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Protecting Native Women from Violence: Fostering State-Tribal Relations and the Shortcomings of the Violence Against Women Act of 2013

by DAYNA OLSON*

Not until the abuse stopped around the fourth grade did [she] realize she wasn't the only child suffering at the hands of that assailant. At least a dozen other young girls had fallen victim to that same man. He was a man who was never arrested for his crimes, never brought to justice, and still walks free today, all because he committed these heinous acts on the reservation and is someone who is not a member of the tribe. It is an unfortunate reality that he is unlikely to be held liable for his crimes.¹

Introduction

Thousands of Native American women face this troubling issue, in which domestic violence and rape have become an alarmingly common part of their lives. Native women face violence at astronomically high rates compared to any other ethnic group in the United States.² These staggering statistics are the effect of poverty, the reduction of tribal sovereignty, and the quagmire of conflicting criminal jurisdiction between tribal, state, and federal prosecutors. As a result, most of these women are left with little to no recourse.

Federal legislation throughout the nineteenth and twentieth centuries, augmented with Supreme Court jurisprudence, removed nearly all of Native

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1. 112th CONG. REC. S5282, 5288 (July 24, 2012) (statement of Sen. Murray).

2. See generally ANDRE B. ROSAY PH.D., NAT'L INST. OF JUST., RESEARCH REPORT: VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN (2016), <https://www.ncjrs.gov/pdffiles1/nij/249736.pdf>.

tribes' jurisdiction over criminal and civil matters. Prior to 2013, tribal law enforcement had almost no authority over non-tribal members who commit crimes or other wrongful acts on reservation lands. Lack of federal resources, driven by a undercurrent of historical and political tension, has resulted in very low prosecution rates and a patchwork of overlapping jurisdictions. This lethal combination has succeeded in allowing certain perpetrators to become "above the law" when they commit offenses within tribal territory. In an effort to combat this issue, the 2013 reauthorization of the Violence Against Women Act (VAWA) included a provision, the Special Domestic Violence Criminal Jurisdiction (SDVCJ), which granted tribal courts the authority to prosecute narrow categories of non-tribal members for specific crimes of intimate partner violence.³ While this enhanced jurisdiction modestly improved the lives of Native American women, this legislation imposes substantial limitations and, in effect, is only one small stepping-stone towards ensuring justice and safety for Native women.

This Note will first describe the pressing issues of violence against women on tribal reservations and the overwhelming need for further law enforcement. Section II of this Note will go into the historical details of the "Rubik's cube" of tribal jurisdiction and the ever-so-murky waters of federal, state, and tribal authorities. Third, this Note will discuss the reauthorization of VAWA 2013, which allots Special Criminal Jurisdiction to tribes for crimes of domestic violence and some of the major flaws therein. Section IV will discuss recent legislative proposition and the current Congressional battles over a 2019 reauthorization. Lastly, this Note will discuss the current political climate and the potential demise of VAWA by the current administration due to the uncertainty surrounding the constitutionality of the SDVCJ legislation. This Note will then go on to argue that, given the current political circumstances before the country, enhancing state and tribal law enforcement cooperation to combat these crimes within tribal territories would be far more beneficial to Native women, both to skirt some of the constitutional pitfalls of VAWA, and to provide the justice that is so urgently needed.

3. Violence Against Women Act § 904, 25 U.S.C. §1304 (2013).

I. The Social Reality: Poverty, Violence, and a “Jurisdictional Quagmire”

Native men, women, and children face the highest rates of violence than any other ethnic group in the United States.⁴ More than four in five American Indian⁵ and Alaskan Native women have experienced physical violence in their lifetime.⁶ Approximately 56% of this violence against these women stems from forms of sexual violence and rape, the majority of which is perpetrated by an interracial partner (meaning a non-Native American or non-Alaskan Native abuser).⁷ When looking specifically at intimate partner violence (IPV), roughly 55% of American Indian and Alaskan Native women, and 43% of men have experienced physical violence.⁸ Rates of stalking, as well as emotional and psychological violence, also affect Native American men and women at significantly higher rates than every other ethnic group in the United States.⁹

These acts of violence lead to profound impacts on the women and men who have been victimized. For female victims of physical IPV, including stalking and sexual violence, 38% needed medical care and 15% required legal services after the assault.¹⁰ Approximately 9% of men needed medical care and 9% required legal services.¹¹ Forty percent of women and 9% percent of men missed several days of work or school because of the violence committed against them.¹² To further highlight the difference of Native women compared to other ethnic and racial groups, the National Institute of Justice (NIJ) concluded that when compared to non-Hispanic White women, Native women are 1.2 times as likely to have experienced violence in their

4. See generally ROSAY, *supra* note 2.

5. Throughout this Note, the terms “Indian,” “tribe,” and “Indian Country,” are utilized by a variety of sources. While the terminology is certainly outdated, it is the language utilized in all federal case law, statutes, and legal journals on the subject. For more information, see Zachary Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657, 659 n.7 (2013).

6. *Id.* at 43.

7. *Id.* at 32–37; this portion of the study demonstrates with strong statistical evidence that native women tend to be attacked by non-native offenders, thus forcing these victims to reckon with the “Rubik’s cube” of tribal jurisdiction and sovereignty.

8. *Id.* at 23–24. This finding is contrasted with non-Hispanic white victims, where 34.5% of white women and 30.5% of white men experienced some form of violence by their intimate partners.

9. *Id.* at 31.

10. *Id.* at 49.

11. *Id.*

12. ROSAY, *supra* note 2, at 47.

lifetime and are 1.7 times as likely to have experienced violence in the past year.¹³

This disparity in the violence affecting tribal men and women has been the subject of intensive research by many health organizations, including the Center for Disease Control, whose findings have further prompted other health organizations to take an active role in advocacy.¹⁴ However, much of the issue stems from the very blatant “jurisdictional gaps” that exist within tribal territories, and the complex legal history between the federal government and tribes that hinder the prosecution of the abusers.

Reports suggest that up to 80% of violence committed against Native women and men stems from non-Native American partners,¹⁵ while other sources estimate as much as 90% of the violence against tribal women is perpetrated by a non-tribal member.¹⁶ Most major crimes committed on tribal lands, including rape and offenses committed by non-Indians, are under the sole purview of federal prosecutors.¹⁷ Pre-VAWA cases, such as *Martinez v. Martinez*,¹⁸ highlight that tribal courts did not have jurisdiction over non-tribal members and could not successfully prosecute them for these crimes, thereby leaving many women wounded, violated, and without any legal recourse. While the federal government maintains primary jurisdiction for major crimes, certain states can maintain authority over non-Indian offenses pursuant to a piece of Eisenhower-era legislation referred to as Public Law 280.¹⁹ However, IPV has been a low priority, and has often fallen within the “jurisdictional gaps,” allowing many perpetrators to go unpunished simply because these crimes are committed on reservation land.

Tribal women who are exposed to domestic violence face stigma at home and have few alternatives to escape the abuse and improve their lives

13. ROSAY, *supra* note 2, at 44.

14. *See generally* CENTERS FOR DISEASE CONTROL AND PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010-2012 STATE REPORT (2017) [hereinafter NISVS SURVEY] <https://www.cdc.gov/violenceprevention/nisvs/summaryreports.htm>; WORLD HEALTH ORGANIZATION, WORLD REPORT ON VIOLENCE AND HEALTH (2002) https://ap.who.int/iris/bitstream/handle/10665/42495/9241545615_eng.pdf.

15. ROSAY, *supra* note 2 at 2.

16. Lyndsey Gilpin, *Why Native American Women Still Have the Highest Rates of Rape and Assault*, HIGH COUNTRY NEWS (June 7, 2016), <http://www.hcn.org/articles/tribal-affairs-why-native-american-women-still-have-the-highest-rates-of-rape-and-assault>.

17. *See, e.g.*, Major Crimes Act, 18 U.S.C. § 1153(a) (2013).

18. *Martinez v. Martinez*, No. C08-5503 FDB, 2008 WL 5262793 (W.D. Wash. Dec. 16, 2008) where the court found that a tribe had no jurisdiction over a nonmember in a domestic violence charge.

19. *See, e.g.*, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); Public Law 280, 18 U.S.C. § 1162(a) (2010), discussed further in this article.

and those of their children.²⁰ Fear of cultural backlash against women who leave the reservation, lack of domestic violence education, as well as the fear of leaving children and family contribute to the many reasons why Native American women stay on the reservation despite suffering abuse.²¹

An additional barrier lies within the state or federal government's capacity to even respond to such incidents of violence. For example, in Alaska, many rural tribal villages are only accessible by plane or boat, and it can often take days for the authorities to arrive after an incident.²² Other issues include access to reliable healthcare services, which prevent Native women from obtaining proper medical intervention after an assault.²³ One reporter commented on the emergency health services offered on the Standing Rock reservation, stating, "At one time, the Indian Health Service hospital at Fort Yates administered rape kits, and then for a few years they didn't, and last summer they began again."²⁴ This inconsistency in rape kit availability often deters rape and assault survivors from seeking urgently needed medical care, because they feel that nothing will be done about the assault.

Furthermore, cultural and legal barriers prevent the tribes from properly assisting these victims after they have been assaulted or abused. Many tribal police officers feel helpless, as they know they are severely limited in their ability to provide any effective remedy. One tribal officer stated, "In the past, the police department would go out and when they ascertained the perpetrator was a non-Indian, there was nothing they could do—they would drive him to the edge of the reservation and just drop him off, knowing that

20. *Domestic Violence Rampant Among Native Americans*, DOMESTICSHelters.ORG (Mar. 13, 2017), <https://www.domesticshelters.org/articles/statistics/domestic-violence-rampant-among-native-americans>

21. Gilpin, *supra* note 16.

22. See Krista Langlois, *New Law Protects Alaska Native Women*, HIGH COUNTRY NEWS (Dec. 24, 2014), <http://www.hcn.org/articles/new-law-protects-alaska-native-women>.

23. Tribal health centers are severely underfunded, and many are ill equipped to treat and properly conduct evidence exams for sexual assault victims. See NATIONAL CONGRESS OF AMERICAN INDIANS, RESOLUTION #KAN-18-005, HEALTHCARE & JUSTICE FOR SEXUAL ASSAULT SURVIVORS THROUGH THE TRIBAL LAW AND ORDER ACT, NATIONAL CONGRESS OF AMERICAN INDIANS (2018), http://www.ncai.org/attachments/Resolution_APmuHrxhoHhFCbwGLjCLWfcBVowXNZZvuoPhulnHiZzTlqwisBK_KAN-18-005%20Final.pdf.

This resolution is largely based upon a 2011 report that found many troubling issues regarding health clinics: many survivors may have to travel upwards of 150 miles to reach a facility that can perform a forensic exam; Indian Health Service (IHS) providers are often prevented from testifying in court, and that 19 out of 45 IHS facilities were unable to provide proper rape kits and had to refer victims elsewhere. *Id.* These barriers to forensic evidence collection along with the declination of federal prosecution prevents perpetrators from being properly arrested and held accountable for their crimes. *Id.*

24. Stephanie Ogburn, *Sexual Assault on the Rez*, HIGH COUNTRY NEWS (Jan. 26, 2011), <http://www.hcn.org/blogs/goat/sexual-assault-on-the-rez>.

he would walk back.”²⁵ Other barriers include the “small-town nature and culture of reservations, where an assaulted woman may be perceived as getting what she deserved.”²⁶ Many law enforcement jurisdictions are rife with deeply rooted biases and prejudices against Indian tribes, which leaves victims of domestic violence and rape at the mercy of those who may or may not deem their pleas for assistance as a worthy use of their time.²⁷

The 2013 reauthorization of the Violence Against Women’s Act’s has tried to address this issue by including Article 9, which gives tribes “Special Domestic Violence Criminal Jurisdiction” (SDVCJ) over non-Indian members.²⁸ While this provision has made some headway in reestablishing tribal sovereignty, the practical application of VAWA still leaves much to be desired. The limitations under which tribes can utilize the SDVCJ and the very narrow set of crimes for which non-Indians can be prosecuted, suggest that this policy has significant shortcomings that have prevented tribes from adequately responding to the pressing needs of their community.

II. U.S.–Tribal Relations and Historical Precedent

A. Historical Backdrop

The relationship between white America and Native Tribes has a horrific history, stemming from early ‘suspect’ treaties that became out-right land grabs forcing tribes to be removed from their ancestral homes. The newly formed federal government “pursued policies aimed at the assimilation of tribal members and the extinction of tribal cultural and political independence”²⁹ by means of eradication if not extermination, thus forming the backdrop to an increasingly volatile relationship between tribes and the federal government of the United States.³⁰

The 1830 Indian Removal Act gave then President Jackson the power to make treaties with every tribe east of the Mississippi River, consequently forcing tribes to surrender their land in exchange for small territories in the

25. Conference: *Violence Against Native Women: Resistance and Responses*, CORNELL LAW SCHOOL (Mar. 12, 2014), <http://www.lawschool.cornell.edu/womenandjustice/Conferences-and-Events/Violence-Against-Native-Women.cfm>.

26. Ogburn, *supra* note 24.

27. *Id.*

28. 25 U.S.C. § 1304.

29. Price, *supra* note 5, at 669.

30. *Id.*

West, often in Oklahoma and the Dakotas.³¹ Many tribes were forced to relocate, resulting in the deaths of thousands of Native Americans.³²

Subsequently, the Indian Appropriations Act of 1851 which created federally designated “Indian Areas” (mostly in modern Oklahoma) directly contributed to the rise in ‘boarding schools’ created by western missionaries to wipe out Native worship, culture, and languages.³³ Soon after, the Dawes Act of 1887 was enacted, and became the signature legislation of what is known as the “Allotment Era.”³⁴ The Dawes legislation divided reservation lands into private parcels, forcing poorer families to sell their land to make tax payments to the government.³⁵ From the time the Act was adopted in 1887 until Congress formally ended the program in 1934, over two-thirds of former tribal lands became owned by non-Indians.³⁶ Today, a large portion, if not a majority, of tribal lands are inhabited by non-Indians.

B. Transforming Tribal Political Autonomy to Federal Control

At the outset, the United States expressly recognized Indian Nations as independent sovereigns.³⁷ A set of three Supreme Court cases in the nineteenth century, dubbed “Marshall’s Trilogy,” further upholds this notion, as these earlier cases tended to point to a larger sense of Indian tribes’

31. MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW 9 (2016).

32. *Id.* One of the most violent removals in American history, is the “Trail of Tears” in which the Cherokee nation was forcibly removed from eastern seaboard to the Midwest in the nineteenth century, thus resulting in thousands of Native American deaths. *Id.*

33. FLETCHER, *supra* note 31, at 10–11. *See also* Andrea A. Curcio, Civil Claims for Uncivilized Acts: Filing Suit Against the Government for American Indian Boarding School Abuses, 4 HASTINGS RACE & POVERTY L.J. 45, 54–57. The American government built schools on reservation land, and forced Native American parents to send their children to these brutal institutions, else forego their food rations and starve. “[P]arents who tried to hide their children were thwarted by government workers who literally ran down the children, roped them like cattle, and took them away from their parents, many times never to return.” *Id.* at 56.

34. *Id.* at 11. *See also* County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 254 (1992), wherein Justice Scalia aptly summarizes this horrific time period of American Indian history, “The objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force assimilation of Indians into the society at large . . . many of the early allottees quickly lost their land through transactions that were unwise or even procured by fraud.” Scalia further notes that even those who were not defrauded of their land, were “deprived of an opportunity to acquire agricultural and other self-sustaining economic skills, thus compromising Congress’ purpose of assimilation.” *Id.* *See infra* note 144 and accompanying text.

35. *Id.* at 11.

36. *Id.*

37. *See* Commerce Clause: Const. Art. I § 8, cl. 3. “To regulate commerce with foreign nations, and among the several states, and with the Indian tribes . . .”

political sovereignty than what we see today.³⁸ In *Johnson v. M'Intosh*, Chief Justice Marshall stated that the Indian tribe's power was "to a considerable extent, impaired . . . their rights to complete sovereignty, as independent nations, were necessarily diminished."³⁹

The result of the *Johnson* decision severely mangled the inherent rights of Native Americans to their lands, and gave them only the right of occupancy over their ancestral home.⁴⁰ By advancing the "international law-derived doctrine of discovery," the newly formed U.S. government had effectively removed all land title from Native tribes.⁴¹ Nevertheless, the tribes were still considered to be politically independent in the sense that the traditional "conqueror-and-conquered relationship" was significantly modified as applied to Native tribes.⁴² Despite undergoing a considerable loss under the *Johnson* ruling, the federal government viewed the tribes as separate sovereign nations whose political autonomy remained intact.⁴³

However, approximately a decade later, in *Cherokee Nation v. Georgia*, the Court began to retract this notion of tribal sovereignty, by holding that the tribes are "domestic dependent" nations whose relationship "resemble[d] that of a ward to his guardian."⁴⁴ One year later, in *Worcester v. Georgia*, Marshall dubbed the tribes a "distinct community occupying its own territory," and held that whomever stepped upon their lands was thereby subject to their laws and regulations as well as any applicable *federal laws*.⁴⁵ Under this interpretation, the individual tribes were again recognized as a politically and socially autonomous bodies, who, in the eyes of Justice Marshall, were dependent upon the nation for *protection*, in a paternalistic sense, to maintain "territorial and political integrity."⁴⁶ While the *Cherokee Nations* and *Worcester* Courts seemingly infantilized the tribes in so far as their "need" for dependence upon the United States, scholars argue that these cases still upheld the "exercise, not the surrender of the tribe's sovereign national character";⁴⁷ a sharp contrast to the Court's future holdings that

38. See generally *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

39. *Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823).

40. *Id.* at 574.

41. N. BRUCE DUTHU, *SHADOW NATIONS: TRIBAL SOVEREIGNTY AND THE LIMITS OF LEGAL PLURALISM*, 79–80 (2013).

42. *Id.*

43. *Id.*

44. *Cherokee Nation v. Georgia*, 30 U.S. 1, 16–17 (1831).

45. *Worcester v. Georgia*, 31 U.S. 515, 561 (1832).

46. DUTHU, *supra* note 41, at 80.

47. *Id.* (emphasis added).

subsequently developed in the late nineteenth and twentieth centuries, wherein tribal sovereignty was substantially diminished.

Following the groundwork laid out in “Marshall’s Trilogy,” in 1883 the Supreme Court handed down a contentious decision in *Ex Parte Crow Dog*, in which a member of the Brule Sioux band murdered another member on tribal lands.⁴⁸ The defendant petitioned for a writ of habeas corpus, alleging that the federal government had no jurisdiction to try him for the crime for which he had been sentenced to death.⁴⁹ The Court agreed and held that the federal courts were without jurisdiction to find or try the defendant, and that there lacked “a clear expression of the intention of Congress . . .” to grant the federal government jurisdiction over Indians in such cases; thus his conviction became void.⁵⁰

The result of this case spurred Congress to pass the Major Crimes Act, which gave the federal government, exclusive of the states and tribes, authority over specified sets of violent crimes when committed by a Native American within tribal lands.⁵¹ The Major Crimes Act, as described below, was one of the first pieces of federal legislation that extended federal jurisdiction over individual Indians, and paved the way for Congress to assert authority over Indians via their plenary powers.⁵² As Native American scholar, Bruce Duthu, aptly puts, “[t]he jurisdictional intrusiveness of this law cannot be overstated since it represented the first major attempt by the federal government to regulate the affairs *of the Indians* rather than *with* the Indians.”⁵³

For certain minor crimes that take place between one tribal member and another tribal member the tribes themselves have jurisdiction; these are typically limited to misdemeanors or localized offenses.⁵⁴ However, the Major Crimes Act stripped the tribes of their ability to try any felony or serious criminal act.

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming . . . incest, a felony assault . . . an assault against an individual who has not

48. *Ex Parte Crow Dog*, 109 U.S. 556, 557 (1883).

49. *Id.*

50. *Id.* at 572.

51. *See generally*, 679, *The Major Crimes Act—18 U.S.C. § 1153*, OFFICE OF THE UNITED STATES ATTORNEYS, CRIMINAL RESOURCE MANUAL, <https://www.justice.gov/usam/criminal-resource-manual-679-major-crimes-act-18-usc-1153>.

52. DUTHU, *supra* note 41, at 83.

53. *Id.*

54. 18 U.S.C. §1152.

attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery within the Indian country, shall be subject to the same law and penalties as *all other persons* committing any of the above offenses, *within the exclusive jurisdiction of the United States*.⁵⁵

Shortly after the enactment of the Major Crimes Act, the Court faced a challenge to the Act's constitutionality in *United States v. Kagama*.⁵⁶ An Indian defendant, who was accused of murdering an Indian victim, argued that the law was beyond the scope of the federal government's power.⁵⁷ By upholding the Major Crimes Act, the Court found that the right to federal power over Indians was a natural result of the federal ownership of the territories and states which the tribes occupied. This right of "exclusive sovereignty" was further justified by the Court by describing the so-called "baseless" and "helpless" nature of the tribes.⁵⁸ Borrowing some of the language from its decision in *Cherokee Nations*, the Court again posited that the tribes were "wards" of the nation who required the federal government's protection from the States as well their assistance in providing them with food and resources for survival.⁵⁹ This sense of paternalism strongly swayed the outcome of this case. However unlike the Marshall Trilogy and its progeny, the *Kagama* Court further propelled the tribes away from their once-held political sovereignty, toward a state of near-complete dependence upon the federal government.⁶⁰

C. Tribal Sovereignty in the Twentieth Century

From the late nineteenth century into the twentieth century, several Congressional actions and Supreme Court decisions further diminished tribal authority. In 1978, in the seminal case *Oliphant v. Suquamish Indian Tribe*, the Court depleted the remnants of tribal authority, by affirming the notion that tribes have no inherent criminal jurisdiction over non-Indians.⁶¹

55. See Major Crimes Act, 18 U.S.C. §1153 (emphasis added).

56. 118 U.S. 375 (1886).

57. *U.S. v. Kagama*, 118 U.S. 375, 376 (1886).

58. *Id.* at 383–84.

59. *Id.*

60. DUTHU, *supra* note 41, at 83–84.

61. 435 U.S. 191 (1978); Indian Reorganization Act of 1934, 25 U.S.C. §476; Indian Civil Rights Act of 1968 25 U.S.C.S. § 1302. Within *Oliphant's* holding, Justice Rehnquist notes that the Indian Civil Rights Act, and the Indian Reorganization Act do not explicitly give tribes the right to prosecute non-members; these Acts merely give defendants' rights similar to those of federal due process, and allow the tribes to modify their own trial proceedings. *Oliphant*, 435 U.S. at n6.

In *Oliphant*, two non-Indian residents of the Suquamish reservation were arrested by tribal authorities, one charged with assaulting a tribal officer, the other charged with reckless endangerment and injury to tribal property.⁶² The Suquamish tribe argued that their right to punish non-Indian offenders stemmed from the Indian Reorganization Act of 1934, and the Indian Civil Rights Act of 1968.⁶³ However, the court found that no such Congressional act “confirmed” their jurisdiction over non-Indians, and thus the Court held that Indian tribes do not have inherent jurisdiction to penalize non-Indian offenders.⁶⁴

This was a major blow to the Native American tribes. Prior notions of “inherent sovereignty” and “self-determination” were completely obliterated. Furthermore, the Court’s holding advanced the twentieth-century trend of removing and abolishing the rights of Native Americans tribes.

I. Duro, Lara, and “the Duro Fix”

In the late twentieth century, the Court’s decision in *Duro v. Reina* implicated the idea that it was unconstitutional for individual tribal courts to exercise authority over members of a different tribe.⁶⁵ This case presented another layer of jurisdictional issues, in that federal officers (and state officers in PL-280 jurisdictions) declined to prosecute these crimes, thus leaving no remedy available for the land-owning tribe.⁶⁶ This case has since been overturned by statute (referred to as the *Duro*-fix) within the Indian Civil Rights Act, which states the following:

“[P]owers of self-government” means and includes all governmental powers possessed by an Indian tribe, executive,

62. *Oliphant*, 435 U.S. at 194–95.

63. *Id.* at 195 n 6. See *supra* note 61 and accompanying text.

64. *Oliphant*, 435 U.S. at 211–12.

65. 495 U.S. 676 (1990). The defendant in *Duro* was a member of one tribe, but was charged and prosecuted for murder by another tribe. *Id.* at 679. Prior to this the federal prosecutors indicted him under the Major Crimes Act, but he was later dismissed. *Id.* at 679–80. Objecting to a foreign tribe’s jurisdiction over him, the defendant filed a habeas motion, and the case ultimately led to the Supreme Court. *Id.* at 682–83. Writing for the Court, Justice Kennedy held that simply by having membership in one tribe, did not mean that the defendant consented to the laws of another, and thus the prosecuting tribe had no authority to try him for the murder that took place on their reservation. *Id.* at 695–97. Seemingly, Kennedy viewed the tribes as individual independent sovereigns, who could only control or maintain authority over their own members regardless of whether other tribal members entered their reservation lands; this was quickly overturned by the *Duro*-fix statute. See *infra* note 67.

66. See *Montana v. United States*, 450 U.S. 544, 565–66 (1981), in which the Court held that the only two sources of tribal authority over non-members were 1) through inherent sovereignty of the tribe, or 2) by way of positive law.

legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.⁶⁷

The decision in *United States v. Lara* upheld Congress's authority to overturn *Duro* with this statute, purely with respect to Native Americans.⁶⁸ The defendant, Lara, a member of the Turtle Mountain Band of Chippewa Indians, was married to a member of the Spirit Lake Nation tribe and resided on their reservation.⁶⁹ Lara's acts of domestic violence against his wife resulted in him being banished from the reservation, and upon his return he assaulted a federal officer.⁷⁰ He was subsequently charged by both the tribal court and the federal prosecutors for assault.⁷¹ In its opinion, the Court both affirmed the validity of the "*Duro*-fix" statute⁷² and articulated for the first time that Congress's authority over Indian affairs, as granted by its plenary powers, are "necessarily inherent in any Federal Government."⁷³

2. *PL 280, the Tribal Law and Order Act, and the Impact of Forced State Jurisdiction*

In the early twentieth century, the federal government attempted to reduce the size and amount of Native reservations by systematically disbanding tribal governments.⁷⁴ In 1953, Public Law 280 ("PL 280") was yet another step in this "Termination Era," in which the federal government transferred legal authority to prosecute crimes that would otherwise be subject to federal jurisdiction to state law enforcement.⁷⁵ PL 280 was initially imposed upon the six states with the largest swaths of tribal territories: California, Oregon, Minnesota, Arizona, Wisconsin, and Alaska

67. 25 U.S.C. § 1301(2).

68. *United States v. Lara*, 541 U.S. 193 (2004).

69. *Id.* at 196.

70. *Id.*

71. *Lara*, 541 U.S. at 196.

72. FLETCHER, *supra* note 31, at 363.

73. *Lara*, 541 U.S. at 201.

74. DUTHU, *supra* note 41.

75. Public Law 280 states "Each of the States . . . shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country . . . to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State." See Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 § 2(a) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360). See generally DUTHU, *supra* note 41. See *infra* note 144.

(later upon statehood).⁷⁶ President Eisenhower's aim was to combat the so-called "lawlessness that pervaded Indian Country," and to provide a better way to remedy the so-called chaos that took place within.⁷⁷

However, this aim has been subject to extreme criticism, with many scholars pointing to PL 280 as a "tremendous—and continuing—failure in most states."⁷⁸ Carol Goldberg, a Native American legal scholar, has written extensively on the subject, citing several problems that the federal government created by enacting PL 280, including augmentation of the complex "jurisdictional patchwork," and lack of funding for states to even prosecute these crimes.⁷⁹ As one might expect, a decline in federal funding led to decreases in the number of court systems and police departments on the reservations, resulting in "a total vacuum of criminal jurisdiction, leading to the very 'lawlessness' that Public Law 280 was designed to address."⁸⁰

This legislation received strong opposition from the tribes as well, most of whom firmly believe that by transferring the power to the states, the government had yet again, diminished tribal sovereignty.⁸¹ The states have likewise criticized PL 280, as the federal government drastically increased the burden on state law enforcement, while refusing to increase any funding or provide adequate resources for handling these additional responsibilities.⁸²

Following its initial enactment, some states, including Florida, Arizona and Nevada, voluntarily became PL 280 states.⁸³ PL 280 was amended in 1968 to require tribal consent before state jurisdiction, and to allow the states to give back some jurisdiction to the federal government.⁸⁴ No tribe has

76. DUTHU, *supra* note 41.

77. Carole Goldberg, *Goldberg: State jurisdiction overlooked problem in criminal justice debate*, INDIAN COUNTRY TODAY (July 13, 2007), <https://indiancountrymedianetwork.com/news/goldberg-state-jurisdiction-overlooked-problem-in-criminal-justice-debate/>.

78. FLETCHER, *supra* note 31, at 330.

79. See Goldberg, *supra* note 77.

80. *Id.*

81. *Id.*

82. *Id.* See also, Emma Garrison, *Baffling Distinctions Between Criminal and Regulatory: How Public Law 280 Allows Vague Notions of State Policy to Trump Tribal Sovereignty*, 8 J. GENDER RACE & JUST. 449 (2004), explaining that PL-280, as initially enacted, made the distinction between laws that are criminal and prohibitory and those that are civil and regulatory. While the PL-280 states technically only had jurisdiction to enforce criminal laws, state and lower federal circuits in the mid-twentieth century were varied in their responses as how to apply this distinction. See generally Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority Over Indian Country Granted by Public Law 280*, 87 WASH. L. REV. 915, 923 (2012), arguing that appointing state jurisdiction in criminal law arena "has made a bad situation worse."

83. ANDREA WILKINS, *FOSTERING STATE-TRIBAL COLLABORATION: AN INDIAN LAW PRIMER*, 40 (2016).

84. FLETCHER, *supra* note 31 at 342.

assented to state jurisdiction since the 1968 amendment.⁸⁵ PL 280 led to a legacy of catastrophe on the relationships between the tribes, the states and the federal governments. By adding to the complexities of the “patchwork jurisdiction,” and leaving the state governments ill-equipped to handle the increased responsibilities, PL 280 only amplified pre-existing problems on tribal reservations.

Several decades later, President Obama enacted the Tribal Law and Order Act (TLOA) of 2010—arguably as a precursor to the VAWA 2013 reauthorization—to encourage greater law enforcement on tribal lands and to help mend some of the issues surrounding PL 280 states.⁸⁶ Specifically, the aim was to address the violence against women by enhancing the tribe’s sentencing authority and giving them the ability to seek redress outside of the confines of state prosecutors.⁸⁷ This also amended a portion of PL 280 by allowing tribes to request that the federal government take concurrent criminal jurisdiction for specific crimes, so long as they acquire the approval and consent of the Attorney General.⁸⁸

One of the main accomplishments of TLOA was the sentencing enhancement, which allowed tribes to authorize up to three years of imprisonment and fines of up to \$15,000 in criminal proceedings in which they have jurisdiction.⁸⁹ However, in order to properly exercise this right, the tribes must follow specific statutory requirements, in that proceedings must take place in a court of record, the judge must be licensed to practice law, and the defense counsel must provide and yield effective legal assistance.⁹⁰ This provision also encourages tribes to use their own cultural and social traditions by allowing “alternatives to incarceration or correctional options . . . [as a different] form of punishment.”⁹¹

Another widely praised accomplishment of the TLOA, is the mandate that the government disclose and explain their declination of prosecutions. Prior to the TLOA enactment, the overburdened federal prosecutors declined 65% of rape charges, and over 61% of cases involving the sexual abuse of children.⁹² Once these cases were declined from the federal government, the

85. FLETCHER, *supra* note 31 at 342.

86. *Tribal Law & Order Act*, NATIONAL CONGRESS OF AMERICAN INDIANS, <http://www.ncai.org/tribal-vawa/resources/tribal-law-order-act>.

87. *Id.*

88. 18 U.S.C. § 1162(d).

89. 18 U.S.C. § 1302(c); *see also* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 (codified as amended in scattered section of 25 and 42 U.S.C.).

90. 18 U.S.C. § 1302(c)(1), (3), and (5).

91. 18 U.S.C. § 1302(d)(1) and (2).

92. Timothy Williams, *Higher Crime, Fewer Charges on Indian Land*, N.Y. TIMES (Feb. 20, 2012), <http://www.nytimes.com/2012/02/21/us/on-indian-reservations-higher-crime-and-fewer->

tribes were seldom able to receive the evidence, thus many of the perpetrators, even in very “cut and dry” cases, received no reprimand or any punishment.⁹³ This effort to increase transparency and understanding of the lack of federal prosecutions has been met with modest success, showing improved declination rates since its inception.⁹⁴ The establishment of the Indian Law and Order Commission (ILOC) which “was charged with developing a comprehensive study of the criminal justice system” within Indian country, has also been credited with increasing the transparency for federal prosecutorial denials.⁹⁵

III. The 2013 Reauthorization of the Violence Against Women Act: A (Partial) *Oliphant*-Fix

In the years following the passage of TLOA, victim advocates and lobbyists joined forces to address the violence against Native people, particularly that of domestic violence and human trafficking, highly prevalent issues that disproportionately affect Native Americans. An Amnesty International report in 2007 highlighted many of the aforementioned jurisdictional gaps that prevented Indian men and women from obtaining justice.⁹⁶ The government’s own statistics, combined with the NISVS Survey, also demarcated the drastic situation faced by Indian women.⁹⁷

In addition to this newly collected data,⁹⁸ several stories from Native women flooded the internet, several of which became viral on social media⁹⁹, bringing a new passion and fervor to activists and lobbyists to address violence against Native women.¹⁰⁰ Native American activist, and former Vice-Chairman of the Tulalip Tribe’s Board of Directors, Deborah Parker, was among those who shared personal stories about the violence against Native women through the media.¹⁰¹ In her moving speech to Congress on

prosecutions.html?_r=3&pagewanted=1&ref=us (commenting that federal prosecutors decline more than 60% of domestic violence offenses, but less than 20% of drug-related offenses).

93. *Id.*

94. Angela Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1588 (2016) (citing Timothy Williams, *U.S. Says It Pursues More Prosecutions on Indian Lands*, N.Y. TIMES (May 31, 2013), noting a rise to 69% of cases prosecuted since the passage of the TLOA).

95. Riley, *supra* note 94, at 1588.

96. See AMNESTY INTERNATIONAL, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA, 27–40 (2007).

97. See Riley *supra* note 94 at 1589–90.

98. See NISVS SURVEY, *supra* note 13.

99. *Women Senators, Tribal Leader Discuss Importance of VAWA Improvements*, YOUTUBE (Apr. 25, 2012), <https://www.youtube.com/watch?v=yIV7-XASQy8>.

100. See Riley, *supra* note 94, at 1588.

101. *Tribal Leader Discuss Importance of VAWA Improvements*, *supra* note 99.

the reauthorization of VAWA, she highlighted her own personal experiences with domestic abuse, and urged her fellow Native American women to stand up and fight against such abuses,¹⁰² thereby “beginning a cascade of Native women’s personal narratives about interracial violence.”¹⁰³

Shortly thereafter, the *New York Times* published a story about the Congressional debate on the VAWA provision that highlighted the lived experiences of Diane Millich.¹⁰⁴ Her ex-husband, who was non-Indian, began to relentlessly abuse her soon after they had married and settled on the Southern Ute reservation in Colorado.¹⁰⁵ Despite several pleas to tribal law enforcement, and the county sheriff’s offices, she could not receive any help, as their hands were effectively tied.¹⁰⁶ Tribal police could not prosecute a non-Indian despite being on reservation land, and local sheriffs could not assist an Indian on the reservation. At one point, Diane’s husband even called the county sheriffs “to prove to her that he could not be stopped.”¹⁰⁷ Diane’s story gained traction among domestic violence victims’ advocates and lobbyists, and helped propel the conversation towards increasing tribal domestic violence jurisdiction.

This renewed social activism, augmented with decades worth of staggering statistics on Native American violence was finally met with success, as the VAWA reauthorization was signed by President Obama in 2013 and fully enacted in 2015.¹⁰⁸ This Act significantly departs from *Oliphant*, by creating a Special Domestic Violence Criminal Jurisdiction (SDVCJ) under which tribes have legally codified authority to criminally prosecute non-Indians for specific crimes of domestic violence.¹⁰⁹ The

102. *Women Senators, Tribal Leader Discuss Importance of VAWA Improvements*, *supra* note 99.

103. Riley, *supra* note 94, at 1590.

104. Jonathan Weisman, *Measure to Protect Women Stuck on Tribal Land Issue*, N.Y. TIMES (Feb. 10, 2013), <http://www.nytimes.com/2013/02/11/us/politics/violence-against-women-act-held-up-by-tribal-land-issue.html>.

105. *Id.*

106. *Id.*

107. *Id.*

108. Hansi Lo Wang, *For Abused Native American Women, New Law Provides A ‘Ray Of Hope,’* NPR (Feb. 20, 2014), <http://www.npr.org/sections/codeswitch/2014/02/20/280189261/for-abused-native-american-women-new-law-provides-a-ray-of-hope>. During the first two years of its inception, VAWA’s SDVCJ was merely a “pilot program” that applied to a few select tribes; only in 2015 could the remaining tribes petition the Department of Justice to join and utilize this prosecutorial authority. SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION PILOT PROJECT REPORT, NAT’L CONGRESS OF AMERICAN INDIANS (Oct. 29, 2015), http://www.ncai.org/attachments/NewsArticle_VutTUSYSfGPRpZQRYzWcuLekuVNeeTAOBBwGyvkWwPRUJOioqI_SDVCJ%20Pilot%20Project%20Report_6-7-16_Final.pdf [hereinafter PILOT PROJECT REPORT].

109. *See generally* 25 U.S.C. §1304.

VAWA provision narrowly describes those defendants who can successfully be hailed into tribal court to be tried and prosecuted for crimes of domestic violence. Non-Indian defendants must be ‘closely tied’ to the tribe by either their employment or their intimate or dating relationship with a tribal member.¹¹⁰

A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant—(i) resides in the Indian country of the participating tribe; (ii) is employed in the Indian country of the participating tribe; or (iii) is a spouse, intimate partner, or dating partner of—(I) a member of the participating tribe; or (II) an Indian who resides in the Indian country of the participating tribe.¹¹¹

However, these requirements leave out anyone who does not maintain these direct ties to the tribe but who nonetheless commit these crimes on the territory (a circumstance known as “stranger rape”).

In addition, the statute delineates that the crimes committed by these defendants must be those of either domestic violence or dating violence, or a violation of a protective order. To be heard in tribal court, protective order violations must have occurred in the Indian Country of the participating tribe and must violate a portion of the order that prohibits “violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; (ii) was issued against the defendant; (iii) is enforceable by the tribe; and (iv) is consistent with section 2265(b) of Title 18.”¹¹² These requirements are imposed in order to comport with the Indian Civil Rights Act, and the Bill of Rights in order to ensure due process requirements for non-Indian defendants are met.¹¹³

A. Shortcomings of VAWA 2013 Special Domestic Violence Criminal Jurisdiction

While VAWA has made substantial progress in providing a remedy for this serious issue that affects members of all Native American tribes, the legislation is far from perfect and still leaves many gaps that Congress must

110. 25 U.S.C. §1304 (b)(4)(A); *see also* Jerry Gardner, *Building Tribal Capacity to Exercise TLOA Enhanced Sentencing and/or VAWA “Special Domestic Violence Criminal Jurisdiction” over Non-Indians*, TRIBAL INSTITUTE (2013) <http://www.tribal-institute.org/download/Drug%20Court/WomenAreSacredConference.pdf>.

111. 25 U.S.C. §1304(b)(4)(B).

112. 25 U.S.C. §1304(c)(2).

113. *See*, PILOT PROJECT REPORT, *supra* note 108, at 3.

close. The SDVCJ has been dubbed a “partial” *Oliphant* fix, in that child abuse, elder abuse, and sexual assault by a stranger—unless either one of these crimes violates a preexisting restraining order—are not covered by the expanded criminal authority of the tribes.¹¹⁴ Furthermore, VAWA section 904 is incredibly specific with regards to who fits within the parameters of a “dating partner,” and tribal leaders have called to expand this jurisdiction to include the offenses of “stranger rape,” sex trafficking, and child and elder abuse.¹¹⁵ The narrow jurisdiction allotted to the tribes prevents them from prosecuting for these crimes should they fall outside of the purview of a preexisting restraining order, or if the perpetrator does not meet any other criteria to be properly tried as a “defendant” under the VAWA legislation.¹¹⁶

While the VAWA reauthorization has given funding for shelters and 24-hour hotlines to increase ease of reporting, significant barriers remain in place and must be dismantled before we can see a decrease in domestic violence on Native reservations. Despite the efforts of these legislative measures, there are many sociological issues that have been left unaddressed in both VAWA and the TLOA. Gun violence and drugs and alcohol-related crimes, are just some of the pervasive problems on reservations that only enhance the likelihood of violence against women. This has led some to criticize VAWA for not providing adequate funding for rehabilitation programs.

B. Objections to VAWA 2013: Constitutional Issues Arising Out of Title IX

Congressional debate around the reauthorization of the 2013 VAWA stemmed largely from the constitutionality of the SDVCJ. The granting of authority to tribal courts to prosecute non-Native American defendants was a contentious issue that raised significant concerns among conservative Congressmen and women.¹¹⁷ While the Court has yet to address a direct

114. § 1304(c)(2).

115. Krista Langlois, *New Law Protects Alaskan Native Women*, HIGH COUNTRY NEWS (Dec. 24, 2014), <http://www.hcn.org/articles/new-law-protects-alaska-native-women>.

116. While highly important, this note will not be delving into these topics individually. For more information see, Gabrielle Mandeville, Note, *Sex Trafficking On Indian Reservations*, 51 TULSA L. REV. 181 (2015); Marie Quasius, Note, *Native American Rape Victims: Desperately Seeking an Oliphant-Fix*, 93 MINN. L. REV. 1902 (2009).

117. Mitch Perry, *Gus Bulirakis defends 2013 opposition to Violence Against Women’s Act*, FLORIDA POLITICS (Mar. 1, 2018), <https://floridapolitics.com/archives/257763-gus-bilirakis-defends-2013-opposition-violence-womens-act>; Mercedes White, *Why some oppose extension to Violence Against Women Act*, DESERET NEWS (Feb. 14, 2013), <https://www.deseretnews.com/article/865573170/Why-some-oppose-extension-to-Violence-Against-Women-Act.html>; Seung Min Kim, *Senate renews anti-violence law*, POLITICO (Feb. 12, 2013), <https://www.politico.com/story/2013/02/senate-passes-violence-against-women-act-087518>.

challenge to VAWA's Title IX provision, there is still some doubt and speculation as to its constitutional validity. Likely challenges to the VAWA Title IX provision include issues surrounding the constitutional due process protections for Non-Indian defendants, and issues surrounding the authority of tribal courts and the complexities involved with the Appointments Clause. In addition, the heavily weighted precedent of *Oliphant*, its potential effect on the constitutionality of the VAWA legislation and the implication of the double jeopardy clause stemming from such precedent are also of concern to those who are skeptical about the lasting impact of the SDVCJ.

1. Due Process Protections for Defendants

VAWA's provision that mandates fair counsel presents a monetary burden on the individual tribes, and has the potential to drastically alter the ways in which certain tribes operate. Tribal judge panels vary in size, and while some tribal criminal proceedings mirror our traditional Anglo-American model of criminal procedure, many tribes have judges, peacemakers, or tribal elders who are generally appointed or elected for the position.¹¹⁸ Congressional legislators expressed their concerns with these facts and the implications of what these meant for non-Indian defendants who would be tried in tribal courts, arguing that this expansion would undoubtedly result in the deprivation of Constitutional and Due Process rights for these defendants.¹¹⁹

However, there is an equally convincing argument that a Constitutional challenge on these grounds would not result in the termination of this legislation. The VAWA legislation explicitly states that the tribes need to provide counsel, and a fair cross-section of the community (meaning both Indians and non-Indians are required) for jury panels. In addition, VAWA provides a 'catch-all' provision for "all other rights whose protection is necessary under the Constitution of the United States."¹²⁰ Essentially, this has come to mean that in order to prosecute non-Indian offenders, tribes must be able to provide a criminal defendant with all of the legal rights that he or she would be granted in a federal proceeding.

118. CARRIE E. GARROW & SARAH DEER, TRIBAL CRIMINAL LAW AND PROCEDURE 79 (2004).

119. See *Dr. Coburn Speaks on the Senate Floor Regarding the Violence Against Women Act*, YOUTUBE (Feb. 11, 2013), https://www.youtube.com/watch?v=Y_uV7Nt6aG8&feature=youtu.be (arguing that many tribal courts do not recognize the Bill of Rights in the same sense as traditional U.S. court, and recognizing tribal jurisdiction in this manner "tramples on the rights of every American who is not a tribal member.").

120. 25 U.S.C. §1304(d)(4).

2. *The Relationship Between Article 3 Courts, Article 4, and the Tribes*

The tenuous nature of the status of Native tribes and their legal relationship with the federal court system, has led to further criticism about the VAWA Title IX legislation. Specifically, this section will address those concerns that stem from Republican-leaning scholars and conservative think tanks who find VAWA to be an overstep of both Congressional and Tribal authority. Heritage Foundation attorney, Paul Larkin, argued that while the SDVCJ provision in VAWA 2013 has made steps in the “eventual right direction,” there are significant drawbacks regarding tribal authority, which could lead the legislation to be deemed unconstitutional if, or when, a legal challenge arises to the Courts.¹²¹ Specifically his concerns lie within the Appointments Clause of Article II of the Constitution and the judicial powers within Article III. Larkin argues that while Congress may create criminal courts that do not need Article III guarantees, this applies to the states and territories that are fully and unalterably incorporated into the “union.”¹²² Tribal reservations are not territories and are, rather, defined as “‘distinct tracts’ of land that are set aside or ‘reserved’ by the United States for ‘occupancy’ and use of a tribe under a treaty, statute, or executive order.”¹²³

In addition, the “Equal Footing Doctrine”¹²⁴ of the United States Constitution grants each state certain rights, including territorial integrity.¹²⁵ This doctrine can be found within Article IV, Section 3, Clause 1, which states that, “. . . no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Jurisdiction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”¹²⁶ This provision applies to the formation of new sovereign Indian territories, further complicating solidification of tribal sovereignty.

121. Paul Larkin, *Domestic Abuse on Indian Reservations: How Congress Failed to Protect Women Against Violence*, THE HERITAGE FOUNDATION (Feb. 19, 2014), http://www.heritage.org/civil-rights/report/domestic-abuse-indian-reservations-how-congress-failed-protect-women-against#_ftnref25. This argument, reflecting the potential constitutional issues stemming from increased tribal sovereignty, was the primary focal point for many of the GOP Senators and House Representatives who voted against the 2013 reauthorization. See *infra* Part IV.

122. *Id.*

123. *Id.*

124. The term “equal footing” originated from the 1787 Constitutional Convention that provided all new states be admitted “in all respects, on an equal footing with their Bretheren.” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 440 (Max Farrand ed., 1911) available at ONLINE LIBRARY OF LIBERTY, https://oll.libertyfund.org/titles/1057#Farrand_0544-01_53.

125. *Id.*

126. U.S. CONST. art. IV § 3, cl. 1.

Although this particular subject is beyond the scope of this Note, these arguments can be refuted. By recognizing that tribal authority arises from federal authority, and that the SDVCJ is an extension of this, tribal courts can legally be considered non-Article III courts, thereby circumventing this Constitutional concern.¹²⁷

3. *Legal Precedent with Oliphant, and Double Jeopardy Concerns*

Considering the weight of the *Oliphant* decision, the Court may decide that the SDVCJ legislation, which deviates so broadly from precedent, should be overturned. As Justice Rehnquist states in *Oliphant*, “. . . it was apparently assumed that the tribes did not have criminal jurisdiction over non-Indians absent a congressional statute or treaty provision to that effect.”¹²⁸ Justice Rehnquist’s opinion goes on to cite brief portions of eighteenth-century treaties that support this view.¹²⁹ However, further historical analysis, reveals contradictory findings. The text of the *1786 Treaty with the Choctaw*, states that those who “attempt to settle on any of the lands . . . shall forfeit the protection of the United States of America, and the Indians may punish him or not as they please.”¹³⁰ Should a future challenge arise, the Court should examine the historical precedent rather than simply relying on the scant findings cited in the *Oliphant* decision.¹³¹

Following the *Oliphant* decision, scholars have argued, that “[i]f tribal prosecutions of non-Indian defendants flow from delegated federal authority, then a tribe could not prosecute conduct that was already the subject of a federal prosecution, no matter how many rights the defendants would have under tribal criminal procedure.”¹³² This concern bleeds into issues surrounding the “double jeopardy” clause of the Constitution, which normally prevents defendants from being tried twice for the same crime.¹³³ Many Congressional leaders who expressed doubts before the VAWA

127. See Margaret H. Zhang, Comment, *Special Domestic Violence Criminal Jurisdiction For Indian Tribes: Inherent Tribal Sovereignty Versus Defendants’ Complete Constitutional Rights*, 164 U. PA. L. REV. 243, 267 n.117 (2015) (“If courts rule that special domestic violence criminal jurisdiction stems from delegated federal authority rather than inherent tribal sovereignty, tribes could answer the Article III contentions by arguing that the jurisdiction is still valid as an exercise of jurisdiction by a congressionally sanctioned non-Article III court.”).

128. *Oliphant*, 435 U.S. at 197.

129. *Id.* at 198.

130. Treaty of Hopewell with the Choctaw, Art. IV, 7 Stat. 21 (1786).

131. DEWI IOAN BALL, *THE EROSION OF TRIBAL POWER: THE SUPREME COURT’S SILENT REVOLUTION*, 173–74 (2016).

132. Margaret H. Zhang, Comment: *Special Domestic Violence Criminal Jurisdiction for Indian Tribes: Inherent Tribal Sovereignty Versus Defendants’ Complete Constitutional Rights*, 164 U. PA. L. REV. 243, 266 (2015).

133. U.S. CONST. amend V.

reauthorization believed there to be a substantial risk for a non-Indian to be tried both in federal and tribal courts. The rationale behind this idea is that since the SCDVJ is a federally authorized expansion of power, any prosecution that arises under this provision is rooted in “some federally-delegated authority.”¹³⁴

This argument isn’t without merit, as the Court has previously held in *United States v. Wheeler* that a defendant’s Fifth Amendment right against “double jeopardy” was not violated when he was convicted under the Navajo Nation’s tribal court and later convicted by a federal court for the same crime, as the convictions were brought by two distinct “sovereigns.”¹³⁵ This is reflected in the recent holding in *U.S. v. Bryant*, where the Court found that “Indian tribal court convictions for domestic assault were sufficient to convict defendant of federal offense of domestic assault by habitual offender, even though defendant had no right to counsel in tribal court, since convictions were valid under tribal law . . .”¹³⁶ Although the SDVCJ is still in its infancy, and only a few convictions have gone through an appeals process, *Bryant*’s holding suggests that the Court is willing to recognize tribal authority as coming from a distinct sovereign.

Thus, it is likely that a particular argument that SDVCJ violates the Fifth Amendment would not stand, as the double jeopardy clause does not apply when crimes come from two distinct sovereigns.¹³⁷ Here, the VAWA provision uses similar language to the Indian Civil Rights Act, which “indicates that the Congress intends for tribes to draw their power to prosecute nonmember Indians from their “inherent” tribal power, “not delegated federal power.”¹³⁸ Thus, using the language derived from legislation, the prosecution of these crimes does not “flow” from the federal government, but rather directly from the tribes themselves, who are a separate entity with their own sovereign powers, thereby refuting any claims of double jeopardy.¹³⁹

134. Shefali Singh, *Closing the Gap of Justice: Providing Protection for Native American Women through the Special Domestic Violence Criminal Jurisdiction Provision of VAWA*, 28 COLUM. J. GENDER & L. 197, 220–21 (2014).

135. *United States v. Wheeler*, 435 U.S. 313, 329–30 (1978).

136. *See United States v. Bryant*, 136 U.S. 1954 (2016).

137. *See generally*, Anthony J. Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, 86 WASH. U. L. REV. 769 (2009). However, conventional notions regarding the “distinct sovereignty” theory as applied under the double jeopardy clause is currently being challenged in the Supreme Court case, *U.S. v. Gamble*, __U.S.__(2019).

138. Singh, *supra* note 134 at 221.

139. *Id*; *See*, Zhang, *supra* note 127 and accompanying text. Utilizing this argument may in fact clear the way for a potential Article III counterargument, in that by recognizing the SDVCJ as stemming from the sovereign tribal nation the courts in which they are prosecuted may no longer be considered a non-Article III, Congressionally-sanctioned court.

C. The Trump Administration on Indian Affairs

Native American women are in a dire situation, and VAWA will need to be reauthorized by Congress in order to continue to provide the necessary financial resources to its various programs. This is incredibly concerning, particularly given that major oppositionists to Article IX are now appointed to chief positions in the Trump administration. Attorney General Jeff Sessions, who opposed the VAWA legislation in 2013, skirted around a question about defending VAWA during his confirmation hearing, stating only that “[he] would defend the statute if it’s reasonably defensible.”¹⁴⁰

Compounding this, the Trump administration has been successively pushing for the privatization of tribal lands, and has proposed severe cuts to the budget of VAWA and the Bureau of Indian Affairs.¹⁴¹ Critics to the current administration’s new budget proposal argue that it prioritizes the construction of a border-wall over tribal land, the privatization of Native reservations, and cuts to vital health services and education programs, all to the detriment of Native people.¹⁴² This budget proposes cuts of up to “\$300 million to the Department of the Interior’s Bureau of Indian Affairs, as well as \$64 million from education, and over 21 million from Indian Country law enforcement.”¹⁴³ Such propositions have many concerned that the current President is reverting back to a “Termination-Era” style of governing the tribes, which had disastrous effects on the tribes in the early twentieth century by diminishing their lands and their sovereignty, and ultimately forcing them to disband.¹⁴⁴ While the current administration has not

140. Kate Segal, *Immigration Orders Undermine Violence Against Women Act Protections*, HUMAN RIGHTS WATCH, (Mar. 13, 2017), <https://www.hrw.org/news/2017/03/13/immigration-orders-undermine-violence-against-women-act-protections>.

141. Tom Perez, *Trump is Breaking the Federal Government’s Promise to Native Americans*, L.A. TIMES (Aug. 7, 2017), <http://www.latimes.com/opinion/op-ed/la-oe-perez-native-american-indians-trump-20170807-story.html>; see also Rob Capriccioso, *Trump Budget Serves Deep Cuts in Many Indian Areas*, INDIAN COUNTRY TODAY (Jun. 6, 2017), <https://indiancountrymedianetwork.com/news/politics/tribal-budget-serves-deep-cuts-indian-areas>.

142. *Id.*

143. Hayley Miller, *Trump’s Policies Show Profound Disregard for Native Americans*, DNC Chair Says, HUFFINGTON POST (Aug. 7, 2017), https://www.huffingtonpost.com/entry/trump-native-americans-tom-perez_us_59889853e4b0ca8b1d49e6df.

144. *Id.* During the Eisenhower administration in the mid-twentieth century, scores of tribes were “terminated,” i.e. stripped of their federal status, their benefits, and their land. See generally STEPHAN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES: THE AUTHORITATIVE ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS* (3d. ed. 2002). Beginning in the early 50’s, the Bureau of Indian Affairs, accompanying the termination policy, sought to “relocate” Native Americans into urban cities and jobs. This was accomplished by distributing flyers and brochures “advertising” the urban areas as places where Native people could find jobs, proper training, and “Happy Homes.” NATIVE PEOPLE’S CONCEPTS OF HEALTH AND ILLNESS (2018), <https://www.nlm.nih.gov/nativevoices/timeline/488.html>. However, fifty percent of those who left the reservations returned within a few years due to lack of opportunity in the urban cities. *Id.* See *supra* Part II Section A.

completely reverted back to such extreme measures, these threats only compound the distrust that has long existed between Native tribes and the federal government.

IV. Revisiting VAWA, and its Proposed 2019 Reauthorization:

A. National Congress of American Indians Report – 5 Years Later

VAWA 2013 made great strides in protecting Native women and men from IPV by affirming, in part, the inherent sovereign authority of Native American tribes. However, many issues have arisen from the 2013 reauthorization that have left tribal prosecutors feeling that the SDVCJ, as it currently stands, is both insufficient and inadequate to address the root of these problems. In March 2018, the National Congress of American Indians (NCAI) released a new report summarizing the first five years of extended tribal domestic violence jurisdiction.¹⁴⁵ The released report highlighted many of SDVCJ's achievements, as well as the many gaps that need to be filled in the next Congressional reauthorization.¹⁴⁶ Since 2013, the eighteen tribes that have implemented the SDVCJ collectively made 143 arrests and 74 convictions, with 24 cases pending.¹⁴⁷ Additionally, the report attempts to refute the conservative argument, that non-Native defendants are being denied their Due Process rights, by pointing to the high number of dismissals and acquittals.¹⁴⁸ To further support this point, the report has utilized testimonials of each tribe that describe the proper jury trials and defense counsel appointed to defendants.¹⁴⁹

The NCAI report is incredibly thorough in demonstrating the successes tribes have had with implementing the SDVCJ. However, the report highlights myriad deficiencies in the current legislation. Presently, tribes are unable to charge cases of assault on law enforcement, criminal contempt,

145. *NCAI Releases Five-Year Report on Tribal Governments Exercising VAWA 2013 Special Domestic Violence Criminal Jurisdiction Over Non-Indians*, NAT'L CONGRESS OF AMERICAN INDIANS (Mar. 20, 2018), <http://www.ncai.org/news/articles/2018/03/20/ncai-releases-five-year-report-on-tribal-governments-exercising-vawa-2013-special-domestic-violence-criminal-jurisdiction-over-non-indians> [hereinafter NCAI Report].

146. *Id.* at 1.

147. *Id.* at 10–11. Please note that this report was released in March 2018, and numbers to present day may vary, as tribes no longer have to report to the DOJ that they are implementing the SDVCJ, and many arrests may occur in a given year.

148. *Id.* at 18. Statistics from the report show that approximately twenty-one percent of cases filed under SDVCJ were dismissed, often for insufficient evidence, and lack of tribal jurisdiction.

149. *Id.* at 16 (“While the defendant was in jail awaiting trial, tribal police were informed that he had outstanding state warrants for drug trafficking. His state appointed public defender, who was already licensed to practice in tribal court, was able to serve as defense counsel in both cases.”).

stalking, driving under the influence, endangering the welfare of a minor (and other crimes of child abuse), violence against victim's family, and false imprisonment.¹⁵⁰ In spite of this, advocates are hopeful that a 2019 reauthorization will address these issues, and tribal criminal authority will be expanded to serve these victims.

B. A 2019 Reauthorization?

Despite the longest government shut-down in American history, Congress enacted emergency measures to ensure VAWA's funding through February 8, 2019.¹⁵¹ However, the funding bill issued on February 14, 2019, excludes the extension of VAWA for the 2019 year.¹⁵² It is unclear the impact this will have in the coming months, as grant-related programs are funded through separate means, which have been provided for in this extension.¹⁵³ Nevertheless, according to national news outlets, Democrats plan to push for further legislation and a broader overhaul in the upcoming months in order to expand the scope of funding and protections.¹⁵⁴

In July 2018, Representative Jackson Lee (D-TX) introduced a bill to reauthorize VAWA.¹⁵⁵ The new bill includes numerous provisions to address issues facing the tribal law enforcement, namely increasing tribal access to federal crime databases.¹⁵⁶ Additionally, this new proposal seeks to fill the gaps created in VAWA 2013, by including protection for child abuse, sex trafficking, and elder abuse as crimes under the purview of the

150. NCAI Report, *supra* note 145, at 23–24. The report notes that 58% of the incidents involved children, as they are not considered “victims” under the VAWA 2013 definitions. *Id.* at 23. Child abuse on Native lands is incredibly prevalent. *Id.* at 24. Native children 2.5 times as likely to experience trauma than their non-Native counterparts, and this abuse has both immediate and long-term effects on the children. *Id.*

151. Elise Viebeck, *Violence Against Women Act Expires with Government Shutdown*, WASH. POST (Dec. 22, 2018), https://www.washingtonpost.com/powerpost/violence-against-women-act-to-expire-with-government-shutdown/2018/12/21/b66f600a-0557-11e9-b5df-5d3874f1ac36_story.html?utm_term=.5f16e8af5d36.

152. Sophie Tatum, et al., *Funding bill leaves out Violence Against Women Act extension*, CNN (Feb. 15, 2019, 12:20 PM), <https://www.cnn.com/2019/02/15/politics/violence-against-women-act-spending-bill/index.html>.

153. *Id.*

154. See Niels Lesniewski, *In bid to avoid shutdown, spending deal drops Violence Against Women Act extension, other contentious provisions*, ROLL CALL (Feb. 13, 2019, 9:50 PM), <https://www.rollcall.com/news/congress/bid-avoid-another-shutdown-spending-conference-report-drops-violence-women-act-extension-contentious-provisions..>

155. Katherine Tully-McManus, *Pelosi, Deb Haaland Stump for Violence Against Women Act*, ROLL CALL (Aug. 7, 2018, 2:23 PM), <https://www.rollcall.com/news/politics/nancy-pelosi-stumps-deb-haalands-new-mexico>; see Violence Against Women Reauthorization Act of 2018, H.R. 6545 115th Cong. (2d. Sess. 2018).

156. H.R. 6545 § 903 (a), (c).

SDVCJ that can be prosecuted by tribal officers.¹⁵⁷ This proposal was applauded by Democrats and victim advocates for increasing the abilities of tribal law enforcement, and gained 181 Democratic co-sponsors.¹⁵⁸ While this particular version has not been touched since September of 2018, Representative Karen Bass (D-CA) introduced yet another reauthorization bill, H.R. 1585, in March 2019.¹⁵⁹ This bill addresses many of the same issues as its predecessor, and includes expanded tribal authority to try perpetrators of elder abuse, child abuse and assaults against tribal officers.¹⁶⁰ On April 4, the House passed the bill forward, where it awaits Senate review.¹⁶¹ The provisions within H.R. 1585 are quite promising, in that it directly addresses two main issues identified by the tribes and the NCAI report: child abuse and acts of violence against tribal officers.

The addition of the SDVCJ in 2013 was one of the main points of contention for Republican Congress members.¹⁶² Concerns stem largely from the constitutional issues of double jeopardy and ensuring due process rights to non-Native American defendants in tribal courts. As such, any 2019 reauthorization will no doubt face the same hurdle, and despite current success within a Democratic-majority House, the reauthorization may not reach Senate approval. Despite the current “political board game,” Native women experience violence at incredibly high rates, vastly disproportionate to the remainder of the U.S. population. These women need action now.

V. State-Led “Stop-Gap” Solutions

In an ideal world the next VAWA reauthorization must include protections for children and elders, and would expand jurisdiction for stranger rape, or sexual assault by non-tribal members who do not fit the

157. H.R. 6545 § 906.

158. Bills Sponsored by Sheila Jackson Lee, 115th Cong. (2017–18), <https://projects.publica.org/represent/members/J000032-sheila-jackson-lee/bills-sponsored/115>; in an effort to reignite the issue and draw attention specifically to Native women and children, in late January Senator Tom Udall (D-NM) introduced S. 290, the Native Youth and Tribal Officer Protection Act in late January. Native Youth and Tribal Officer Protection Act, S. 290, 116th Cong. (1st Sess. 2019). This bill, focuses solely on expanding the ability to prosecute for crimes of child violence and abuse, as well as violence against tribal law enforcement officers. *Id.*

159. Violence Against Women Reauthorization Act of 2019, H.R. 1585, 116th Cong. (1st Sess. 2019), available at <https://www.congress.gov/bill/116th-congress/house-bill/1585/text>.

160. *Id.*

161. Katherine Tully-McManus, *Violence Against Women Act clears House*, ROLL CALL (Apr. 4, 2019), <https://www.rollcall.com/news/congress/violence-women-act-clears-house>.

162. Mercedes White, *Why some oppose extension to the Violence Against Women Act*, DESERET NEWS (Feb. 14, 2013, 12:10 PM), <https://www.deseretnews.com/article/865573170/Why-some-oppose-extension-to-Violence-Against-Women-Act.html>; Seung Min Kim, *Senate renews anti-violence law*, POLITICO (Feb. 12, 2009, 3:10 PM), <https://www.Politi.co.com/story/2013/02/senate-passes-violence-against-women-act-087518>.

statute's parameters of an "intimate partner." Despite a Democratic House majority, an expansion of tribal authority will no doubt face push back from several Congressional leaders, as they echo their same concerns from the 2013 reauthorization. Despite the advent of the SDVCJ, federal, state and tribal law enforcement have competing interests and complex jurisdictional "gaps" remain. In this next section, this Note posits that in order to avoid the weaknesses that arguably exist within the current VAWA legislation, state and local government officials should adopt and mirror the methodology utilized by Oregon, Arizona, Wisconsin and other states to increase state-tribal cooperation and coordination to better fill this "patchwork" jurisdiction and created by federal legislation and Supreme Court jurisprudence.

A. Oregon's Approach

Within the last two decades, Oregon has made significant leaps in trying to bridge some of these gaps between state and tribal authorities, and recognizing the authority of tribal police officers in limited circumstances.¹⁶³ In 2011, Oregon's governor signed Senate Bill 412, giving tribal peace officers in the states' nine federally recognized tribes the same status and authority to make arrests on tribal lands as state police officers, so long as tribal officers complied with training and insurance requirements.¹⁶⁴ Despite initial concerns by conservatives and local sheriffs that this new authority would lead to the tribal peace officers becoming the "most powerful law enforcement of the state,"¹⁶⁵ this bill has been very successful for the state of Oregon, and has garnered massive support from tribal authorities, state legislators, and victims' rights advocates alike.¹⁶⁶

Most of the Oregon tribes are now "412 compliant" with the training and insurance liability requirements. The few exceptions involve smaller tribes that have entered into a direct contractual agreement with local Oregon state law enforcement in nearby municipalities.¹⁶⁷

By requiring tribal police to go through the same training as state police and giving them the ability to go on and off the reservation to investigate

163. See *State v. Kurtz*, 350 Or. 65 (2011) (reaffirming Oregon Supreme Court holding in 2005 that tribal officers may make off-reservation arrests while in "hot pursuit").

164. 2011 Ore. SB-412 (codified as amended at OR. REV. STAT. § 161.015(4)(f) (2013)).

165. Lauren Dake, *Senate OKs Tribal Police Bill; State sheriffs group expresses concern as legislation moves to House*, THE BEND BULLETIN, (June 7, 2011), <http://www.bendbulletin.com/news/1416972-151/senate-oks-tribal-police-bill>. The conflicting jurisdictions that operate within tribal lands create what is monickered as a "checkerboard effect."

166. *Id.*

167. STATE OF OREGON DEPARTMENT OF JUSTICE CRIME VICTIM'S SERVICES DIVISION, OREGON DEPT. OF JUSTICE VAWA IMPLEMENTATION PLAN 2014-2016, https://www.doj.state.or.us/wp-content/uploads/2017/06/20142016_stop_vawa_implementation_plan_appendices.pdf.

crimes and pursue criminal suspects, this bill has “eliminated the checkerboard effect,” of competing federal-state-tribal jurisdictions, and is one of the first major steps in filling in these “gaps.”¹⁶⁸ While this bill was set for a sunset date of 2015, the immense support it received from tribal officials and Oregon state troopers alike propelled it through the sunset period and it is now a permanent piece of legislation.¹⁶⁹

B. Arizona’s Inter-governmental Agreements

Similar to Oregon, Arizona statute 13-3874(A) gives tribal officers the same enforcement powers as the state police so long as tribal officers comply with training and insurance requirements.¹⁷⁰ This varies slightly from Oregon’s statute in that the Arizona’s definition of a police officer remains the same, but tribal officers are granted extended authority beyond the borders of the reservation.¹⁷¹

In addition, Arizona’s governor has made a variety of agreements with local law enforcement and certain tribes, namely the Navajo Nation.¹⁷² In the last few years, domestic violence crisis calls have nearly doubled in the Navajo Nation,¹⁷³ and the need for continued safety enhancements is greater than ever. The Navajo Nation has since agreed to direct cooperation with the Arizona Department of Public Safety, allowing them to enter onto tribal lands, so long as there is communication and cooperation with Nation peace

168. Janine Robben, *Life In Indian Country: How the Knot of Criminal Jurisdiction is Strangling Community Safety*, OREGON STATE BAR, (Jan. 2012), <https://www.osbar.org/publications/bulletin/12jan/indiancountry.html>.

169. *Id.*; see also *Testimony Before the House Judiciary Committee In Support of Senate Bill 343*, <https://olis.leg.state.or.us/liz/2015R1/Downloads/CommitteeMeetingDocument/68579>.

170. ARIZ. REV. STAT. ANN. § 13-3874(A) (2019)

171. ARIZ. REV. STAT. ANN. § 13-3874(B) (2019). For comparison purposes, Oregon statute actually modified the definition of “peace officer” to include tribal officers that are members of a duly recognized federal tribe, and comply with various record-sharing and due process requirements. “The Legislative Assembly finds and declares that the purpose of sections 1 to 4 of this 2011 Act is to provide authorized tribal police officers with a limited ability to exercise the powers of, and to receive the same authority and protections provided to, law enforcement officers under the laws of this state . . .” 2011 Ore. SB 412 §3 (1). Arizona’s statute simply gives the tribe’s extended powers under the law, and they are not part of the code as a “peace officer.”

172. *Law Enforcement Agreement Between the Navajo Nation and The Arizona Department of Public Safety*, UNIVERSITY OF CALIFORNIA, LOS ANGELES, https://www.aisc.ucla.edu/iloc/resources/documents/ILOCFH_PhxAZ_Ref_AZNavajo_LawEnfAgreement.pdf.

173. *Delegates Walk with Grandma Emma In Support of Domestic Violence Awareness*, NATIVE NEWS ONLINE.NET, (Oct. 20, 2017), <https://nativenewsonline.net/currents/delegates-walk-grandma-emma-support-domestic-violence-awareness/> (Arizona state representative remarking that the number of calls from the nation have increased from 3,300 to 6,400 over the course of three years [2014-present].).

officers.¹⁷⁴ This Act has been in place for the last five years, and according to the Arizona Office of the Attorney General, its overall success has prompted plans to renew this agreement for the future.¹⁷⁵

C. Other State Approaches: Immunity Waivers and Criminal Extradition

Many states have also agreed to enhance the authority of the tribal police force, provided they maintain their own separate liability insurance or property insurance for damages incurred. This is usually coupled with a provision that requires the tribal officers to waive their sovereign immunity in case of lawsuits against them. Washington and Kansas state statutes both allow for tribal officers to exercise similar authority to state police officers so long as they release the State from any liability, and if they are sued it is done so separately from the state police, and proceeds under state tort law.¹⁷⁶

Extraditing criminal offenders on or off tribal lands has been deeply challenging and has only compounded the violence and drug abuse that is rife within tribal lands. Because of the jurisdictional gaps, many offenders can “flee” from law enforcement by simply staying on or off the reservation, knowing that law enforcement, absent any state-level agreement, cannot sustain any authority over them. One example is the Pine Ridge reservation, where reports estimate that of the “111 misdemeanor warrants on domestic violence cases, 73 were for those believed to be on reservation land.”¹⁷⁷

Wisconsin has a rather unique approach towards extradition with the Menominee Indian Nation, whereupon the tribe has codified their own criminal extradition procedures. The Menominee code gives full faith and credit to state warrants for a period of 48 hours, after which the tribal judge can release the offender or grant more time to the state to move the offender into state jurisdiction.¹⁷⁸

174. *Law Enforcement Agreement Between the Navajo Nation and The Arizona Department of Public Safety*, *supra* note 172, at 82.

175. *FY 2017 First Quarter Report*, NAVAJO NATION OFFICE OF ATT’Y GEN. (Dec. 2016), http://www.nnols.org/uploads/FileLinks/c6f6c1361361424c9666a0b2201405e7/NNDOJ_First_Quarterly_Report_to_NNC_FY17.pdf.

176. See KAN. STAT. ANN. § 22-2401a(3)(e) (2018) “Neither the state nor any political subdivision of the state shall be liable for any act or failure to act by any tribal law enforcement officer.” See KAN. STAT. ANN. § 22-2401a(3)(b) (2018) “The tribe shall waive its sovereign immunity solely to the extent necessary to permit recovery under the liability insurance.” See generally WASH. REV. CODE ANN. § 10.92 (LexisNexis 2018).

177. Tiffany Tan, *Oglala Sioux planning mutual aid with outside enforcement*, RAPID CITY JOURNAL (May 28, 2017), http://rapidcityjournal.com/news/local/ogla-sioux-planning-extradition-mutual-aid-with-outside-law-enforcement/article_986ae136-6598-526e-8ab0-8d8b4d1490d7.html.

178. Menominee Indian Tribe of WI Code, Art. 2 §132–6 (B).

The Arizona statute similarly affords the right to both Indian tribes and the state to seek extradition of criminal offenders from their respective jurisdictions, provided they follow tribal or state procedural due process.¹⁷⁹ Both of these models allow state and tribal officers to seek out a criminal offender, which would otherwise be beyond their respective reach, and helps further close those jurisdictional gaps on the reservations.

D. Potential Hurdles with the State Enforcement Model

Although states have enacted several agreements and procedures to address the issues of violence on tribal lands at a more localized level, the tribal-state relationships remain fraught with many underlying issues that often cloud the efforts to finding a resolution to the violence on tribal lands. Stemming from years of abuse and land disenfranchisement of Native peoples, state governments have had a less than ideal relationship with tribal authorities. A common complaint of tribes is the lack of respect or knowledge that the state law enforcement has about the individual tribes and their culture.¹⁸⁰ Should the states attempt to further exert their jurisdiction over certain tribes in place of the federal authorities, this could lead to an increase in conflict.

The Northern California Tribal Court Coalition's (NCTCC) 2013 report describes several instances in which members of Northern California tribes had issues with law enforcement's handling of 911 calls.¹⁸¹ An account by a 911 service provider states:

When I've been here in town, there have been times when a woman has reported, a police officer has taken her out to the curb and said he's not going to file a report because he doesn't think she is serious and he has had dealings with her before, and she didn't follow through, so he is not going to waste his time. So if you have a history of domestic violence, you are much less likely to get help from the police department.¹⁸²

179. See ARIZ. REV. STAT. ANN. § 13-3869(D), providing that Indian tribes demanding extradition must provide a copy of a warrant and a criminal complaint made before a tribal judge.

180. RESPONSES TO DOMESTIC VIOLENCE TRIBAL COMMUNITIES: A REGIONAL SURVEY OF NORTHERN CALIFORNIA, CTR. FOR COURT INNOVATION (Jan. 2013), https://www.courtinnovation.org/sites/default/files/documents/NCTCC_Responses_D_V.pdf [hereinafter NCTCC SURVEY] (where respondents believed the law enforcement issues lied within their lack of knowledge about the individual tribes).

181. *Id.*

182. *Id.* at 30.

One potential way to combat this, particularly in the context of domestic violence, is to increase police training about the issue, focusing specifically on the ways in which domestic violence affects the tribal members and their community. While this would naturally require a degree of cooperation between local and tribal authorities, as well as more education about the cultural norms within each tribe, it would ultimately foster a better relationship.

Additionally, the NCTCC has reported that the tribes in Northern California tend to be unaware of the resources available to them and thus are hesitant to reach out for assistance.¹⁸³ “Temporary housing and shelter care, vouchers for immediate needs, court advocacy, safety planning, crisis counseling, and re-location assistance are some of the other services . . . [however,] groups of interest, specifically community members, victims, and perpetrators, revealed limited knowledge of such resources.”¹⁸⁴ Increasing awareness through community involvement on and off the reservation would alleviate some of these issues. However, such a feat would no doubt require extra funding provided by the state governments, which presents another obstacle for domestic violence victims and their advocates.

On the Pine Ridge Indian Reservation, local tribal authorities cite similar feelings of unease in entrusting local government with criminal jurisdiction. The tribe has seen a vast increase in violent crime, as well as an increased spread of methamphetamine addiction from drug traffickers in nearby metropolitan areas.¹⁸⁵ Given a lack of funding, there has been a significant decrease in tribal law enforcement authority on the reservation, as well as issues extraditing perpetrators to and from the reservation.¹⁸⁶ But tribal members are skeptical of any agreement with their neighboring county officials—this is mostly due to hostile encounters with state police which include racial profiling and disparate treatment, as well as a justifiable fear of a “domino effect” that such an agreement would have on decreasing their autonomy.¹⁸⁷

Similarly, the Navajo Nation has expressed much concern over their extradition policies with the states of New Mexico and Arizona. While policies are in place to ensure the due process rights of the Indians that are arrested and held on the reservation, there have been many complaints that officials ignore these proceedings in removing offenders to state and federal

183. NCTCC SURVEY, *supra* note 180, at 30.

184. *Id.*

185. Ian MacDougall, *Should Indian Reservations Give Local Cops Authority on Their Land?* THE ATLANTIC (July 19, 2017), <https://www.theatlantic.com/politics/archive/2017/07/police-pine-ridge-indian-reservation/534072/>.

186. *Id.*

187. *Id.*

jurisdictions. “[I]t was common practice for federal agents to show up on the reservation and pick up an individual without due process . . . People would come in and literally badge out an individual from tribal custody without any process at all.”¹⁸⁸ Such blatant ignorance and disrespect for tribal procedure leaves many tribes questioning why they should bother entering into these agreements with state and local law enforcement.¹⁸⁹ This is not to say that the extradition treaties are unimportant, yet it nevertheless highlights some of the issues that are necessary for states and tribes to work through, including respect, understanding, and safeguarding their respective measures of due process.

Conclusion

The proposed legislation that is advancing in Congress may finally reaffirm tribal criminal sovereignty and expand the rights of tribal prosecutors. However, given the current political climate, the future of a 2019 reauthorization remains uncertain for the 18 tribes that exercise jurisdiction. Though an imperfect framework, solidifying the relationships between state and tribal law enforcement has been shown to have a greater impact on tribal communities and the safety of Indian women. To heal from the disastrous impact of PL 280, many states have been granting the tribal police the same authority to prosecute as state enforcement officers, and tribal law enforcement have been negotiating arrangements that fit their needs in order to protect members on reservations. As demonstrated in Oregon, Arizona, and other states, this increase in authority can extend off the reservation in particular cases, thus preventing the perpetrators from becoming “untouchable” once they cross the reservation lines.

This particular “stop gap” framework is not without complications. The expansion of tribal authority has, in a number of cases, amplified mistrust among state law enforcement, and the allowance of state troopers on tribal lands resonates a similar feeling among tribal authorities. These hurdles can hopefully be overcome in time through cooperation, domestic violence training, and cultural awareness, but nevertheless continues to present a substantial obstacle.

The advent of VAWA’s SDVCJ and the TLOA are beacons of hope for a shifting political tide in removing some of the impediments to tribal sovereignty.¹⁹⁰ But, the laws also present “a paradox” in that with “increased authority comes greater federal interference and more oversight into internal

188. Noel Lyn Smith, *Stronger Extradition laws proposed in wake of Carroll sentencing*, NAVAJO TIMES (July 4, 2013), <http://www.navajotimes.com/news/2013/0713/070413extradition.php>.

189. *Id.*

190. Riley, *supra* note 94, at 1595.

tribal institutions and processes.”¹⁹¹ By imposing federally derived legislation upon the tribes, we are inherently drawing tribes further away from any semblance of political and cultural autonomy and imposing “an American model of criminal justice.”¹⁹² By doing this, we are sending the tribes into a “double bind,” upon which their sovereign rights are only guaranteed if they operate on “the terms of the very government that has, for so long, sought to dismantle tribal justice systems.”¹⁹³

Ideally, the federal legislature will expand the reach of VAWA and the TLOA beyond their current parameters in a 2019 reauthorization. However, we are nevertheless forced to reconcile this with the politics of the current federal government and the uncertainty of funding available to assist in any further progressive action. This Note modestly attempts to show that by putting the immediate needs of Native American women and domestic violence victims first, the local-tribal police cooperation model has the potential for substantial benefits to those affected by domestic violence. These state and local agreements and legislative measures can enhance trust and coordination between tribal and local law enforcement and, perhaps, will continue to foster the relationship between them, hopefully resulting in increased tribal sovereignty over criminal affairs.

191. Riley, *supra* note 94, at 1595.

192. *Id.*

193. *Id.*
