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# OVERCOMING LEGAL HURDLES IN THE WAR AGAINST METH IN INDIAN COUNTRY

CHRISTOPHER B. CHANEY\*

## I. INTRODUCTION

Methamphetamine is “public enemy number one” for many tribes within the United States. Methamphetamine, or “meth,” is destroying lives, breaking up families, and undermining tribal cultures. In recent decades most tribes have faced a number of common challenges often including some combination of lack of educational attainment, unemployment, weak family structures, alcoholism, high crime rates, and lack of hope. As if these obstacles to safe communities were not enough, the poison of methamphetamine arrived in Indian country<sup>1</sup> in the late 1990s and, like gasoline thrown on a fire, has multiplied many of the social problems that had already been holding back tribal self-fulfillment.

Part II of this article discusses the scope of the problem of methamphetamine in Indian country, especially as it relates to criminality. Part III examines the legal hurdles that inhibit the law enforcement response to

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1. The term “Indian country” is defined at 18 U.S.C. § 1151 (2000) to include all land within reservation boundaries, “dependent Indian communities,” and allotments. In addition, some lands are designated “Indian country” by statutory designation even though they may or may not fall within one of the three categories set forth in § 1151; for example, Santa Fe Indian School has Indian country jurisdictional status per Pub. L. No. 106-568, § 824(c), 114 Stat. 2868, 2920 (2000). Lastly, it should be noted that the United States Supreme Court has held that “informal reservations” are also “Indian country”—so far, the Supreme Court has only used this concept when discussing the jurisdictional status of former reservation lands held in trust in Oklahoma. *Oklahoma Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 453 (1995); *Oklahoma Tax Comm’n v. Sac & Fox Nation*, 508 U.S. 114, 128 (1993).

combating methamphetamine in tribal communities. Solutions to these hurdles will be proposed and discussed.

## II. THE IMPACT OF METHAMPETAMINE IN INDIAN COUNTRY

Alcohol has long had a devastating impact on many tribes. Stories range from non-Indian treaty negotiators getting tribal delegates intoxicated in order to get them to sign unfavorable treaties, to the sight of intoxicated American Indians in reservation border towns. Regardless, the adverse effects of alcohol are well-known, and unfortunately have contributed to the development of negative stereotypes about the larger native population. What is less well-known by mainstream America is that since the late 1990s, methamphetamine has been rapidly replacing alcohol as the drug of choice for an increasing number of people. Recent testimony before the United States Senate Indian Affairs Committee noted that on the San Carlos Apache reservation,<sup>2</sup> twenty-five percent of babies born on the reservation were born addicted to methamphetamine.<sup>3</sup> Furthermore, on the White Mountain Apache reservation,<sup>4</sup> thirty percent of tribal government employees tested positive for methamphetamine use.<sup>5</sup>

### A. DEPARTMENT OF JUSTICE STATISTICS

The crime rate in Indian country is unacceptably high. According to the United States Department of Justice (DOJ), “[t]he annual average violent crime rate among American Indians from 1992 to 2001 (101 per 1,000 person[s] age 12 or older) was about 2 ½ times the national crime rate (41 per 1,000 persons).”<sup>6</sup> This statistic may actually be low because another study, also performed by the DOJ, found that only forty-six percent of American Indian victims of violent crime even report the offense to law

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2. The San Carlos Apache Tribe is located in east central Arizona.

3. *Methamphetamine in Indian Country: Hearing on the Problem of Methamphetamine in Indian Country, Before the S. Comm. on Indian Affairs*, 109th Cong. 1-6 (2006) (statement of Kathleen W. Kitcheyan, San Carlos Apache Chairwoman), available at [http://Indian.senate.gov/public/index.cfm?fuseAction=Hearings/eHearing\\_ID=47](http://Indian.senate.gov/public/index.cfm?fuseAction=Hearings/eHearing_ID=47) (follow the “Testimony of Kathleen W. Kitcheyan” hyperlink).

4. The White Mountain Apache Tribe is located in east central Arizona adjacent to the San Carlos Apache reservation.

5. *Indian Youth Suicide: Hearing on The Tragedy of Indian Youth Suicide, Before the S. Comm. on Indian Affairs*, 109th Cong. 17-18 (2006) (statement of Donna Vigil, Director for the White Mountain Apache Tribe Division of Health Programs), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cig?dbname=109\\_senate\\_hearings&docid=f:27643.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cig?dbname=109_senate_hearings&docid=f:27643.pdf).

6. STEPHEN W. PERRY, U.S. DEP’T OF JUSTICE, A BJS STATISTICAL PROFILE, 1992-2002, AMERICAN INDIANS AND CRIME 4-5 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/aic.pdf>.

enforcement in the first place.<sup>7</sup> These studies, utilizing statistics from 1993-1998 and 1992-2001 respectively, do not reflect the increase of methamphetamine driven crime that has occurred since the time frame covered in these statistical reports.

#### B. THE BUREAU OF INDIAN AFFAIRS OFFICE OF JUSTICE SERVICES STUDY

In order to statistically capture the impact of methamphetamine on criminality in Indian country, the Bureau of Indian Affairs Office of Justice Services (BIA OJS)<sup>8</sup> conducted an unscientific survey of BIA and tribal law enforcement agencies.<sup>9</sup> Ninety-six law enforcement agencies responded to the survey instrument.<sup>10</sup> The results were startling: Seventy-four percent of the responses indicated that methamphetamine was the number one drug threat in their jurisdictions.<sup>11</sup>

Other responses trailed greatly. For example, eleven percent of jurisdictions thought marijuana was the biggest threat.<sup>12</sup> Six percent responded that crack cocaine was most threatening.<sup>13</sup> Additionally, five percent of jurisdictions considered powder cocaine as its most serious problem.<sup>14</sup>

When asked if various categories of crimes increased in their areas due to methamphetamine, forty-eight percent of Indian country jurisdictions reported that child abuse/neglect increased due to methamphetamine in their communities.<sup>15</sup> Fifty-seven percent reported that burglaries increased due

7. CALLIE RENNISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENT VICTIMIZATION AND RACE, 1993-1998 8 (2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/vvr98.pdf>.

8. Formerly known as the Bureau of Indian Affairs Office of Law Enforcement Services.

9. N.M. INVESTIGATIVE SUPPORT CTR., NATIONAL METHAMPHETAMINE INITIATIVE SURVEY: THE STATUS OF THE METHAMPHETAMINE THREAT AND IMPACT ON INDIAN LANDS (2006), available at [http://www.ncai.srg/ncai/Meth/BIA\\_MethSurvey.pdf](http://www.ncai.srg/ncai/Meth/BIA_MethSurvey.pdf) [hereinafter NATIONAL INITIATIVE SURVEY]. This study was prepared for the Bureau of Indian Affairs Office of Law Enforcement Services, now known as BIA OJS. *Id.* The data was analyzed and report prepared by the New Mexico Investigative Support Center, an initiative of the New Mexico High Intensity Drug Trafficking Area. *Id.*; see DuWayne W. Honahni, *Methamphetamine in Indian Country: A Law Enforcement Perspective*, 31 IHS PRIMARY CARE PROVIDER 307, 307 (2006) (indicating that BIA OJS conducted a survey relating to methamphetamine problems on tribal land).

10. The ninety-six responders included Indian country law enforcement agencies serving communities located in Alabama, Alaska, Arizona, California, Colorado, Connecticut, Idaho, Kansas, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming.

11. NATIONAL INITIATIVE SURVEY, *supra* note 9, at 4.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 9; see also Roe Bubar & Diane Payne, *Methamphetamine and Child Abuse in Native America*, 31 IHS PRIMARY CARE PROVIDER 305, 305 (Dec. 2006).

to methamphetamine.<sup>16</sup> Sixty-four percent of the responses indicated that domestic violence and assault/battery increased due to methamphetamine.<sup>17</sup> In addition to the BIA OJS research, the Federal Bureau of Investigation (FBI) estimates that forty to fifty percent of Indian country violent crime is now methamphetamine related.<sup>18</sup>

While the sheer magnitude and impact of methamphetamine on reservation criminality is startling, the reasons for the categories of crimes impacted is easily explained. Violent crimes such as domestic violence, child abuse, assault, and battery are a well-known result of methamphetamine abuse. While under the influence of methamphetamine, users are typically in an excited state favorable to sudden and irrational acts, such as violence.<sup>19</sup> Users can go for days without sleep, experience irritability, hallucinations, and commit acts of violence.<sup>20</sup> Methamphetamine has other adverse affects, including its highly addictive nature.<sup>21</sup> Methamphetamine treatment is time-consuming and expensive.<sup>22</sup>

### C. THE CORRELATION OF METHAPHETAMINE USE AND OTHER CRIMINAL ACTS

Persons addicted to methamphetamine have been known to resort to burglary, identity theft, and other property crimes in attempts to acquire money to support their habits.<sup>23</sup> Children often become innocent victims of methamphetamine addicted parents who are focused on the drug instead of their families.<sup>24</sup> Children who are not being properly protected from strangers in the home have been known to become victims of sexual abuse.<sup>25</sup> Child neglect may come in the form of failing to provide for the

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16. NATIONAL INITIATIVE SURVEY, *supra* note 9, at 9.

17. *Id.*

18. FBI Indian Country Unit Representative, Remarks at the Federal/Tribal Methamphetamine Summit Sponsored by the U.S. Dep't of Justice Attorney Gen. Advisory Comm's Native Am. Issues Subcomm. (Oct. 13, 2005).

19. NAT'L INST. ON DRUG ABUSE, METHAMPHETAMINE ABUSE AND ADDICTION 5 (2006), available at <http://www.drugabuse.gov/PDF/RRMetham.pdf>.

20. UNIV. OF MD. CTR. FOR SUBSTANCE ABUSE RES., METHAMPHETAMINE (2005), <http://www.cesar.umd.edu/cesar/drugs/meth.asp#user>.

21. *Id.*

22. Ill. Att'y Gen., MethNet: Strategies for Fighting Meth, [http://www.illinoisattorney-general.gov/methnet/fightmeth/treatment.html#addict\\_treatment](http://www.illinoisattorney-general.gov/methnet/fightmeth/treatment.html#addict_treatment) (last visited Feb. 6, 2007).

23. *Id.*

24. NAT'L DRUG INTELLIGENCE CTR., INFORMATION BULLETIN: CHILDREN AT RISK (2002), available at [www.usdoj.gov/ndic/pubs1/1466/index.htm#Related](http://www.usdoj.gov/ndic/pubs1/1466/index.htm#Related); see Bubar & Payne, *supra* note 15, at 306.

25. See GOVERNOR'S OFFICE OF CRIM. JUSTICE PLANNING, OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, DANGERS TO CHILDREN LIVING AT METH LABS, <http://www.ovc.gov/publications/bulletins/children/pg5.html> (last visited Feb. 6, 2007).

children's needs (such as adequate and healthy food and water), or by allowing children to be present during the highly dangerous process of methamphetamine manufacture.<sup>26</sup> These child neglect issues have spawned the concept of the Drug Endangered Child (DEC).<sup>27</sup> Many jurisdictions now employ DEC prevention programs in order to protect children who might otherwise fall victim to abuse or neglect by addicted parents.<sup>28</sup>

#### D. DRUG TRAFFICKING IN INDIAN COUNTRY

Another issue that should be mentioned when considering the scope of the methamphetamine problem within tribal communities is that drug dealers are targeting Indian country jurisdictions for drug trafficking. This is happening in three contexts. First, methamphetamine smuggling is occurring across tribal lands, particularly when the reservation lies adjacent to an international border. The increasing amounts of methamphetamine available in the United States as a result of product smuggled out of Mexico are of particular importance.<sup>29</sup> In recent years, many drug smugglers have decided to bring their operations to remote areas of the United States/Mexico border, such as the one occupied by the Tohono O'odham Nation reservation,<sup>30</sup> which has approximately seventy miles of land contiguous to the international border.<sup>31</sup>

The second way methamphetamine distribution occurs within tribal lands is due to the belief (real or perceived) that it is easier to get away with such a crime in Indian country. This situation is best illustrated through an Oklahoma example, where drug dealers are known to prefer to ply their wares within Indian country jurisdictions.<sup>32</sup> The perception is that inadequately funded law enforcement programs in Indian country make it less

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26. *Id.*

27. OFFICE OF NAT'L DRUG CONTROL POLICY, DRUG ENDANGERED CHILDREN, [http://www.whitehousedrugpolicy.gov/enforce/dr\\_endangered\\_child.html](http://www.whitehousedrugpolicy.gov/enforce/dr_endangered_child.html) (last visited Feb. 6, 2007).

28. *Id.*

29. NAT'L DRUG INTELLIGENCE CTR., U.S. DEP'T OF JUSTICE, NATIONAL DRUG THREAT ASSESSMENT 2005—EXECUTIVE SUMMARY 1-2 (2005), *available at* <http://www.usdoj.gov/ndic/pubs11/13745/13745t.htm>.

30. The Tohono O'odham Nation reservation is located in south central Arizona.

31. Another tribe that has suffered greatly due to international smuggling activities across its territory is the St. Regis Mohawk Tribe in northern New York whose reservation extends to the international boundary with Canada. NAT'L NATIVE AMERICAN LAW ENFORCEMENT ASS'N, INDIAN COUNTRY BORDER SECURITY AND TRIBAL INTEROPERABILITY PILOT PROGRAM: THE IMPORTANCE OF TRIBES AT THE FRONTLINES OF BORDER AND HOMELAND SECURITY 15-16 (2006), *available at* <http://www.nnalea.org/TBSP/TBSPReport.pdf>.

32. Dr. John Duncan, Dir., Okla. Bureau of Narcotics & Dangerous Drugs Control, Address at the Okla. Sup. Ct. Sovereignty Symposium (May 31, 2006).

likely for drug dealers to be caught.<sup>33</sup> In addition, a number of non-Indian drug dealers believe that since tribes have no criminal jurisdiction over them, it is less likely that they will be successfully prosecuted, even if apprehended.<sup>34</sup>

Finally, distribution of methamphetamine occurs within tribal lands in order to create methamphetamine-addicted clientele. Some methamphetamine dealers target Indian country because they seek to replace alcohol addiction with methamphetamine addiction in an effort to become the financial beneficiaries of addictive behavior. During the investigation and prosecution of a methamphetamine distribution case from the Wind River reservation<sup>35</sup> in Wyoming, it became apparent that non-Indian drug dealers from out-of-state had developed a “business plan” to get Native American people addicted to methamphetamine.<sup>36</sup> The plan included developing a market (getting people addicted by providing initially free samples of methamphetamine), manufacturing, and distribution (forcing addicts who run out of money to produce methamphetamine and/or peddle it to their friends and relatives).<sup>37</sup> This plan was organized with the business goal of making a substantial profit.<sup>38</sup>

#### E. REDUCING DEMAND FOR METHAMPHETAMINE IN INDIAN COUNTRY

Native Americans have the highest rate of methamphetamine abuse of any ethnicity in the United States.<sup>39</sup> In addressing the problems caused by methamphetamine use, it is important to consider “demand reduction,” that is, reducing methamphetamine addiction and thereby reducing the demand for the drug. One way of reducing demand is to educate youth to not experiment with methamphetamine. On National Methamphetamine Awareness

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33. *Id.*

34. *See infra* Part III.A.1 (discussing jurisdictional issues related to the legal status of suspects).

35. The Wind River reservation is home to the Northern Arapaho and Eastern Shoshone tribes.

36. *See* Dist. of Wyo. U.S. Att’y Matthew Mead, Panelist at the Federal Bar Ass’n Indian Law Conference (Albuquerque, N.M. Apr. 7, 2006) (speaking on Tribal-Federal law enforcement strategies against methamphetamine trafficking).

37. *Id.*

38. *Id.*

39. NAT’L CONG. OF AM. INDIANS, METHAMPHETAMINE IN INDIAN COUNTRY: AN AMERICAN PROBLEM UNIQUELY AFFECTING INDIAN COUNTRY 1 (2006), *available at* [http://www.ncai.org/methamphetamine\\_Resources.195.0.html](http://www.ncai.org/methamphetamine_Resources.195.0.html).

Day,<sup>40</sup> Dirk Kempthorne, Secretary of the Interior, announced a plan for an anti-methamphetamine advertising campaign specifically designed to educate American Indian youth about the dangers posed by methamphetamine.<sup>41</sup>

However, once a person is hooked, he or she can be prosecuted in tribal court for misdemeanor drug possession. At this stage, the tribal government has an opportunity to help the addicted person through creative sentencing options, such as ordering the offender into a drug rehabilitation program.<sup>42</sup> Unfortunately, according to the BIA OJS study, only thirty-one percent of responding tribal jurisdictions facilitate or sponsor methamphetamine rehabilitation programs.<sup>43</sup> When rehabilitation is available, the recovery process is very long, often taking twelve to eighteen months for both residential and intensive outpatient programs.<sup>44</sup> Methamphetamine addiction treatment programs in Indian country are few, and often expensive; the recovery process is very long, and recidivism rates are extremely high. However, when a methamphetamine-addicted misdemeanant is sentenced in a tribal court forum, the tribal government has a prime opportunity to be an instrument in demand reduction and ultimately improve public safety.

In short, statistics demonstrate that methamphetamine is increasing the incidence of crime in Indian country. Both property crime and violent crime are rising while methamphetamine traffickers are actively plying their wares within tribal communities. A key weapon in the war against methamphetamine in Indian country would be reducing demand through prevention programs and rehabilitation, aided by creative and enforceable sentencing options.

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40. Press Release, Office of Press Sec'y, National Methamphetamine Awareness Day: A Proclamation by the President of the United States (Nov. 28, 2006), *available at* <http://www.whitehouse.gov/news/releases/2006/11/20061128.html>.

41. Press Release, Office of Sec'y, U.S. Dep't of Interior, Coalition Announces \$300,000 for Public Awareness Campaign (Nov. 30, 2006), *available at* [www.doi.gov/news/06\\_News\\_Releases/061130.html](http://www.doi.gov/news/06_News_Releases/061130.html).

42. A number of tribes have established drug courts or "Healing to Wellness" courts which seek to address substance abuse addictions in a comprehensive way that shepherds addicted persons through the rehabilitation process. CARRIE E. GARROW & SARAH DEER, TRIBAL CRIMINAL LAW AND PROCEDURE 392-94 (Jerry Gardner ed., AltaMira Press 2004).

43. N.M. Investigative Support Ctr., *supra* note 9, at 13.

44. Susan Dreisbach et al., *Rural Methamphetamine Use: Implications for AI/AN Communities*, IHS PRIMARY CARE PROVIDER 300, 303 (2006).



### III. LEGAL HURDLES TO COMBATING METHAMPHETAMINE IN INDIAN COUNTRY

There are two main legal hurdles, both of which are jurisdictional, that are currently hindering effective law enforcement in the war against methamphetamine in Indian country. These jurisdictional hurdles are: (1) posed by legal status of suspects; and (2) posed by the Indian Civil Rights Act.<sup>45</sup> During the discussion of these hindrances, possible solutions will be proposed.

#### A. JURISDICTIONAL HURDLES POSED BY LEGAL STATUS OF SUSPECTS

##### 1. *Oliphant v. Suquamish Indian Tribe*

In the 1978 case of *Oliphant v. Suquamish Indian Tribe*,<sup>46</sup> the United States Supreme Court held that tribal governments did not have criminal jurisdiction over non-Indians.<sup>47</sup> The Court held that tribal exercise of such authority was inconsistent with their status.<sup>48</sup> While it is easy to dismiss the Court's ruling as elitist at best, it is noteworthy that the factual situation addressed in that case was atypical of most reservations. For example, the land within the Suquamish Tribe's Port Madison reservation was heavily checker-boarded with sixty-three percent being non-Indian owned private land.<sup>49</sup> The population of the reservation was ninety-eight percent non-Indian, and the tribal court which originally convicted the non-Indian defendants did not allow non-Indians to participate in juries.<sup>50</sup>

Today, many, if not most, tribal courts allow, or even encourage, non-Indian residents to participate in tribal court juries. Jury pool reform in tribal courts can take place by tribal legislative changes to tribal code jury pool composition requirements. Changes can also be effectuated by tribal court action, such as by amending court rules or by issuing precedent that requires non-Indian residents to be offered the opportunity to participate in

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45. Jurisdictional confusion in general has had an adverse effect on the war against methamphetamine. In *United States v. Baker*, a federal conviction for manufacturing methamphetamine and for possession of a precursor chemical on the Southern Ute reservation in Colorado was reversed because the operative search warrant was issued by a state court instead of a federal or tribal court. 894 F.2d 1144, 1147 (10th Cir. 1990).

46. 435 U.S. 191 (1978).

47. *Oliphant*, 435 U.S. at 212.

48. *Id.* at 208.

49. *Id.* at 193 n.1.

50. *Id.* at 193 n.4.

this important responsibility of reservation civic life. For example, Navajo Nation law used to only allow Navajo tribal members to sit on tribal court juries.<sup>51</sup> In *Navajo Nation v. MacDonald*,<sup>52</sup> the Navajo Nation Supreme Court adopted the “fair cross section of the community” concept.<sup>53</sup> In addition, the Navajo Nation Code has been amended to no longer require tribal membership as a juror qualification.<sup>54</sup> In fact, today it is interesting to note that many tribal courts offer criminal defendants greater rights than the federal Indian Civil Rights Act<sup>55</sup> requires. In fact, many tribal courts now offer misdemeanor defendants greater rights than are available to defendants in federal misdemeanor cases.<sup>56</sup>

Despite jury pool reform and other major gains in the professionalization and development of tribal courts, neither Congress nor the United States Supreme Court, has overturned the effect of the now antiquated *Oliphant* decision. However, Congress has stepped-up to correct a similar Supreme Court imposed restriction on tribal court authority. In *Duro v. Reina*,<sup>57</sup> the United States Supreme Court expanded on the already problematic *Oliphant* decision and held that tribal courts did not have criminal jurisdiction over non-member Indians.<sup>58</sup> In other words, tribal court criminal jurisdiction would be limited to members of its own tribe, and members of other tribes could not be prosecuted in that tribal court.<sup>59</sup> Congress quickly realized the unworkable nature of such a result and

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51. The Navajo Nation judicial system is the most highly developed tribal court system in the United States. It consists of eight district courts located in Window Rock, Chinle, Tuba City, Dilkon, and Kayenta, all in Arizona, plus Shiprock, Ramah, and Crownpoint in New Mexico. There are also part-time circuit courts located in Alamo and Tohajiilee (Canoncito), New Mexico. In addition, there are plans to possibly open a new court in Aneth, Utah. Appeals are handled by the Supreme Court of the Navajo Nation located in Window Rock, Arizona. The Navajo Nation judiciary operates under statutory authority and an extensive array of court rules. NAVAJO NATION CODE tit. VII, §§ 101-853 (1995).

52. No. A-CR-09-90, ¶ 30 (1991) (VersusLaw).

53. *Id.*; see also *George v. Navajo Indian Tribe*, 2 Navajo Rptr. 1, 5-6 (1979) (holding that prohibiting non-Indian jurors was a violation of equal protection).

54. NAVAJO NATION CODE tit. VII, § 654 (1995).

55. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341 (2000).

56. Christopher B. Chaney, *The Effect of United States Supreme Court's Decisions During the Last Quarter of the Nineteenth Century on Tribal Criminal Jurisdiction*, 14 BYU J. PUB. L. 173, 183 (2000).

57. 495 U.S. 676 (1990).

58. *Duro*, 495 U.S. at 677.

59. After the *Duro v. Reina* decision was handed down, there were serious concerns that non-member Indians would be largely immune from prosecution for most misdemeanor level crimes because there is no state criminal jurisdiction over Indians who commit crimes in Indian country. See, e.g., *Worcester v. Georgia*, 31 U.S. 515, 596 (1832) (holding that a non-Indian could not be convicted for a state-defined crime committed within tribal territory). Federal jurisdiction over Indians in Indian country is largely limited to felonies unless it is an interracial crime. 18 U.S.C. §§ 1152-1153 (2000).

statutorily overturned the effect of the *Duro* case.<sup>60</sup> The “*Duro*-fix” legislation accomplished this by amending the Indian Civil Rights Act to reflect that tribal courts would have jurisdiction over “all Indians.”<sup>61</sup> In *United States v. Lara*,<sup>62</sup> the Court upheld the *Duro*-fix legislation.<sup>63</sup> Congress could easily strengthen public safety in Indian country by amending 25 U.S.C. §1301(2) to state that tribal governments have criminal jurisdiction over “all persons.” This would enhance the tribal law enforcement authority and help relieve burdened sheriff’s offices that are currently primarily responsible for policing non-Indian misdemeanants in Indian country.<sup>64</sup>

## 2. Addressing Oliphant Problems Through Tribal Law

While tribal law enforcement agencies patiently wait for Congress to fix the jurisdictional problems brought about by the *Oliphant* decision, many tribes have developed creative means to deal with crimes committed on their reservations by non-Indians.<sup>65</sup> For example, since the methamphetamine epidemic has hit Indian country, a number of tribes have enacted laws providing authority and process for actions to exclude or “banish” certain persons—such as drug dealers—from the community.<sup>66</sup> The tribal exclusionary power is well established.<sup>67</sup>

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60. *Duro*, 495 U.S. at 677.

61. 25 U.S.C. § 1301(2) (2006).

62. 541 U.S. 193 (2004).

63. *Lara*, 541 U.S. at 193-94. In this case a non-member Indian who had been convicted in tribal court challenged his subsequent federal prosecution for the same offense in federal court. *Id.* The defense argued that the *Duro*-fix legislation amounted to a delegation of federal power to the tribal court and that successive tribal/federal prosecutions violated principles of Double Jeopardy. *Id.* The Court rejected that argument and found the *Duro*-fix legislation merely affirmed Congress’ recognition of inherent tribal criminal jurisdiction over non-member Indians. *Id.* at 193-94.

64. Because tribal land is not taxable, some state jurisdictions complain that being forced to provide law enforcement services within Indian country results in an unfunded mandate that they are forced to bear. This concern has been raised in numerous jurisdictions subject to the mandatory version of Public Law 280. 18 U.S.C § 1162 (2000). Since 1968, states have retroceded jurisdiction over numerous reservations to the federal government. The most recent time this was done was for the Santee Sioux Tribe located in Nebraska. Notice of Acceptance of Retrocession of Jurisdiction for the Santee Sioux Nation, NE, 71 Fed. Reg. 7994 (Feb. 8, 2006).

65. GARROW & DEER, *supra* note 42, at 97-108; Chaney, *supra* note 56, at 174-78. In addition to criminal implications, methamphetamine abuse in Indian country raises numerous civil issues such as how to address situations arising when methamphetamine-addicted parents are no longer able to properly care for their children. *See, e.g.*, Colville Confederated Tribes v. Sutton, 32 INDIAN L. REP. 6037 (Colville Tribal Ct. 2005) (discussing the child endangerment effects that a mother’s use of methamphetamine would have on the child).

66. LUMMI NATION CODE, tit. 12 (2004).

67. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 159 (1982) (explaining that tribes have an inherent power to exclude non-members); *see also* COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 219-20 (2005).

### 3. *Addressing Oliphant Problems Through Existing Federal Law*

Federal criminal laws carry a great deal of weight in Indian country. While tribal courts are primarily responsible for handling misdemeanor crimes,<sup>68</sup> federal courts have a history of handling felony crimes committed in Indian country. This is because the Major Crimes Act<sup>69</sup> and the Indian Country Crimes Act<sup>70</sup> have long provided a federal jurisdictional basis for the prosecution of crimes from Indian country.<sup>71</sup> In addition to these statutes, federal crimes of general applicability apply within Indian country just as they do in all other parts of the United States.<sup>72</sup>

For instance, federal criminal statutes that prohibit manufacturing, possessing, and distributing controlled substances apply within Indian country.<sup>73</sup> Methamphetamine is one of those controlled substances.<sup>74</sup> In 2006, President George W. Bush signed the Combat Methamphetamine Act (CMA) into law.<sup>75</sup> This law, which applies within Indian country, establishes federal restrictions on the availability of certain common over-the-counter cold medications, which contain pseudoephedrine, ephedrine, and phenylpropanolamine.<sup>76</sup> These medications are regulated because they can be used to illegally manufacture methamphetamine. In addition, the CMA increases the sentencing authority in cases where methamphetamine is manufactured on premises in which children are present or reside.<sup>77</sup>

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68. Tribal courts are limited to misdemeanor sentencing pursuant to the Indian Civil Rights Act, 25 U.S.C. § 1302(7) (2006).

69. 18 U.S.C. § 1153 (2000).

70. 18 U.S.C. § 1152 (2000).

71. See United States Department of Justice Criminal Resource Manual §§ 678-680, 689 (summarizing application of the Major Crimes Act and General Crimes Act within Indian country); see also Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 715-24 (2006).

72. See *Standing Bear v. United States*, 68 F.3d 271, 272 (8th Cir. 1995) (applying federal firearms laws in Indian country).

73. *United States v. Brisk*, 171 F.3d 514, 521 (7th Cir. 1999), cert. denied, *Sanapaw v. United States*, 528 U.S. 860 (1999); *United States v. Blue*, 722 F.2d 383, 386 (8th Cir. 1983).

74. 21 C.F.R. § 1308.12(d)(2) (2006); see *United States v. Carpenter*, 163 F. App'x 707 (10th Cir. 2006) (arresting defendant for possession with intent to distribute methamphetamine on Northern Arapaho and Eastern Shoshone Tribes' Wind River reservation in Wyoming); *United States v. Drapeau*, 414 F.3d 869, 873 (8th Cir. 2005), cert. denied, 126 S. Ct. 1090 (2006) (arresting defendant for possessing methamphetamine on Crow Creek Sioux reservation in South Dakota); see also *United States v. Ward*, 182 F. App'x 779 (10th Cir. 2006), cert. denied, 127 S. Ct. 422 (2006) (convicting defendant of attempting to manufacture methamphetamine on Absentee Shawnee tribal lands in Oklahoma); *United States v. Fredericks*, 273 F. Supp. 2d 1032, 1034-35 (D. N.D. 2003) (indicting defendant for possession with intent to distribute methamphetamine on Three Affiliated Tribes' reservation in North Dakota).

75. *Combat Methamphetamine Epidemic Act of 2005*, Pub. L. No. 109-177, 120 Stat. 192, 256 (2006) (codified as amended in scattered sections of 21 U.S.C.).

76. 21 U.S.C. § 830 (2006).

77. 21 U.S.C. § 860(a) (2006).

Other provisions of federal drug laws also apply in Indian country, such as possession of a controlled substance within 1,000 feet of a public housing authority.<sup>78</sup>

Authority to enforce federal controlled substance laws within Indian country lies with the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), and the BIA OJS. Tribally administered police departments operating under a “638 contract”<sup>79</sup> or “Self-Governance compact”<sup>80</sup> carry out day-to-day policing on most reservations that are not effected by the mandatory version of “Public Law 280.”<sup>81</sup>

Tribal police have the authority to enforce tribal law. However, many tribal police departments have also been authorized to enforce federal law. Many of these federal commissions are issued by the BIA OJS through Special Law Enforcement Commissions (SLEC).<sup>82</sup> As of 2002, there were at least fifty-seven tribal law enforcement agencies which enforced federal laws under this regime.<sup>83</sup> The SLEC program allows tribal law enforcement officers who have that authority to act as full partners with FBI, DEA, and BIA agents to investigate federal drug offenses for prosecution in federal district court. This authority is not limited to prosecution of Indian offenders only.

#### B. JURISDICTIONAL HURDLES POSED BY THE INDIAN CIVIL RIGHTS ACT

The second legal hurdle to tribal governmental efforts in addressing the methamphetamine problem is that tribal courts are limited to imposing one-year sentences in accordance with the Indian Civil Rights Act (ICRA).<sup>84</sup> This is especially problematic because, as pointed out earlier, methamphetamine treatment programs often take well over one year to be effective. For example, suppose a methamphetamine-addicted defendant is convicted in

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78. *United States v. Milk*, 281 F.3d 762, 766 (8th Cir. 2002) (applying 21 U.S.C. §§ 860 and 841(a)(1) (1994), and finding that these provisions also apply to offenses within 1,000 feet of tribal housing authorities).

79. *See* 25 U.S.C. § 450f (2000) (authorizing self determination contracts for tribal organizations).

80. 25 C.F.R. § 1000.161 (2006).

81. *See* 18 U.S.C. § 1162 (2000) (indicating that some states have jurisdiction over offenses committed in Indian country).

82. *Internal Law Enforcement Services Policies*, 69 Fed. Reg. 27, 6321-22 (Feb. 10, 2004) (providing the BIA policy on Special Law Enforcement Commissions).

83. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002 13-18 (2005).

84. 25 U.S.C. § 1302(7) (2000).

tribal court<sup>85</sup> for a misdemeanor methamphetamine possession offense and is sentenced to one-year imprisonment, which is the maximum. If it takes four months to get placed at a methamphetamine treatment facility because of lack of space, by the time he is transferred from the tribal jail, the court can require the defendant to attend the program only for the remaining eight months of his sentence. Before the treatment is completed, the court's sentence expires and the defendant is free to walk out of the treatment facility before the program is complete.

Some tribal courts get around this obstacle by stacking one-year sentences in multiple count cases.<sup>86</sup> One obvious solution to this problem would be to remove the one-year sentencing restriction from the ICRA—an idea that merits discussion in Indian country justice circles.<sup>87</sup> Another possible solution is for tribal courts to handle substance abuse addiction as a civil matter, in a manner similar to the way that tribal courts currently handle civil commitment cases for mentally and emotionally challenged persons who may need institutionalization for periods that exceed one year. By making such cases civil matters, rather than criminal, the federal sentencing restrictions would no longer apply.

In sum, there are two types of legal hurdles to effective law enforcement in Indian country. The first is the ban on tribal criminal jurisdiction over non-Indians as set forth in the antiquated *Oliphant* decision. The second hurdle is the sentencing restrictions imposed on tribal courts by the Indian Civil Rights Act.

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85. In addition to tribal criminal courts, tribal "Drug Courts" have been established on a handful of reservations. These courts, sometimes referred to as "Healing to Wellness Courts," typically utilize creative sentencing options to get substance abuse treatment and/or other assistance for addicted convicts. Orders to attend rehabilitation or take other actions are enforced through closely monitored probation backed by the threat of incarceration. At least one defendant has (unsuccessfully) raised failure to provide a drug court as a defense in an Indian country federal methamphetamine case. *United States v. Carpenter*, 163 F. App'x 707, 712 (10th Cir. 2006).

86. *Ramos v. Pyramid Tribal Ct.*, 621 F. Supp. 967, 969-70 (D. Nev. 1985); see *Tuckta v. Cruz*, 16 IND. L. REP. 3102, 3102 (D. Or. 1988) (explaining that the defendant was sentenced for multiple charges with consecutive terms).

87. It should be noted that increases in tribal sentencing authority will likely place increased demand on already heavily burdened detention facilities. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JAILS IN INDIAN COUNTRY, 2004, 8 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/jic04.pdf> (providing statistics regarding overcrowding issues facing many Indian country detention facilities); see also OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF THE INTERIOR, No. 2004-I-0056, "NEITHER SAFE NOR SECURE": AN ASSESSMENT OF INDIAN DETENTION FACILITIES 50-51 (2004), available at <http://www.oig.doi.gov/upload/IndianCountryDetentionFinal%20Report.pdf> (discussing the problem of overcrowded jails in Indian country).

#### IV. CONCLUSION

The impact of methamphetamine is devastating and has an unacceptably high cost on lives, families, and tribal cultures. The *Oliphant* decision and the sentencing restrictions of the ICRA pose serious stumbling blocks to the effective administration of criminal justice in Indian country. There are a number of tools, such as federal cross-commissioning and sentence-stacking, which are being used to side-step these hurdles. Congress has the power to make tribal communities safer by crafting permanent and appropriate updates to remove these unnecessary and dangerous legal hurdles. By making these adjustments, Congress would improve public safety to all Americans who live, work, travel, or recreate within or near Indian country.