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Tribal Law: The United States' Window Dressing of Rape Prevention in the SAVE Native Women Act, the Violence Against Women Act and the Tribal Law and Order Act

The broad circulation of statistics showing that one in three American Indian women are victims of sexual assault becomes even more disconcerting when looking at the abysmal numbers of perpetrators who are prosecuted for these crimes. Despite the U.S. Government's multiple attempts over the last seven years to ameliorate existing laws that limit the ability of tribes to prosecute sexual assault offenders, these figures remain unchanged. Legal actions post-*Oliphant v. Suquamish*, which ruled that tribal nations could not prosecute non-Indian offenders, have helped in the efforts to reform rape law. However, I contend that most of these efforts have been insufficient, leaving Native American communities skeptical of whether the United States can effectively help tribal nations to combat and prosecute these crimes. Examining three recent and critical legal revisions, the 2010 Tribal Law and order Act, the 2011 SAVE Native Women Act, and the 2013 reauthorization of the Violence Against Women Act, I will argue that these laws have failed to address the root causes of rape, to lower the rates of sexual violence perpetrated against Native women, and, I argue, therefore provide more of an appearance of change than actual change.

A Brief Background Regarding U.S. Imposition of Jurisdictional Boundaries that Limit Tribal Ability to Prosecute the Rape of Native Women

Three major Acts restricting tribal jurisdiction in rape cases have inspired the three laws at the core of this paper, the TLOA, the VAWA and the SAVE Native Women Act. The need for

these new laws can be traced to the Major Crimes Act, the Indian Civil Rights Act and the ruling of *Oliphant v. Suquamish*.

The Major Crimes Act of 1885 was perhaps the beginning of what can now be seen as decades of U.S. intervention aimed at limiting jurisdictional sovereignty of tribal nations. The Major Crimes Act was authorized to ensure that significant crimes committed by Native Americans would be subject to prosecution by the federal government, guaranteeing federal control over the most serious cases. Some of the crimes include: murder, arson, burglary, kidnapping, and rape. Sarah Deer, a Native Studies scholar and activist, reports in her book, *The Beginning and End of Rape*, that because of this "a rape survivor will navigate a federal criminal justice system if she reports the rape to law enforcement", removing a tribal court's ability to address rape cases for it's own community members and according to the context and tradition of its own community's retribution practices (35).

Further diminishing the power tribal courts held over their territory was the Indian Civil Rights Act of 1968 . The authority to commit convicted peoples was limited to a maximum of a $5,000 fine and a one year prison sentence (Deer 40). This limits criminal prosecution for serious crimes and, as Deer notes, caps tribal sentencing authority at a mere misdemeanor level, which leaves rape victims whose cases are prosecuted by tribal courts vulnerable to repeat offenses after inefficient sentencing (Deer 40). It is additionally important to note that because of this sentencing cap, many tribal courts refuse to prosecute rape crimes that they have jurisdiction over in special circumstances, "having internalized the Anglo-American belief that incarceration or monetary sanctions are the only possible response to violence" (Deer 40). Thus, tribal courts

have become even less likely to prosecute offenders, such as rapists, whom they believe can not be properly punished within the limited framework of their sentencing authority.

Another ruling that compounded the inability of tribes to prosecute rape crimes came after the infamous *Oliphant v. Suquamish* court case, which delivered one of the most significant blows to tribal sovereignty. The ruling inhibited tribal courts from prosecuting non-Indian defendants, even if they committed crimes on Indian land. For tribal courts, this often means that they cannot protect women from the most prevalent offenders of rape on their land (89% of offenders are non-Indian) because these offenders can commit rape with relative "impunity" due to the "jurisdictional gaps" ("Maze of Injustice", Deer 41). The federal government is then responsible for prosecuting these cases, but, time and again, studies show that the rates of prosecution of non-Indian offenders are disproportionately lower than the rates of non-Indian on Indian rape crimes (Deer 41).

The Tribal Law and Order Act

Samuel Cardick, an academic writer for the *St. Louis University Public Law Review*, comments on the Tribal Law and Order Act of 2010, citing that the Act is favorable, yet still does not address the "jurisdictional maze that has contributed to a sense of lawlessness in Indian country" (547). Perhaps the most important improvement of the jurisdictional boundary problem in TLOA is it's slight alleviation of the 1968 Indian Civil Rights Act. The previous sentencing cap imposed on tribal court prosecution was raised to a three year sentence and $15,000 fine (Cardick 564). Of course, this jurisdictional advantage is still a bit of a conundrum, as the additional sentencing power may only be executed over repeat offenders, still limiting the ability

to properly prosecute first time rapists or sexual offenders (Cardick 564). While this section of the Act is an increase from the earlier sentencing cap, tribal courts may be forced to leave an Indian rape victim vulnerable to violence from offenders who may only receive a limited first time sentence. In turn, it becomes increasingly difficult for tribal courts to prevent rape on Indian lands, as lenient sentencing does not incentivise offenders to stop assaulting women.

While some of the limitations on jurisdiction in the Major Crimes Act were availed by TLOA, federal policies still lengthen and complicate the process of prosecution for tribal nations, making rape prevention difficult to achieve. Namely, the TLOA allows tribal jurisdiction over "major crimes" such as rape, but only in specific cases whereby federal prosecutors decide not to go forth with a case guaranteed to them by the Major Crimes Act (Cardick 564). The federal government, rather than considering that tribal courts are inherently capable of prosecuting rape in their own communities, makes tribal court rape prosecution impossible without special permission from the federal government.

According to Cardick, federal agencies also attempt to assist tribal courts with reports when federal prosecutors reject rape cases (564). Federal prosecutors, under the legislation of the TLOA are required to give reports to tribal courts detailing their pre-reviewed evidence of rape cases. In addition, reports on which strategies regarding gendered violence prevention are most effective are to be generated for tribal courts post-TLOA signing (Cardick 569). Rather than listening to or following suggestions laid out in the multitude of reports from tribal nations that "already cite the jurisdictional maze and suggest ways to fix it", the TLOA implicitly overlooks these developments (Cardick 569). Instead the TLOA pursues their own theories about what might effectively address intimate partner violence. Although tribes are committed to self

determination, U.S. laws like TLOA have limited tribal ability to exercise their sovereignty and self determination making it near impossible for tribes to be effective when it comes to rape prevention.

A third attempt in the TLOA aimed at addressing staggering rates of sexual violence perpetrated against Indigenous women comes in the form of cross deputization and additional funding for education and resources. Specifically, where the MCA and ICRA made it impossible for Tribal Prosecutors to prosecute non-Indians, the TLOA states that tribal prosecutors are permitted to stand in as U.S. Attorney's for crimes they do not have jurisdiction over (Cardick 565). Additionally, federal officers must receive special education about sexual assault cases and IHS and BIA officials must testify in tribal court during sexual assault cases (Cardick). Nonetheless, Cardick notes that [the provisions] "do not ease the complexity of the jurisdictional maze but rather allow certain authorities to pass over it through direct communication" with one another (569). Federal as well as Tribal authorities can work together in a system of concurrent jurisdiction, but still, the TLOA makes clear that tribal courts do not have sovereign jurisdiction over non-Indian offenders. The cross-deputization policies obscure this fundamental issue by providing circumstantial sovereignty to Tribal Prosecutors. Yet, "unlike how a New York City Police officer has jurisdiction over a tourist to the city", a tribal prosecutor must work her or his way through an increasingly complicated tangle of jurisdictional policies (Cardick 569).

The SAVE Native Women Act

In 2011, a revision inspired by the Major Crimes Act and the *Oliphant v. Suquamish* case entitled the SAVE Native Women Act authorized incremental changes in laws affecting response

to sexual assault crimes. Namly, SAVE partially restores jurisdiction to tribal courts. The blueprint of SAVE demonstrates the delicate ruling of concurrent jurisdiction, allowing power to be delegated between tribal sovereigns and the federal government. Jurisdictional power of tribal courts is partially restored as they are now able to prosecute and police Indian defendants who commit major crimes (Dabiri). But, tribes may only prosecute residents of their own tribe or members with significant relation to their tribe (Dabiri). According to Hossein Dabiri of the University of Oklahoma College of Law, however, the Save Native Women Act allows the federal government to "maintain its power while simultaneously recognizing the inherent power of Indian sovereigns to police criminal conduct" (419). In brief translation, SAVE allows for the federal government to impose its jurisdiction in specific cases outlined in the Major Crimes Act, such as rape cases, especially over non-Indian defendants. The SAVE Native Women Act also proposes that the Attorney General be required to review inquires for grants that will enable tribes to advance police work in pursuit of responding more efficiently to crimes of violence against American Indian Women (Dabiri 404).

While these amendments do serve in the name of gender justice, specifically for American Indian rape victims, the orchestrated dependency enforced by the federal government undermines the likelihood of effectiveness in such policies because federal workers are not *obligated* by the SAVE Native Women Act to prioritize rape prevention, or take any action on the problem (Dabiri 415). Indeed, extra funds and a larger share of sovereignty over serious crimes will enable tribal nations to sharpen their rape response work, however, this comes at the expense of federal reliance. As highlighted by Dabiri, the federal government, maining its overarching sovereignty, is unlikely to prioritize cases whereby the victim is not a resident of

federal or state territory if a tribal court does not have the resources to prosecute a rapist (Dabiri). In fact, the federal government may pick and choose which rape cases to take on as the SAVE Native Women Act does not oblige the United States to take on any case, even if requested by an underfunded, ill-equipped tribal court. Newly outlined tenants of SAVE requiring the federal review of grants for gendered violence may solve this issue, but grant requirements remain problematic as the Attorney General can still deny such grants (Dabiri 404). Moreover, the awards that are offered may not be sufficient enough to make prosecution and policing more effective, as the grant amounts are determined at the complete discretion of the Attorney General, leaving rape victims still vulnerable to inaction (Dabiri 404). Again, the federal government is allowed and likely to prioritize other matters, as has historically been the case.

The third chief tenet of the SAVE Native Women Act partially retracts the patronizing ruling of the Major Crimes Act, permissing tribal courts to request, again at the constitutional discrepancy of the Attorney General, for special domestic violence jurisdiction (406 Daribi). This special violence jurisdiction can be extended over all people, whether Indian or not, so long as the crime was committed on tribal lands. Unfortunately, this most crucial section of the SAVE Native Women Act is likely to do little for a majority of American Indian rape victims. While indeed the Attorney General *may* extend full jurisdiction to tribes in the case of domestic violence rape, allowing victims protection from high rates of repeat offenses, she or he *may not.* In the case of rejected jurisdiction, tribal courts still can do nothing to prosecute rape. Putting aside the the daunting fact that the Attorney General may deny such jurisdiction, the lengthy process required to request delegated jurisdiction creates a dangerous time gap whereby victims of domestic assault may experience anxiety, fear, and repeat abuses. Even if the waiting period

only takes one business day, domestic violence rape cases require immediate attention, as lethal assaults may occur in less than a minutes time.

The SAVE Native Women Act failed to provide effective rape prevention policies based on one crucial detail: domestic violence is defined as assault occurring between two people in any given *relationship*. Thus, even if the Attorney General grants jurisdiction within a limited time frame, and she or he has already allocated effective grants to advance rape prevention and prosecution, rape committed by someone the victim does not intimately know is not grounds for delegated jurisdiction. Thus, the special domestic violence jurisdiction will do nothing to encourage responses in non-domestic rapes. Samuel Cardick poignantly remarks that "ever since the decision by the Supreme Court in *Oliphant*, Indian reservations have served as a lawless territory where non-Indians may commit crimes with a much lower chance of being caught and prosecuted" (Cardick 569). Because Native American women experience assault 89% of the time at the hands of non-Indian men, who are less likely to be intimate partners, this section of SAVE is useless against prosecuting the most prevalent rape cases ("Maze of Injustice").

The Reauthorization of the Violence Against Women Act

Recently, the 2013 reauthorization of the Violence Against Women Act provided some of the most substantial relief yet from the *Oliphant v. Suquamish* case, which ruled that tribal courts could not prosecute non-Indians, though VAWA did not fully reverse the ruling. Under VAWA, tribal courts now have concurrent jurisdiction with the federal government in special domestic violence cases, meaning tribal courts no longer have to ask for special permission to prosecute non-Indians who commit domestic rape (Castillo 316). However, similar to the problems I

addressed in the SAVE Native Women Act, Cynthia Castillo of the *American Indian Law Review* states that "the VAWA complicates an already complex jurisdictional system by granting jurisdiction to tribal courts in a narrow set of cases while leaving the remaining cases under federal (and sometimes state) jurisdiction" (312). VAWA falls short of a comprehensive reversal from *Oliphant v. Suquamish* and is unlikely to aid in tribal prosecution of rape cases because prosecution is limited to non-Indians who either live in the tribe's territory or have significant ties to the tribe. Under VAWA tribes do not have jurisdiction over all, or even a majority of the perpetrators who rape Native women. Likewise, this limitation is further compounded by the premise of "special domestic violence jurisdiction" as domestic violence jurisdiction does not include the authority to prosecute non-Indian rapists who are not in a relationship with the victim. The VAWA holds little significance for advancing rape prosecution as most of the perpetrators who rape Native women can escape tribal prosecution and, as mentioned earlier, are less likely to face federal prosecution for rape than they are to actually commit rape.

So What?

In conclusion, while the succession of laws enacted since 2010 make it appear that the federal government has made strides in addressing the pervasive rates of rape of Native women, they have actually provided complicated and largely ineffective solutions. The provisions in SAVE, VAWA, and TLOA were composed in a paternalistic, complicated, and ultimately colonialist fashion which had not the interests of Native American women at heart, but the interest of federal superiority and control over tribal nations. The federal government's patronizing attitudes toward indigenous populations still prevents them from thinking that Native

people can be trusted to handle serious crimes in their own territory. That the United States has consistently failed to address the root causes of inaction in rape cases provides a logical basis to urge federal authorities to listen to Native scholars and community proposals about how to best prevent and prosecute sexual violence of American Indian women. For creating laws based on Indian proposals that call for jurisdictional sovereignty and the resources necessary to address sexual assault cases may potentially lower the staggering numbers of rape against Native women.

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