ARE WE THERE YET?

AN ANALYSIS OF VIOLENCE AGAINST NATIVE AMERICAN WOMEN AND THE IMPLEMENTATION OF SPECIAL CRIMINAL DOMESTIC VIOLENCE JURISDICTION

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INTRODUCTION

The Pascua Yaqui Tribal Court of Arizona made history in 2017 by prosecuting Frank Jaimez for domestic violence on tribal lands.[1] Courts are universally entrusted to prosecute crimes, so a tribal court rendering a guilty verdict may not sound novel at first blush. But prior to Jaimez's trial, no non-Native man had been convicted in tribal court for thirty-nine years.[2] The Pascua Yaqui Tribe exercises Special Domestic Violence Criminal Jurisdiction (SDVCJ) granted with the Violence Against Women Act (VAWA) reauthorization of 2013.[3] These landmark provisions and those in

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1. Debra Utacia Krol, *Pascua Yaqui Tribe First to Use VAWA to Prosecute Non-Indian*, INDIAN COUNTRY TODAY MEDIA NETWORK (June 9, 2017), https://indiancountrymedianetwork.com/news/politics/pascua-yaqui-tribe-first-use-vawa-prosecute-non-indian/.

2. Alfred Urbina & Melissa Tatum, *On-the-Ground VAWA Implementation: Lessons from the Pascua Yaqui Tribe*, THE JUDGES' J., Fall 2016, at 8.

3. *Id*. at 9.

current legislative proposals represent a policy shift. As tribal courts implement SDVCJ, the nation watches using VAWA as a looking glass. By measuring the results achieved by tribes implementing VAWA, Congress can consider what consequences stem from longstanding federal policies that deny tribes prosecutorial power based on a defendant's skin color. Mounting outcries over glaringly high rates of sexual violence against Native American[4] women paved the way for VAWA's reauthorization provisions.[5] Since 1978,[6] Federal law has denied tribal courts criminal jurisdiction over non-Native defendants committing crimes in Indian Country.[7] The legal term "Indian Country" includes: 1) land within a reservation; 2) dependent Indian communities; 3) Indian allotments where Indian title has not been extinguished; and 4) Indian land held in trust by the United States.[8] Now codified as 25 U.S.C. § 1304, VAWA authorized limited tribal jurisdiction to directly combat domestic violence in tribal communities.[9] Domestic violence on tribal land is only a subset of a larger national problem with many sources. Limitations on tribal jurisdiction, low levels of law enforcement in Indian Country, and high declination rates

4. This article uses the term "Native American" for United States Indigenous People unless a referenced holding or statute uses contrary terms. *See* Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law and Reform and Federal Indian Law*, 38 SUFFOLK U. L. REV. 455, 455 n.2 (2005) (recognizing that legal and academic fields use varied terms); *see* also *Native American v. Indian: Amanda Blackhorse asks: Which Name?*, INDIAN COUNTRY TODAY MEDIA NETWORK (Aug. 29, 2016), https://indiancountrymedianetwork.com/culture/social-issues/native-american-vs-indian/
(reporting some Native American's discourage using the word "Indian" while others find it socially acceptable).

5. Urbina, *supra* note 2, at 9 (citing Amnesty International *infra* note 10.)

6. *See infra*, Oliphant note 46.

7. Defined in 18 U.S.C. § 1151 (2012); This is a developing area in Native American law due to a recent 10th Circuit opinion in Murphy v. Royal, 866 F.3d 1164 (10th Cir. 2017). The court determined that Congress never officially disestablished a Creek reservation in Oklahoma and decided the land in question was Indian Territory. The court overturned the State's murder conviction for lack of jurisdiction. The holding strips Oklahoma's criminal jurisdiction in roughly half of the state, affecting approximately 1.8 million Oklahomans who may now live in previously unrecognized Indian Country. Writ of Certiorari was filed before the United States Supreme Court in 2018 with legal scholars speculating that the Court will grant the review because of the holding's massive implications. *See also* McBride, Jessica, *Under Treaty*, THE TULSA VOICE, http://www.thetulsavoice.com/February-B-2018/Under-treaty/.

8. United States v. Bryant*, see infra* note 41, at n.1.

9. NATIONAL CONGRESS OF AMERICAN INDIANS, VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 1 (2018).

by federal prosecutors produce a significant void in justice for women in Indian Country.[10] And attackers are well-aware of the systematic failures. Research shows that failure to arrest and prosecute abusers emboldens attackers and deters Native American victims from reporting the crime.[11] Prior to VAWA, tribal authorities could only drive a domestic abuse offender to a reservation border and leave him free to return and repeat the same offense.[12] This note explores the need to prosecute violent offenders in Native American communities and analyzes VAWA's results and areas for improvement.

I. Shocking Statistics

Theresa Pouley, retired Chief Justice for Tulalip Tribal Court calls the sexual violence against Native Americans a "perfect storm."[13] She contends:

"When you have the combination of the silence that comes from victims who live in fear and a lack of accountability by outside jurisdictions to prosecute that crime, you've created, if you will, the perfect storm for domestic violence and sexual assault, which is exactly what all the statistics . . . bear out."[14]

The statistics that Justice Pouley references come from multiple reports revealing a national epidemic.[15] Native American women on Indian reservations experience the highest rates of domestic violence and sexual assault in America.[16] One out of two Native American women will experience domestic abuse at the

10. Amnesty International, *Maze of Injustice: The Failure to Protect Indigenous Women From Sexual Violence in the USA*, 1-2 (2010) [hereinafter Amnesty International].

11. *Id.* at 5; M. Brent Leonhard, *Implementing VAWA 2013*, 62 FED. LAW 53, 53 (2015).

12. Krol, *supra* note 1.

13. *PBS NewsHour*, (PBS television broadcast Sept 5. 2015) (transcript available at https://www.pbs.org/newshour/show/tribal-justice-prosecuting-non-natives-sexual-assault-indian-reservations#transcript).

14. *Id.*

15. *The Facts on Violence Against American Indian/American Native Women Fact Sheet,* FUTURES WITHOUT VIOLENCE, https://www.futureswithoutviolence.org/userfiles/file/Violence%20Against%20AI%20AN%20Women%20Fact%20Sheet.pdf [Hereinafter Futures without Violence].

16. *Id.*

hands of an intimate partner.[17] A Native American woman is two and a half times more likely to be raped or assaulted than women in the general population.[18] Based on current statistics, one in three Native American women will be raped in her lifetime.[19] In 2007, Amnesty International credited the federal policies behind these extreme rates of sexual violence against Native American women as outright human rights violations.[20] Other data helps illuminate the problem. Comparing sexual violence against Native American women and the overall population shows marked differences. For example, while violence accompanies all rape because of the nature of the crime, Native American women report escalated physical violence during their attacks.[21] Native American victims suffer more injuries during rape,[22] and the risk of a perpetrator using a weapon during an attack is three times higher.[23] Lastly, contrasting the racial profiles of victims and perpetrators demands response. Most women in the general population report assailants targeting victims within their race. Seventy-five percent of black and white victims identify an intra-racial attack.[24] But this pattern pivots for Native American victims. Most Native American victims of rape or sexual assault report non-Native attackers.[25] The U.S. Department of Justice estimates that 88% of the reported cases of rape by Native American women are committed by non-Native perpetrators.[26] These statistics on intra-racial and inter-racial attacks show polar-opposite victimization profiles. When the racial nature of Native American rape contrasts this

17. ANDRE B. ROSAY, U.S. DEP'T OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN, 23 (2016).

18. STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, AMERICAN INDIANS AND CRIME- A BJS STATISTICAL PROFILE 1992-2002 5 (2004) [hereinafter PERRY].

19. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCE OF VIOLENCE AGAINST WOMEN – FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY *22* (U.S. DEP'T OF JUSTICE, 2000).

20. Urbina, *supra* note 5.

21. Amnesty International, *supra* note 10, at 5; Deer, *supra* note 4, at 457.

22. *Id.*

23. Deer, *supra* note 4, at 457.

24. NATIONAL CRIME VICTIMIZATION SURVEY, TABLE 42: PERSONAL CRIMES OF VIOLENCE (2008).

25. Deer, *supra* note 4, at 457; Amnesty International, *supra* note 10, at 4.

26. PERRY, *supra* note 18, at 9.

sharply with general statistics, the elephant no longer sits in the room – it completely occupies it.

II. History of Violence

Condemning these statistics, President Obama addressed tribal leaders:[27] "The shocking and contemptible fact that one in three Native American women will be raped in their lifetime is an assault on our national conscious that we can no longer ignore."[28] Choosing words like "ignore" and "conscious" conceivably fuels reproofs that these statistics are remnants from five centuries of Native American persecution.[29] Textbook accounts of early American colonial affronts to tribal sovereignty often omit recognizing rape as a tool of conquest and control. Modern day educational materials, children's films, and books are notably mute on the sexual violence imposed on Native American women.[30] Nevertheless, early journals[31] support an expanding recognition that sexual violence against Native American women was commonplace.[32] The earliest court records reveal a miniscule, nearly non-existent number of rape prosecutions with Native American victims, suggesting colonial tolerance or maybe acceptance of sexual violence against tribal women.[33] This prosecutorial absence parallels with records

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27. Jasmine Owens, *Historic in a Bad Way: How the Tribal Law and Order Act Continues the American Tradition of Providing Inadequate Protection to American Indian and Alaska Native Rape Victims,* 102 J. OF CRIM. L. & CRIMINOLOGY 497, 503 (2012).

28. *Id*. (quoting remarks from a White House-Tribal Nations Conference from Nov. 5, 2009).

29. Rory Flay, *A Silent Epidemic: Revisiting the 2013 Reauthorization of the Violence Against Women Act to Better Protect American Indian Native Women*, 5 AM. INDIAN L. J. 228, 240-244 (2016) (noting a legacy of sexual violence and abuse against Native American women); Deer, *supra* note 4, at 457-459.

30. *See* Jackie Mansky, *The True Story of Pocahontas,* SMITHSONIAN (March 30, 2018, 6:18 PM), https://www.smithsonianmag.com/history/true-story-pocahontas-180962649/; *See also* Leslie Marshall, *Teaching Fiction Over Fact*, US NEWS (March 30, 2018 6:25 PM), https://www.usnews.com/opinion/leslie-marshall/2014/09/17/texas-textbooks-are-wrong-to-rewrite-history-for-us-students.

31. Deer, *supra* note 4, at 457-459; Flay, *supra* note 29.

32. Amnesty International, *supra* note 16, at 15 ("Sexual assault rates and violence against Native American women did not just drop from the sky. They are the process of history."); SHARON BLOCK, RAPE AND SEXUAL POWER IN EARLY AMERICA 97-100 (2006).

33. Despite the presence of Native American women in early British colonies, out of 700 prosecutions for sexual assault, less than half a dozen involved Native American victims. BLOCK, *supra* note 32, at 99.

showing an absence of attempts to conceal the crime.[34] The case of "Great Hills's" rape in 1722 highlights the boldness of an unapologetic rape on a Native American "squaw."[35] It was practically a public performance. After raping Great Hills in broad daylight, James Brown sought out friends to join him. The men brutally tortured their victim with sticks, fully aware that several Native American girls were witnessing the mutilation.[36] Great Hill's story supports historians writing that rape was a weapon of conquest.[37] Sexual violence against Native American tribes perhaps helped the American colonies acquire land and establish power, even if this weapon was unspoken.[38] Abundant injustices imposed for hundreds of years compounds the emotional infliction on today's Native American victims. Sarah Deer, Native American Law Professor explains:

> [T]he language used in illustrating colonization often parallels the language of sexual violence. . . .[W]ords like "seize, conquer," and "possess" are used to describe both rape and colonization. . . it is often difficult for [Native American victims] to separate the more immediate experience of their assault from the larger experience that their people have experienced through forced removal, displacement, and destruction. Both experiences are attacks on the human soul, both the destruction of indigenous culture and the rape of a woman connote a kind of spiritual death that is difficult to describe to those who have not experienced it.[39]

As modern American generations endorse equal protections previously unavailable to all citizens alike, attention must turn to

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34. *Id.*

35. *Id.* at 83.

36. *Id.*

37. Deer, *supra* note 4, at 47-458 (quoting Albert L. Hurtado, *When Strangers Met: Sex and Gender on Three Frontiers, in* WRITING THE RANGE: RACE CLASS AND CULTURE IN THE WOMEN'S WEST 52,66 (Elizabeth Jameson & Susan Armitage eds., 1997) ("Part of the invading population was imbued with a conquest mentality, fear and hatred of Indians that in their minds justified the rape of Indian women.").

38. *Id.* at 459.

39. *Id.*

the discriminatory undertones within the American legal system and Native American law. Failing to grasp that current systems are products of intolerable reasoning allows systematic injustice to linger. Modern judicial action and congressional deference rely upon foundational Native American doctrines from two hundred years ago.[40] Discovering callous rationale beneath modern case law requires no heavy digging. As recently as 2011, the Supreme Court described the current relations with Native American sovereigns by citing *United States v. Sandoval*.[41] But misgivings arise when dicta in that precedent reads: "Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetishism, and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed, and inferior people."[42] Is discriminatory rationale this palpable really worth preserving? Any honest efforts for stopping violence against Native American women requires critical analysis. Questions must focus on how our current legal system co-exists with such rampant and premeditated violence. A problem this perverse absolutely precludes a simple solution. But solving it requires knowing how the current jurisdictional structures operate—in both theory and practice.

III. Criminal Jurisdiction in Indian Territory

As the Supreme Court recently recognized in *United States v. Bryant*, "the 'complex patchwork of federal, state, and tribal law' governing Indian Country, has made it difficult to stem the tide of domestic violence experienced by Native American women."[43] Today, qualifying tribal courts only have criminal jurisdiction over non-Native defendants in select cases of domestic abuse, as granted in VAWA.[44] Understanding what VAWA accomplishes first requires understanding the maze[45] of criminal jurisdiction in Indian Country. The simplest presentation uses restrictive terms

40. Modern jurisprudence stems from characterizing the United States and Native American tribes as "guardian" and "wards." *See* Flay, *supra* note 29, at 244-246 (discussing Cherokee Nation v. Georgia, 30 U.S. 1 (1831) and Worcester v. Georgia, 31 U.S. 515 (1932)).

41. United States v. Jicarilla Apache Nation, 564 U.S. 162, 177 (2016).

42. United States v. Sandoval, 231 U.S. 28, 39 (1913).

43. United States v. Bryant, 136 S. Ct. 1954, 1959-60 (2016).

44. 25 U.S.C. § 1304 (2012).

45. Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA. L. REV 1564, 1567 (2016) (noting authorities' common reference to "jurisdictional maze").

and apophatic explanations. In 1978, *Oliphant v. Suquamish Indian Tribes* held tribal courts lack inherent criminal jurisdiction to prosecute non-Indian Defendants regardless of where the crime occurs.[46] Post *Oliphant*, no tribal prosecution can avail a Native American victim for a crime committed in Indian territory if the defendant is non-Native.[47] An amended Congressional statute later defined this inherent authority over "Indians" to include all Native American defendants regardless of tribal affiliation.[48] In short, tribal courts only hold criminal authority over Native American defendants who victimize Native Americans in Indian Country.[49] In 1885, the Major Crimes Act federally appropriated criminal jurisdiction in Indian Territory by granting federal jurisdiction over Native American defendants charged with the original seven deadly sins.[50] Murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny were federal jurisdiction, even when the victim and defendant were both Native American and the crime occurred in Indian Country.[51] Subsequent amendments added seven additional crimes to this list and permitted federal punishment for offenses committed by Native Americans in Indian Country.[52] This Act did not strip tribal jurisdiction over these crimes, and a Native American defendant may be tried in both tribal and federal court without violating double jeopardy.[53] But statutory barriers severely reduce the reach of the inherent tribal authority.[54] Legislative time limitations on tribal penalties most notably hinder tribal courts.[55] Passed in 1968, The Indian Civil

46. United States v. Oliphant, 435 U.S. 191, 212 (1978).

47. Special Domestic Violence Criminal Jurisdiction is the only exception to this holding in Oliphant. Bryant, *supra* note 43, at n.4.

48. Amendments to 25 U.S.C. § 1301(2) superseded *Duro v. Reino*, 495 U.S. 676 (1990) which held tribal courts' inherent authority only extended over tribal members. United States v. Lara, 541 U.S. 193 (2004).

49. *See General Guide to Criminal jurisdiction in Indian Country,* http://www.tribal-institute.org/lists/jurisdiction.htm (last visited April 11, 2018).

50. Now codified as Title 18 U.S.C. § 1153 (2012), Michael J. Bulzomi, *Indian Country and the Tribal Law and Order Act of 2010,* FBI LAW ENFORCEMENT BULL. LEGAL DIG. (May 1, 2012), https://leb.fbi.gov/articles/legal-digest/legal-digest-indian-country-and-the-tribal-law-and-order-act-of-2010.

51. *Id.*

52. *Id.*

53. Lara, 541 U.S. at 210.

54. 25 U.S.C. § 1304 (Supp. I 2013).

55. *Id.*

Rights Act restricted tribal authority over all crimes.[56] The Act severely limited the penalties imposable on criminal defendants.[57] Additionally, the Act required tribal courts to provide certain procedural protections borrowed from the Bill of Rights.[58] The current limits on tribal sentencing came in 2010 with the Tribal Law and Order Act (TLOA).[59] New legislation incorporated additional due process requirements as justification for increasing the penalties available to tribal courts.[60] To exercise criminal authority, tribal courts must provide licensed legal counsel for defendants, sufficiently trained judges, and publicly available laws and court records.[61] After implementing the mandatory requirements, approved tribal courts may now impose a maximum penalty of three years for a criminal conviction.[62] Furthermore, a cumulative cap applies to multiple judgments. Previously, tribal courts could potentially stack multiple counts and enforce longer sentencing in aggregate.[63] The amended statute prevents that workaround. A nine-year sentencing cap per case reduces a tribe's ability to stack sentences for multiple counts.[64] The practical effect of the penalty restrictions prevent tribal courts from properly punishing anything beyond misdemeanor crimes. Forcing a rape offender to serve three years for his crime lacks the stigma, sting, and status degradation that accompanies rape in a federally prosecuted case. To Troy Eib, a U.S. Attorney in Colorado, lowering a felony charge like murder or rape by treating it as a misdemeanor in tribal courts only "adds insult to injury."[65] State criminal jurisdiction varies according to whether Public Law 280 governs.[66] In 1953,

56. Now codified as 25 U.S.C. § 1301 (2012); Bulzomi, *supra* note 50.

57. Deer, *supra* note 4, at 461 (listing ICRA as a "barrier" for tribal governments addressing sexual assault).

58. Bulzomi, *supra* note 50.

59. 25 U.S.C. § 1302(a)(7)(D) (2010).

60. 25 U.S.C. § 1302(c) (2010).

61. M. Brent Leonhard, *Implementing VAWA 2013*, 62 FED. LAW 53, 56 (2015).

62. Bulzomi, *supra* note 50.

63. Seth Fortin, *The Two-Tiered Program of the Tribal Law and Order Act*, 61 UCLA L. REV. Discourse 88, 91 (2013).

64. *Id.*

65. *Bill Moyers Journal*, (PBS television broadcast Nov. 14, 2008) (transcript available at http://www.pbs/org/moyers/journal/11142008/transcript4.html).

66. Bulzomi, *supra* note 50; Public Law 280 is codified as 18 U.S.C. 1162(a) (1964).

Public Law 280 transferred the federal criminal and civil jurisdiction for Indian Territory to six states.[67] Public Law 280 later allowed ten additional states to "opt in" and assume jurisdiction over tribes within their borders by passing state legislation or amending state constitutions.[68] Fifteen years after its enactment, Congress amended Public Law 280 requiring states to get tribal consent before assuming jurisdiction. No tribe has consented since.[69] In states where Public Law 280 applies, the state has criminal jurisdiction for Indian Country for those major crimes assigned to federal jurisdiction under the Major Crimes Act.[70]

IV. Alarming Declination Rates

Because of the time limitation on tribal sentencing, Native American communities rely heavily on federal prosecutors for indicting violent crimes. For decades, tribal communities report high declination rates by U.S. Attorneys and FBI agents.[71] Until legislation[72] forced the Justice Department to report declination data in 2010, little information was available to appraise the declination complaint. Congress passed the declination reporting provision after reviewing private data gathered by *The Denver Post* and realizing no federal reports were available to discredit the findings.[73] While investigating violence in Indian Territory, data uncovered in Michael Riley's series "Lawless Land" showed alarmingly high declination rates in Indian Country.[74] The data showed

67. (Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin) 18 U.S.C. § 1162.

68. *Id.*

69. *Id.*

70. Flay, *supra* note 29, at 249.

71. H.R. REP. NO. 111-93, at 12 (2009) [hereinafter HOUSE REPORT I].

72. Required by the Tribal Law and Order Act, codified at 25 U.S.C. § 2809(a)(4) (2012).

73. "The Department of Justice has been requested to share declination material with us and has declined to do that. . .pathetically it only comes from information from Syracuse University. I don't have any idea whether this represents accurate information." *Examining Federal Declinations to Prosecute Crimes in Indian Country: Hearing Before the Sen. Comm. on Indian Affairs*, 110th Cong. 2-3 (2008) [hereinafter *Senate Committee I*] (statement of Sen. Dorgan, Chairman of Comm. on Indian Affairs).

74. Riley employed the Syracuse University Research Center to compile Department of Justice declination data utilizing requests under the Freedom of Information Act. *Bill Moyers Journal*, *supra* note 65; Michael Riley, *Lawless Lands,* THE DENVER POST, https://www.denverpost.com/tag/lawless-lands/.

federal authorities declining 62% of reported crime in Indian Territory in 2007.[75] The highest declination rates were for adult sex cases—76% went unprosecuted.[76] Eventually complying with Congress's request for declination data, the Department of Justice reported a 50% overall declination rate and a 67% declination rate for sexual abuse and related matters.[77] Spurred by these statistics, Congress required the Attorney General to report declination rates in Indian Territory annually.[78] But in a 2017 review, the Office of Inspector General criticized the Department of Justice, calling the declination data "so outdated and incomplete as to be virtually useless."[79] Seven years after the Tribal Law and Order Act mandated the reporting, the Office concluded "[w]ithout efforts to update and consolidate data, the Department and others must rely on outdated or incomplete statistics, anecdotes, and periodic news articles to assess crime and law enforcement issues in Indian [C]ountry. None of these sources enable the Department to engage in appropriate, performance-based management of its activities in [Indian Country]."[80] These criticisms seriously weaken reliance on the Attorney General's recently self-reported declination rate of 34%.[81] Beyond the numerical support, testimony from people on both sides of the jurisdictional mess explain federal declination for cases in Indian Territory. At Senate hearings on declination, previous U.S. Attorneys testified that Indian Country receives little support from the Justice Department.[82] Many reservations are hundreds of miles from the federal offices and courthouses in rural, isolated environments.[83] Unfortunately, attitudes in some U.S. Attorney's offices reflect an "out of sight/out of mind" regard for Indian Country.[84]At the same hearing, The Honorable Thomas

75. Riley, *supra* note 70; (House Report I.), *supra* note 67, at n.46.

76. HOUSE REPORT I, *supra* 71, at n. 46.

77. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-1167R, U.S. DEPARTMENT OF JUSTICE DECLINATIONS OF INDIAN COUNTRY CRIMINAL MATTERS, GAO 11-167R 3 (2010).

78. 25 U.S.C. § 2809(b) (2012).

79. OFFICE OF THE INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE, REVIEW OF THE TRIBAL LAW AND ORDER ACT OF 2010, ii. (2017).

80. *Id.* at 47.

81. U.S. DEPARTMENT OF JUSTICE, INDIAN COUNTRY INVESTIGATIONS AND PROSECUTIONS, 3 (2016).

82. SENATE COMMITTEE I, *supra* note 73, at 3.

83. *Id.*; *Tell Me More* (NPR broadcast Aug. 3, 2010) (transcript available at https://www.npr.org/templates/story/story.php?storyId=128953556).

84. *Senate Committee I*, *supra* note 73, at 1.

Weissmuller, Chief Justice of the Mashandtucket Pequot Tribal Nation, told of a tribal jury trial for rape.[85] The tribal court convicted the Native American defendant in under an hour. At trial, multiple witnesses described walking into a bathroom and seeing the naked defendant rising off the undressed, unconscious young girl. Blood samples and DNA evidence identified the defendant, corroborating all of the eyewitness testimony. Most concerning to Justice Weissmuller was that federal authorities not only knew of all this evidence, but moreover knew that the defendant had even previously confessed to the crime. No federal charges were filed.[86] When attackers expect to escape prosecution, the lack of repercussion creates a category of people living "essentially above the law."[87] In 2011, former Attorney General, Tom Perrelli, explained, "Abusers who are not arrested are more likely to repeat and escalate their attacks. Research shows that law enforcement's failure to arrest and prosecute abusers both emboldens attackers and deters victims from reporting future incidents."[88]

V. VAWA's Provisions

In 2013, Congress addressed the violence in Indian Country by restoring a small piece of the jurisdictional sovereignty that tribes employed prior to *Oliphant*.[89] The Department of Justice laid the framework for the Violence Against Women Act two years earlier when it uncharacteristically proposed congressional legislation to counter the "unprosecuted and unpunished" domestic violence in Indian Country.[90] These recommendations foreshadowed

85. *Id.* at 52.

86. *Id.* at 52.

87. PBS Newshour, *supra* note 13 (remark by Theresa Pouley).

88. M. Brent Leonhard, *Implementing VAWA 2013*, 62 FED. LAW 53, 53 (2015).

89. O. Joseph Williams, *The Violence Against Women Reauthorization Act of 2013 and Tribal Criminal Jurisdiction over Non-Indians,* 84 OKLA B.J. 1567, 1567 (2013). https://www.okbar.org/wp-content/uploads/2018/06/OBJ2013Aug17-sm.pdf

90. The proposal resulted from extensive consultation with tribal governments. THE DEPARTMENT OF JUSTICE NAT'L CONGRESS OF AMERICAN INDIANS, VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 4 (2018). [hereinafter NCAI 5Y REPORT].

Special Domestic Violence Criminal Jurisdiction over all persons.[91] The special jurisdiction began in 2015, with five tribes implementing it before then utilizing a "Pilot Project" period.[92]

Entirely voluntary provisions extend tribal jurisdiction over domestic violence, dating violence, and violation of victim protection orders.[93] Whether tribal prosecution may occur turns on the victim's identity and the location of the domestic violence. The statute precludes jurisdiction if both the victim and defendant are non-Indian.[94] Additionally, the defendant must have sufficient ties to the tribe, and the crime must occur in Indian Territory.[95] Lastly, the Act's procedural requirements add to the due process protections enacted under TLOA in 2010.[96]

VI. VAWA's Impact

To date, eighteen tribes exercise special domestic violence criminal jurisdiction. Complying with the statute required some tribes to overhaul their entire constitution and model codes.[97] Tribal law enforcement contracts with various federal and state agencies in collaborative efforts. When offenders cross jurisdictional lines, implementing tribes have agreements with neighboring state and federal law enforcement for extraditing defendants.[98] Tribes also contract with nearby detention centers for housing detainees.[99] One report notes detention costs present a significant hurdle for some tribes.[100] While the Act allocated $5,000,000 in competitive grants for funding implementation, only

91. *Id.* at 5; Violence Against Women Act is codified as 25 U.S.C. § 1304. ("Special domestic violence criminal jurisdiction" is defined as criminal jurisdiction that a participating tribe may exercise under this section but not otherwise elsewhere. 25 U.S.C. § 1304(a)(6) (Supp. I 2013)).

92. The first five tribes to implement were The Confederated Tribes of Umatilla Indian Reservation, The Pasqua Yaqui Tribe, The Tulalip Tribe, Assiniboine and Sioux Tribes of Fort Peck Indian Reservation, and the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation. NCAI 5Y REPORT, *supra* note 90, at 40.

93. 25 U.S.C. § 1304(c) (Supp. I 2013).

94. 25 U.S.C. § 1304(b)(4)(A) (Supp. I 2013).

95. 25 U.S.C. § 1304(a)(3) (Supp. I 2013).

96. To utilize special domestic abuse criminal jurisdiction, the tribal court must provide an impartial jury representing a fair cross section of the community including non-Indians. 25 U.S.C. § 1304(d)(3) (Supp. I 2013).

97. NCAI 5Y REPORT, *supra* note 90, at 5.

98. *Id.* at 16.

99. *Id.* at 30.

100. *Id.*

four implementing tribes received any of these grant funds.[101] Implementing tribal courts report 143 arrests of 128 non-Native abusers.[102] As noted earlier, offenders often repeat crimes when authorities fail to reprimand the activity. A major impetus for SDVCJ was preventing offenders from exploiting the jurisdictional gaps. Recently reported data validates this concern and shows tribal momentum leaving that era behind them.[103] Of 128 non-Native arrestees, 85 of these men accounted for 378 prior contacts with tribal law enforcement. Jefferson Keel, President of the National Congress of American Indians, discusses VAWA's positive effects on Tribal Communities: "Survivors of domestic violence in Indian Country have begun to see justice after VAWA 2013, and it serves as a real deterrent to violent crime."[104] The Tulalip Tribe, one of the first to implement SDCJV, reports an increase in reporting for domestic violence and sexual assault. Communities are beginning to see perpetrators held accountable and "it changes the level of reporting. [T]hat's really the first step towards stopping it."[105] Notably, zero federal writs of habeas corpus petitions have been brought in a special jurisdiction case; the National Conference of American Indians infers this absence in habeas petitions to evidence tribal courts' diligence and justice in using their restored authority.[106] Increasingly, attorneys across the country prepare to work within this new environment. Lawyers recognizing an incoming influx of criminal trials prepare to practice in tribal court by learning the court rules of implementing courts.[107] One practice guide for attorneys entering this new "battleground" predicts that SDVCJ is "extremely likely" to continue growing as more tribes meet the requirements in VAWA.[108]

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101. *Id.*

102. *Id.* at 1.

103. *Id.* at 41.

104. *Legislation introduced to restore tribal jurisdiction over domestic violence incidents on tribal land to children and law enforcements*, NATIVE NEWS ONLINE (December 15, 2017), https://nativenewsonline.net/currents/legislation-introduced-restore-tribal-jurisdiction-domestic-violence-incidents-tribal-land-children-law-enforcement/.

105. PBS NewsHour, *supra* note 13.

106. Brunner, *supra* note 90, at 1.

107. *Domestic Violence called 'Latest Battleground' in Tribal Justice*, THE CRIME REPORT, (February 9, 2018), https://thecrimereport.org/2018/02/09/domestic-violence-is-latest-battleground-in-tribal-justice/.

108. *Id.* (quoting James D. Diamond, *Criminal Courts and an Update on Recent Expansion on Criminal Jurisdiction Over Non-Indians*, 32 CRIM. JUST. 8, 9 (2018)).

VII. Proposed Amendments

Special Domestic Violence Criminal Jurisdiction allows some tribal recourse for non-Native violence but many authorities point out its narrow breadth.[109] A recently split Supreme Court case served as a posterchild for this contention in 2016.[110] Dollar General Stores sought injunctive relief from the 5th Circuit for tort damages awarded by a tribal court.[111] At first glance, appealing tort liability and monetary judgment lack a surface level connection to VAWA, which is exactly why it raised eyebrows.[112] In *Dollar General v. Mississippi Band of Choctaws*, a non-Native store manager, accused of sexually assaulting and molesting a 13 year-old-girl on Indian Territory, fell outside of SDVCJ.[113] Rallies and initiatives responded by criticizing this case and all others including minors, for falling outside of the domestic violence definitions of VAWA.[114] The store manager faced no criminal consequences for his action.[115] Federal authorities declined prosecution and the tribe had no authority to file criminal charges because the defendant was non-Native.[116] Failure to prosecute crimes involving children endangers children in Indian Country who suffer more exposure to violence than any other race in the country.[117] In December

109. *Id.* at 22; *See VAWA Tribal Sovereignty Initiative Supreme Court Cases,* Restoration Magazine (National Indigenous Women's Resource Center, Lame Deer, MT.), May 2016, at 7 [hereinafter Restoration Magazine].

110. Dollar Gen. Corp. v. Miss. Band of Choctaws, 136 S. Ct. 2159 (2016).

111. Dolgencorp. v. Miss. Band of Choctaw Indians, 746 F.3d 167 (5th Cir. 2014).

112. "'For far too long our voices have been silenced,' said NIWRC Executive Director, Lucy Rain Simpson. 'We will not abide a non-Indian corporation's attack on our nations' inherent authority to protect its women and children. At a time when the national conversation is about protecting victims of sexual assault, our brief is particularly important," said Simpson. "Relief for the crimes of sexual assault are seldom available to Native women and children, so we are compelled to call on the Court to affirm their rights within their tribal courts to relief and protection.'" Restoration Magazine, *supra* note 100, at 24.

113. Dolgencorp, *supra* note 102, at 177.

114. Restoration Magazine, *supra* note 100, at 7.

115. *Id.*

116. *Id.*

117. Native youth experience Post-Traumatic Stress Disorders at the same rate as veterans returning from Iraq or Afghanistan. Native youth are 2.5 times more likely to experience violence impairing both immediate and long-term physical and mental health. Childhood physical trauma alters neurological development, resulting in poor physical and mental health, poor school performance, substance abuse, and

of 2017, the United States Senate recognized this gap, addressing the problem by referring a new bill to the Committee on Indian Affairs.[118] Titled the "Native Youth and Tribal Officer Protection Act," the proposal cites the high rate of violence in Indian Territory and recognizes that children commonly serve as witnesses to domestic abuse or fall victims to it themselves.[119] Senator Tom Udall proposed an amendment to VAWA which primarily calls for changing the definition of domestic violence to include child violence and violence against law enforcement officers.[120] When introducing the bill, Udall remarked: "There are far too many desperate stories illustrating how Native American women, children, and law enforcement are caught up in acts of domestic violence while the perpetrator goes unpunished. With this bill, we can close a dark and desperate loophole in Tribal criminal jurisdiction."[121] The National Congress of American Indians reports other limitations in VAWA.[122] Currently, the Act excludes common forms of violence against women, like sexual assault by a stranger, stalking, and sex trafficking. The omission frustrates implementing tribes from providing recourse for these violent crimes in Native American communities. Domestic violence often co-occurs with other accompanying crimes outside of the tribes' jurisdictional reach.[123] This inability to hold defendants accountable for all criminal conduct stemming from the same incident produces two concerns. First, non-Native defendants escape retribution for criminal conduct. Second, failure to prosecute can result in an inaccurate criminal history for that defendant which fails to accurately reflect the scale of the crimes committed.[124] Recognizing these problems, the National Congress of American Indians supports restoring full criminal jurisdiction for crimes in Indian Territory.[125] Less sweeping

overrepresentation in the juvenile justice system. NCAI 5Y REPORT, *supra* note 90, at 24.

118. S. 2233, 115th Cong. (2017).

119. *Id.*

120. *Id.*

121. Interview with U.S. Senator Tom Udall, Vice Chairman of the Senate Comm. on Indian Affairs, Address at Nat'l Cong. of Am. Indians Exec. Council Winter Session (December 14, 2017).

122. NCAI 5Y REPORT, *supra* note 90, at 22.

123. *Id.*

124. *Id.*

125. *Id.* at 23; For a discussion questioning Congress's ability to regulate tribal jurisdiction at all see Justice Thomas's Concurrence in United States v. Lara, 541 U.S. 193. ("But I do not see how this is consistent with the apparently 'undisputed

solutions propose adding the sexual violence categories listed above to SDVCJ.[126] Introduced in 2017, The Justice for Native Survivors of Sexual Violence Act would amend VAWA's jurisdiction to include all forms of sexual violence.[127] Another concern for tribal courts implementing VAWA stems from funding challenges. Poverty stricken economies in tribal communities delay accomplishing the goals of SDVCJ. To qualify as a tribal criminal court under TLOA and VAWA, courts must meet the procedural due process requisites, and, restyling an entire criminal justice system takes money. Congress authorized up to 25 million in tribal grants for VAWA.[128] But despite the grant programs, the primary reason given by tribes for not utilizing SDVCJ was the lack of resources.[129] Tribes competing for federal grant money may lack any other realistic sources to fund tribal courts. SDVCJ incurs expenses well beyond the direct cost of compliance with VAWA and TLOA standards. Other indirect costs, such as training and staffing law enforcement and court employees, continue after implementation. Incarceration costs alone, which average $86 a day, may prevent tribal systems from accomplishing a successful SDVCJ.[130]

CONCLUSION

VAWA and the movement behind it press forward demanding equal protections for Native American women. The Act lifted a 40-year asylum for non-Native perpetrators. To date, over 100 men answer for domestic abuse previously off limits, demonstrating VAWA's most significant accomplishment. The Act allows tribes to treat all perpetrators the same way. Finally, the veil lifts on the national horror happening to Native American women, and the

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fact that Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government.' (citation omitted) The sovereign is, by definition, the entity 'in which independent and supreme authority is vested.' (citation omitted). It is quite arguably the essence of sovereignty not to exist merely at the whim of an external government.").

126. S.1986, 115th Cong. (2017).

127. *Id.*

128. Kassie McClung, *Domestic Abuse Law Slow to Take Root on Oklahoma Tribal Land*, THE OKLAHOMAN (July 26, 2015), http://newsok.com/article/5436214.

129. NCAI 5Y REPORT, *supra* note 90, at 29.

130. Implementing tribes report detention costs ranging $32-150+ a day. While discussing expenses, one implementing tribe reported paying over $60,000 for one detainee's healthcare expenses. *Id.* at 30. **

door opens for awareness and action. Conversations on violence in Indian Territory ask hard questions and propose differing solutions. But of all the varying answers and calls to actions—a consensus rises above the discourse. Almost in echo, every response demands that violent offenders answer for their crimes against Native American women. Even if the proposed methods vary, the goal is the same. Violence is violence, and Native soil can no longer be an element precluding prosecution. Hope is in the air.