ADDRESSING THE *OLIPHANT* IN THE ROOM: DOMESTIC VIOLENCE AND THE SAFETY OF AMERICAN INDIAN AND ALASKA NATIVE CHILDREN IN INDIAN COUNTRY

KELLY GAINES STONER[*] & LAUREN VAN SCHILFGAARDE[**]

I. INTRODUCTION

Lakota people know that as long as a small infant has a soft spot on its head, it is sacred. It is through that opening that Tunkasila communicates with that child. Children are the hope of a nation . . .[1]

---

[*] Kelly Stoner graduated from the University of Oklahoma College of Law in December 1988. In October 2011, Ms. Stoner was appointed as a Judge for the Seminole Nation of Oklahoma and as of October 2013, Stoner is a Victim Advocacy Legal Specialist for the Tribal Law and Policy Institute. For the past twenty years, she has taught at the North Dakota School of Law and Oklahoma City University School of Law where she was an Instructor teaching Tribal Law and Domestic Violence classes. For eight years, she directed the University of North Dakota Native American Law Project that served clients of the Spirit Lake Reservation and handled cases involving teen and adult victims of domestic violence and sexual assault in Indian Country. From 2001-2013, Ms. Stoner directed the Native American Legal Resource Center at Oklahoma City University School of Law where she supervised law students prosecuting and representing victims of domestic violence, sexual assault and stalking cases in state, tribal and CFR courts and in the Court of Indian Offenses.

In 2008, Ms. Stoner testified before the U.S. Indian Affairs Committee regarding domestic violence issues affecting Native American women in Indian Country. In 2010, she was invited to the White House to witness the signing of the Tribal Law and Order Act. She is a frequent lecturer for the American Bar Association's Commission on Domestic Violence and for the Office on Violence Against Women's national technical assistance providers on domestic violence issues in Indian Country, and wrote and was awarded a federal grant to launch Oklahoma's only tribal coalition against domestic violence, sexual assault and stalking—the Native Alliance Against Violence. In 2011, she supervised a project in partnership with the Apache Tribe of Oklahoma that established a SAFE Unit at a local hospital, recruited SANEs and targeted community education on the topics of domestic violence and sexual assault.

[**] Lauren van Schilfgaarde (Cochiti Pueblo) serves as the Tribal Law and Policy Institute's (TLPI) Tribal Law Specialist, which includes facilitating technical assistance to tribal courts, including Healing to Wellness Courts, and researching legal and policy issues as they face tribal governance and sovereignty. Lauren graduated from the UCLA School of Law, where she focused her studies on tribal and federal Indian law. While in law school, she served as president of the Native American Law Students Association and on the board of the National Native American Law Students Association. Lauren participated in two tribal clinics, the Tribal Legal Development Clinic and the Tribal Appellate Court Clinic, and has served as law clerk at the Native American Rights Fund and the Legal Aid Foundation of Los Angeles. Lauren is licensed in the State of California, and recently finished serving a 3-year term on the board of the California Indian Law Association. Lauren currently serves on the board of the National Native American Bar Association, on the board of the American Bar Association's Center for Racial and Ethnic Diversity, and on the board of the American Bar Association's Tribal Courts Council.

[1] Delphine Red Shirt, *The Lakota Children Are Called Wakanyeja 'Little Sacred Ones,* NATIVE AM. TIMES, Feb. 9, 2015, http://www.nativetimes.com/index.php/life/commentary/11125-the-lakota-children-are-called-wakanyeja-little-scared-ones.

The health and wellbeing of American Indian and Alaska Native (AI/AN)[2] families are in peril as their children are exposed to domestic violence and other multiple forms of violence in Indian country[3] at rates highest among all U.S. races.[4] For AI/AN youth, this exposure to violence results in increased rates of "altered neurological development, poor physical and mental health, poor school performance and substance abuse, and over-representation in the juvenile justice system."[5] The data, although sparse, for AI/AN youth exposed to violence in Indian country paints a profoundly disturbing picture.

AI/AN youth experience 50 percent higher rates of child abuse compared to non-native youth.[6] According to the Health Director of the Oglala Sioux Tribe, approximately 95 to 98 percent of the tribal population experienced sexual abuse as children[7] Native American youth have higher rates of problems related to mental health and substance use, and are twice as likely to commit suicide as other minority youth.[8] Native youth are 2.5 times more likely to experience trauma than their non-Native peers[9] and are experiencing post-traumatic stress disorder at a rate of 22 percent—*the same rate as*

---

[2] The terms Indian, American Indian, Alaska Native, and Native American are used interchangeably in this article.

[3] 18 U.S.C. §1151 (2012). Section 1151 defines Indian country as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and , including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Id.

[4] U.S. DEP'T OF JUST., AMERICAN INDIAN AND ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE: ENDING VIOLENCE SO CHILDREN CAN THRIVE, 38 (2014), http://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2014/11/18/finalaianreport.pdf (citing Bonnie E. Carlson, *Children Exposed to Intimate Partner Violence: Research Findings and Implications for Intervention*, 1 TRAUMA, VIOLENCE, & ABUSE 321 (2000)).

[5] *Id.*; *see also* Jonathan Litt & Heather Valdez Singleton, *American Indian/Alaska Native Youth & Status Offense Disparities: A Call for Tribal Initiatives, Coordination & Federal Funding*, COALITION FOR JUVENILE JUSTICE AND THE TRIBAL LAW AND POLICY INSTITUTE 1-5 (Jun. 2015), http://www.juvjustice.org/sites/default/files/resource-files/SOS%20Tribal%20Brief%20FINAL_0.pdf; INDIAN LAW & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES 156 (2013), www.aisc.ucla.edu/iloc/report/ [hereinafter ILOC REPORT].

[6] S. REP. NO. 111-93, at 2 (2009) (citing *Child Maltreatment*, U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES 28 (2006) ("AI/AN youth "suffer rates of abuse at 15.9 per 1,000 children")); *see also* Neelum Arya & Addie Rolnick, *A Tangled Web of Justice: American Indian and Alaska Native Youth in Federal, State, and Tribal Justice Systems*, 5 RACE & ETHNICITY, Jun. 3, 2008, at 1, 5, http://www.modelsforchange.net/publications/212.

[7] U.S. DEP'T OF JUST., *supra* note 4, at 74 (citation omitted).

[8] *Id.* at 38.

[9] *Id.* (citing ILOC REPORT, *supra* note 5, at 151).

veterans returning from Iraq and Afghanistan.[10] Data suggests that AI/AN youth report the threat of injury and witnessing injury as the most common form of trauma exposure.[11] Moreover, poverty[12] and historical trauma[13] are significant factors in this cataclysm.

While tribal governments acknowledge their responsibility to keep tribal citizens safe, various federal intrusions and restrictions placed upon tribal sovereignty impede tribes from doing so.[14] Of scant data available, non-Indians are committing a majority of sexual violence against American Indians.[15] About one-quarter of all cases of family violence, violence involving spouses, against American Indians involve a non-Indian perpetrator, which is a rate five times higher than any other racial groups.[16] Non-Indians are committing crimes against women and children in Indian country, due in part to a huge gap in tribal criminal jurisdiction created by the U.S. Supreme Court decision in *Oliphant v. Suquamish Indian Tribe*.[17] *Oliphan*t held that tribal courts lack subject matter jurisdiction over non-Indians committing crimes in Indian country.[18] *Oliphant* created an untenable chasm in justice.[19] However, a recent shift in federal policy supporting tribal sovereignty has loosened some of the previous federal restrictions placed on tribal courts related to criminal jurisdiction. In particular, Section 904 of the Violence Against Women Act of 2013 (VAWA)[20] relaxed the federal restriction set forth in *Oliphant* by allowing

---

[10] ILOC REPORT, *supra* note 5, at 151.

[11] Dolores Subia BigFoot et al., *Trauma Exposure in American Indian/Alaska Native Children*, INDIAN COUNTRY CHILD TRAUMA CENTER 3 (2008) http://www.theannainstitute.org/American%20Indians%20and%20Alaska%20Natives/trauma%20Exposure%20in%20AIAN%20Children.pdf.

[12] *See* ILOC REPORT, *supra* note 5, at 151.

[13] Maria Yellow Horse Brave Heart et al., *Historical Trauma Among Indigenous Peoples of the Americas: Concepts, Research, and Clinical Considerations*, 43 J. PSYCHOACTIVE DRUGS 282, 282-83 (2011). Historical trauma is defined as cumulative emotional and psychological wounding across generations, including the lifespan, which emanates from massive group trauma. *Id.* at 283.

[14] *See infra* Part III.

[15] *See* AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 5 (2007), http://www.amnestyusa.org/pdfs/mazeofinjustice.pdf.

[16] *See* STEVEN W. PERRY, U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS, A BJS STATISTICAL PROFILE, 1992-2002: AMERICAN INDIANS AND CRIME 8 (1999), http://www.bjs.gov/content/pub/pdf/aic02.pdf.

[17] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).

[18] *Id.*

[19] *See* Attorney General Loretta E. Lynch, Remarks at the Justice Department Event in Recognition of Domestic Violence Awareness Month (Oct. 6, 2015), http://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-justice-department-event-recognition.

[20] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54, 120-23 (2013) (amending 25 U.S.C. § 1304) [hereinafter VAWA]. Section 904 of VAWA provides:

Sec. 904 TRIBAL JURISDICTION OVER CRIMES OF DOMESTIC VIOLENCE.

Title II of Public Law 90-284 (25 U.S.C. 1301 et. seq.) (commonly known as the "Indian Civil Rights Act of 1968") is amended by adding at the end the following: "SEC. 204. TRIBAL JURISDICTION OVER CRIMES OF DOMESTIC VIOLENCE.

(a) DEFINITIONS—In this section:

(1) DATING VIOLENCE—The term 'dating violence' means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

(2) DOMESTIC VIOLENCE.—The term 'domestic violence' means violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family-violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs.

(3) INDIAN COUNTRY—The term 'Indian country' has the meaning given the term in section 1151 of title 18, United States Code.

(4) PARTICIPATING TRIBE—The term "participating tribe' means an Indian tribe that elects to exercise special domestic violence criminal jurisdiction over the Indian country of that Indian tribe.

(5) PROTECTION ORDER—The term 'protection order'—

(A) means any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; and

(B) includes any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a Pendente lite order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of the person seeking protection.

(6) SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION—The term 'special domestic violence criminal jurisdiction' means the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.

(7) SPOUSE OR INTIMATE PARTNER—The term 'spouse or intimate partner' has the meaning given the term in section 2266 of title 18, United States Code.

(b) NATURE OF CRIMINAL JURISDICTION—

(1) IN GENERAL—Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by sections 201 and 203 [25 USC § 1301 and 1303, respectively], the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.

(2) CONCURRENT JURISDICTION—The exercise of special domestic violence criminal jurisdiction by a participating tribe shall be concurrent with the jurisdiction of the United States, of a State, or of both.

(3) APPLICABILITY—Nothing in this section—

(A) creates or eliminates any Federal or State criminal jurisdiction over Indian country; or

(B) affects the authority of the United States or any State government that has been delegated authority by the United States to investigate and prosecute a criminal violation in Indian country.

(4) EXCEPTIONS—

(A) VICTIM AND DEFENDANT ARE BOTH NON-INDIANS—

(i) IN GENERAL—A participating tribe may not exercise special domestic violence criminal jurisdiction over an alleged offense if neither the defendant nor the alleged victim is an Indian.

(ii) DEFINITION OF VICTIM—In this subparagraph and with respect to a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction based on a violation of a protection order, the term 'victim' means a person specifically protected by a protection order that the defendant allegedly violated.

(B) DEFENDANT LACKS TIES TO THE INDIAN TRIBE—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.

(c) CRIMINAL CONDUCT—A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant for criminal conduct that falls into one or more of the following categories:

(1) DOMESTIC VIOLENCE AND DATING VIOLENCE—An act of domestic violence or dating violence that occurs in the Indian country of the participating tribe.

(2) VIOLATIONS OF PROTECTION ORDERS—An act that—

(A) occurs in the Indian country of the participating tribe; and

(B) violates the portion of a protection order that—

(i) prohibits or provides protection against 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 participating tribe; and

(iv) is consistent with section 2265(b) of title 18, U.S. Code.

(d) RIGHTS OF DEFENDANTS—In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide to the defendant—

(1) all applicable rights under this Act;

(2) if a term of imprisonment of any length may be imposed, all rights described in section 202(c) [25 USC 1302(c)];

(3) the right to a trial by an impartial jury that is drawn from sources that—

(A) reflect a fair cross section of the community; and

(B) do not systematically exclude any distinctive group in the community, including non-Indians; and

(4) all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.

(e) PETITIONS TO STAY DETENTION—

(1) IN GENERAL—A person who has filed a petition for a writ of habeas corpus in a court of the United States under section 203 [25 USC § 1303] may petition that court to stay further detention of that person by the participating tribe.

tribal courts that meet certain federal mandates to exercise criminal jurisdiction over non-Indians committing certain statutorily enumerated crimes against Indian victims in Indian country.[21] Tribal courts are extremely capable of exercising criminal jurisdiction over all perpetrators, Indian and non-Indian alike, who commit domestic violence and ancillary crimes.[22] Tribal courts are making steady progress implementing Section 904 of VAWA.[23] However, Section 904 is far too narrow to protect child victims of domestic violence and ancillary crimes in Indian country.[24] Section 904 must be amended to allow tribal courts to exercise special domestic violence criminal jurisdiction over non-Indians who commit domestic violence and ancillary crimes against AI/AN children in Indian country.

II. DOMESTIC VIOLENCE CRIMES IN INDIAN COUNTRY AND AI/AN CHILDREN

Domestic violence, in this article, is defined as "a pattern of abusive behavior in any [intimate] relationship that is used by one partner to gain or maintain power and control over another intimate partner."[25] Domestic violence can be "physical, sexual, emotional, economic, or psychological actions or threats of actions that influence another person . . . includ[ing] any behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone."[26]

> (2) GRANT OF STAY—A court shall grant a stay described in paragraph (1) if the court—
>
> (A) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and
>
> (B) after giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.
>
> (3) NOTICE—An Indian tribe that has ordered the detention of any person has a duty to timely notify such person of his rights and privileges under this subsection and under section 203 [25 USC § 1303]."

VAWA § 904, 127 Stat. at 120-23.

[21] *Id.* (limiting tribal jurisdiction over non-Indians to the crimes of domestic violence, dating violence, and the violation of a protection order).

[22] *See infra* Part IV. Both Congress' legislative intent behind the Indian Civil Rights Act and the Supreme Court's reasoning in *Oliphant* were grounded in the thinking that tribal courts were/are somehow inadequate. As we detail in Part IV, this thinking is misguided.

[23] *See, e.g., About the Inter-Tribal Working Group*, NAT'L CONG. OF AM. INDIANS: TRIBAL IMPLEMENTATION OF VAWA, http://www.ncai.org/tribal-vawa/pilot-project-itwg/about-itwg (last visited Mar. 30. 2015) (listing the tribes that have made efforts to implement special domestic violence criminal jurisdiction under VAWA).

[24] *See* VAWA, Pub. L. No. 113-4, § 904, 127 Stat. 54, 120-23 (2013) (amending 25 U.S.C.A § 1304).

[25] *Domestic Violence*, U.S. DEP'T OF JUST. (Oct. 6, 2015), http://www.justice.gov/ovw/domestic-violence.

[26] *Id.*

American Indian women residing on Indian reservations suffer domestic violence and physical assault at rates far exceeding women of other ethnicities.[27] In 2004, the Department of Justice estimated that the assault rates among AI/AN women were as much as 50% higher than the next most victimized demographic.[28] Domestic violence and crimes against children are concomitant. Children who witness domestic violence within their home are 15 times more likely than the national average to be abused[29] Various forms of ancillary crimes may be present in a domestic violence case, such as physical assaults, sexual assaults, destruction of property, stalking, breaking and entering, child abuse, child neglect, and child sexual assault.[30]

Domestic violence has a substantial effect on children, particularly those who grow up witnessing domestic violence. Frequent exposure to violence in the home not only predisposes children to numerous social and physical problems, but also teaches them that violence is a normal way of life—thereby increasing their risk of becoming society's next generation of victims and abusers.[31] Repeated exposure to childhood violence has a staggering impact on an individual's health and well-being. According to the Adverse Childhood Experience (ACE) Study, "persons who experience four or more childhood adversities have a four- to twelvefold increased risk for alcoholism, drug use, depression, and suicide attempt[s] when compared to those who had experienced [no childhood adversities]."[32] The combination of the ACE Study and the data on AI/AN children exposed to violence demonstrates that AI/AN children have a "fivefold higher risk of being exposed to four or more adverse childhood events, underscor[ing] the overwhelming impact of exposure to violence . . . ."[33] A recent study supported by the Department of Justice's Office on Violence Against Women provides insight into the co-occurrence of domestic violence and child maltreatment in Indian country and highlights key challenges specific to AI/AN communities.[34]

Poverty contributes to a number of less than desirable environmental conditions that contribute to increased stress and trauma. Approximately 28 percent of AI/AN live in poverty, compared with 16 percent of the general

---

[27] Brief for National Network to End Domestic Violence et al. as Amici Curiae Supporting Respondents at 2, Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008) (No. 07-411).

[28] *See* PERRY, *supra* note 16, at iv-v.

[29] Sandra A. Graham-Bermann & Kathryn H. Howell, *Child Maltreatment in the Context of Intimate Partner Violence*, *in* THE APSAC HANDBOOK ON CHILD MALTREATMENT 169 (3d ed. 2011).

[30] *Id.*

[31] *See id.* at 170-72.

[32] U.S. DEP'T OF JUST., *supra* note 4, at 9 (citation omitted).

[33] *Id.*

[34] *See generally* White Eagle, Maureen, Clairmont, Bonnie, & Hunter Lonna, *Responses to the Co-Occurrence of Domestic Violence and Child Maltreatment in Indian Country: Repairing the Harm and Protecting Children and Mothers*, TRIBAL L. & POL'Y INST. (December 2011), http://www.tribal-institute.org/download/OVWGreenbookReportHVS_TD_7-18.pdf.

population, and 13 percent of white Americans.[35] "Single parent AI/AN families have the highest poverty rates in the country."[36] The Indian Law and Order Commission stated that AI/AN Native youth are among the most vulnerable group on children in the United States. "In comparison to the general population, poverty, substance abuse, suicide, and exposure to violence and loss disproportionately plague Native youth."[37]

Although all tribes are unique, one common feature of nearly all Indian tribes is a "shared history of destructive federal policies intended to assimilate Indian people into the American way of life."[38] These destructive policies included "forced relocation, forced removal of their children to be educated in boarding schools, and prohibition of spiritual and cultural practices."[39] The abuse of Indian women and children can be traced to the introduction of foreign ways of life that were unnatural to the Native cultures.[40] This theory states that violence against AI/AN women directly relates to historical victimization, domination and oppression of Native peoples, exacerbated by both economic deprivation and dependency, facilitated through the restriction of tribal rights and sovereignty.[41] Consequently, AI/ANs today are believed to suffer from internalized oppression and the normalization of violence.[42]

Before the arrival of European immigrants, tribal youth were not so endangered. While tribal cultures vary considerably, common threads of spirituality and community reveal tribal child-rearing practices and beliefs that promote a natural system of child protection quite distinct from Western individualized child-rearing customs.[43] Prior to contact with European immigrants, traditional Indian spiritual beliefs emphasized that "all things had a spiritual nature that demanded respect," including children.[44] Indian children were taught self-discipline through methods marked with extraordinary patience and tolerance.[45] The nuclear family, as well as the extended family and community members, often had child-rearing responsibilities, extending the responsibility of the protection of children to all people within the community.[46] Child abuse and neglect were rarely a

---

[35] U.S. CENSUS BUREAU, *Poverty Status in the Past 12 Months* (2010), http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk.

[36] Dolores Subia Bigfoot & Susan R. Schmidt, *Honoring Children, Mending the Circle: Cultural Adaptation of Trauma-Focused Cognitive Behavioral Therapy for American Indian and Alaska Native Children*, 66 J. CLINICAL PSYCHOLOGY 847, 848 (2010).

[37] ILOC REPORT, *supra* note 5, at xxv.

[38] U.S. DEP'T OF JUST., *supra* note 4, at 95.

[39] *Id.*

[40] NAT'L SEXUAL VIOLENCE RES. CTR., SEXUAL ASSAULT IN INDIAN COUNTRY: CONFRONTING SEXUAL VIOLENCE 2-3 (2000).

[41] *Id.*

[42] *See* Dolores Subia BigFoot, *History of Victimization in Native Communities*, NATIVE AMERICAN TOPIC-SPECIFIC MONOGRAPH SERIES 3 (1997).

[43] *See* U.S. DEP'T OF JUST., *supra* note 4, at 74.

[44] *Id.* at 74-75.

[45] *Id.* at 75.

[46] *Id.*

problem in traditional tribal settings because of these traditional beliefs and natural safety net.[47] Since time immemorial, tribes have sought to maintain balanced systems of social control and dispute resolution.[48] A tribe's ability to continue these tribal customs and traditions, and otherwise exercise its sovereignty to define its own community, is woven through each and every issue affecting AI/AN children.[49] The iconic Wilma Mankiller, former President of the Cherokee Nation, said it best, "I [] want to be remembered for emphasizing the fact that we ha[d] indigenous solutions to our problems."[50]

III. FEDERAL INTRUSIONS AND RESTRICTIONS ON TRIBAL SOVEREIGNTY

Presently, tribal governments are still considered to be sovereign nations with the inherent power to self-govern, unless that power is divested by Congress.[51] Tribal sovereignty encompasses the authority of a tribe to govern itself.[52] Unfortunately, this authority is currently "asterisked" by a mish-mash of conflicting and counter-intuitive federal policies, dating back to the Constitutional Convention.[53] To understand such devastating rates of violence and trauma in Indian country, as well as to develop cognizable solutions, it is critical to grasp the context in which tribal governments have come to coexist with the United States.

In federal Indian Law, three crucial terms serve to delineate tribal jurisdictional authority, legal responsibilities and property rights—Indian tribe, Indian, and Indian Country.[54] Curiously, none of these terms have a single, all-purpose definition that has consistently been utilized by the federal government.[55] The term "Indian tribe" or "Indian nation" refers to "an indigenous North American group with which the United States has established a legal relationship."[56] In 2010, approximately 5.2 million people identified as being Native American.[57] Each tribe has formally established enrollment criteria.[58] No single set of criteria exists which establishes tribal membership consistently across tribes.[59] The term "Indian" refers "either to

---

[47] *See* U.S. DEP'T OF JUST., *supra* note 4, at 74.

[48] *See id*.

[49] *Id.* at 41.

[50] WILMA MANKILLER & MICHAEL WALLIS, MANKILLER: A CHIEF AND HER PEOPLE 250-51 (1993).

[51] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 207 (Nell Jessup Newton ed. 2012) [hereinafter COHEN'S HANDBOOK].

[52] *See id.*

[53] *See id.* at 208.

[54] *Id.* at 130.

[55] *Id.*

[56] *Id.* at 130-131 (internal quotations omitted).

[57] TINA NORRIS ET AL., U.S. CENSUS BUREAU, BRIEF NO. C2010BR-10, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010 (2012), http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf.

[58] *See* COHEN'S HANDBOOK, *supra* note 51, at 131-37.

[59] *Id.* At 131-32.

a member of such a tribe or a person with some specified relationship to such a tribe."[60] Historically, American Indians tended to use a much broader definition of Indian.[61]

"Indian Country" refers to the territory set aside for the operation of special rules allocating governmental power among Indian tribes, the federal government, and the states.[62] The legal definition of "Indian Country" typically means "(a) all land within the limits of any reservation under the jurisdiction of the United States government . . . (b) all dependent Indian communities within the borders of the United States . . . and, (c) all Indian allotments, the Indian titles to which have not been extinguished . . . ."[63]

At the time of European contact, tribes were sovereign by nature and conducted their own internal affairs.[64] Inherent tribal sovereignty is a power that originates from within the tribe, as opposed to a delegation of power from another sovereign, such as the delegation of power from the state to a local county.[65] Tribal sovereignty includes the inherent authority to govern and protect the health, safety, and welfare of tribal citizens within tribal lands, including AI/AN youth.[66]

However, Europeans perceived their "discovery" of the Americas as a necessary diminishment of tribal sovereignty.[67] This perceived diminishment led the United States to demote tribes to "domestic dependent sovereigns,"[68] over which Congress exercises exclusive plenary power.[69] Despite the 566 tribal nations representing a panoply of various and complex government structures and cultures, European and American settlers either failed to recognize, or at least deemed inferior, tribal non-Western judiciary models.[70] This perception of inferiority and diminished tribal sovereignty led to a pattern of nineteenth and early twentieth century legislation aimed towards introducing "law" to the "lawless Native American people."[71]

---

[60] COHEN'S HANDBOOK, *supra* note 51, at 131.

[61] *See id.* at 132.

[62] *Id.* at 131.

[63] 18 U.S.C. § 1151 (2012).

[64] WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 73 (6th ed. 2015).

[65] *Id.* at 73.

[66] *See id.*

[67] Johnson v. M'Intosh, 21 U.S. 543, 568 (1823) ("Even if it should be admitted that the Indians were originally an independent people, they have ceased to be so. A nation that has passed under the dominion of another, is no longer a sovereign state").

[68] *See* Cherokee Nation v. Georgia, 30 U.S. 1, 19-20 (1831) (holding that tribes are not foreign states, but that they maintain a degree of independence from the United States despite colonial expansion).

[69] *See* United States v. Kagama, 118 U.S. 375, 383-85 (1886). It is from this plenary power that Congress derives its authority to enact most legislation that affects tribes and Native peoples. *Id.*

[70] VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 81 (1983).

[71] Rebecca A. Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CAL. L. REV. 185, 198 (2008); *see also* James Bradley Thayer, *A People Without Law*, *in* LEGAL ESSAYS 96-97 (1908).

A. Federal Intrusion on Tribal Sovereignty: The General Crimes Act

In 1817, Congress enacted the General Crimes Act, also known as the Indian Country Crimes Act.[72] Rejecting tribal territorial jurisdiction from the outset, the General Crimes Act provides federal courts with concurrent jurisdiction over interracial crimes that are committed in Indian country.[73] Tribes retained their exclusive authority to prosecute crimes committed by Indians (including non-tribal members) against Indians, as well as over crimes committed by Indians against non-Indians, so long as the tribe has already initiated "punishment."[74] Concerning the prosecution of non-Indian perpetrators, the tribes and the federal government were concurrently empowered.[75]

Congress's intrusion into tribal territorial jurisdiction was primarily concerned with the non-Indian.[76] Tribes were acknowledged to have sovereign systems co-existing with America, but these systems could be trusted only so far as they applied to Indians.[77] The General Crimes Act continues to be good law today, used by the federal government to exercise criminal jurisdiction for inter-racial crimes.

B. Federal Intrusion on Tribal Sovereignty: The Major Crimes Act

In 1883, the Lakota of the Brule Sioux Band, in response to the murder of Spotted Tail by Crow Dog, required Crow Dog to pay $600, eight horses, and blankets in restitution to Spotted Tail's family.[78] Spotted Tail had maintained

---

[72] *See* 18 U.S.C. § 1152 (2012). Congress additionally passed the Assimilative Crimes Act, providing federal courts with the ability to draw from neighboring state/territorial statutes if federal courts encounter a crime for which they do not have applicable criminal statutes. 18 U.S.C. § 13 (2012).

[73] *See* 18 U.S.C. § 1152. Up until 1881, the federal courts also possessed criminal jurisdiction over crimes committed by a non-Indian against another non-Indian under the General Crimes Act. *See generally* United States v. McBratney, 104 U.S. 621 (1881). However, in *McBratney*, the Supreme Court held that state courts solely possess the criminal jurisdiction to prosecute non-Indian crimes committed in Indian country. *Id.* at 624.

[74] 18 U.S.C. § 1152 specifically states:

> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Id.

[75] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 214 (1978) (noting that Congress never expressly forbade tribes from imposing criminal penalties on non-Indians). Tribes retained all powers not expressly abrogated by Congress until the Supreme Court's ruling of implied divestment of tribal sovereignty in *Oliphant. See id.* at 210.

[76] *Id.* at 201.

[77] *Id.* at 203-04.

[78] CAROLE GOLDBERG, ET. AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM: CASES AND MATERIALS 84 (6th ed. 2010).

relatively friendly relations with the neighboring white settlers.[79] Concerned that Crow Dog was escaping punishment, namely capital punishment, the white settlers pressured federal prosecutors to also prosecute Crow Dog for the murder.[80] In *Ex parte Crow Dog*, the United States Supreme Court held that the federal territorial court could not prosecute Crow Dog due to lack of criminal jurisdiction and because the Lakota had reserved exclusive criminal jurisdiction over its members in the treaty of 1868.[81]

Interpreting the Lakota's restorative justice approach as inadequate justice, federal authorities moved quickly to further inject federal authority into Indian county. In that same year, the United States Department of Interior established "formal" tribal forums termed "Courts of Indian Offenses," also known as "CFR courts" throughout Indian country.[82] CFR courts, a handful of which are still active today, handled less serious criminal actions and resolved disputes between tribal members.[83] At their height, they were also used to enforce pro-assimilation laws that criminalized Native practices, with non-Indian Bureau of Indian Affairs (BIA) superintendents often serving as judges.[84]

In 1885, also in response to *Ex Parte Crow Dog*, Congress enacted the Indian Major Crimes Act, extending concurrent federal criminal jurisdiction over Indians for particular enumerated crimes, regardless of the race of the victim.[85] Congress thereby invaded tribes' exclusive jurisdiction over Indians. Like the General Crimes Act, the Major Crimes Act is also good law, used by the federal government to exercise criminal jurisdiction over Indians for any "major" offense occurring in Indian country.[86]

---

[79] GOLDBERG, *supra* note 78, at 84.

[80] *Id.*

[81] *See Ex parte* Crow Dog, 109 U.S. 556, 567, 572 (1883).

[82] DOCUMENTS OF UNITED STATES INDIAN POLICY 160-61 (Francis Paul Prucha 2d ed. 1990) (citing H.R. EXEC. DOC. NO. 48-1, at x-xiii (1883)). The Commissioner of Indian Affairs established tribunals at all Indian agencies "except among the civilized Indians, consisting of three Indians, to be known as the court of Indian offenses," because "[m]any of the agencies are without law of any kind, and the necessity for some rule of government on the reservations grows more and more apparent each day." *Id. United States v. Clapox* is the only case to directly regard the legality of CFR courts. United States v. Clapox, 35 F. 575, 577 (D. Or. 1888). *Clapox* describes the courts as "mere educational and disciplinary instrumentalities by which the Government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian." *Id.*

[83] B.J. JONES, *Role of Indian Tribal Courts in the Justice System*, NATIVE AMERICAN TOPIC-SPECIFIC MONOGRAPH SERIES 7-8 (Mar. 2000).

[84] *See id.* at 4; *see also* Casey Douma, *40th Anniversary of the Indian Civil Rights Act: Finding a Way Back to Indigenous Justice*, 55 FED. L. 34, 34 (2008).

[85] *See* 18 U.S.C. § 1153 (2012). The United States Supreme Court upheld the constitutionality of the Major Crimes Act in *United States v. Kagama*, holding that Congress possessed the plenary authority to abrogate tribal sovereignty because of its "trust relationship." United States v. Kagama, 118 U.S. 375, 376, 384-85 (1886).

[86] 18 U.S.C. § 1153 (2012). The Major Crimes Act states:

> 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, a felony under chapter 109A, incest, assault with intent to commit

C. Federal Intrusion into Tribal Criminal Jurisdiction: The Indian Civil Rights Act

Tribes were not invited to the Constitutional Convention[87] and therefore did not ratify the document. Further, tribal powers are not derived from the federal government.[88] Thus, the Constitution's protections for individual liberties under the Bill of Rights do not apply to tribal governments.[89] The Indian Civil Rights Act (ICRA) of 1968 extended provisions comparable to select provisions of the Bill of Rights, including equal protection, due process, and aspects of criminal procedure to tribal governments.[90] Congress sought to ensure that individuals under tribal jurisdiction would be guaranteed individual rights comparable to those under state and federal jurisdiction.[91] By extending these rights, Congress elevated the rights of Indian individuals, but at the expense of tribal sovereignty.[92] There was no opt-out clause or recognition of tribes that already guarantee due process protections to its litigants. Rather, the protection of individual liberty was narrowly interpreted, and the nature of tribal courts was broadly besmirched such that all tribal courts needed to further Americanize in order to obtain legitimacy.[93]

Further, the ICRA goes beyond criminal procedural protections. Through ICRA, Congress restricted tribal courts' sentencing authority to impose a

---

> murder, assault with a dangerous weapon, assault resulting serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title 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.

18 U.S.C. § 1153 (2012).

[87] *Angela R. Riley, Introduction, in* THE INDIAN CIVIL RIGHTS ACT AT FORTY xi (Kristen A. Carpenter et al. eds., 2012).

[88] *See* Talton v. Mayes, 163 U.S. 376, 382-83 (1896).

[89] *Id.* at 384 (holding that the Fifth Amendment right to a grand jury does not apply to the Cherokee Nation).

[90] 25 U.S.C. § 1302, (2012).

[91] *Riley*, *supra* note 87, at xi (citing S. REP. No. 90-721, at 33 (1968)) ("The proposed legislation . . . is an effort on the part of those who believe in constitutional rights for all Americans to give 'the forgotten Americans' basic rights which all other Americans enjoy.").

[92] *See, e.g.*, S. REP. No. 90-721, at 31 (1968); *see also Riley*, *supra* note 87, at xi-xii. The ICRA intentionally did not extend all of the Bill of Rights, such as the Establishment Clause, recognizing tribal theocracies and other tribal forms of government inconsistent with the American Constitution. *Id.* at xi.

[93] *See* SUMMARY REPORT OF HEARINGS AND INVESTIGATIONS BY THE SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 89th Cong., 2d Sess. 24 (1966) [hereinafter 1966 SUMMARY REPORT] ("Indian citizen's rights are most seriously jeopardized by the tribal government's administration of justice. These denials occur, it is also apparent, not from malice or ill-will, or from a desire to do injustice, but from the tribal judges' inexperience, lack of training, and unfamiliarity with the traditions and forms of the American legal system.").

felony sentence for criminal acts for crimes committed in Indian country.[94] As originally enacted, section 1302(7) limits tribes from imposing any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both.[95] In 1986, Congress raised the sentencing limitations to one-year imprisonment, a fine of $5,000, or both.[96] This sentencing limitation is in place for tribal courts regardless of the nature of the crime being prosecuted, including murder, rape, child abuse or child sexual assault.[97] The Congressional reasoning for these limitations, while never explicitly stated, was rooted at least in part by Congress's belief that tribal courts were inadequate.[98] As a result of ICRA, tribal courts are significantly restricted in the sentences they can administer, while nevertheless expected to exude the American ideals of criminal procedure.

D. Federal Intrusion: The Oliphant *Restriction on Tribal Criminal Jurisdiction*

Congress has remained silent concerning the restriction of tribal criminal jurisdiction over non-Indians. For over two centuries, it was settled doctrine that while Congress had expanded its own authority to prosecute in Indian country, Indian tribes retained their inherent sovereign powers to criminally prosecute both Indians and non-Indians.[99] Tribal courts were simply limited in what criminal sentences they could dispense.

In 1978, the Supreme Court unilaterally abrogated tribal criminal jurisdiction, holding that tribal sovereignty had been diminished over time such that tribes now lack criminal jurisdiction over non-Indians.[100] In reaching its decision, the Court relied on the domestic dependent status of tribes, finding such dependent status to be inconsistent with jurisdiction over non-Indians.[101]

---

[94] *See* 25 U.S.C. § 1302. A felony is defined as a crime punishable by imprisonment in excess of one year. 18 U.S.C. § 3156(a)(3) (2012).

[95] The Indian Civil Rights Act of 1968, Pub. L. 90-284, Title II, § 202, at 77 (1968).

[96] Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, Pub. L. No. 99-570, § 4217 (codified as amended at 25 U.S.C. § 1302(a)(7)(B) (2006)).

[97] *See* 25 U.S.C. § 1302(a)(7)(B) ("No Indian tribe in exercising powers of self-government shall . . . impose for conviction of *any 1 offense* any penalty or punishment greater than imprisonment for a term of 1 year or a fine of $ 5,000, or both . . . .") (emphasis added).

[98] THE INDIAN CIVIL RIGHTS ACT AT FORTY 217 (Kristen A. Carpenter et al. eds., 2012).

[99] *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 146-47 (1981) (holding that a tribe does not abandon its sovereign powers simply because it has not expressly reserved them though a contract); *see also* United States v. Mazurie, 419 U.S. 544, 557 (1975) (finding that tribes have traditionally had power over both their members and their territory.); Worcester v. Georgia, 31 U.S. 515, 561 (1832) (stating that a Georgia law had no effect in Cherokee Indian country, even with regard to non-Indians).

[100] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) (holding that tribes lack criminal jurisdiction over non-Indian defendants).

[101] *See id*. at 209-10 ("By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily [gave] up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.").

This blow to tribal sovereignty, with no statutory foundation, means non-Indian offenders enjoy freedom from any tribal prosecutorial authority, and often are low priority for state and federal prosecution.[102] In response, tribes have used creative civil mechanisms to hold non-Indian offenders accountable including civil contempt, exclusion/banishment, forfeiture, and cross-deputization with neighboring sovereigns.[103] These remedies are unfortunately a far cry from an effective penance or deterrent, particularly for crimes against children.[104]

E. Federal Intrusion on Tribal Sovereignty: Public Law 280

Criminal jurisdiction in Indian country was further complicated in 1953 by the enactment of Public Law 280.[105] Public Law 280 mandatorily relinquished federal criminal jurisdiction to certain enumerated states,[106] and provided the option to other states,[107] with differing jurisdictional consequences. The goal of Public Law. 280 was further tribal assimilation, with Congress noting "lawlessness on reservations, the desire to assimilate Indian tribes into the population at large, and a shrinking federal budget for Indian affairs" as their primary motivations.[108] Public Law 280 did not strip tribes of their jurisdiction.[109] Rather, tribes and the state share concurrent criminal jurisdiction.[110] However, the impact of Public Law 280 is sweeping, generally marking severely under-developed or nonexistent tribal criminal

---

[102] CARRIE E. GARROW & SARAH DEER, TRIBAL CRIMINAL LAW AND PROCEDURE 115 (2d ed. 2015).

[103] *Id.*

[104] Hallie Bongar White et al., *Creative Civil Remedies Against Non-Indian Offenders in Indian Country*, 44 TULSA L. REV. 427, 427 (2008).

[105] Pub. L. No. 83-280, § 2, 67 Stat. 588 (1953) (codified at 18 U.S.C. § 1162 (2012)); 25 U.S.C. § 1321 (2012) (stating that "the United States shall accept concurrent jurisdiction to prosecute violations of sections 1152 and 1153 of title 18, United States Code, within the Indian country of the Indian tribe"); *see also* Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 698 (2006).

[106] Public Law 280 mandatorily divested jurisdiction to Alaska (except over Metlakatla Indian Reservation), California, Minnesota (except over Red Lake Reservation), Nebraska, Oregon (except over Warm Springs Reservation), and Wisconsin. Pub. L. No. 83-280, § 2(a), 67 Stat. 588, 588 (1953) (codified at 18 U.S.C. § 1162).

[107] Public Law 280 also provides opt-in authority to states other than the those granted mandatory jurisdiction. Pub. L. No. 83-280, § 27, 67 Stat. 588, 590 (1953); 25 U.S.C. § 1321 (2012). The states currently exercising this optional jurisdiction are Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington). *See* COHEN'S HANDBOOK, *supra* note 51, at 544 n.308.

[108] Rebecca A. Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CAL. L. REV. 185, 205 (2008) (citing Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1659 (1998)).

[109] *See* Walker v. Rushing, 898 F.2d 672, 675 (8th Cir. 1990).

[110] *See id.* (holding that tribes retain the same criminal authority under Public Law 280 that they do under the federal statutory system).

justice systems coupled with weak and inadequate state and local responses.[111]

F. Results: Criminal Jurisdiction in Indian Country Today

Instead of a single, coherent vision of criminal justice in Indian country, the history of these varying laws reveal a tangled labyrinth of contradictory policies that pose a significant hindrance to law enforcement efforts.[112] Tribal criminal jurisdiction currently depends upon the race of the perpetrator, the race of the victim, where the crime was committed and the nature of the crime.[113] Because the race of a party is not always obvious, determining who has investigative authority can take weeks.[114] The delivery of justice "depends on each identified government being able and willing to fulfill its Indian country responsibilities,"[115] including "extensive coordination between police departments, prosecutors' offices, court systems, probation/parole offices, and victim service providers."[116]

Tribal court sentencing and jurisdictional limitations are premised on the belief that federal prosecutors will pick up the slack by prosecuting the serious offenders that tribal courts are unable to effectively prosecute or sentence.[117] However, from 2005 to 2009, the federal declination rate of

---

[111] *See* Goldberg & Champagne, *supra* note 105, at 697.

[112] *See* COHEN'S HANDBOOK, *supra* note 51, at 736; *see also* Judith V. Royster, Oliphant *and Its Discontents: An Essay Introducing the Case for Reargument before the American Indian Nations Supreme Court*, 13 KAN. J. L. & PUB. POLICY 59, 61 (2003) (pointing out that the Federal Bureau of Investigation, the primary investigative agency for crimes in Indian country committed by non-Indians against Indians, has been reoriented from traditional law enforcement activities toward increasing anti-terrorism functions); *see, e.g.*, *General Guide to Criminal Jurisdiction in Indian Country*, TRIBAL COURT CLEARING HOUSE, http://www.tribal-institute.org/lists/jurisdiction.htm (last visited Mar. 24, 2016).

[113] *See* 18 U.S.C. § 1152 (providing that federal courts have jurisdiction over interracial crimes committed in Indian country); Assimilative Crimes Act, 18 U.S.C. § 13; Major Crimes Act, 18 U.S.C. § 1153 (providing federal criminal jurisdiction, exclusive of the states, over ten enumerated major crimes committed in Indian country); 18 U.S.C. § 1162 (delegating federal jurisdiction to six states over most crimes throughout most of Indian country within their state borders); *see also* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) (holding that tribes lack criminal jurisdiction over non-Indian defendants); VAWA, Pub. L. No. 113-4, § 904, 127 Stat. 54, 120-23 (2013) (amending 25 U.S.C.A § 1304) (expanding tribal criminal jurisdiction to non-Indians for the crimes of domestic violence, dating violence and the violation of protection orders so long as the defendant has certain ties to the community and the tribe provides certain due process protections).

[114] *See* Alfred Urbina & Melissa Tatum, *Considerations in Implementing VAWA's Special Domestic Violence Criminal Jurisdiction and TLOA's Enhanced Sentencing Authority: A Look at the Experience of the Pascua Yaqui Tribe*, INDIAN L. RESOURCE CTR. 17 (2014), http://www.ncai.org/tribal-vawa/getting-started/Practical_Guide_to_Implementing_VAWA_TLOA_letter_revision_3.pdf (noting that the victim must be Indian and the defendant must have a connection with the tribe).

[115] ILOC REPORT, *supra* note 5, at 9.

[116] Urbina & Tatum, *supra* note 114, at 6.

[117] *See id.* at 23, 32, 34, 54.

crimes committed in Indian country was approximately 52 percent.[118] Of the types of cases which declined, 46 percent were assault matters and 67 percent were sexual abuse matters arising in Indian country.[119] Furthermore, U.S. Attorneys, FBI field offices, and federal courthouses are rarely located near an Indian reservation, and often are hundreds of miles away.[120] Criminal prosecution in Indian country, especially for less serious crimes, has often been seen as low-status work for federal prosecutors.[121] Moreover, the crimes and their punishments are defined largely by federal officials, not tribal officials.[122] Such great distances, both geographic and cultural, isolate the victim and witnesses from the tribunal, as well as the federal prosecutor from the community.[123] The result is a significant discrepancy in what crimes are investigated and prosecuted, and how often.[124]

Public Law 280 states that state governments are expected to provide criminal justice services over Indian country with no funding, while the federal government reduced or completely eliminated funding to tribal justice systems.[125] Public Law 280 states have proven to be less cooperative and predictable than the federal government.[126] In an immense study on law enforcement and criminal justice in Public Law 280 states, researchers found:

> (1) county-state police overstepping their authority through excessive force, disrespect of Tribal law, discrimination, and arrests without proper warrants; (2) a lack of county-State police presence or minimal patrolling; (3) inadequate county-State police response; (4) a perceived lack of thoroughness and timeliness in investigations; (5) perceived poor communications by county-

---

[118] U.S. GOV'T ACCOUNTABILITY OFF., U.S. DEP'T OF JUST. DECLINATIONS OF INDIAN COUNTRY CRIM. MATTERS 3 (2010), http://www.gao.gov/products/GAO-11-167R.

[119] *Id.*

[120] Seth Fortin, *The Two-Tiered Program of the Tribal Law and Order Act*, 61 UCLA L. REV. 88, 92 (2013).

[121] *Id.*

[122] Kevin K. Washburn, *American Indians, Crime and the Law*, 104 MICH. L. REV. 709, 726-29 (2006).

[123] *Id.* at 729-30.

[124] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 118, at 3 (reporting that from 2005-2009, the Government Accountability Office (GAO) found that U.S. Attorneys declined to prosecute nearly 52% of violent crimes in Indian country). Prior to the enactment of TLOA, United States Attorneys were not required to report their declination rates. *See* U.S. DEP'T OF JUST., INDIAN COUNTRY INVESTIGATION AND PROSECUTIONS 2011-2012 3 (2013). Section 212 of the Tribal Law and Order Act of 2010 (TLOA) now requires that they submit an annual report to Congress detailing their declination rates. *Id.* According to their first report, United States Attorney Offices declined to prosecute 37% of all Indian country submissions for prosecution in 2011, and 31% in 2012. *Id.* at 5; *see also* Fortin, supra note 120, at 92; Laura C. Sayler, *Back to Basics: Special Domestic Violence Jurisdiction in the Violence Against Women Reactivation Act of 2013 and the Expansion of Inherent Tribal Sovereignty*, 1 CARDOZO LAW REV. DE NOVO 1 3 (2014) (citing Samuel E. Ennis, Case Comment, *Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of* Oliphant, 57 UCLA L. Rev. 553, 556 (2009)).

[125] AMNESTY INTERNATIONAL, *supra* note 15, at 29.

[126] ILOC REPORT, *supra* note 5, at 11.

> State police with tribal communities; (6) a lack of respect by county-State police for Tribal culture and Tribal governmental authorities; and (7) overall perceptions of unfairness.[127]

The current constraints on tribal court criminal jurisdiction deprive tribal governments of potent tools to combat domestic violence crimes committed by non-Indians against Indians in Indian country. Moreover, tribes are prohibited from applying uniform law throughout their territory.[128] Tribes are limited in their ability to effectively communicate and collaborate with other sovereigns, due in part to the fact that tribal and state systems are grounded in such different conceptual frameworks in which reciprocity is neither possible nor desirable.[129] However, the tide is shifting.

IV. FEDERAL RELAXING OF TRIBAL COURT RESTRICTIONS: EMPOWERING TRIBAL JUSTICE SYSTEMS

The glaringly high rates of violence in Indian country call into question the effectiveness of the federal and state dominance in the Indian country criminal jurisdictional realm. The systems are institutionally complex, lack local accountability and buy-in, and most importantly, do not effectively address the highest rates of violence in the country.[130] However, the federal government is beginning to signal their acknowledgement that these restrictions on tribal criminal authority are not only inconsistent with tribal self-government, they are simply not working.[131] Importantly, the trend of recent federal laws affecting tribal criminal jurisdiction signal an era of tribal-federal partnership, in which tribal governments can decide whether to opt-in to relaxed restrictions on tribal sovereignty.[132]

A. Federal Law Relaxing the ICRA Restrictions on Tribal Court Sentencing: The Tribal Law and Order Act of 2010

In 2010, Congress directly broached the malfunction of criminal justice in Indian country through the enactment of the Tribal Law and Order Act (TLOA) of 2010.[133] Congress explicitly noted that "the complicated jurisdictional scheme that exists in Indian country has a significant negative impact on the ability to provide public safety to Indian communities; [and]

---

[127] ILOC REPORT, *supra* note 5, at 28, n.11; Carole Goldberg & Heather Valdez Singleton, *Final Report: Law Enforcement and Criminal Justice Under Public Law 280*, U.S. DEP'T OF JUST., NCJRS No. 222585, 88-89, 98-99, 133, 143, 166, 201 (2008).

[128] *See* Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction*, 101 CAL. L. REV. 1499, 1503 (2013).

[129] *Id.* at 1005; *see also* Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973, 1002 (2010).

[130] *See* 1966 SUMMARY REPORT, *supra* note 93, at 24.

[131] GARROW & DEER, *supra* note 102, at 165.

[132] *Id.*

[133] Tribal Law and Order Act (TLOA), Pub. L. No. 111-211, §§ 201-266, 124 Stat. 2261, 2261-74 (2010).

has been increasingly exploited by criminals."[134] The comprehensive Act was intended to address multiple areas of criminal justice, including the collaboration between federal, state, and tribal systems.[135]

One of TLOA's core provisions reversed prior federal policy concerning the authority and capacity of tribal courts. Section 234 relaxed the tribal court sentencing restriction of ICRA from a one-year imprisonment and $5,000 fine, to three years' imprisonment and a $15,000 fine.[136] This expanded tribal sentencing authority is "opt-in," such that in order to take advantage of the new sentencing provisions, tribes must provide criminal defendants additional due process protections:

> (1) provide the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
>
> (2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;
>
> (3) require that the judge presiding over the criminal proceeding—
>
> > (A) has sufficient legal training to preside over criminal proceedings; and
> >
> > (B) is licensed to practice law by any jurisdiction in the United States;
>
> (4) . . . make publicly available the criminal laws . . . of the tribal government; and
>
> (5) maintain a record of the criminal proceeding . . . .[137]

These added due process protections further the trajectory of the 1968 Indian Civil Rights Act, empowering tribal courts, but only so long as tribal courts dispense a more palatably Americanized form of justice dictated by federal law. Congress's due process requirements do not stem from twenty-first century research findings on tribal courts, responses to habeas corpus litigation of due process violations, or even from recent hearings on perceived deficiencies in tribal courts.[138] Rather they appear to be in response to the

---

[134] § 202(a)(4), 124 Stat. at 2262.

[135] *See* § 222, 124 Stat. at 2272.

[136] § 234(b), 124 Stat. at 2280 (amending 25 U.S.C. § 1302 (2012)).

[137] 25 U.S.C. §1302(c) (2012).

[138] *See* Rob Roy Smith, *Enhancing Tribal Sovereignty by Protecting Indian Civil Rights: A Win-Win for Indian Tribes and Tribal Members*, AM. INDIAN L.J. 41, 54 (2012) ("[T]here

1960s Senate's Constitutional Committee's original concerns that tribal courts were illegitimate forums.[139]

Nevertheless, TLOA's enhanced sentencing has marked a significant juncture in the tribal-federal relationship. Congress has unequivocally signaled their endorsement of tribal courts as judicial forums capable of handling more than just misdemeanors. With the ability to sentence a three-year imprisonment term and with the option to stack up to nine years,[140] tribes have the ability to better hold Indian offenders accountable. However, *Oliphant* still looms, prohibiting tribal courts from exercising criminal jurisdiction over non-Indian offenders for crimes committed against Indians in Indian country.[141]

B. Federal Law Loosens Restrictions on Tribal Sovereignty and Provides a Partial "Oliphant Fix"

In 2013, Congress continued the trend towards empowering tribal courts through the enactment of Section 904 of the Violence Against Women Reauthorization Act (VAWA) of 2013.[142] In response to epidemic levels of violence being committed against AI/AN women noted above,[143] Congress enacted a partial *Oliphant*-fix by re-affirming tribal criminal jurisdiction over non-Indians for the particular crimes of domestic violence, dating violence, and the violation of a protection order against Indian victims, termed "special domestic violence criminal jurisdiction" (SDVCJ).[144] This was Congress's first declaration concerning tribal criminal jurisdiction over non-Indians, and it represented a powerful endorsement of tribal justice systems, as well as a long overdue recognition of the suffering and vulnerability of Native women.

Like TLOA, however, in order for tribes to utilize their jurisdiction over non-Indians they must "opt-in" and provide the non-Indian defendant additional due process requirements, including all of the due process protections required for TLOA's enhanced sentencing.[145] In addition, to exercise SDVCJ, tribes must ensure to the non-Indian defendant "the right to

---

are only three post-*Santa Clara* ICRA cases brought by tribal members in federal courts that have survived motions to dismiss to reach a decision on the merits of their claims.").

[139] INDIAN CIVIL RIGHTS ACT AT FORTY, *supra* note 98, at 221-22. Testimony before the 1962 Constitutional Rights Subcommittee included such statements as "[i]n fact, you may well find that some tribe have no written laws or regulations governing their courts," and "[s]ome of those who are elected or appointed as Indian judges lack educational qualifications." *Id.* at 222 (testimony of Sen. Keating and testimony of Mr. Carver, Assistant Secretary of Indian Affairs).

[140] 25 U.S.C. § 1302(a)(7)(D) (2012).

[141] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).

[142] VAWA, Pub. L. No. 113-4, § 904, 127 Stat. 54, 120-24 (2013) (amending 25 U.S.C.A § 1304).

[143] *See supra* Part I. AI/AN women are 2.5 times more likely to be raped or sexually assaulted than any other race, with an estimated 34.1 percent of AI/AN women that will be raped in their lifetime. AMNESTY INT'L, *supra* note 15, at 2.

[144] VAWA § 904, 127 Stat. at 121.

[145] *See* 25 U.S.C. § 1304(d)(2) (2012).

a trial by an impartial jury that is drawn from sources that (a) reflect a fair cross section of the community, and (b) do not systematically exclude any distinctive group in the community, including non-Indians."[146] Tribes must also afford the non-Indian defendant "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise criminal jurisdiction over the defendant."[147]

SDVCJ is limited to non-Indian perpetrators who have "ties" to the community, such as residence, employment within the tribal territory, or if the non-Indian is a spouse, intimate partner, or dating partner of a tribal member or an Indian who resides in the tribal territory.[148]

SDVCJ is an extremely limited jurisdictional hook, recognizing tribal authority to prosecute only certain non-Indians, for only three crimes.[149] Of major concern is the narrow class of crimes covered under SDVCJ.[150] Although children are frequently witnesses to domestic violence or victims themselves, the law currently only applies to crimes of domestic or dating violence committed against romantic or intimate partners, or a violation of a protection order that occurs in Indian Country and violates the portion of a protection order that "(i) prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; (ii) was issues against the defendant; (iii) is enforceable by the participating tribe; and (iv) is consistent with section 2265(b) of title 18" of the United States Code.[151] Thus, implementing tribes are unable to prosecute non-Indians for many of the crimes against children that are co-occurring with domestic violence unless the children are named in a protection order set forth in VAWA 2013. Instead, they are left to refer these cases to state or federal authorities, who often do not pursue them.[152]

---

[146] 25 U.S.C. § 1304(d)(3) (2012).

[147] 25 U.S.C. § 1304(d)(4) (2012). Note, the TLOA due process protections are required only for tribes that have opted to have a three-year imprisonment term a possibility for any of its defendants, and then only if a term of imprisonment of any length may be imposed for that particular defendant. *See* 25 U.S.C. § 1302(b).

[148] 25 U.S.C. § 1304(b)(4)(B) (2012); *see also Introduction to the Violence Against Women Act*, TRIBAL COURT CLEARING HOUSE, http://www.tribal-institute.org/lists/title_ix.htm (last visited Feb. 26, 2016) (comparing the due process requirements found in TLOA and VAWA).

[149] The SDVCJ allows for tribal jurisdiction for the crimes of dating violence, domestic violence, and the violation of a protection order. 25 U.S.C. § 1304(c). These crimes are defined in § 1304(a). *See supra* note 20.

[150] *See id.* The Federal Register noted that there are many crimes, in addition to the ones discussed in § 1304(a) that also fall outside the scope of SDVCJ and leave tribal victims without access to justice in too many cases. *See* Pilot Project for Tribal Jurisdiction over Crimes of Domestic Violence, 78 Fed. Reg. 71645, 71648 (Nov. 29, 2013). Sexual assault committed by a stranger or acquaintance, elder abuse, child abuse and many other crimes that tribes consider to be domestic or familial violence are also not covered by SDVCJ. *Id.*

[151] *See* 25 U.S.C. § 1304(c) (2012).

[152] NAT'L CONG. OF AM. INDIANS, SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION PILOT PROJECT REPORT, 26 (2015), https://turtletalk.files.wordpress.com/2016/06/sdvcj-pilot-project-report_6-7-16_final.pdf.

Further, due to the limitation of tribal jurisdiction to domestic violence, dating violence, and violations of protection orders, this jurisdiction does not extend to any other attendant crimes which may occur[153] There is "uncertainty about a tribe's authority to charge an offender for crimes that may occur within the context of the criminal justice process, like resisting arrest, assaulting an officer, witness tampering, juror intimidation, or obstruction of justice."[154] Because tribal prosecutors are unable to charge the full range of criminal conduct that may occur in a domestic violence incident, they may be more dependent on victim cooperation to get a conviction, plea negotiations may be hampered, and ultimately, the offender's criminal history will not accurately reflect the severity of his or her actions.[155]

Finally, when a rape or other assault occurs in Indian country, unless the tribe can prove that the perpetrator was a current or former spouse or intimate partner of the victim, or that the criminal act was a violation of certain portions of a protection order,[156] the tribe continues to lack any criminal jurisdiction over the non-Indian.[157] This is true even when the victim is a child incapable of entering into an intimate relationship.

But, like TLOA, VAWA is also a major Congressional statement endorsing tribal courts as the necessary response to violence in tribal communities. The Act signals a new willingness in Congress to "fix" *Oliphant,* albeit piecemeal, one subject matter at a time.

V. TRIBAL COURTS ARE CAPABLE

Among the principal objections to the extension of tribal jurisdiction over non-Indians is that tribal courts lack the experience and resources to protect the due process rights of criminal defendants.[158] The Supreme Court has

---

[153] NAT'L CONG. OF AM. INDIANS, *supra* note 152, at 28 (describing an instance of uncertainty as to whether the tribal court judge could order a search warrant for urine analysis of a suspected non-Indian domestic violence perpetrator who was visibly under the influence of methamphetamine).

[154] *Id.*

[155] *See id.* at 28.

[156] *Id.* at 7.

[157] *See* Urbina & Tatum, supra note 114, at 6. For example, the first, and as of the date of this publication, only SDVCJ jury trail resulted in an acquittal due to the Pascua Yaqui Tribe's inability to establish an "intimate partnership." Peter Yucupicio, Fred Urbina, & Oscar Flores, *Pascua Yaqui Tribe VAWA Implementation*, PASCUA YAQUI TRIBE 1, (2015) http://www.ncai.org/tribal-vawa/pilot-project-itwg/Pascua_Yaqui_VAWA_Pilot_Project_Summary_2015.pdf. Despite an undisputed violent assault, the same sex couple were not formally out in the community. *Id.*

[158] S. REP. NO. 112-153, at 37-38, 48 (2012) (minority views from Senators Grassley, Hatch, Kyl, and Cornyn, separate minority views from Senators Kyl, Hatch, Sessions, and Coburn); *see also* Tom F. Gede, *Criminal Jurisdiction of Indian Tribes: Should Non-Indians Be Subject to Tribal Criminal Authority Under VAWA?*, 13 J. FED. SOC'Y PRAC. GRP., JULY 2012, at 41 (2012); Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 732 F.3d 409, 417 n.6 (5th Cir. 2013), *opinion withdrawn and superseded*, 746 F.3d 167 (5th Cir. 2014), *cert granted*, 135 S. Ct. 2833 (2015) (noting that the desire to limit tribal civil jurisdiction over

been particularly concerned with the protection of non-Indians from the perceived deficiencies of tribal courts.[159] In debating the special domestic violence criminal jurisdiction provisions of VAWA, minority senators argued that tribes are not bound by the Constitution's First, Fifth, or Fourteenth Amendments, but rather only to statutory analogues in ICRA.[160] However, concerns of inadequate tribal courts and uneducated tribal judges, stemming all the way back to the Senate Constitutional Committee hearings of the 1960, have been significantly addressed in the subsequent five decades.[161]

Today, many tribal courts generally resemble other American judiciaries in feel and substance.[162] While tribal courts can apply customary and traditional tribal law, these holdings are nevertheless still foreseeable, reliable, and familiar to Western perspectives.[163] In the last few decades, many tribal courts have adopted sophisticated case management software and court staff, utilize websites that publish their statutes and case law, and offer appellate review.[164] As the court recently noted in a challenge to tribal civil jurisdiction, "[w]hile hypothesizing about potential unfairness in a tribal court, neither [petitioners] point[] to any actual unfairness in the procedures of this particular tribal court."[165] The tribes exercising SDVCJ have a seemingly impeccable record of handling these cases involving non-Indians committing certain crimes in Indian country. Additionally, an alarming trend regarding the children exposed to violence in these cases is exposing some troubling trends.

---

non-Indians appears to be largely driven by the concern that subjecting non-members to the jurisdiction of tribal courts will violate their due process rights).

[159] Case Comment, *Fifth Circuit Disclaims Independent Obligation to Ensure that Tribal Courts Have Subject Matter Jurisdiction in Disputes Involving Nonmembers* – Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 128 HARV. L. REV. 1035, 1042-43 (2015) (referencing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); Duro v. Reina, 495 U.S. 676 (1990); Strate v. A-1 Contractors, 520 U.S. 438 (1997); and Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 337 (2008)).

[160] *See* S. REP. NO. 112-153, at 48-49 (2012) (minority views from Senators Kyl, Hatch, Sessions, and Cornyn); Gede, *supra* note 158, at 41.

[161] INDIAN CIVIL RIGHTS ACT AT FORTY, *supra* note 98, at 227.

[162] *See e.g.*, BUREAU OF INDIAN AFF. & AM. INDIAN L. CTR., INC., SURVEY OF TRIBAL JUSTICE SYSTEMS & COURTS OF INDIAN OFFENSES: FINAL REPORT, vii, 19 (2000) (About 75% of responding tribal justice systems operate under a Bill of Rights promulgated by the tribal constitution or by tribal legislation. Most tribes (78%) have a written code; of that number, 71.8% are western-style). The Bureau of Justice Statistics is currently conducting an updated tribal court survey for calendar year 2015. *See* BUREAU OF JUST. STATS., TRIBAL COURTS (last revised Feb. 25, 2016), http://www.bjs.gov/index.cfm?ty=tp&tid=29#data_collections.

[163] *See* Robert Odawai Porter, *The Inapplicability of American Law to the Indian Nations*, 89 IOWA L. REV. 1595, 1613 (2004) (noting that more attorneys are becoming involved in tribal courts, serving as general counsels, prosecutors, judges, defense counsel, and private practitioners).

[164] *See* INDIAN CIVIL RIGHTS ACT AT FORTY, *supra* note 98, at 228-29.

[165] Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 732 F.3d 409, 418 n.6 (5th Cir. 201), *withdrawn*,746 F.3d 167 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2833 (2015).

As of August 2015, ten tribes have implemented TLOA's enhanced sentencing and seven tribes have implemented VAWA's special domestic violence criminal jurisdiction.[166] On February 20, 2015, the Pascua Yaqui Tribe became one of only five tribes approved by the U.S. Department of Justice to start exercising special domestic violence criminal jurisdiction prior to the March 7, 2015 effective date.[167] Within eight months, the Tribe had eighteen reported cases involving fifteen non-Indian defendants.[168] Of the offenders, only three did not have preexisting criminal records with the State of Arizona.[169] The fifteen offenders had accumulated a total of 84 Pascua Yaqui Tribal Police contacts.[170] One defendant, while being arrested, actually stated "you can't do anything to me anyway."[171]

Most jarring, however, was the extent to which AI/AN children were involved. Of the eighteen VAWA cases, a majority of the incidents involved children, a total of 17 children, all under the age of eleven.[172] In some cases, children were removed from the home, and in one instance, a child was assaulted for reporting the domestic violence incident.[173] The children faced physical intimidation and threats.[174] The Tribe laments their lack of jurisdiction to charge for crimes that endanger, threaten, or harm tribal children.[175]

In fact, all of the implementing tribes lament the narrowness of SDVCJ jurisdiction.[176] Child abuse, sexual assault, elder abuse, and many other crimes that tribes consider to be domestic or familial violence are not covered by SDVCJ, forcing tribes to continue to rely upon state and federal authorities.[177]

Federal Indian law has generally been schizophrenic in its treatment towards Indian nations, though tribal judiciaries have consistently been forced to prove their legitimacy.[178] Since *Oliphant,* scholars have long

---

[166] *See Implementation Chart: VAWA Enhanced Jurisdiction and TLOA Enhanced Sentencing*, TRIBAL CT. CLEARING HOUSE (Aug. 14, 2015) http://www.tribal-institute.org/download/VAWA/VAWAImplementationChart.pdf.

[167] VAWA 2013 created a "Pilot Project" that enabled Indian tribes to exercise SDVCJ earlier, provided the implementing tribe received approval from the Department of Justice to do so. NAT'L CONG. OF AM. INDIANS, *supra* note 152, at 2.

[168] Urbina & Tatum, *supra* note 114, at 32.

[169] *Id.*

[170] *Id.*

[171] *Id.* at 33.

[172] *Id.*

[173] *Id.* at 34.

[174] Urbina & Tatum, *supra* note 114, at 34.

[175] *Id.*

[176] NAT'L CONG. OF AM. INDIANS, *supra* note 152, at 28.

[177] *Id.*

[178] *See* United States v. Lara, 541 U.S. 193, 219 (2004) (Thomas, J., concurring) ("Federal Indian policy is, to say the least, schizophrenic. And this confusion continues to infuse federal Indian law and our cases."). Federal Indian law has additionally been described as a pendulum, oscillating, albeit unpredictable, between pro-sovereignty and anti-sovereignty policies throughout American history. *See id.*

pushed for an *Oliphant*-fix.[179] However, recently, both the executive and legislative branches of the federal government have signaled a united endorsement of tribal justice system, coupled with an acknowledged failure of prior Indian country criminal policy.

In 2010, Congress and the President explicitly acknowledged that tribal justice systems are often the most appropriate institutions for maintaining law and order in Indian country.[180] Tribal sovereignty, unlike prior attempts at paternalistic injections of law and order, has "proven to be the only policy that has shown concrete success in breaking debilitating economic dependence on federal spending programs and replenishing the social and cultural fabric that can support vibrant and healthy communities and families."[181] Importantly, empowering tribal governments to protect their communities empowers the community. Jurisdiction is a precursor to governmental accountability—accountability which tribes are currently circumventing.[182] Tribal governments should be held to the same standards as other governments.

In TLOA, Congress established and mandated a final report and recommendations from the Indian Law and Order Commission.[183] The Commission's report, *A Roadmap for Making Native American Safer*, listed forty recommendations intended to make tribal nations safer and more just, and to reduce the unacceptably high rates of violent crime within Indian country.[184] The Commission's very first recommendation is that all tribes, at their own sole discretion and on their own timetable, be able to "opt out" of existing criminal jurisdictional schemes and be restored to their inherent authority to prosecute and punish *all* offenders.[185] In 2014, the American Bar Association reiterated this call.[186] This recommendation is directed squarely at *Oliphant*, as well as Public Law 280, the General Crimes Act, the Major Crimes Act, and the myriad of federal and state policies that have ironically made Indian country a "lawless" land.[187]

---

[179] *See, e.g.*, Sayler, *supra* note 124, at 7.

[180] Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(2)(B), 124 Stat. 2258, 2262 (2010).

[181] Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self Rule* 1 (Harv. Kennedy Sch. Working Paper Series, Working Paper No. RWP04-016, 2004), https://research/hks.harvard.edu/publications/workingpapers/citation.aspx?PubId=1884&type=FN&PersonId=67.

[182] Kirsten Matoy Carlson, *Jurisdiction and Human Rights Accountability in Indian Country*, 2013 MICH. ST. L. REV. 355, 360 (2013).

[183] Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 235(b), 124 Stat. 2282-83 (2010). The Indian Law and Order Commission was an independent national advisory commission, created in July 2010 by the Tribal Law and Order Act. *Id.* The President and the majority and minority leadership of the Congress appointed the nine Commissioners. *Id.*

[184] *See generally* ILOC REPORT, *supra* note 5, at i.

[185] *Id.* at ix.

[186] ABA Res. 111A (2013) (adopting the Indian Law and Order Commission Report as ABA policy).

[187] *Id.*

Also in 2014, the Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence also recommended in their report, *Ending Violence So Children Can Thrive*, that "Congress should restore the inherent authority of [AI/AN] tribes to assert full criminal jurisdiction over all persons who commit crimes against AI/AN children in Indian country."[188] In light of VAWA, the Advisory Committee noted that it is troubling that tribes still lack any criminal jurisdiction over non-Indians who commit heinous crimes of sexual and physical abuse of AI/AN children.[189] Specifically, "despite numerous and horrific findings that non-Indians are committing sexual assault [in] Indian country,"[190] VAWA does not extend criminal jurisdiction over non-Indians for the crimes of sexual and physical abuse of AI/AN children, or any other crimes that may have been committed in conjunction with the domestic violence.[191]

Tribes, like all communities, should have the ability to provide public safety and to hold all perpetrators accountable. However, as Congress has signaled its move towards empowering tribal courts, congress has expressed an interest in doing so by piecemeal.

The high rates of violence are devastating to Native women.[192] Unfortunately, the devastation does not cease with women. Domestic violence is family violence. Tribes need the ability to protect their children. This is an immediate and devastating need. If we must proceed one subject matter at a time, then Congress must expand VAWA's SDVCJ to include special domestic violence criminal jurisdiction over non-Indians for domestic violence and ancillary crimes committed against children in Indian country.

VI. CONCLUSION

Criminal justice is failing in Indian country. More importantly, it is failing children. While critics of expanded tribal criminal jurisdiction have expressed concerns for the due process rights of defendants, federal restrictions on tribal criminal jurisdiction are currently undermining the due process rights of Native children by denying them equal protection under the law, judicial protection, and an effective judicial remedy.[193] Similarly situated children are receiving more effective justice purely due to jurisdictional lines. Unless Section 904 of VAWA 2013 is expanded to include ancillary domestic violence crimes against children, more and more tribes will be forced to drop charges against non-Indians who perpetrate domestic violence-related crimes against children.

In sum, the answer is to allow tribes to exercise tribal sovereignty to protect both women and children from the ravages of domestic violence. As

---

[188] U.S. DEP'T OF JUST., *supra* note 4, at 9.
[189] *Id.*
[190] *Id.* at 49.
[191] *Id.*
[192] AMNESTY INT'L, *supra* note 15, at 2.
[193] Carlson, *supra* note 182, at 359.

U.S. Attorney General Loretta Lynch noted in her address during the Department of Justice's Domestic Violence Awareness Month: "BY WHAT AND HOW WE PROSECUTE, WE AS A SOCIETY INDICATE BOTH WHAT AND WHOM WE VALUE AND PROTECT."[194] Amending Section 904 of VAWA to allow tribes to once again hold non-Indian offenders accountable for committing domestic violence and ancillary crimes again Indian children in Indian country is a big step towards supporting tribes struggling to keep Indian children safe.

[194] Loretta E. Lynch, Attorney General, Dep't of Justice, Opening Remarks at the Congressional Hispanic Caucus Institute Leadership Luncheon (Oct. 6, 2015), https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-opening-remarks-congressional-hispanic-caucus.