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The Struggle of Native American Tribal Nations to Exercise Sovereignty

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A recurrent theme when discussing the significant challenges Native American Indians face is the refusal of the U.S. government to decisively recognize and honor tribal sovereignty. While the federal government technically engaged in nation-to-nation relationships with many tribal nations through the signing of treaties during the late 18th and early 19th centuries, it has never truly and in good-faith recognized tribal nations as sovereign political entities equal to the United States. The federal government's continual dismissal of and attack on tribal sovereignty has created ongoing challenges to tribal economic development and the assertion of tribal jurisdiction. The most effective way to address these problems is through a combination of relinquished federal control of Native life, increased funding to tribes, and development of tribal-specific criminal justice systems.

Federal legislation that restricts tribal jurisdiction is a significant challenge that continually affects Native Americans. The Major Crimes Act "forcibly imposed the federal criminal justice system on tribal communities" by providing the federal government with criminal authority on five major crimes, including murder and rape, on many contemporary reservations (Deer, 37). Because of this law, few tribes have pursued prosecution of crimes of murder or rape within the past century. Public Law 280, on the other hand, turned criminal authority over to state governments in certain states, once again having the practical effect of limiting tribal jurisdiction. The result of this law is that state governments, as opposed to the federal government (or tribal governments), primarily exercise criminal jurisdiction over Indian country in the affected states. Thus legislation such as the MCA and PL 280 have combined to severely restrict and weaken tribal jurisdiction.

The challenge of tribal economic development and the reality of restricted tribal jurisdiction are similar in that they both threaten a tribal nation's ability to assert its sovereignty.

The inability of many tribal nations to provide adequate health care, housing, and public safety services, and to defend against the federal government's frequent attacks on their lands, rights, and resources, degrade the perceived legitimacy of tribal nations as political sovereigns.

Increased economic development would promote the growth of tribal "political, social, and cultural institutions," and overall assertion of tribal sovereignty (Wilkins, 167). Without more tribal-influenced economic development, tribal sovereignty will continue to be undermined through the frequent reduction and exploitation of tribal land and resources perpetrated by the federal government.

Similarly, the reality of weakened tribal jurisdiction, as demonstrated by the fact that few tribes currently prosecute crimes such as murder or rape, threatens the sovereignty of tribal nations. A "sovereign political entity has duties to protect citizens from abusive power," and thus restricted tribal jurisdiction directly impacts the legitimacy of tribal nations as political sovereigns (Deer, 31). Because many tribal nations no longer assert the authority to respond to rape, and do not hold offenders accountable, instead largely allowing the federal government complete control over murder and rape cases, an integral element of tribal sovereignty - the duty to protect - is diminished. Tribal sovereignty could effectively be strengthened in the form of reasserted tribal jurisdiction.

There are 573 federally recognized tribes in the United States, and "more than two hundred federally recognized Indian groups in the United States" (Cramer, 6). Each of these tribes is unique, yet the challenges to tribal economic development and of restricted tribal jurisdiction are similar in that they developed out of the common non-Native desire to frame Native life as one singular narrative. The desire to frame Indian life as uniform has led non-

Natives to use Indian gaming to threaten tribal economic development, and use the perceived leniency of one tribal tradition to restrict criminal jurisdiction for all tribes.

The recent rise of Indian gaming operations has created “a heightened perception among many non-Indian Americans and federal and state policymakers that tribal nations are all now economically well off” and no longer in need of federal financial assistance (Wilkins, 165). In addition to overlooking the debilitating poverty that is a reality on a majority of Indian reservations, this misconception ignores the reality that while “Indian gambling facilities are a financial boom to some tribes, [they are] a break even scheme for others” (Cramer, 94). Tribal nations are unique and diverse, and just because gaming is successful for one tribe does not mean it will be for all tribes. In fact, casino revenues “are not spread evenly” among tribes, and “the top 20% of casinos earn nearly 70% of the gambling revenue” (Pever, 286). Many tribal gaming operations are small and not very profitable, and thus the presence of a casino does not negate the need for federal aid. Thus the singular narrative or myth that because of gaming success “all tribes are now rich and no longer need government assistance,” is problematic and deters tribal economic development by creating a false narrative that negates the reality of tribal economic struggles (Pever, 287). Tribal nations are unique and diverse, and their various relations to gaming operations attest to this.

In 2003, the U.S. Commission on Civil Rights released a detailed study titled *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country*, which testified to the socio-economic struggles Natives continue to face today. The study reported that Native peoples “still suffer higher rates of poverty, poor educational achievement, substandard housing, and higher rates of disease and illness... [and] continue to rank at or near the bottom of nearly every social,

health, and economic indicator” (“A Quiet Crisis”). This study proves the extent to which tribal economic development remains a challenge across Indian country.

The Major Crimes Act (MCA), which had the practical effect of supplanting tribal jurisdiction on crimes such as murder and rape with federal jurisdiction, was passed in the context of the non-Native public retaining a singular and uniform conception of all Native people. The U.S. Supreme Court Case *Ex Parte Crow Dog* arose out of a situation wherein a Lakota man named Crow Dog killed a rival leader, and the Lakota people, “[exercising] their inherent authority over intertribal crime, adjudicated Crow Dog in a traditional setting, imposing traditional penalties” (Deer, 35). Federal officials perceived the tribal punishment as lenient, and later arrested and prosecuted Crow Dog in federal court. Crow Dog petitioned the U.S. Supreme Court arguing that the federal government did not have the authority to prosecute and arrest him, as he was a citizen of a foreign government “accused of violating foreign law on foreign soil” (Deer, 35). Crow Dog won his case, and the Court recognized tribal nations as independent sovereigns. The non-Native population was outraged by the decision, and “demanded that Congress intervene to change the laws governing tribal federal relationships to ensure that Native defendants would be prosecuted in the Anglo legal system;” thus the passage of the MCA (Deer, 36).

The public outrage over the tribe’s traditional homicide penalties, and subsequent passage of the MCA, represent how the non-Native population viewed tribal criminal justice systems as uniformly inadequate (when compared to the Anglo-American criminal justice system) and considered unique tribal traditions as unimportant. The intent of Congress through passage of the MCA was “to infiltrate and control the [entire] indigenous population through increased legal authority;” not just the Lakota people (Deer, 36). While the public’s perception of

traditional Lakota penalties as too lenient is problematic entirely on its own, the resulting legislation that uniformly regulated Indian criminal law is most relevant to my argument that non-Natives attempt to tell a singular narrative of Native life. The public used their outrage against one tribal-specific law to usher in legislation that greatly restricted tribal jurisdiction among all tribes, with the logic that if one tribe is too lenient on criminals all tribes will be. This demonstrates how tribal jurisdiction was limited through the telling of a singular story about Native life.

Challenges to tribal economic development and to tribal assertion of jurisdiction are also continually and purposefully manipulated by the federal government through colonialism. The government continually prevents economic development through the economic control and exploitation of Indian resources, and continually endorses restricted tribal jurisdiction through various legislation.

The MCA and Public Law 280 are legal manifestations of the federal government's desire to politically control tribal nations through the weakening of tribal jurisdiction. Although tribal governments technically and apparently retain inherent jurisdiction over all crimes committed in Indian country, they often choose not to prosecute the crimes which federal or state governments have concurrent jurisdiction to prosecute. As a result, "the federal government has largely controlled the development of contemporary tribal legal systems, and tribal governments have not consistently exercised concurrent jurisdiction over violent crimes" (Deer, 37). Additionally, tribal governments are seriously underfunded and lacking in resources. Thus the combined effect of the MCA and PL 280 is that today "few tribes pursue prosecution of crimes such as murder and rape," and victims who report their attacks are necessarily interacting with federal representatives (Deer, 37). Until these laws are repealed, tribal criminal justice systems

will continue to be weakened at the expense of federal intrusion into Indian life, and restricted tribal jurisdiction will be an ongoing problem.

The exploitation and control of Indian resources is one major way the government's policy of economic control creates an ongoing challenge to tribal economic development. The federal government has long engaged in tactics of environmental racism, in which tribal land has been "disproportionately exposed to or deliberately targeted for environmental harm" (Voyles, 6). One example of this is uranium mining on land owned by the Navajo Nation. Uranium has been mined on and near Navajo land at a disproportionately high rate when compared to non-Navajo land, but "economic development was never realized [by the Navajo people] in large part because royalties for uranium ore obtained from tribal lands were kept artificially low" (Voyles, xiv). This demonstrates another hallmark of the federal government's exploitation of Native resources: not adequately compensating Natives for the resources taken and the environmental harm inflicted. This practice of environmental racism then creates a dependency among affected tribal nations on dangerous, labor defensive, and environmentally harmful jobs that cause generational harm to tribal nations.

The only way this pattern of exploitation will end is if the federal government ceases to control and target Native lands for resource extraction and degradation. This seems unlikely in the near future, as the process of colonialism which has long structured American society is something of a cannibal, continually "feeding on [Native lands] and bodies to perpetuate itself" (Voyles, 215). Policies of environmental racism socially construct Native lands as inherently wastelands, destined to contain waste, contamination and destruction. Through the process of reification, this social construction of Native land as environmentally polluted is a self-fulfilling prophecy - made real through the extensive and intensive extraction of oil or uranium from

Native land. Thus this process of environmental racism, which hinders tribal economic development in a multitude of ways, is ongoing and integral to modern American society. The only way to end the exploitation and control of Indian resources would be to end the structural colonialism that necessitates the presence of a wasteland where destruction and exploitation is understandable and acceptable.

An additional way the challenge to tribal economic development is perpetrated by the federal government is through the underfunding of tribal nations. Statistics show that the “American Indian population has grown at a faster rate than the U.S. population as a whole,” and yet “over the last two decades [tribes] have experienced a decline in spending power focused on Indigenous needs” (Wilkins, 167). Additionally, “studies have shown that...tribes suffer the worst socioeconomic conditions of any group in the country” (Wilkins, 167). It is thus inherently unjust and wrong that federal funding would decrease to this growing, and increasingly struggling, portion of the U.S. population.

It could also be argued that this decrease in funding violates the government's fiduciary responsibility to “remain loyal to [tribal nations] and act in the [their] best interests” (Pevar, 31). While it is true the federal government no longer enters into treaties with tribal nations, the government still has an obligation to honor the trust responsibilities it accepted through the signing of treaties. The extent to which the U.S. honors the trust responsibility it committed to through treaties reflects “the extent to which [American] society is committed to the rule of law and justice” (Pevar, 54). Thus given the information that clearly demonstrates the needs of tribal people, the U.S has a duty to appropriate sufficient funding to tribal nations.

Challenges to tribal economic development and of restricted tribal jurisdiction are also similar in that they are complex enough that they cannot be simply solved only through the

federal government appropriating funds targeted to tribal nations. In the case of tribal economic development, this is evidenced by the fact that “even those tribes with impressive gaming revenues, the forty-plus tribes with producing mineral leases and other tribes with significant natural resources...still lag far behind the rest of society in many socioeconomic categories” (Wilkins, 166). In the same vein, if complete tribal jurisdiction was magically restored and “tribal nations suddenly had the power and resources to respond effectively to rape,” tribal nations would still struggle to immediately operate an effective criminal justice system (Deer, 107). This is because both of these problems cannot be reduced to solely a lack of funding or power, but should also be addressed within the context of developing tribal-centric political and economic systems.

An effective solution that would allow tribes to successfully develop economically would include a solution whereby the federal government not only increases financial aid to tribal nations, but also relinquishes control as to how this money is spent. Although today billions of dollars have been “appropriated for Tribal [nations], less than 30 percent of that money ever reached the reservation” (Wilkins, 167). Instead the federal government, through agencies like the “notoriously corrupt” Bureau of Indian Affairs, has used Native money in a reckless manner, without the consent of tribal nations (Treuer, 127). One way they have done this is through the investment of “Indigenous funds in railroad companies and various municipal and state bonds” (Dunbar-Ortiz, 168). The Natives never gave consent for their funds to be utilized in investments to grow the prosperity and power of the United States, and yet “Indigenous leaders were powerless to stop [these practices]” (Dunbar-Ortiz, 168). Thus the federal government’s careless control of Native funding challenges tribal economic development.

The federal government should relinquish control over tribal funding (including money that it appropriates to tribal nations). Tribal nations should have the sole authority to determine how they use their money to develop their economies. Tribal nations have demonstrated their ability to responsibly manage funds through the use of casino profits to “improve health care, education, and public safety services;” all three of which are worthy causes more likely to benefit tribal nations than investments in corporate industries (Wilkins, 171). Additionally, tribal nations with successful gaming operations have become “a major source of employment [which] pumps millions into state economies,” also testifying to the competence of tribal nations to support economic development without federal government interference (Wilkins, 176). The solution to challenges preventing tribal economic development can be found in a proposal that includes an increase in funding to tribal nations, less federal involvement in decisions about how funds are used, and greater self-determination of tribal nations.

In the context of tribal jurisdiction, the federal government’s restoration of full tribal jurisdiction will be most effective and beneficial if made in conjunction with the development of tribal-centric criminal justice systems that transcend the weaknesses of the American criminal justice system. Simply turning the authority of the “male-centered, colonial, American [criminal justice] model” over to tribal nations will create more problems in Indian country, specifically with regard to the violence perpetrated against Native women (Deer, 113). Instead, tribal nations will be more likely to flourish if allowed to use their “unique history, language, government structure,” and traditional conceptions and teachings of violence and rape to inform and develop a tribal criminal justice system founded on an indigenous jurisprudence (Deer, 115). Thus the solution of restoring tribal jurisdiction requires not only the federal government relinquishing its power over tribal criminal matters, but also the development of an indigenous criminal justice

system that is not required to replicate the mistakes of the patriarchal and colonial American criminal justice system.

Challenges to tribal economic development and restricted tribal jurisdiction are two prevalent problems that threaten the tribal sovereignty of Native Americans. Both of these problems perpetuate the telling of Native life as a singular one-dimensional story, are ongoing problems exacerbated by structural colonialism, and are complex enough that they require more than merely the federal government's appropriation of money or relinquishment of power; they also require the simultaneous development of tribal economic and criminal systems. These problems are most likely to be solved through a combination of federal money with no restrictions, decreased federal interference in all tribal matters, and the overall reassertion of tribal sovereignty.

Works Cited

Cramer, Renée Ann. *Cash, Color, and Colonialism: the Politics of Tribal Acknowledgment*.

University of Oklahoma Press, 2008.

Deer, Sarah. *The Beginning and End of Rape: Confronting Sexual Violence in Native America*.

University of Minnesota Press, 2015.

Dunbar-Ortiz, Roxanne. *An Indigenous Peoples' History of the United States*. Beacon Press,

2015.

Pevar, Stephen L. *The Rights of Indians and Tribes*. 4th ed., Oxford University Press, 2012.

Voyles, Traci Brynne. *Wastelanding: Legacies of Uranium Mining in Navajo Country*.

University of Minnesota Press, 2015.

Wilkins, David E., and Heidi Kiiwetinepinesiik Stark. *American Indian Politics and the*

American Political System. 4th ed., Rowman & Littlefield, 2018.

U.S. Commission on Civil Rights. *A Quiet Crisis: Federal Funding and Unmet Needs in Indian*

Country. Washington, DC: U.S. Commission on Civil Rights, 2003, <http://purl.access.gpo.gov/GPO/LPS49018>.