

NOTES

AN AVOIDABLE CONUNDRUM: HOW AMERICAN INDIAN LEGISLATION UNNECESSARILY FORCES TRIBAL GOVERNMENTS TO CHOOSE BETWEEN CULTURAL PRESERVATION AND WOMEN'S VINDICATION

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INTRODUCTION

Gender violence in American Indian¹ communities is a serious, complex issue due to a myriad of legal and cultural barriers.² Today, rates of rape and

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1 For the purposes of this Article, "Indian" means any person who is a member of an Indian tribe, as defined in 25 U.S.C. § 1603(13) (2012). This definition includes those who:

(A), irrespective of whether he or she lives on or near a reservation, is a member of a tribe, band, or other organized group of Indians, including those tribes, bands, or groups terminated since 1940 and those recognized now or in the future by the State in which they reside, or who is a descendant, in the first or second degree, of any such member, or (B) is an Eskimo or Aleut or other Alaska Native, or (C) is considered by the Secretary of the Interior to be an Indian for any purpose, or (D) is determined to be an Indian under regulations promulgated by the Secretary.

25 U.S.C. § 1603(13) (footnote omitted).

2 This Note does not address the societal and cultural hurdles American Indians face such as: the geographic isolation of reservations, the lack of access to adequate medical care (including rape kits), and the overall prevalence of alcoholism, poverty, and depression in Indian country. For a discussion on these issues, see RONE BACHMAN ET AL., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN 84–86 (2008), <http://www.nij.gov/topics/tribal-justice/vaw-research/pages/welcome.aspx>; Bonnie Duran et al., *Intimate Partner Violence and Alcohol, Drug, and Mental Disorders Among American Indian Women from Southwest Tribes in Primary Care*, 16 J. NAT'L CTR. FOR AM. INDIAN & ALASKA NATIVE MENTAL HEALTH RES., no. 2, 2009,

other sexual assaults are higher for American Indian women than any other demographic in the country.³ In fact, a Department of Justice report found that the assault rates for American Indian and Alaska Native women could be as much as fifty percent higher than the next most victimized demographic.⁴ Significantly, a majority of these sexually motivated crimes are committed by non-Indians—individuals who, for the most part, *cannot* be held accountable in tribal courts,⁵ and who, all too often, *are not* held accountable in federal courts.⁶

In the last 150 years, both caselaw and legislative action concerning criminal justice in American Indian communities have been inconsistent and often discriminatory. Members of the federal government have even conceded that the history of the federal government's dominance over American Indian criminal justice systems is a "national disgrace."⁷ Instead of protecting individual rights and supporting tribal autonomy, federal legislation has effectively perpetuated crime in Indian country.⁸ Studies show that the federal government's failure to hold perpetrators in Indian country accountable

at 11, 20; Joseph P. Gone & Carmela Alcántara, *Identifying Effective Mental Health Interventions for American Indians and Alaska Natives: A Review of the Literature*, 13 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 356 (2007), http://calmhhsa.org/wp-content/uploads/2014/09/Identifying-Effective-Mental-Health-Interventions-for-American-Indians-and-Alaska-Natives_A-Review-of-the-Literature.pdf; Timothy Williams, *For Native American Women, Scourge of Rape, Rare Justice*, N.Y. TIMES (May 22, 2012), http://www.nytimes.com/2012/05/23/us/native-americans-struggle-with-high-rate-of-rape.html?_r=0.

3 See BACHMAN ET AL., *supra* note 2, at 6, 33.

4 See FUTURES WITHOUT VIOLENCE, THE FACTS ON VIOLENCE AGAINST AMERICAN INDIAN/ALASKAN NATIVE WOMEN 1–2 (2011), <http://www.futureswithoutviolence.org/userfiles/file/Violence%20Against%20AI%20AN%20Women%20Fact%20Sheet.pdf> (citing STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE, 1992–2002 (2004)).

5 Tribal courts cannot prosecute non-Indians, except in rare circumstances. See *infra* Part I.

6 See BACHMAN ET AL., *supra* note 2, at 89 (citing Amy Radon, Note, *Tribal Jurisdiction and Domestic Violence: The Need for Non-Indian Accountability on the Reservation*, 37 U. MICH. J.L. REFORM 1275, 1282 (2004)) (reporting how, between 2000 and 2001, federal authorities declined to prosecute 42.9% of assault cases); see also Timothy Williams, *High Crime but 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-prosecutions.html> ("Federal prosecutors in 2011 declined to file charges in 52 percent of cases involving the most serious crimes committed on Indian reservations, according to figures compiled by the Transactional Records Access Clearinghouse at Syracuse University . . .").

7 See, e.g., *Discussion Draft Legislation to Address Law and Order in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 1, 52 (2008) [hereinafter *Discussion Draft Legislation to Address Law and Order in Indian Country*] (statement of W. Patrick Ragsdale, Director, Office of Justice Servs., U.S. Dep't of the Interior).

8 See *id.* at 1 (statement of Sen. Byron L. Dorgan, Chairman, S. Comm. on Indian Affairs) ("[S]exual and domestic violence have reached epidemic proportions; victims have to wait in many cases hours and weeks for a response to law enforcement calls . . . The lack of consequences has created some notion of lawlessness in many communities.").

actually emboldens offenders, specifically sexual offenders.⁹ In other words, the federal government's decision to prevent tribal courts from prosecuting accused criminals encourages criminals to continue engaging in illegal activity on tribal lands. This lack of accountability has created a vicious cycle: since no prosecutorial action is taken after a crime is reported,¹⁰ victims feel discouraged from even reporting the crime in the first place.¹¹

The federal government first stripped tribal courts of their criminal justice authority in the nineteenth century and has taken very small steps to return minimal power to the tribes.¹² The most recent attempts to give tribes the authority to combat violence in their communities are represented in the 2010 Tribal Law and Order Act (TLOA) and the 2013 Reauthorization of the Violence Against Women Act (VAWA). TLOA has many facets, but, most importantly, it authorizes tribal courts to impose enhanced sentences on offenders.¹³ This necessary authorization, however, is shackled by strict requirements.¹⁴ The 2013 VAWA reauthorization provided a much needed expansion of tribal criminal jurisdiction, however, as with TLOA, many of the provisions in the Act are only available to tribes that meet rigid qualifications¹⁵—qualifications that could impact the integrity, autonomy, and traditions of American Indian tribes.

VAWA's tribal provisions were not implemented until March 2015; therefore, there is very little data available to measure their effectiveness. VAWA did, however, initiate a one-year pilot project, commencing in February

9 See S. 1763, S. 872, and S. 1192: *Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 10 (2011) (statement of Thomas J. Perrelli, Assoc. Att'y Gen., U.S. Dep't of Justice).

10 See *supra* note 6 and accompanying text.

11 See Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1582 (2016) ("Studies show that countless Indian women and girls decline to even report violent crime or sexual assault committed by non-Indians on the reservation because they do not believe there will be justice." (citing Lorelei Laird, *Indian Tribes Are Retaking Jurisdiction Over Domestic Violence on Their Own Land*, A.B.A. J. (Apr. 1, 2015), http://www.abajournal.com/magazine/article/indian_tribes_are_retaking_jurisdiction_over_domestic_violence_on_their_own)); see also Williams, *supra* note 2 ("Women's advocates on the [Navajo Nation] reservation say only about 10 percent of sexual assaults are reported.").

12 See *infra* Section I.B.

13 See Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234, 124 Stat. 2261, 2279 (2010) (codified at 25 U.S.C. § 1302 (2012)). As discussed in detail later, see *infra* subsection I.B.6, this enhanced sentencing power is very limited in scope because TLOA did not expand the tribes' jurisdictional reach and enhanced sentences can only be imposed against defendants whom either (1) previously have been convicted of the same or a comparable offense, or (2) are under prosecution for a felony. See 25 U.S.C. § 1302(b).

14 See 25 U.S.C. § 1302(b). In order to benefit from TLOA, tribes must make their laws publicly available, the tribal courts must be courts of record, judges must be licensed to practice law, and defense counsel must be afforded and must provide effective assistance. *Id.*; see also subsection I.B.6.

15 See 25 U.S.C. § 1304.

2014.¹⁶ Only three tribes qualified to participate in the project, and the data on their experiences was recently released.¹⁷ This Note analyzes that data and concludes that the three participating tribes were well suited to implement VAWA because of their preexisting legal infrastructures and overall demographics. However, this Note argues that, because of its rigid requirements, VAWA will not impact most tribes as positively as it did the three pilot tribes.

These laws, while an improvement and a necessity, make clear that “sovereignty comes at a price.”¹⁸ The federal government is effectively coercing tribes to either implement a version of the federal criminal adjudication system (and give up their own, traditional tribal court system), or else deal with the consequences of a system that cannot prosecute or punish many perpetrators. Moreover, even if the tribes decide to incorporate VAWA’s requirements in order to expand its jurisdiction, the limitations on TLOA’s enhanced sentencing authority essentially makes the wider jurisdictional grant toothless. In other words, even if a tribe is authorized to prosecute a perpetrator, without the power to adequately sentence the individual, the prosecution is futile.

This Note makes two arguments concerning the state of American Indian legislation, and then proposes an alternative. First, this Note argues that the recently enacted legislation regarding criminal justice in American Indian societies will work to encourage cultural assimilation and result in the loss of tribal traditions and autonomy. In effect, the legislation is putting tribes in an impossible position: it is unfairly coercing them to choose between (1) the preservation of their own culture and customs, and (2) the ability to prosecute those victimizing their members. Second, this Note argues that even if a tribe decides to risk its culture and tradition in order to adopt the federal policies needed to protect its members, the legislation does not go far enough. The two prominent legislative enactments in place—TLOA and VAWA—are wrought with so many limitations and qualifications that, in practice, they do not give tribes enough power to protect their members.

Instead, this Note suggests that the federal system of appeals is capable of solving the current dilemma. In reviewing tribal court decisions, federal courts should give administrative agency–like deference to tribal courts because the tribal courts are better positioned to interpret their own laws (laws that are often rooted in tradition and culture), just as administrative agencies are better positioned to interpret ambiguity in their respective

16 See NAT’L CONG. OF AM. INDIANS, SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION PILOT PROJECT REPORT 3 (2015) [hereinafter PILOT PROJECT REPORT], http://www.ncai.org/attachments/NewsArticle_VutTUSYSfGPRpZQRYzWcuLekuVNeeTAOBBwGyvkWYwPRUJOioqI_SDVCJ%20Pilot%20Project%20Report_6-7-16_Final.pdf.

17 See *id.* at 2.

18 Riley, *supra* note 11, at 1571.

fields.¹⁹ By inquiring into whether the tribal courts acted reasonably, the federal government can ensure that basic individual liberties are upheld in tribal proceedings. Simultaneously, the tribal courts would interpret and implement their own laws, thus preserving tribal autonomy.

Part I of this Note begins by discussing the historical context of gender violence in American Indian communities. Then, it examines several significant pieces of federal legislation, as well as a notable Supreme Court case, concerning crimes that occur on tribal lands or crimes involving American Indian victims. Overall, the purpose of Part I is to show the evolution of federal American Indian law in order to give context to the current state of the law. Part II analyzes the pilot project data for the three VAWA pilot project-qualifying tribes: the Pascua Yaqui Tribe, the Tulalip Tribes, and the Confederated Tribes of the Umatilla Indian Reservations. This Part particularly focuses on how each tribe's court system had previously incorporated VAWA's procedural requirements²⁰ and argues that, because of this preexisting legal infrastructure, these tribes were ideal (and unrepresentative) participants in the pilot project. Part III outlines why the legislation currently in place is inadequate to combat gender violence in American Indian communities and argues that the restrictions in TLOA and VAWA should be relaxed. Furthermore, this Part contends that the federal system of appeals could smoothly solve the issue at hand by reviewing tribal court decisions with a high level of deference. Finally, the conclusion summarizes the Note's arguments and calls for (1) Congress to repeal the TLOA and VAWA limitations, and (2) courts to implement a deferential standard of review in reviewing tribal court decisions.

I. HISTORICAL BACKGROUND AND LEGISLATION

Implementation of federal law in Indian country has been described as an "anomalous zone" because of the overall complexity and lack of consistency in both legislation and case law.²¹ After depriving tribal courts of essentially all of their authority in the late nineteenth century,²² the federal government slowly began returning some power to the tribes to enable them

19 In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court articulated the judicial deference standard that courts owe administrative agencies. 467 U.S. 837 (1984). According to the Court, if Congress has explicitly addressed an issue, then the reviewing court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 843. But, if Congress has not commented on the matter, or the comment was ambiguous, then the court should uphold the agency's interpretation as long as it is reasonable. *Id.*

20 For example, each tribal court system already provided defense attorneys and employed law-trained judges. See *infra* Part II.

21 Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1201 (1996) (defining an "anomalous zone" as "a geographical area in which certain legal rules, otherwise regarded as embodying fundamental policies of the larger legal system, are locally suspended").

22 See *infra* subsection I.B.1.

to combat crime within their territory. Culminating in the passage of the Tribal Law and Order Act of 2010 and the 2013 Reauthorization of the Violence Against Women Act, federal legislation has come a long way. However, as this Part points out, there is still a long way to go in order to give tribal governments the power they need to address crime in their communities.

This Part has several goals. First, it briefly discusses the history of gender violence in native communities, including its origins and inseparable link to colonization. Then, it describes the major legislative acts and cases that laid the foundation for the current legal framework concerning American Indian criminal justice systems. Finally, the most recent legislative enactments are examined, followed by an analysis of the current state of the law.

A. *Colonization and Historical Trauma*

Many scholars believe that gender violence in indigenous communities stems from colonization.²³ Until colonization, most tribes did not experience domestic violence.²⁴ In fact, women “thriv[ed] under a unique form of gender balance” where their opinions were considered in both “politics and production.”²⁵ But as colonial power intensified, native women were deprived of their role in “spiritual, sexual, economic, social, political, diplomatic, and military realms.”²⁶

Based on the oppression and domination of the native peoples, many American Indian communities suffer from “historical trauma,” which is “unresolved trauma and grief that continue to adversely affect the lives of survivors of such trauma.”²⁷ Examples of these adverse effects include inter-

23 See, e.g., ONT. FED’N OF INDIAN FRIENDSHIP CTRS., ABORIGINAL SEXUAL VIOLENCE ACTION PLAN 2 (2011), <http://www.ofifc.org/sites/default/files/docs/Aboriginal%20sexual%20violence%20action%20plan%20final%20report.pdf> (“Sexual violence is rooted in the legacy of residential schools, colonization and systemic discrimination that resulted in the loss of culture, roles, family and community structure.”); ANDREA SMITH, CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE 137–39 (2005); Emily Snyder et al., *Gender and Violence: Drawing on Indigenous Legal Resources*, 48 U.B.C. L. REV. 593, 604 (2015) (“Violence against women is . . . intimately linked with the broader colonial context . . .”); Hilary N. Weaver, *The Colonial Context of Violence: Reflections on Violence in the Lives of Native American Women*, 24 J. INTERPERSONAL VIOLENCE 1552, 1555–62 (2009).

24 See Weaver, *supra* note 23, at 1555.

25 Sam Grey, *Self-Determination, Subordination, and Semantics: Rhetorical and Real-World Conflicts Over the Human Rights of Indigenous Women*, 47 U.B.C. L. REV. 495, 498–99 (2014).

26 *Id.* at 499 (first citing Penelope Andrews, *Violence Against Aboriginal Women in Australia: Possibilities for Redress Within the International Human Rights Framework*, 60 ALB. L. REV. 917 (1997); then citing Carl Fernández, *Coming Full Circle: A Young Man’s Perspective on Building Gender Equity in Aboriginal Communities*, in STRONG WOMEN STORIES: NATIVE VISION AND COMMUNITY SURVIVAL 242 (Kim Anderson & Bonita Lawrence eds., 2003); then citing Kiera L. Ladner, *Gendering Decolonisation, Decolonising Gender*, 13 AUSTL. INDIGENOUS L. REV. 62 (2009); and then citing M. Céleste McKay, *International Human Rights Standards and Instruments Relevant to Indigenous Women*, 26 CAN. WOMAN STUD. 147 (2008)).

27 Eduardo Duran et al., *A Postcolonial Perspective on Domestic Violence in Indian Country*, in FAMILY VIOLENCE AND MEN OF COLOR: HEALING THE WOUNDED MALE SPIRIT 143, 148

nalized oppression and the normalization of violence.²⁸ Unfortunately, this normalization of violence oftentimes manifests itself in gender violence.²⁹

B. Federal Legislation and Case Law

Prior to colonization, individual tribes handled criminal adjudication according to their own tribal customary law.³⁰ “[C]onflict between Indians and settlers [however,] slowly introduced federal jurisdiction into Indian country criminal justice matters.”³¹ Given the unique position American Indian tribes hold as both a sovereign and a dependent entity,³² the federal government has a history of legislation specifically aimed at resolving jurisdictional disputes involving American Indians. Decades of inadequate legislative action resulted in a “jurisdictional maze,”³³ where “criminal jurisdiction over Indian country crimes is governed by shifting and sometimes contradictory variables, including where the crime was committed, whether both the defendant and victim are Indians, and the classification of the alleged crime.”³⁴ Most scholars agree that the early enactments were not only unsuccessful, but also “actually caused reservation crime to flourish.”³⁵ This Section outlines the relevant legislation and case law, placing particular emphasis on their impact on gender violence.

(Ricardo Carrillo & Jerry Tello eds., 2d ed. 2008); *see also* Weaver, *supra* note 23, at 1555–62.

28 *See* FUTURES WITHOUT VIOLENCE, *supra* note 4, at 4; *see also* Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 16 (1999) (“The material, psychological and spiritual circumstances of Navajo people—circumstances that are a direct result of colonization—are related to both the occurrence of domestic violence and women’s responses to such violence.”).

29 *See* Williams, *supra* note 6 (“[American Indian women] are raped or sexually assaulted at a rate four times the national average, with more than one in three having either been raped or experienced an attempted rape.”).

30 *See* Riley, *supra* note 11, at 1578 (“Long before the Constitution was drafted and ratified, Indian nations had inherent sovereignty over their people and territories and governed according to their own laws.” (citing Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1718–21 (2012))); *see also* K.N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941).

31 Riley, *supra* note 11, at 1577.

32 *See generally* Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657 (2013); *see also* BACHMAN ET AL., *supra* note 2, at 7.

33 Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 504 (1976) (referring to criminal justice as a “jurisdictional maze”).

34 Riley, *supra* note 11, at 1575 (footnote omitted).

35 *Id.* at 1574.

1. The Major Crimes Act (1885)

In 1885, the federal government asserted jurisdiction over “major crimes”³⁶ in Indian country, even if between two American Indians, with the passage of the Major Crimes Act.³⁷ This legislation granted federal courts jurisdiction over violent crimes against women, including aggravated assault, rape, and homicide.³⁸ While the Act did not entirely preclude tribal governments from prosecuting the offenders (prosecution was permitted as long as both parties were American Indian), this legislation was still seen as a move “to break up traditional tribal justice systems and further the assimilation of Indians into White society.”³⁹

2. Indian Reorganization Act (1934)

The Indian Reorganization Act (IRA)⁴⁰ represents a rare example of the federal government returning power to tribal governments. Under the IRA, tribes are permitted to organize their own governments.⁴¹ This authority includes the power of tribes to institute their own court systems.⁴² Once a tribe decides to create a court system, a Court of Federal Regulation (“CFR Court”)⁴³ acts as a temporary court while the self-determined court is being (re)established.⁴⁴ Since the enactment of the IRA, hundreds of tribes have established their own court systems and the utilization of CFR Courts has

36 Major crimes under the current U.S. Code include “murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country.” 18 U.S.C. § 1153 (2012).

37 The Major Crimes Act of 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153 (2012)). This was enacted in response to *Ex parte Crow Dog*, in which the Supreme Court found a lack of jurisdiction to try an Indian accused of a crime against another Indian on tribal land. 109 U.S. 556, 567 (1883).

38 18 U.S.C. § 1153.

39 Riley, *supra* note 11, at 1578.

40 25 U.S.C. §§ 461–479 (1982).

41 *See id.* § 476.

42 *See id.*

43 According to Tribal Court Clearinghouse:

“Courts of Indian Offenses,” or “Courts of Federal Regulations” (“CFR Courts”) were the first modern iteration of tribal courts. They were established by the Department of the Interior in 1883 in part to handle less serious criminal actions and resolve disputes among tribal members. However, many judges were non-Indian BIA superintendents with express objectives of assimilating Native people into western society and abolishing “barbarous” practices such as ceremonial dances. Some tribes still operate CFR Courts today

Tribal Courts, TRIBAL COURT CLEARINGHOUSE, <http://www.tribal-institute.org/lists/justice.htm> (last visited Oct. 9, 2017).

44 *See id.*

consistently declined.⁴⁵ Tribal governments continue to benefit from the IRA; however, as Part III discusses, recent federal legislative enactments threaten the IRA's positive impact.

3. Public Law 280 (1953)

In 1953, Congress passed Public Law 280 ("PL-280"),⁴⁶ which authorized state governments to exert jurisdiction over offenses committed in Indian country or involving American Indians and Alaska Natives.⁴⁷ The six states with the highest population of American Indians were required to adopt PL-280,⁴⁸ and "optional" states could choose to assume part or total jurisdictional authority over American Indian affairs within their states.⁴⁹ This statute "was an attempt at compromise between wholly abandoning the Indians to the states and maintaining them as federally protected wards, subject only to federal or tribal jurisdiction."⁵⁰ Of the over 500 tribes in the continental United States, fifty-two percent are located in PL-280 states.⁵¹ Therefore, in practice, this extra level of jurisdiction further complicates the already convoluted criminal justice system.

4. Indian Civil Rights Act (1968)

Supporters of the Indian Civil Rights Act claimed that it would guarantee individual rights to American Indians,⁵² but it in fact resulted in major

45 See Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 233 n.23 (1994) (discussing how, since 1978, the number of tribal courts has increased while, simultaneously, the number of CFR courts has decreased); see also STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002 iii (2005), <https://www.bjs.gov/content/pub/pdf/cjjaic02.pdf> (recognizing how the number of tribal courts continues to rise with about 188 in 2002).

46 Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (codified in scattered sections of 18, 28 U.S.C.).

47 See FUTURES WITHOUT VIOLENCE, *supra* note 4.

48 Mandatory states include Alaska (upon statehood), California, Minnesota, Nebraska, Oregon, and Wisconsin. See ch. 505, 67 Stat. at 588.

49 States that elected to assume jurisdictional authority over American Indians include Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington. See BACHMAN ET AL., *supra* note 2, at 75 n.26.

50 Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, 537 (1975).

51 See Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697 (2006) (analyzing findings regarding the impact of Public Law 280).

52 See Riley, *supra* note 11, at 1580 ("Congress' goal was to balance individual rights with the federal policy of tribal self-determination." (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 n.11 (1978))). Individual protections guaranteed by this Act include the writ of habeas corpus, *id.*, but do not include the requirement of grand jury indictment or jury trials. See *Constitutional Rights of the American Indian: Hearing on S. Res. 53 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 87th Cong. 1 (1961).

limitations on the power of tribal governments to sentence offenders.⁵³ The statute has been strengthened over the years, but the sentencing powers awarded to tribal courts are still inadequate. When it was first enacted, tribal courts were not permitted to punish offenders with more than \$500 in fines, six months in jail, or both.⁵⁴ This provision was amended in 1986 to allow punishments of up to a \$5000 fine, one year in jail, or both.⁵⁵ It was again amended in 2010 and now allows for punishments of up to three years in jail.⁵⁶ Many critics believe that this Act “represents a congressional decision to limit Native American sovereignty” and is “inadequate to protect the rights of Native American individuals[,]” especially Native American women.⁵⁷

5. *Oliphant v. Suquamish Indian Tribe* (1978)

In *Oliphant v. Suquamish Indian Tribe*,⁵⁸ the Supreme Court issued a significant, far-reaching opinion regarding tribal court jurisdiction. According to the Court, tribal courts do not have jurisdiction over non-American Indians, even if the offense occurred on tribal territory.

The *Oliphant* decision was highly criticized by many scholars who argue that the *Oliphant* holding in conjunction with the other legal constraints in place at the time resulted in widespread injustice.⁵⁹ According to American Indian scholar Angela Riley, the combination resulted in “countless incidences of inadequate punishments, failures to prosecute, paltry resources for safety and policing, as well as brazen acts of violence by savvy criminals actively seeking to commit crimes on reservations where they believe[d] they [were] insulated from prosecution.”⁶⁰ Many scholars agree with Riley’s suggestion that not only was the state of the law at the time ineffective in prosecuting perpetrators, but also that it effectively made non-American Indian offenders immune from prosecution.⁶¹ Studies representing the low report-

53 See Indian Civil Rights Act of 1968, Pub. L. No. 90-284, tit. II, 82 Stat. 73, 77–78 (codified as amended at 25 U.S.C. § 1302 (2012)).

54 See *id.*

55 See *id.* This grant of authority did not include the power to impose felony sentences. See *id.*

56 Partially amended by the Tribal Law and Order Act, discussed *infra* subsection I.B.6.

57 See *e.g.*, Carla Christofferson, Note, *Tribal Courts’ Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act*, 101 YALE L.J. 169, 169–170 (1991).

58 435 U.S. 191, 212 (1978).

59 See, *e.g.*, Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433, 458 (2005) (describing *Oliphant* as “troubling”); Joseph William Singer, *Canons of Conquest: The Supreme Court’s Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 650 (2003) (arguing that the *Oliphant* decision was an attack on tribal sovereignty).

60 Riley, *supra* note 11, at 1582.

61 See *id.* at 1587 (noting how “every crime—even misdemeanors—committed by non-Indians against Indians or Indian property in Indian country can only be prosecuted by the federal government,” and later acknowledging how federal prosecutors fail to prosecute a majority of crimes reported on Indian country); see also 160 CONG. REC. S942 (daily ed. Feb. 12, 2014) (statement of Sen. Leahy) (discussing the Violence Against Women Act, Kimberly Norris Guerrero, native Cherokee and Colville Indian stated, “[o]ver the years,

ing and response levels for crimes committed in Indian country, specifically for sexual abuse cases, further indicate the ineffectiveness of the legislation and *Oliphant* decision.⁶²

6. Tribal Law and Order Act (2010)

Tribal courts' inability to prosecute non-Indians became increasingly problematic as a larger number of non-Indians started living in Indian country.⁶³ Advocates and lobbyists fighting for American Indian's and women's rights spent decades calling for a change.⁶⁴ Eventually, two key enactments emerged: the 2010 Tribal Law and Order Act (TLOA)⁶⁵ and the 2013 Reauthorization of the Violence Against Women Act (VAWA).⁶⁶

TLOA's stated purpose is to combat crime in tribal communities while placing a strong emphasis on decreasing violence against American Indian and Alaska Native women.⁶⁷ The Act, among other things, provides for enhanced sentencing, requires reporting of federal declination rates, and creates the Indian Law and Order Commission (ILOC).⁶⁸ While TLOA does not attempt to expand criminal jurisdiction of tribal governments, it does "allow tribes enhanced sentencing over those defendants in cases in which the tribe would already have criminal jurisdiction."⁶⁹ Under TLOA, qualifying tribes are authorized to impose punishments of up to three years in jail and fines up to \$15,000.⁷⁰ While the enhanced sentencing power provision,

what happened is that white men, non-native men, would go onto a Native American reservation and go hunting—rape, abuse, and even murder a native woman, and there's absolutely nothing anyone could do to them"); Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL'Y 121, 128 (2004) (arguing that *Oliphant* puts "tribal communities at the mercy of non-Indian criminals").

62 See *supra* notes 10–11 and accompanying text.

63 In 1990, forty-five percent of people living in Indian country had an American Indian householder. See EDNA L. PAISANO ET AL., U.S. DEP'T. OF COMMERCE, *WE THE FIRST AMERICANS* 1, 11 (1993). By 2010, however, seventy-seven percent of people living in Indian country identified as non-Indian. See Riley, *supra* note 11, at 1583 (citing TINA NORRIS ET AL., U.S. DEP'T. OF COMMERCE, *THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010* at 13–14 (2012), <http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf>).

64 Riley, *supra* note 11, at 1584 (discussing the hearings begun in 2004 by the U.S. Senate Committee on Indian Affairs, a series of articles the *Denver Post* published on criminal injustice in Indian country, and a 2007 Amnesty International report explaining the jurisdictional barriers faced by Indian tribes).

65 See Tribal Law and Order Act of 2010, Pub. L. No. 111-211, tit. II, 124 Stat. 2261 (codified in scattered sections of 25 U.S.C.).

66 See 25 U.S.C. § 1304 (2012).

67 See *Tribal Law and Order Act One Year Later: Have We Improved Public Safety and Justice Throughout Indian Country?: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 1 (2011) (statement of Sen. Daniel K. Akaka, Chairman, S. Comm. on Indian Affairs).

68 See 25 U.S.C. §§ 1302(b), 2809(a), 2812(a).

69 Riley, *supra* note 11, at 1585.

70 See 25 U.S.C. § 1302. This provision also amended the Indian Civil Rights Act, discussed above. See *supra* notes 52–57 and accompanying text.

which is arguably the most important provision of TLOA, is a great step toward improving criminal justice in Indian country, its implementation is shackled by several limitations.

For example, tribes must qualify in order to impose these heightened sentences.⁷¹ In order to qualify, the tribe must implement proceedings that align more comfortably with the federal system—a requirement that could result in a complete reorganization of a tribe's system of adjudication. The tribe must make its laws publicly available,⁷² the tribal courts must be courts of record,⁷³ judges must be licensed to practice law,⁷⁴ and defense counsel must be afforded and must provide effective assistance.⁷⁵ While these requirements may seem reasonable, they can be difficult for tribes to meet given the structure of their established systems.

TLOA goes even further to limit tribal communities' sentencing enhancement power by placing restrictions on *who* the enhanced sentence can be imposed against. In order to seek a heightened sentence, the defendant must either (1) previously have been convicted of the same or a comparable offense, or (2) be under prosecution for a felony.⁷⁶ Therefore, first-time sexual offenders (or convicts that have committed crimes other than sexual assault), regardless of the severity of the offense, cannot be sentenced for more than one year by the tribal courts, as the Indian Civil Rights Act would govern.⁷⁷

The next critical feature of TLOA, its collection and disclosure requirement for information regarding prosecution rates,⁷⁸ "was meant to increase political accountability and transparency between tribes and the federal government."⁷⁹ This provision is extremely necessary given the astoundingly high declination rates of sexual assaults reported in Indian country.⁸⁰ Since the federal government is (typically) the only body with jurisdiction to prosecute crimes committed by non-Indians against an Indian in an Indian community, it is extremely important that it investigates and prosecutes these crimes.

TLOA also established the Indian Law and Order Commission.⁸¹ The ILOC was tasked with analyzing the criminal justice system relating to Indian

71 See 25 U.S.C. § 1302(c).

72 *Id.* § 1302(c)(4).

73 *Id.* § 1302(c)(5).

74 *Id.* § 1302(c)(3)(b).

75 *Id.* § 1302(c)(1).

76 *Id.* § 1302(b).

77 See *supra* subsection I.B.4.

78 See Tribal Law & Order Act of 2010, Pub. L. No. 111-211, § 212(a)–(b), 124 Stat. 2261, 2267–68 (codified at 25 U.S.C. § 2809(a) (2015)) (describing Congress's requirement that the Attorney General submit an annual report detailing the declination rates in Indian country).

79 Riley, *supra* note 11, at 1587.

80 See *supra* note 6 and accompanying text.

81 See 25 U.S.C. § 2812(a).

country as a whole.⁸² The ILOC synthesized its findings in *A Roadmap for Making Native America Safer*, in which it found that tribally led solutions would be the most effective way to end the criminal injustice in Indian country.⁸³

Additionally, the Act created initiatives to confront some of the practical and social challenges that contribute to the gender violence problem. These include the Tribal Access Program (TAP),⁸⁴ the American Indian and Alaska Native Sexual Assault Nurse Examiner-Sexual Assault Response Team (SANE-SART),⁸⁵ and a collaborative initiative with the Substance Abuse and Mental Health Service Administration (SAMHSA).⁸⁶

7. The Reauthorization of the Violence Against Women Act (2013)

The Violence Against Women Act is a comprehensive piece of legislation that criminalizes interstate violence against women.⁸⁷ In response to the inadequate state of the law at the time, Congress reauthorized VAWA in 2013 in order to address, among other things, three major legal constraints that impaired tribal jurisdiction.⁸⁸ First, it gave qualifying tribes the authorization to exercise “special domestic violence criminal jurisdiction” (SDVCJ) over those who commit acts of domestic violence,⁸⁹ regardless of their Indian or

82 *Id.* § 2812(d).

83 INDIAN LAW & ORDER COMM’N, *A ROADMAP FOR MAKING NATIVE AMERICA SAFER* 27 (2013), https://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf.

84 TAP launched in August 2015 “to provide tribes access to national crime information systems for both civil and criminal purposes. TAP allows tribes to more effectively serve and protect their nation’s citizens by ensuring the exchange of critical data across the Criminal Justice Information Services (CJIS) systems and other national crime information systems.” *Tribal Access Program (TAP)*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/tribal/tribal-access-program-tap> (last visited Oct. 9, 2017).

85 SANE-SART aims to provide “support to enhance the capacity of [American Indian and Alaska Native] communities to provide coordinated community, victim-centered sexual assault responses to adult and child victims.” OFFICE FOR VICTIMS OF CRIMES, AMERICAN INDIAN AND ALASKA NATIVE SEXUAL ASSAULT NURSE EXAMINER-SEXUAL ASSAULT RESPONSE TEAM INITIATIVE SUMMARY 1 (2012), http://www.ovc.gov/AIANSane-Sart/pdf/AI-AN_SANE-SARTInitiativeSummary.pdf.

86 Under TLOA, the SAMHSA is tasked with determining “the scope of the alcohol and substance misuse problems faced by American Indians and Alaska Natives” and identifying areas the federal government can improve on. *About the TLOA*, SAMHSA, <http://www.samhsa.gov/tloa/about> (last updated June 27, 2016).

87 Violence Against Women Act of 2000, Pub. L. No. 106–386, 114 Stat. 1491 (codified as amended in scattered sections of 42 U.S.C.).

88 See 160 CONG. REC. S940–43 (daily ed. Feb. 12, 2014) (statement of Sen. Leahy).

89 PILOT PROJECT REPORT, *supra* note 16, at 5. Crimes that are not covered by this jurisdictional grant include: crimes committed outside of Indian country; crimes between two non-Native Americans; crimes between two strangers, including sexual assault; crimes committed by a person who lacks sufficient ties to the tribe, such as living or working on its reservation; and child abuse or elder abuse crimes. See Lauren R. Kelly, *The Human Rights Impacts of VAWA 2013: A True Victory for Native American Women?*, 7 INQUIRIES J., no. 5, 2015, at 4–5.

non-Indian status (amending the Major Crimes Act and effectively overruling part of *Oliphant*).⁹⁰ This apparent grant of authority, however, did not come without strings attached. Significantly, the jurisdiction only extends to qualifying tribes. In order to be eligible for the SDVCJ, a tribe must meet the same requirements set forth under TLOA's sentencing enhancement power.⁹¹ Moreover, the tribe can only exercise this grant of jurisdiction under very specific circumstances when the offender "[l]acks ties to the Indian tribe";⁹² therefore the tribal courts still have no authority to prosecute offenders who are strangers to the victims. Given these restraints, only three tribes were initially authorized to participate in VAWA's pilot project.⁹³

C. Current Jurisdictional Status

In order to receive the full benefits of TLOA and VAWA (such as the enhanced sentencing authority and SDVCJ), tribal communities are forced to abide by requirements that would not otherwise bind them.⁹⁴ These requirements fundamentally conflict with many of the tribes' established justice systems.⁹⁵ Moreover, even if the tribe is willing to conform to the federal system, they still would not have the power to prosecute any individual who did not have sufficient ties with the community.⁹⁶ This is especially troubling considering the fact that, "[a]bout 9 in 10 American Indian victims of rape or sexual assault were estimated to have had assailants who were [non-Indian]."⁹⁷ Furthermore, even if jurisdiction is appropriate, tribal courts cannot impose sentences over one year if the offender has not previously

90 See *supra* Section I.B. See generally U.S. DEP'T OF JUSTICE, INDIAN COUNTRY INVESTIGATIONS AND PROSECUTIONS 17–18 (2014), <https://www.justice.gov/tribal/tribal-law-and-order-act>.

91 See *supra* subsection I.B.6.

92 25 U.S.C. § 1304(b)(4)(B) (2012). In order to have sufficient ties, the defendant must: reside in the Indian country of the participating tribe; be employed in Indian country of the participating tribe; or be a current or former spouse, intimate partner, or dating partner of a member of the participating tribe or an Indian who resides in the Indian country of the participating tribe. *Id.*

93 The three authorized tribes were: (1) the Pascua Yaqui Tribe (Arizona); (2) the Confederate Tribes of the Umatilla Indian Reservation (Oregon); and (3) the Tulalip Tribes (Washington). See PILOT PROJECT REPORT, *supra* note 16, at 5. Additionally, just one day before the pilot project concluded, the Fort Peck Assiniboine and Sioux Tribes (Montana) and the Sisseton-Wahpeton Oyate Tribe (South Dakota) also qualified. *Id.* However, given the timing, neither tribe was able to initiate prosecutions under VAWA. See Riley, *supra* note 11, at 1591 n.136 (citing PILOT PROJECT REPORT, *supra* note 16, at 5). The pilot project is discussed in detail in Part II.

94 See *supra* notes 65–95 and accompanying text; see also *Talton v. Mayes*, 163 U.S. 376, 385 (1896) (holding that the United State Constitution is not applicable to tribal governments).

95 See Riley, *supra* note 11, at 1595–607 (discussing the balance between tribal sovereignty and assimilation).

96 See *supra* note 92 and accompanying text.

97 LAWRENCE A. GREENFELD & STEVEN K. SMITH, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME 7 tbl.10 (1999).

been convicted of the same or a similar offense or if they are not concurrently being tried for a felony. All things considered, this “grant of authority” leaves a lot to be desired.

II. THE VAWA PILOT PROJECT UNPACKED

Although VAWA did not take effect until March 2015, its reauthorization created a “Pilot Project”⁹⁸ that “enabled Indian tribes who received prior approval from the United States Department of Justice (DOJ) to exercise SDVCJ on an accelerated basis.”⁹⁹ The Department of Justice established a protocol for tribes to apply to the pilot project,¹⁰⁰ and only three tribes were initially approved to participate¹⁰¹: the Pascua Yaqui Tribe in Arizona, the Tulalip Tribes in Washington, and the Confederated Tribes of the Umatilla Indian Reservations in Oregon.¹⁰² Each tribe applied to the project with a preexisting criminal justice system that resembled the federal system.¹⁰³

During the pilot project, the participating tribes heard a total of twenty-seven SDVCJ cases.¹⁰⁴ “Of the 27 cases, 11 were ultimately dismissed for jurisdictional or investigative reasons, 10 resulted in guilty pleas, 5 were referred for federal prosecution and 1 offender was acquitted by a jury.”¹⁰⁵ While every tribal conviction of a sexual offender is a victory, the fact that eleven cases were dismissed for “jurisdictional or investigative reasons” and another five were referred for federal prosecution—meaning that the tribal courts did not effectively have jurisdiction over sixteen cases, more than fifty percent—is evidence that current legislation does not give tribal courts enough authority.

This Part analyzes the success of VAWA, and specifically the SDVCJ, in each of the three tribes that were approved before the pilot project commenced. Section II.A focuses on the Pascua Yaqui Tribe, Section II.B then examines the Tulalip Tribes’ experience, and Section II.C considers the cases dealt with in the Confederated Tribes of the Umatilla Indian Reservation. Given the characteristics of each tribe, specifically the fact that each tribe’s preexisting court system closely resembled the federal system, this Part argues that the results of the pilot project are not representative of how

98 Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 908(b), 127 Stat. 54, 125–26.

99 PILOT PROJECT REPORT, *supra* note 16, at 2. The pilot project began on February 20, 2014 and lasted until March 7, 2015, the date of general implementation. *See id.* at 5.

100 *See id.* at 4. As part of the application, the tribes were required to fill out an Application Questionnaire. The questionnaires largely consisted of questions regarding whether the tribe was willing to implement VAWA’s requirements. To review the completed questionnaires, see *Tribal Implementation of VAWA*, NAT’L CONG. OF AM. INDIANS, <http://www.ncai.org/tribal-vaawa/pilot-project-itwg/pilot-project> (last visited Oct. 10, 2017).

101 As previously mentioned, two additional tribes were approved as the pilot project was wrapping up. *See supra* note 93.

102 *See* PILOT PROJECT REPORT, *supra* note 16.

103 *See generally id.*

104 *See id.* at 5.

105 *Id.*

VAWA will perform in the majority of tribes. Each of the participating tribes was “already well-positioned to implement the new laws,” and any “concerns they had regarding assimilation may have already been dealt with in earlier iterations of criminal justice decisions and discussions.”¹⁰⁶ Without having to make these tough decisions regarding cultural assimilation and the autonomy of the tribe, the VAWA SDVCJ went rather smoothly. The real test will come, however, when tribes with rich cultural traditions that include criminal justice systems inconsistent or incompatible with the federal system are forced to choose between (1) assimilating and (2) enacting measures that will enable them to hold sexual offenders accountable. Therefore, as Part III argues, the legislation’s restrictions should be repealed.

A. *Pascua Yaqui Tribe*

Pascua Yaqui Tribe leadership described the Tribe as the “ideal” participant for the pilot project, given its location and demographics.¹⁰⁷ The Tribe is located near Tucson, Arizona, and has approximately 19,000 members—4000 or 5000 of whom live on the reservation.¹⁰⁸ The reservation’s population is composed of approximately ninety percent American Indians.¹⁰⁹ Single-mother households account for forty-three percent of all Pascua Yaqui households, making it the most common household demographic.¹¹⁰

Compared to most American Indian tribes, the Pascua Yaqui Tribe is somewhat unique in that, prior to its participation in the pilot project, its court system already aligned relatively nicely with the federal court system.¹¹¹ Significantly, therefore, the Tribe was not tasked with a restructuring of its system of adjudication before engaging in the pilot project, which is one reason why the Tribe was such an ideal candidate. For example, the Tribe has provided for defense attorneys and has employed traditionally trained judges for many years—automatically fulfilling two of VAWA’s requirements for SDVCJ.¹¹² The link between the Tribe’s justice system and the federal justice system is also represented by the fact that several of its prosecutors are designated as Special Assistant United States Attorneys (SAUSAs).¹¹³ The Tribe

106 Riley, *supra* note 11, at 1606.

107 PETER YUCUPICIO ET AL., NAT’L CONG. INDIAN AM., PASCUA YAQUI TRIBE VAWA IMPLEMENTATION 1, 2, http://www.ncai.org/tribal-vawa/pilot-project-itwg/Pascua_Yaqui_VAWA_Pilot_Project_Summary_2015.pdf. This report was compiled by Peter Yucupicio, the Tribal Chairman; Fred Urbina, the Attorney General of the tribe; and Oscar Flores, the Interim Chief Prosecutor of the tribe. *Id.* at 9.

108 *See id.* at 2; PILOT PROJECT REPORT, *supra* note 16, at 6.

109 *See* PILOT PROJECT REPORT, *supra* note 16, at 6.

110 *See* YUCUPICIO ET AL., *supra* note 107, at 2.

111 *See id.* at 3 (“The Pascua Yaqui tribal court provides all defendants with the same rights in tribal court as they would have in any state or municipal court.”).

112 *See* PILOT PROJECT REPORT, *supra* note 16, at 6.

113 *See id.* Special Assistant United States Attorneys are “appointed for the purpose of assisting in the preparation and presentation of special cases” pursuant to 28 U.S.C § 543 (2012). U.S. DEP’T OF JUSTICE, U.S. ATTORNEY’S MANUAL 3-2.300 (1997), <https://www.justice.gov/usam/usam-3-2000-united-states-attorneys-ausas-special-assistants-and-agac>. Addi-

even conceded that it elected to participate in the pilot project “in part because it had already built the necessary infrastructure required by federal prerequisites.”¹¹⁴

The Tribe regarded the pilot project and the implementation of VAWA (and SDVCJ) as a success.¹¹⁵ Over the course of the thirteen months, the Pascua Yaqui Tribe had eighteen SDVCJ cases—the highest number of the three tribes.¹¹⁶ The eighteen cases involved fifteen separate defendants,¹¹⁷ all of whom were (necessarily) non-Indian American.¹¹⁸ Notably, the fifteen defendants “had more than 80 documented tribal police contacts, arrests, or reports attributed to them” on the reservation in the previous four years alone.¹¹⁹

VAWA’s SDVCJ was, fortunately, exceptionally successful in the Pascua Yaqui Tribe.¹²⁰ The key word here being *exceptionally*. This success should not be manipulated into an argument that VAWA will always be so successful, for several reasons. First, leaders of the Pascua Yaqui Tribe noted that VAWA “is consistent with Yaqui tradition and culture.”¹²¹ Therefore, the Tribe was not forced to weigh its cultural tradition against its desire to protect members of the community. The Tribe had seemingly already weighed these values, or the values did not conflict in the first place. Furthermore, the Pascua Yaqui Tribe already had most of the legal mechanisms in place to combat its domestic violence issues.¹²² All it needed was authority—the authority to try non-Indians and the authority to impose enhanced sentences. In this regard, the pilot project demonstrated “how necessary Tribal jurisdiction is over non-Indian perpetrators of domestic violence.”¹²³ It did not demonstrate, however, that VAWA was the appropriate way to grant this authority.

Significantly, while the Pascua Yaqui Tribe leaders were satisfied with the results of the pilot project, they admitted that their preexisting legal infrastructure was a major factor in the project’s ultimate success.¹²⁴ The tribal leaders noted how VAWA “may not be appropriate for all tribes” and that “[t]ribes with a smaller homogenous population or without the necessary

tionally, “[t]he tribe currently employs twenty-six uniformed patrol officers who are certified by Arizona as state officers and most are federal Special Law Enforcement Commissioned officers.” YUCUPICIO ET AL., *supra* note 107, at 3.

114 YUCUPICIO ET AL., *supra* note 107, at 3.

115 *Id.* at 2 (“The impact over the last year has been substantial both on protecting the immediate tribal victims of domestic violence and the children who witnessed the violence.”).

116 See PILOT PROJECT REPORT, *supra* note 16, at 6.

117 *Id.*

118 The purpose of the “special domestic violence criminal jurisdiction” grant is to prosecute non-Indians. See *supra* subsection I.B.7.

119 See PILOT PROJECT REPORT, *supra* note 16, at 6.

120 See generally *id.*

121 YUCUPICIO ET AL., *supra* note 107, at 4.

122 See *supra* notes 113–14 and accompanying text.

123 YUCUPICIO ET AL., *supra* note 107, at 3.

124 *Id.* at 5.

resources to build the required infrastructure may find that the cost and complexity of VAWA [is] prohibitive.”¹²⁵ Herein lies the problem. VAWA cannot necessarily be as smoothly implemented in tribes where the culture and legal tools do not so neatly align with those of the federal system. But the tribes where this would be the case nevertheless deserve the same level of protection.

B. Tulalip Tribes

The Tulalip Tribes are located in western Washington State and have around 4500 members—2500 of which live on the reservation.¹²⁶ Similarly to the Pascua Yaqui Tribe, around ten percent to fifteen percent of the reservation’s population is non-Indian.¹²⁷ The Tribes’ criminal justice system, like the Pascua Yaqui Tribe’s system, is similar to the federal system. For example, all of VAWA’s qualifications for granting enhanced sentencing authority—employing law-trained judges, providing indigent defense, permitting non-Indians to participate in the jury pool, and recording court proceedings¹²⁸—were incorporated into the Tulalip Tribes’ criminal adjudication system over ten years ago.¹²⁹

The pilot project was successful in the Tulalip Tribes, although not as successful as it was in the Pascua Yaqui Tribe.¹³⁰ The Tulalip Tribes prosecuted six SDVCJ cases, four of which resulted in guilty pleas. Notably, the six “non-Indian defendants had over 88 documented tribal police contacts, arrests, or reports attributed to them in the past.”¹³¹ A jurisdictional grant and enhanced sentencing authority was undeniably necessary. However, it was not enough. Each of the four guilty defendants were only placed on probation and were required to attend batterer intervention programming.¹³²

Similarly, to the Pascua Yaqui Tribe’s experience, the Tulalip Tribes had success implementing VAWA and, specifically, SDVCJ. However, also similar to the Pascua Yaqui Tribe, the Tulalip Tribes’ criminal justice system already fit the VAWA mold, making it much easier to implement. Additionally, while the four tribally-prosecuted, guilty sexual offender pleas represent progress, there is still room for improvement in terms of jurisdictional reach and sentencing power.

125 *Id.*

126 *See* PILOT PROJECT REPORT, *supra* note 16, at 9.

127 Riley, *supra* note 11, at 1604.

128 PILOT PROJECT REPORT, *supra* note 16, at 9.

129 *Id.*

130 *Id.* at 10.

131 *Id.*

132 *See id.*

C. *Confederated Tribes of the Umatilla Indian Reservations*

The Confederated Tribes of the Umatilla Indian Reservations (CTUIR) are located in Oregon.¹³³ Unlike the Pascua Yaqui and Tulalip Tribes, the CTUIR has a very high population of non-Indians living on the reservation. Of the approximately 3280 people, forty-six percent are non-Indians.¹³⁴ The CTUIR is similar to the other two tribes, however, in terms of its criminal justice system: the CTUIR's system greatly resembles to the federal system.¹³⁵ The CTUIR has, for example, "provided indigent counsel, recorded tribal judicial proceedings, employed law-trained judges, and included non-Indians on tribal juries since long before VAWA 2013 was enacted."¹³⁶

According to the Tribes, sixty percent of the cases brought before the Umatilla Family Violence Program in 2011 involved non-Indians.¹³⁷ Therefore, the authority to prosecute these non-Indian individuals was clearly necessary. Fortunately, VAWA seemed to be effective in the CTUIR. The CTUIR prosecuted four SDVCJ cases during the pilot project, all of which resulted in guilty pleas.¹³⁸ The convicts were sentenced to tribal probation, including a requirement to participate in batterer intervention treatment.¹³⁹

Significantly, the CTUIR had implemented TLOA in 2011,¹⁴⁰ and therefore was authorized to impose enhanced sentences.¹⁴¹ However, the Tribes did not seek enhanced sentences in *any* of their SDVCJ cases during the pilot project.¹⁴² The lack of information available on the cases makes it impossible to determine why an enhanced sentence was not sought, but TLOA's limitations could be a factor. As previously discussed, in order to impose more severe sentences under TLOA, the tribe not only needs to comply with procedural requirements,¹⁴³ but the accused must either (1) already have been convicted of the same or a comparable offense, or (2) be under prosecution for a felony.¹⁴⁴ Therefore, it is possible (and perhaps likely) that these limitations prohibited the tribal courts from imposing harsher sentences. The CTUIR's experience demonstrates how TLOA can limit VAWA, hindering a tribe's authority to protect its members.

133 *Id.* at 11.

134 *Id.*

135 *Id.*

136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.*

140 *Id.*

141 *See supra* subsection I.B.6.

142 Riley, *supra* note 11, at 1616.

143 *See supra* notes 72–75 and accompanying text (discussing how the tribe must make its laws publicly available, the courts must be courts of record, judges must be licensed to practice law, and defense counsel must be afforded and provide effective assistance).

144 *See supra* note 76 and accompanying text.

* * *

These cases illustrate how VAWA can be successful—as long as the tribe has a preexisting criminal justice system that mirrors the federal system. The three participants applied to participate in the project “in part because they already had in place many of the procedural mechanisms required under the statute.”¹⁴⁵ This legal structure made the VAWA implementation deceptively simple because any cultural concerns about assimilation and loss of autonomy were practically nonexistent.¹⁴⁶ The smooth transitions represented in these cases are exceptions. Under other circumstances, tribes could effectively have to choose between revamping their entire criminal justice system—and simultaneously compromising their cultural traditions—and protecting victims of gender and domestic violence. This is a choice that no tribe should have to make.

III. THE WRONG “SOLUTION”

Every government must have mechanisms in place aimed at protecting its citizens. These mechanisms necessarily must include the authority to arrest, prosecute, and punish wrongdoers. The federal government has never permitted American Indian governments to function in this way.¹⁴⁷ Instead, the federal government has limited tribal governments’ exercise of authority to the point of perpetuating crime on reservations.¹⁴⁸ TLOA and VAWA have taken important steps toward authorizing tribal governments to exercise more power, however, the federal government conditioned this necessary grant of power on the adoption of procedural practices that are contrary to traditional tribal governments.¹⁴⁹ It is well-established that “[a]cknowledging the cultural viewpoint of the indigenous nations is requisite for creating law appropriate for the Indians directly affected.”¹⁵⁰ These enactments, however, fail to do so.

This Part argues that TLOA and VAWA will effectively coerce tribal governments into adopting the acts’ procedural requirements for the sake of the enhanced sentencing power and expanded jurisdictional reach. The tribes are therefore forced into an impossible position: uphold tribal traditions or protect their members from violence. The federal government, through

145 Riley, *supra* note 11, at 1606 (citing Press Release, Francesca Hillery, Tulalip Tribes, Tulalip Tribes One of Three Tribes Nationwide to Implement Special Domestic Violence Criminal Jurisdiction Under VAWA 2013 (Feb. 6, 2014), <http://www.tulaliptribes-nsn.gov/LinkClick.aspx?fileticket=OHGIBp5ufqo%3D&tabid=36>).

146 See YUCUPICIO ET AL., *supra* note 107, at 4 (noting how Pascua Yaqui tribal leaders found VAWA “consistent with Yaqui tradition and culture”); Riley, *supra* note 11, at 1606 (discussing why the three tribes were “well-positioned” to participate in the pilot project).

147 See generally Part I.

148 See *supra* notes 10–11 and accompanying text.

149 See *supra* subsections I.B.6–7.

150 Valencia-Weber, *supra* note 45, at 229.

these pieces of legislation, is imposing constitutional limitations on tribal courts—limitations that would not normally apply.¹⁵¹

In order to preclude tribes from making this unmanageable decision, this Part argues that the limitations restricting the implementation of the current legislation should be relaxed. By loosening the legislative restrictions, tribes will be able to stay autonomous and deal with gender violence issues in a way that will best fit their individual needs. In short, Section III.A argues that the limitations placed on the grant of authority are coercive and, ultimately, unnecessary. Congress should repeal these limitations and allow tribes the flexibility to entertain their own adjudication methods in order to adequately confront the issues in their communities.

Some argue that TLOA and VAWA restrictions are necessary to protect the individual liberties of nonmembers.¹⁵² This Part argues that the federal appeals system is sufficient to quell any concerns that non-Indians' constitutional rights may be violated in tribal court proceedings. As long as federal courts give tribal courts a high degree of deference, then both tribal autonomy and the individual rights of non-Indians will be adequately preserved.

A. *Autonomy of Tribal Courts*

“The traditional law and narrative of many tribes . . . place emphasis on community, cooperation, and relatedness. However, the dominant legal narrative of majoritarian jurisprudence is often rooted in individualism, competition, and autonomy.”¹⁵³ Given this contrast, federal legislation addressing tribal governance should consider the customs and culture of the tribes when contemplating binding legislation. No such factors were considered in the years leading up to the passage of TLOA and VAWA. Rather, under the cur-

151 See *Talton v. Mayes*, 163 U.S. 376 (1896) (discussing how, since tribal courts are not created by the Constitution, it does not apply).

152 See 142 CONG. REC. E1704 (daily ed. Sept. 26, 1996) (statement of Rep. Henry J. Hyde) (“I want to say emphatically that it is only right that [tribal] courts should provide all of the constitutional protections required by law, including basic due process. The consistent enforcement of constitutional norms is particularly important if the tribal courts are to have jurisdiction over nonmembers who have only tangential relationships with the tribes.”); Molly Ball, *Why Would Anyone Oppose the Violence Against Women Act?*, ATLANTIC (Feb. 12, 2013), <https://www.theatlantic.com/politics/archive/2013/02/why-would-any-one-oppose-the-violence-against-women-act/273103/> (discussing how senators may have voted against VAWA because tribal courts do not provide adequate protection for defendants). *Contra* Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2306 (1989). It should also be noted that procedural individual rights in tribal courts have existed for decades. See U.S. COMM’N ON CIVIL RIGHTS, *THE INDIAN CIVIL RIGHTS ACT: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS* 1, 11–12 & nn.36–43 (1991) (cataloguing tribal court opinions pertaining to the right to a trial by jury, to a fair and speedy trial, to the right to counsel, to reasonable search and seizure, to adequate jail conditions, to due process in the administration of justice, and to freedom from fines).

153 Frank Pommersheim, *A Path Near the Clearing: An Essay on Constitutional Adjudication in Tribal Courts*, 27 GONZ. L. REV. 393, 405 (1991).

rent system, the federal government expects tribes to either (1) forgo tradition, or (2) accept the reality that non-Indians will not be held liable for their criminal acts in Indian country.

Many tribes have established methods of imposing criminal justice that vary greatly from the traditional federal system. For example, “[o]n many reservations, Indian tribal courts use methods such as ‘Peacemaking,’ ‘Sentencing Circles,’ or other methods of dispute resolution that more closely resemble the ways disputes were settled among Native people before the non-Indian society stepped in.”¹⁵⁴ The Mille Lacs Band of Chippewa Indians, for example, utilize Sentencing Circles for many juvenile cases.¹⁵⁵ Moreover, the Navajo and Seneca Nations have established Peacemaker Courts, which typically rule on disputes involving “cultural beliefs and a failure to comply with custom.”¹⁵⁶ Likewise, some tribes may simply resolve disputes through discussions with families, clans, talking circles, or elder councils.¹⁵⁷

While a majority of tribes do not follow these traditional models, their court systems still significantly vary from the federal system. For example, many tribes appoint (or elect) individuals who are “knowledgeable of the customs and traditions of a particular tribe” as judges, regardless of whether they have a formal law degree.¹⁵⁸ These arbitrators are better positioned to understand the tribes’ values and customs.¹⁵⁹

As opposed to the federal system, these tribal models of criminal justice focus on restitution, not punishment.¹⁶⁰ The federal government should consider these fundamental differences in their legal systems when enacting binding legislation. TLOA and VAWA failed to do so and, instead, are forcing tribal courts to conform to the federal system. Pressuring tribes to change their tribal system, even if the tribal system already incorporates some aspects of the federal system, directly impacts tribal sovereignty because “tribally operated courts are the vanguard for advancing and protecting the

154 B.J. JONES, *ROLE OF INDIAN TRIBAL COURTS IN THE JUSTICE SYSTEM* 6 (2000), <http://www.icctc.org/Tribal%20Courts.pdf> (footnotes omitted).

155 *See id.* at 6 n.17.

156 Valencia-Weber, *supra* note 45, at 251. The Seneca Nation in New York provides an interesting example, as New York state law requires that state courts enforce the Peacemaker Court judgments on three reservations: Allegheny, Cattaraugus, and Tonawanda. *See id.* at 252 n.83 (citing N.Y. INDIAN LAW art. 4 § 46 (1950)).

157 *See* Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 309 (1998) (describing Winnebago dispute resolution through “family, clan or council” deliberations (quoting *Rave v. Reynolds*, 23 Indian L. Rep. 6150, 6158 (Winnebago Sup. Ct. 1996))).

158 JONES, *supra* note 154, at 7; *see also id.* at 12 (“Indian tribes traditionally resolved disputes by consensus rather than by court adjudication.”).

159 *See* Valencia-Weber, *supra* note 45, at 227–30, 250–55.

160 *See* KATHERINE S. NEWMAN, *LAW AND ECONOMIC ORGANIZATION: A COMPARATIVE STUDY OF PREINDUSTRIAL SOCIETIES* 12–17 (1983) (categorizing law systems into punishment or restitution models).

right of tribal self-government.”¹⁶¹ The legislation, therefore, should not have imposed so many limitations on the grant of power.

B. Federal Appeals: A Simple Solution

Instead of threatening tribal cultures by conditioning tribal governments’ criminal adjudication power on the adoption of procedural functions, the federal government should rely on the federal appeals system to ensure individual rights are being protected in tribal proceedings.¹⁶² This Section argues that federal courts should review tribal decisions in a manner similar to review of administrative agency decisions—with great deference. This level of deference is necessary to respect tribal autonomy. At the same time, federal court review of final tribal decisions will ensure that individual rights are being protected.

The relationship between administrative agencies and the federal government and tribal governments and the federal government is fundamentally different.¹⁶³ However, the rationale for granting administrative agencies such a high degree of deference is applicable to tribal courts. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court determined that administrative agencies tasked with administering specific statutes have the authority to resolve ambiguities regarding interpretations of that statute.¹⁶⁴ According to the Court, since these agencies had “great expertise” in the relevant field and judges were “not experts in the field,” courts should defer to agency decisions, as long as these decisions are reasonable.¹⁶⁵ The Court performed a two-step inquiry into whether or not an administrative agency deserved this high-degree level of deference. First, if the reviewing court concludes that Congress had explicitly addressed an issue, then the court “must give effect to the unambiguously expressed intent of Congress.”¹⁶⁶ But, if Congress did not comment on the matter, or was ambiguous, then the court should uphold the agency’s interpretation as long as it is reasonable.¹⁶⁷

161 Valencia-Weber, *supra* note 45, at 232; *see also* Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay*, 18 N.M. L. REV. 49, 71 (1988) (describing tribal courts as “the primary tribal institutions charged with carrying the flame of sovereignty and self-government”).

162 *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987) (holding that after exhausting tribal remedies, litigants who met the diversity jurisdiction requirement could appeal to the federal court).

163 *See* Alex Tallchief Skibine, *Deference Owed Tribal Courts’ Jurisdictional Determinations: Towards Co-Existence, Understanding, and Respect Between Different Cultural and Judicial Norms*, 24 N.M. L. REV. 191, 193 (1994) (asserting that administrative agencies and tribal courts are essentially opposites in terms of how they fit into the overall government structure, but, nonetheless, advocating for administrative agency-like deference to be applied to tribal proceedings).

164 467 U.S. 837 (1984).

165 *Id.* at 865.

166 *Id.* at 842–43.

167 *Id.* at 843.

There are 562 federally recognized Indian Nations in the United States.¹⁶⁸ Each tribe has its own unique values, customs, culture, and, most pertinently, law. Given the diverse cultures, it would be impossible for federal courts to either promulgate rules applicable to all tribes or to try and review *de novo* decisions rooted in any of the hundreds of unique laws and customs.¹⁶⁹ The federal judges would be completely incapable of determining and applying a particular tribe's relevant laws and customs—just as federal judges are incapable of deciding what constitutes a “‘new or modified major stationary source[]’ of air pollution.”¹⁷⁰ Therefore, deferring to the experts—the tribal courts and the administrative agencies—is the most logical solution.

Again, it is important to acknowledge how tribal governments and administrative agencies hold very different positions in our overall system of government. Nonetheless, the deference given to administrative agencies acts as an appropriate framework for the deference that should be granted to tribal courts. The first inquiry, whether or not Congress has legislatively addressed the matter, is a bit trickier in the context of tribal governments because the Constitution does not apply to American Indian tribes,¹⁷¹ and, thus, certain constitutional rights (such as court procedural rights) are not required in tribal proceedings. However, as discussed in Part II, Congress has passed a number of laws trying to coerce tribes into guaranteeing these rights. If these statutes are relaxed, as this Note argues they should be, then the reviewing court could easily go on to step two of the analysis: whether or not the tribal court acted reasonably.¹⁷²

Under this deferential standard of review, federal courts would still be able to protect against any egregious violations of individual rights that took place as a result of tribal prosecution by considering whether or not the tribal courts acted reasonably. Any completely incoherent holdings or arbitrary procedural happenings could be reversed and remanded. Simultaneously, tribal courts' sovereignty would be protected because the tribal courts are the bodies interpreting and implementing their own laws.

CONCLUSION

Gender violence in American Indian communities is astoundingly prevalent. There are many reasons for the pervasiveness of such abuse, such as the historical context of colonization, certain common societal behaviors, poor declination rates, and a lack of reporting (due to a lack of confidence in the justice system). The most significant factor, however, is the federal govern-

168 NAT'L CONG. OF AM. INDIANS, AN INTRODUCTION TO INDIAN NATIONS IN THE UNITED STATES 2 (2015), http://www.ncai.org/about-tribes/indians_101.pdf.

169 See Skibine, *supra* note 163, at 210.

170 *Chevron*, 467 U.S. at 840 (quoting Clean Air Act Amendments of 1977, 42 U.S.C. § 7502(b)(6) (1982)).

171 See *Talton v. Mayes*, 163 U.S. 376, 385 (1896) (holding that the United States Constitution is not applicable to tribal governments).

172 *Chevron*, 467 U.S. at 843.

ment's legislative failure to grant trial courts any jurisdictional reach or sentencing authority. This legislative failure, scholars agree, effectively *promotes* crime in Indian country because non-American Indian offenders are rarely held accountable.

Admittedly, the federal government has come a long way since the Major Crimes Act of 1885. The Tribal Law and Order Act of 2010 and the Violence Against Women Reauthorization of 2013 were very significant, necessary steps toward giving tribal governments the power to combat crime, specifically sexual offenses, in Indian country. However, these pieces of legislation are inadequate given the serious and widespread issues tribal governments face.

First, TLOA and VAWA are wrought with limitations and thus do not give tribal governments enough authority to have the power to protect their members. Under current law, tribal courts remain unable to exercise jurisdiction over non-Indians who do not have "sufficient ties" to the tribe. Additionally, tribes cannot seek a heightened sentence for an accused offender unless that offender has either previously been tried for the same or a similar offense, or is under prosecution in federal court. Given the historical context of criminal justice in Indian country (tribes did not have jurisdiction to try non-Indians) and the fact that, generally, federal courts have failed to charge or try a large number of offenders accused on Indian country, this "grant of authority" is more of a façade. In other words, since many sexual offenders were not tried in the past due to the loopholes in the system (for example, the tribe did not have jurisdiction or the federal court failed to prosecute), it is likely that they will again slip through the cracks, either because they were never previously tried or because the federal courts refrain from prosecution.

Current legislation is also inadequate because of the harsh conditions it puts on exercising the increased authority. To ask a tribal government to restructure its criminal justice system so that it aligns with the federal system is to ask the tribe to choose between attaining the authority to combat crime within its territory and its traditions, customs, and autonomy. This is simply asking too much.

Tribes should be able to implement the TLOA and VAWA grants of authority more easily, so they are not forced to sacrifice their culture for the safety of their people. Even though some tribal courts already incorporate procedures similar to those used in the federal courts, any mandatory change would interfere with a tribe's sovereignty and undermine the Indian Reorganization Act. By relaxing the TLOA and VAWA restrictions, tribes would be able to keep their tribal customs in place while still protecting their members.

Furthermore, the federal government need not worry about tribal courts infringing on non-Indian constitutional protections because all litigants can appeal to federal court, after exhausting all tribal recourse. By utilizing a very deferential standard of review, federal courts would be able to protect individuals against any possible unfair treatment by tribal courts while still

not interfering with tribal sovereignty. This relationship between tribal courts and federal courts, along with the TLOA and VAWA grants of authority (stripped of their restrictions), would give tribal governments the power they need to protect their members.