in 2006 and 571 in 2007.<sup>106</sup> Indeed, so striking was Tulalip’s success that the Harvard Project on American Indian Economic Development selected Tulalip’s Alternative Sentencing Program as one of its 2006 “Honoring Nations” honorees, explaining that by helping “offenders to recover rather than just ‘throwing them away,’ the Tulalip Tribal Court Alternative Sentencing Program supports efforts to establish a crime free community.”<sup>107</sup>

Of course, programs like drug and alcohol treatment and domestic abuse counseling are not necessarily a traditional part of tribal law. Nonetheless, there are two reasons to think they fall within the ambit of tribal governments’ cultural protection mandate. First, they may reflect traditional values, in that traditional tribal legal systems often sought to repair the social breach and provide restitution first, and were only secondarily concerned with punishment for its own sake.<sup>108</sup> Second, tribes’ sovereignty over their own criminal procedure is important precisely because it encourages experimentation with new methods of enforcement that are effective for a particular tribal society in its own historical and cultural context. Tulalip’s example shows just how effective the exercise of that freedom can be. But without the leverage offered by longer sentences, tribes may find it difficult to make such programs work.

Moreover, the recent statutory reauthorization of the Violence Against Women Act (VAWA) raises the stakes even further. VAWA authorizes tribes to exercise jurisdiction over non-Indians for the first time since the Supreme

---

105. *Id.*

106. *Tribal Courts and the Administration of Justice in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 30 (2008) (testimony of Hon. Theresa M. Pouley, Chief Judge, Tulalip Tribal Court); TULALIP TRIBAL COURT, 2008 ANNUAL REPORT, at 2 (2009).

107. HARVARD PROJECT ON AM. INDIAN ECON. DEV., HONORING NATIONS: DIRECTORY OF HONORED PROGRAMS 36 (2007).

108. *See, e.g.*, HARRING, *supra* note 85, at 1 (detailing the resolution of an 1881 murder on the Great Sioux Reservation through a meeting between families and material reparation); KARL N. LEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* 6–13 (1941) (giving case studies of individuals who were expelled from Cheyenne society, but then rehabilitated and reintegrated); Robert Yazzie, *Healing as Justice: The Navajo Response to Crime*, in JUSTICE AS HEALING: INDIGENOUS WAYS 121 (Wanda D. McCaslin ed., 2005) (emphasizing the social healing aspect of Navajo common law); James W. Zion, *Punishment Versus Healing: How Does Traditional Indian Law Work?*, in JUSTICE AS HEALING: INDIGENOUS WAYS, *supra*, at 68, 70–75.

Court's controversial decision eliminating that jurisdiction in *Oliphant v. Suquamish Indian Tribe*<sup>109</sup>—albeit, for now, in only a limited class of domestic violence cases.<sup>110</sup> On reservations with significant non-Indian populations, the *Oliphant* rule has resulted in a near-anarchic lack of law enforcement and prosecution.<sup>111</sup> The expansion of even partial jurisdiction over non-Indians therefore represents a huge leap forward in the ability of tribal governments to protect their constituents. But there are familiar strings attached—tribes that wish to exercise VAWA's new jurisdictional powers over non-Indians in domestic violence cases must also meet the TLOA's due process requirements.<sup>112</sup>

### CONCLUSION

For tribes that can afford to meet its requirements, the TLOA offers genuine opportunities for greater sovereignty and self-determination. The expense of meeting those requirements, however, and the pressure the requirements put on tribes to make their court systems look more stereotypically American, bar many tribes from reaping the Act's benefits. Indeed, the Act may actually make it harder for many tribes to control crime on their reservations by removing the one mechanism (sentence stacking) by which they had previously been able to impose serious punishments.

In short, although Congress has in recent years undertaken to expand the criminal enforcement powers of tribal governments significantly, it may be that the TLOA unintentionally sorts tribes into two tiers. Richer and more assimilated tribes will be able to effectively deter reservation crime, while poorer and more traditional tribes are now less able to do so than they were before.

---

109. 435 U.S. 191, 212 (1978) (“[We] conclude that Indian tribes do not have inherent jurisdiction to try and to punish non-Indians.”).

110. Violence Against Women Reauthorization Act of 2013, S. 47, 113th Cong. § 904(b)(1) (“[T]he powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.”).

111. See, e.g., Sierra Crane-Murdoch, *On Indian Land, Criminals Can Get Away With Almost Anything*, ATLANTIC (Feb. 22, 2013, 9:16 AM), <http://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391> (“The Bakken oil boom hit western North Dakota in 2008, and for all the hype, there’s been little said about the reservation at its center. . . . The reservation’s population has more than doubled with an influx of non-Indian oil workers—over whom the tribe has little legal control.”).

112. See S. 47, § 904(d)(2) (“In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide to the defendant . . . if a term of imprisonment of any length may be imposed, all rights described in section 202(c) . . .”).

Without better funding mechanisms and, likely, some statutory revision, the Act unfortunately does not meet its goal of helping tribal courts become more equal partners in the American justice system.