

BEYOND VAWA: PROTECTING NATIVE WOMEN FROM SEXUAL VIOLENCE WITHIN EXISTING TRIBAL JURISDICTIONAL STRUCTURES

Jessica Allison*

One in three American Indian women will be raped in her lifetime. This rampant assault is only exacerbated by the fact that tribes have not been able to prosecute non-Indians for any crime, including rape, since the 1970s. The Violence Against Women Reauthorization Act of 2013 took a small step toward filling this jurisdictional hole by creating provisions under which tribes can prosecute certain non-Indian defendants for a limited set of sexual violence crimes. However, VAWA is not enough to protect Indian women from the astronomical rates of violence they experience.

This Comment explores mechanisms used by tribes to protect their communities from sexual violence that are more compatible with notions of tribal traditions and inherent sovereignty than the mechanisms required under VAWA. These mechanisms better balance the realities of a post-colonial world with the unique social and cultural needs of each tribe and indigenous victim of sexual violence. This Comment both celebrates what tribes have already done to eradicate sexual violence in their communities and discusses options other tribes have at their disposal to do the same.

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* Citizen, Cherokee Nation; J.D. Candidate, 2019, University of Colorado Law School; Casenote & Comment Editor, *University of Colorado Law Review*. *Wado* (“thank you”) to my colleagues on the Law Review for their invaluable insight, Professor Carla Fredericks for her advice and encouragement throughout the process, and my family for their endless support.

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INTRODUCTION

Diane Millich, a member of the Southern Ute Tribe, was 26 when her new husband, a white man, moved in with her on her tribe's reservation in southwestern Colorado.¹ He began to abuse her, and law enforcement could do nothing about it.² Because her husband was non-Indian, the tribal police had no jurisdiction; and because she was an Indian³ woman on tribal lands, local law enforcement had no jurisdiction either.⁴ In fact, on one occasion her husband called the tribal police and the local sheriff's department on himself to show her that no one could stop him.⁵ After Millich filed for divorce, he came to her workplace and opened fire; her coworker was injured when he took a bullet for her.⁶ It took hours for investigators to measure

1. Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1590 (2016).

2. *Id.*

3. This Comment will use "Indian," "American Indian," and "Native American" interchangeably to collectively refer to the indigenous peoples of the United States. Though this terminology does not elucidate the cultural and societal differences among tribes, consistent language will provide greater clarity throughout this Comment. Tribes are referred to individually when appropriate. Additionally, this Comment refers to "Indian Country" in the colloquial sense of lands owned or utilized by tribes across the nation, rather than the legal definition given to the term under 18 U.S.C. §1151.

4. Riley, *supra* note 1, at 1590. See *infra* Section I.A for a discussion of this complex jurisdictional framework.

5. Riley, *supra* note 1, at 1591.

6. Sari Horwitz, New Law Offers Protection to Abused Native American Women, WASH. POST (Feb. 8, 2014), https://www.washingtonpost.com/world/national-security/new-law-offers-a-sliver-of-protection-to-abused-native-american-women/2014/02/08/0466d1ae-8f73-11e3-84e1-7626c5ef5fb_story.html?utm_term=

where the gun was when Millich's husband fired it and where her coworker was standing to determine that local law enforcement had jurisdiction.⁷ Even then, Millich's husband wasn't arrested for several weeks because he fled to New Mexico—he ultimately took a deal and pled guilty to only aggravated driving under revocation.⁸

This is the reality for many American Indian women.⁹ Thirty-nine percent of American Indian women experience domestic violence in their lifetime, and more than one-third are raped.¹⁰ Yet sexual violence was virtually nonexistent prior to colonization.¹¹ Traditionally, women in many Indian societies were respected and influential members of the community.¹² Tribes did not tolerate rape, and it was punished harshly in the rare instances it occurred.¹³ In the Iroquois Nation, for example, a man could not hold a leadership position if he had ever sexually assaulted a woman.¹⁴ And the Muscogee (Creek)

.792f647a708d [https://perma.cc/9YX8-E95R].

7. *Id.*

8. *Id.*; Ryan Sullivan, Native American Women Seek Protections from Abuse, FOX 8 (May 14, 2012, 6:44 PM), <https://myfox8.com/2012/05/14/native-american-women-seek-protections-from-abuse/> [https://perma.cc/M69A-RCGN].

9. Because the vast majority of sexual assaults are perpetrated against women, I have elected to use feminine pronouns throughout this Comment to refer to victims of sexual violence. However, any of the strategies described below can protect anyone who is a victim of sexual violence, including men, women, children, and elders.

10. Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL'Y 121, 123 (2004) ("The National Crime Victimization Survey indicates that American Indian and Alaska Native women suffer a rate of sexual assault of 7 per 1000 people annually, compared to 2 per 1000 for all women.").

11. SARAH DEER, *THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA* 21–22 (2015).

12. Deer, *supra* note 10, at 129. For example, some tribes, such as the Cherokee, trace their lineage through women. Amanda M.K. Pacheco, *Broken Traditions: Overcoming the Jurisdictional Maze to Protect Native American Women From Sexual Violence*, 11 J.L. & SOC. CHALLENGES 1, 7–8 (2009).

13. Deer, *supra* note 10, at 129–30; SHARING OUR STORIES OF SURVIVAL: NATIVE WOMEN SURVIVING VIOLENCE 8 (Sarah Deer et al. eds., 2008) ("When individual incidents of violence against Native women occurred in precolonial times, they were addressed in the context of the worldview and spiritual beliefs of the tribe. Unlike non-Indian jurisdictions, the commission of an act of violence held harsh consequences for the abuser, and the right of a husband to beat his wife was not legally sanctioned.").

14. Pacheco, *supra* note 12, at 8. Many Iroquois continue to revere women through certain ceremonies that thank women for providing food and children. Mary K. Mullen, Comment, *The Violence Against Women Act: A Double-Edged Sword for Native Americans, Their Rights, and Their Hopes of Regaining Cultural Independence*, 61 ST. LOUIS U. L.J. 811, 813 (2017).

Nation traditionally allowed the victim to determine the punishment for sexual violence as she saw fit, through either restitution or whipping.¹⁵

By contrast, European society widely used rape to threaten or punish women. This dynamic played out during the colonization of North America, as rape is an exercise of hostile, aggressive power—instead of an act of sexuality.¹⁶ As Indian women were assaulted by European men, the underlying social and legal sanction of rape as a means of control infiltrated tribal belief systems through the process of assimilation.¹⁷ However, Europeans' use of sexual violence as a means of control is not the only reason why rape against Indian women perpetrated by non-Indian men persists at such startling rates today. Another reason is the fact that the United States has systematically stripped tribes of the ability to effectively punish sexual offenders.¹⁸ Of particular importance, in 1978, the Supreme Court held in *Oliphant v. Suquamish Indian Tribe* that tribes lack the ability to prosecute non-Indians for any crimes arising within their jurisdiction.¹⁹ This severely restricted the tribes' ability to keep their members safe from crimes committed by non-Indians in Indian Country.

For the first time since *Oliphant*, the Violence Against Women Reauthorization Act of 2013 (VAWA 2013)²⁰ recognizes tribes' inherent sovereignty to prosecute non-Indians for certain domestic and sexual violence crimes.²¹ VAWA 2013 acknowledges—both symbolically and practically—a vital power that should not be downplayed. A fundamental aspect of sovereignty is the ability to protect citizens from crime, and VAWA 2013 provided a broader interpretation of tribes' sovereignty than previously recognized. Yet the statistical prevalence of sexual assault in Indian Country today indicates

15. Pacheco, *supra* note 12, at 15.

16. See James W. Zion & Elsie B. Zion, *Hozho's Sokee'—Stay Together Nicely: Domestic Violence Under Navajo Common Law*, 25 ARIZ. ST. L.J. 407, 411 (1993); DEER, *supra* note 11, at 20–21.

17. See DEER, *supra* note 11, at 23–24.

18. See *infra* Section I.A.

19. 435 U.S. 191 (1978).

20. Pub. L. No. 113-4, 127 Stat. 54 (codified as amended in scattered sections of U.S.C.).

21. VAWA 2013 is the first time since *Oliphant* that non-Indians can be subject to tribal criminal jurisdiction. See *infra* Part II for a more thorough discussion of *Oliphant* and the impact of VAWA 2013.

VAWA 2013 does not go far enough on its own to protect the people of Indian Country from sexual violence.

This Comment will highlight alternative mechanisms various tribes have employed—and others can employ—to better protect tribal communities. These mechanisms are not dependent on VAWA 2013, though they can be used in conjunction with the prosecutorial abilities VAWA 2013 confers. Part I will discuss the road leading to the passage of VAWA 2013, including a summary of the relevant congressional acts and Supreme Court opinions that have systematically stripped away tribes' inherent rights to prosecute non-Indian offenders. Part II will discuss how VAWA 2013 came to be passed and explain its text, including the steps tribes must take in order to exercise its provisions. Part II will also examine the successes experienced by tribes that have implemented jurisdiction granted by VAWA 2013. Part III will then discuss practical strategies tribes have used—either in tandem with VAWA 2013 jurisdiction or alone—to further address the extreme rates of sexual violence in Indian Country. Part IV highlights the commendable steps tribes have already taken to protect their communities, which serve as a roadmap for tribes that might want to implement similar mechanisms.

I. THE ROAD TO THE PASSAGE OF VAWA

It is an essential characteristic of sovereignty that a government possess the ability to protect its citizenry.²² Though the United States has always recognized the inherent sovereignty of Indian tribes, it has impeded tribes' ability to exercise the powers essential to their sovereignty. Federal encroachments on tribes' authority to protect their citizens through statutes, such as the Indian Civil Rights Act, and cases, such as *Oliphant*, have created jurisdictional gaps and, in turn, a lack of meaningful law and order in Indian Country.

Besides the ability to provide safety and security to its citizens, tribal sovereignty is about preserving “the culture and traditions of Indian people.”²³ But as Sarah Deer argues, as long as Indian communities are hurting from astronomically

22. Deer, *supra* note 10, at 143.

23. Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 HOUS. L. REV. 701, 719 (2006).

high rates of sexual violence, efforts to maintain tribal traditions, and in turn tribal sovereignty, will fail.²⁴ It is vital that tribes be able to protect their women and children because “[i]t is impossible to have a truly self-determining nation when its members have been denied self-determination over their own bodies.”²⁵

This Part provides a chronological survey of the major statutes and Supreme Court opinions that have expanded federal power within Indian Country and diminished tribal sovereignty. It will then provide an explanation as to how this legal history has impacted tribal communities in the modern era.

A. *Federal Incursions into Tribal Sovereignty*

Colonization is a gradual process, and it has played out against Indian people in part through legislative and judicial actions.²⁶ When Europeans first made contact with Indian tribes, they encountered sovereign peoples with complex, individualized systems of tribal governance.²⁷ Early Supreme Court opinions made clear that this sovereignty survived European contact but was thereafter subject to limitation.²⁸ This limitation, the Supreme Court held, made tribes “domestic dependent nations,” each one a kind of quasi-sovereign.²⁹ In *Worcester v. Georgia*, for example, Chief Justice Marshall wrote:

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition,

24. DEER, *supra* note 11, at 97.

25. *Id.* at xvi.

26. See generally Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77 (1993).

27. ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLES’ HISTORY OF THE UNITED STATES 25–26 (2014) (explaining how varied indigenous governance systems were, including tribes that left all internal affairs up to individual towns and tribes that had three branches of government).

28. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 13 (1831).

29. *Id.* However, the Court held that the Cherokee Nation was not a foreign nation such that the Supreme Court had original jurisdiction over matters pertaining to it. *Id.* at 14, 54.

that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient predecessors.³⁰

Marshall went on to explain that tribes only lost certain rights upon contact, such as the right to grant title to their lands to anyone other than the Europeans.³¹ Additionally, *Worcester* established one of the most important canons of federal Indian law: Indian tribes retain any rights not expressly ceded in a treaty or statute, rather than the inverse interpretation that treaties and statutes are a grant of rights to tribes.³²

Through the 1800s, the federal government systematically expanded its jurisdictional powers within Indian Country³³ in an era of federal Indian law referred to as the Trade and Intercourse Era.³⁴ This policy was double-sided—the federal government aimed to promote peace between the United States and tribes, but it also sought to acquire complete control over Indian affairs.³⁵ Beginning with the Trade and Intercourse Act of 1790,³⁶ Congress methodically gave itself full control over Indian affairs—referred to as “plenary power.”³⁷ The 1790 Act, for example, prohibited U.S. citizens from engaging in any land

30. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542–43 (1832).

31. *Id.* at 544–45; *see also* *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823) (holding that Indian tribes cannot transfer title to land to anyone but the federal government).

32. *Worcester*, 31 U.S. at 559–60. Sadly, the Supreme Court did not comply with this canon in perpetuity, as the Court neglected to apply it in one of Indian law’s landmark cases, *Oliphant v. Suquamish Indian Tribe*. *See* 435 U.S. 191 (1978); *infra* notes 84–86 and accompanying text.

33. “Indian Country” is defined in 18 U.S.C. § 1151 to include (a) “all land within the limits of any Indian reservation under the jurisdiction of the United States Government,” including rights-of-way running through the reservation, (b) all “dependent Indian communities,” and (c) “all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.”

34. CONFERENCE OF WESTERN ATTORNEYS GENERAL, *AMERICAN INDIAN LAW DESKBOOK* § 1:8 (2018).

35. Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 *IDAHO L. REV.* 1, 111–12 (2005) (“The main federalism policy of this era was the attempt to place the control over Indian affairs solely into the hands of the central federal government and to exclude the states.”).

36. 1 Stat. 137 (1790).

37. CONFERENCE OF WESTERN ATTORNEYS GENERAL, *supra* note 34, at § 1:8.

transactions with Indian tribes unless they had federal authority to do so.³⁸ And in 1817, Congress passed the General Crimes Act, which gave federal courts criminal jurisdiction over interracial crimes in Indian Country.³⁹ However, the 1817 Act did not include Indian-on-Indian crimes, instances in which an Indian defendant had already been prosecuted by a tribal court, or instances where a treaty expressly stipulated that the tribe was to retain exclusive jurisdiction.⁴⁰

Conflicts between the states and the tribes, such as those between Georgia and the Cherokee Nation that produced *Cherokee Nation* and *Worcester*,⁴¹ led to the Removal Era, which dictated Indian law from the 1830s to the 1880s.⁴² The states and white citizens demanded access to the lands held by the eastern tribes.⁴³ And as the United States grew economically and militarily, it had less of an incentive to promote peace between the states, the federal government, and the tribes.⁴⁴ Most tribes east of the Mississippi were forced off of their ancestral homelands and removed to western lands.⁴⁵ There was similar pressure to eradicate Indian people farther out West, where the discovery of gold led to the start of the reservation system in the 1850s.⁴⁶

When yet another wave of European settlers demanded Indian land, federal Indian policy shifted into the Allotment and Assimilation Era.⁴⁷ Instead of attempting to separate the races, as with the reservation system, the federal government encouraged assimilation of Indian people into white society.⁴⁸ The hallmark of the Allotment and Assimilation Era was the General Allotment Act,⁴⁹ or the Dawes Act, which was an attempt to encourage Indians to adopt Western land ownership

38. 1 Stat. 137, 138 § 4 (1790).

39. 3 Stat. 383 (1817).

40. *Id.*

41. *See supra* notes 28–32 and accompanying text.

42. DAVID E. WILKINS & HEIDI KIIWETINEPINESIHK STARK, *AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM* 125 (3d ed. 2011).

43. STEPHEN PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 7 (4th ed. 2012).

44. *Id.*

45. *Id.*

46. WILKINS & KIIWETINEPINESIHK STARK, *supra* note 42, at 126.

47. CONFERENCE OF WESTERN ATTORNEYS GENERAL, *supra* note 34, at § 1:8.

48. PEVAR, *supra* note 43, at 8.

49. 24 Stat. 388 (1887) (current version at scattered sections of 25 U.S.C. (2012)).

systems and assimilate into white society.⁵⁰ In practice, however, allotment destroyed tribal land bases—by the time allotment ended in 1934, 118 of the 213 reservations had been allotted, and nearly a million acres of tribal lands had been lost to non-Indians.⁵¹

The Major Crimes Act (MCA)⁵² was passed in 1885, right at the end of the Allotment and Assimilation Era.⁵³ The MCA was a response to the Supreme Court's decision in *Ex Parte Crow Dog*,⁵⁴ which held that the federal government did not have jurisdiction to prosecute an Indian-on-Indian murder that occurred on a reservation.⁵⁵ Based on a paternalistic fear that the tribes would fail to adequately punish Indian defendants,⁵⁶ the MCA granted the federal government concurrent jurisdiction over seven enumerated Indian-on-Indian crimes committed within Indian Country.⁵⁷ Important to the discussion here, rape was one of those enumerated offenses.⁵⁸ Despite the fact that the MCA did not explicitly divest tribes of jurisdiction over these crimes, the practical effect has been that many tribes have not prosecuted a single person for the enumerated offenses, including rape, for over one hundred years.⁵⁹ This means that a rape survivor who reports her crime will often have to interact with prosecutors from the U.S. Attorney's Office—someone who “carr[ies] the official badge of colonization,” as Deer calls it.⁶⁰ And, unfortunately, granting this jurisdiction does not require that the federal government actually exercise

50. Sarah Krakoff, *Tribal Civil Jurisdiction Over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1197–98 (2010).

51. WILKINS & KIIWETINEPINESIIK STARK, *supra* note 43, at 128.

52. 23 Stat. 385 (1885) (current version at 18 U.S.C. § 1153 (2012)).

53. 1887 is often considered the end of the Allotment and Assimilation Era, but that date is largely arbitrary. Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1065–66 (2012).

54. 109 U.S. 556 (1883).

55. DEER, *supra* note 11, at 35.

56. See Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1094–97 (2005) (arguing that because nonmembers in tribal courts are not losing cases at disproportionate rates, tribal courts are not unfair to non-Indian litigants); Fletcher, *supra* note 23, at 739.

57. 23 Stat. 385 (1885) (current version at 18 U.S.C. § 1153(a) (2012)). The enumerated offenses are murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. *Id.*

58. *Id.*

59. DEER, *supra* note 11, at 37.

60. *Id.*

it.⁶¹

The federal government recognized that allotment was a complete failure and adopted new priorities during the subsequent Era of Reorganization and Self-Government.⁶² The Reorganization and Self-Government Era was defined by the passage of the Indian Reorganization Act,⁶³ which “encouraged tribes to adopt constitutions and enact other laws intended to support separate tribal political existence.”⁶⁴

Though this policy allowed tribes to reclaim their individual cultures to an extent, congressional policy dramatically shifted in the 1940s.⁶⁵ During the Termination Era, the federal government ended its relationship with some tribes and, as a part of that policy, Congress passed Public Law 83-280 (PL-280).⁶⁶ PL-280 transferred Indian Country jurisdiction from the federal government to certain state governments, and in some instances allowed states to opt in to exercising jurisdiction.⁶⁷ Tribes retained concurrent jurisdiction.⁶⁸ States’ new PL-280 jurisdiction was actually more expansive than the criminal jurisdiction previously enjoyed by the federal government because a state could enforce all of its criminal laws, including misdemeanors, in Indian Country.⁶⁹ Unfortunately, neither the states where PL-280 was implemented mandatorily nor the tribes within them consented to this regime, and states received no additional funding in exchange for taking on this jurisdiction.⁷⁰ In the case of sexual violence crimes occurring in

61. See Berger, *supra* note 56, at 1108 (“The U.S. Attorney’s Office, by some estimates, declines to prosecute 50 to 85% of the cases [of sexual violence] that are reported, and many of those it does accept are child sexual abuse cases.”); see also *infra* notes 108–113 and accompanying text.

62. Krakoff, *supra* note 50, at 1198.

63. 48 Stat. 984 (1934) (current version at scattered sections of 25 U.S.C. (2012)).

64. Krakoff, *supra* note 50, at 1198.

65. *Id.*

66. *Id.* (describing the goals of the Termination Era); Pub. L. No. 83-280, 67 Stat. 588 (1953) (current version at 18 U.S.C. § 1162 (2012)).

67. The Act granted California, Minnesota, Nebraska, Oregon, Wisconsin and Alaska (upon statehood) with jurisdiction over offenses committed “by or against Indians in the areas of Indian country.” 67 Stat. 588.

68. Kathleen Finn et al., *Responsible Resource Development and Prevention of Sex Trafficking: Safeguarding Native Women and Children on the Fort Berthold Reservation*, 40 HARV. J.L. & GENDER 1, 16 (2017).

69. *Id.*

70. DEER, *supra* note 11, at 38 (“For all practical purposes, tribal governments in PL 280 states have historically been at a distinct disadvantage when it comes to crime control.”).

Indian Country within PL-280 states, these resource limitations make it harder for state courts to investigate and prosecute these crimes.⁷¹

In the late 1960s, the federal government again drastically switched from the Termination Era to the Self-Determination Era.⁷² Congress passed the Indian Civil Rights Act (ICRA) in 1968.⁷³ ICRA required that tribal courts implement procedural safeguards in both criminal and civil proceedings that mirror those found in the Bill of Rights. These safeguards include the guarantees of due process and equal protection, and the prohibition of cruel and unusual punishment.⁷⁴ Additionally, ICRA restricted the criminal sentences tribes could impose to no more than six months and a \$500 fine.⁷⁵ Some interpreted these sentencing provisions to mean that tribal courts no longer had jurisdiction over felony offenses.⁷⁶ This is incorrect—tribes retained the ability to sentence defendants for felony crimes but were simply limited in the severity of these sentences.⁷⁷ However, the practical effect of ICRA was that some tribal

71. Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 815 (2006) (“Providing education and other services to impoverished American Indians suddenly became the responsibility of state governments. Cash-strapped states that initially favored increased state authority in Indian country began to see Public Law 280 and the termination acts as unfunded mandates. As a result, Indian people were poorly served, and civil rights issues flared.”).

72. The start of the Self-Determination Era is thought to be 1970, when Richard Nixon gave a famous speech in which he called for “tribal self-determination” and an “increased [tribal] role in implementing federal Indian programs.” *Id.* at 817. However, the shift began at the end of the 1960s, in part because of President Lyndon Johnson’s statement that “[w]e must affirm the rights of the first Americans to remain Indians while exercising their rights as Americans. We must affirm their rights to freedom of choice and self-determination.” PEVAR, *supra* note 43, at 12.

73. Pub. L. No. 90-284, 82 Stat. 77 (1968) (current version at 25 U.S.C. §§ 1301–04 (2012)); DEER, *supra* note 11, at 39. Federal lawmakers passed this Act after learning that tribes are not bound by the U.S. Constitution, though the idea that tribal courts are hostile to defendants’ civil rights is a common assimilationist argument. *Id.*

74. 25 U.S.C. § 1302(a) (2012); Samuel E. Ennis & Caroline P. Mayhew, *Federal Indian Law and Tribal Criminal Justice in the Self-Determination Era*, 38 AM. INDIAN L. REV. 421, 435 (2014). However, despite requiring tribal courts provide these protections, defendants’ only available remedy for deprivation of these rights is a habeas corpus petition. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

75. In 1986, these limits were raised to one year of imprisonment and a fine of up to \$5,000. Finn et al., *supra* note 68, at 17.

76. Deer, *supra* note 10, at 128.

77. *Id.* (“[T]he ICRA sentencing limitation does not actually prohibit tribal

courts grew more reluctant to prosecute serious crimes, including sexual violence.⁷⁸

Despite the fact that ICRA was passed in an era of “self-determination,” the statute severely infringed upon tribal sovereignty.⁷⁹ ICRA was passed at the height of the civil rights movement, when Indian people were fighting to address the disparate treatment they received within the American legal system.⁸⁰ Instead of addressing these concerns, Congress focused on the perceived unfairness litigants in tribal court were experiencing.⁸¹ The bill’s main sponsor thought that “tribal judges’ inexperience, lack of training, and unfamiliarity with the traditions and the forms of the American legal system” deprived litigants of their civil liberties.⁸² To the contrary, tribal feedback during hearings on the bill suggested that it was state and federal authorities who were responsible for civil liberties violations in Indian Country.⁸³

Tribal criminal jurisdiction was most drastically reduced by the Supreme Court decision in *Oliphant v. Suquamish Indian Tribe*.⁸⁴ There, the Rehnquist Court held that Indian tribes did not possess any criminal jurisdiction over non-Indian defendants.⁸⁵ One troubling aspect of this decision was the Court’s abandonment of long-standing principles of Indian law. Previous Court opinions interpreting the bounds of tribal sovereignty looked for clear congressional statements abrogating tribes’ jurisdiction over non-Indians. Instead, in *Oliphant*, the Court looked to lower court decisions, congressional reports, and other questionable evidence to hold that, via the implicit

nations from prosecuting any particular type of crime; it only controls the sanctions that can be imposed.”).

78. AMNESTY INT’L, MAZE OF INJUSTICE 29 (2007), <http://www.amnestyusa.org/pdfs/MazeOfInjustice.pdf>, [<https://perma.cc/KAN8-65ZE>].

79. DEER, *supra* note 11, at 39.

80. *Id.*

81. *Id.* (acknowledging that this was “a legitimate problem, to be sure, but abusive tribal governments were no more or less common than abusive state governments”).

82. Ennis & Mayhew, *supra* note 74, at 434.

83. *Id.*

84. 435 U.S. 191 (1978).

85. *Id.* at 195–99. The Court later held in *Duro v. Reina* that tribes do not have jurisdiction over non-member Indians. 495 U.S. 676 (1990). This was quickly reversed in what came to be known as the “Duro Fix”—which reaffirms Congress’s ability to expand tribal criminal jurisdiction beyond that established by the Court. Ennis and Mayhew, *supra* note 74, at 432.

divestiture doctrine,⁸⁶ tribes never possessed criminal jurisdiction over non-Indians.⁸⁷ The Court did state, however, that Congress has the power to explicitly authorize the exercise of such jurisdiction.⁸⁸ The result of *Oliphant* was that non-Indian defendants could not be prosecuted in tribal courts for crimes of sexual violence arising in Indian Country.

Congress held seventeen hearings between 2007 and 2010 to investigate the rising levels of crime in Indian Country, including sexual violence.⁸⁹ The result was the Tribal Law and Order Act of 2010 (TLOA),⁹⁰ which expanded tribal courts' power to an extent. TLOA amended ICRA by allowing tribal courts to impose harsher sentences if they implemented additional protections for defendants. Under TLOA: (1) defendants must have the right to effective assistance of counsel at least equal to that guaranteed by the U.S. Constitution; (2) the tribe must provide licensed indigent defense counsel at the expense of the tribal government; and (3) the presiding judge must have sufficient legal training and be licensed to practice law.⁹¹ The tribe's criminal laws, rules of evidence, and rules of criminal procedure must be publicly available, and the court must make a public record of criminal proceedings.⁹²

Under TLOA, heightened sentencing is restricted in that a defendant is only eligible for enhanced punishment if the defendant has been previously convicted of the same or a comparable offense by any U.S. jurisdiction, or if the offense, or a comparable offense, would be punishable by more than one year in prison if prosecuted by the United States or any state.⁹³

86. This doctrine stands for the proposition that simply because of European contact and the subsequent incorporation of tribes into the United States, tribes inherently lost certain rights. See Krakoff, *supra* note 50, at 1208.

87. Henry S. Noyes, *A "Civil" Method of Law Enforcement on the Reservation: In Rem Forfeiture and Indian Law*, 20 AM. INDIAN L. REV. 307, 317 (1995-1996). See also Berger, *supra* note 56, at 1056 ("By patching together bits and pieces of history and isolated quotes from nineteenth century cases, and relegating contrary evidence to footnotes or ignoring it altogether, the majority created a legal basis for denying jurisdiction out of whole cloth.").

88. See *Oliphant*, 435 U.S. at 208.

89. Matthew L.M. Fletcher, *Tribal Law and Order Act Details*, TURTLE TALK (July 19, 2010), <https://turtletalk.wordpress.com/2010/07/19/tribal-law-and-order-act-details/> [<https://perma.cc/NY8A-FPK9>].

90. Pub. L. No. 111-211, 124 Stat. 2261 (2010) (codified in scattered sections of 25 U.S.C. (2012)).

91. 25 U.S.C. § 1302(c) (2012).

92. *Id.*

93. *Id.* § 1302(b).

If these conditions are met, a tribe can sentence a defendant for up to three years in prison and a fine of up to \$15,000 for a single offense.⁹⁴ Additionally, the tribal court may stack consecutive sentences for a total penalty no greater than nine years' imprisonment.⁹⁵ Though this increase might seem marginal, it can provide a survivor of sexual violence a greater sense of safety if her assailant is incarcerated for up to nine years, as opposed to a year or less under ICRA.⁹⁶ But even though TLOA was a move in the right direction for tribal sovereignty, the legacy of federal Indian law has left women in Indian Country without legal recourse for sexual violence crimes perpetrated against them.

B. The Contemporary Impact of this Jurisdictional Framework

The jurisdictional holes resulting from these successive policies have left violence and virtual lawlessness in their wake. As stated above, an estimated 34.1 percent of American Indian women will be raped in their lifetime.⁹⁷ This is a rate of seven sexual assaults per 1,000 people annually, as compared to two per 1,000 people annually for all women within the United States.⁹⁸

The impacts of sexual violence on a woman's health and her community's well-being should not be ignored. Rape affects a survivor physically, mentally, and spiritually.⁹⁹ For example, Indian women who have been sexually assaulted report higher levels of depression, substance abuse, and suicidal ideation than those who have not been sexually assaulted.¹⁰⁰ Moreover, in Indian communities a survivor must deal with the trauma of knowing that not only was she sexually assaulted, but generations before her have faced the same violence with little to no justice.¹⁰¹ As Sarah Deer writes, sexual assault is an attack "on

94. *Id.*

95. *Id.* § 1302(a)(D).

96. Sarah Deer, *Bystander No More: Improving the Federal Response to Sexual Violence in Indian Country*, 2017 UTAH L. REV. 771, 777–78 (2017).

97. Deer, *supra* note 10, at 123.

98. *Id.*

99. DEER, *supra* note 11, at 11.

100. Deer, *supra* note 10, at 124; Deer, *supra* note 96, at 775.

101. DEER, *supra* note 11, at 12 ("Imagine living in a world in which almost every woman you know has been raped. Now imagine living in a world in which

the human soul; the destruction of indigenous culture and the rape of a woman connote a kind of spiritual death that is difficult to describe to those who have not experienced it. It is not only Native women who have been raped but Native nations as a whole.”¹⁰²

Prosecution of sexual violence crimes is further complicated by two factors. First, the vast majority of Indian victims of sexual assault report their assailants to be of a different race.¹⁰³ And because tribal courts do not have jurisdiction over non-Indians, the tribe cannot punish many of those who commit crimes within their boundaries and instead must rely on federal or state courts—and, as previously discussed, such reliance has proven to be futile. Additionally, a Bureau of Justice Statistics report found that in rapes reported between 1992–1996, 75 percent were either committed by a stranger or mere acquaintance of the victim.¹⁰⁴ Given that the vast majority of sexual assaults are committed by non-Indians, and VAWA 2013 does not allow tribes to prosecute offenders who are strangers or merely acquaintances of the victim,¹⁰⁵ the federal framework is insufficient to protect Indian women. Second, many tribal jails house more inmates than they are equipped to hold—nearly one-third in 2001 were operating at about 150 percent capacity.¹⁰⁶ Between this overcrowding and the

four generations of women and their ancestors have been raped. Now imagine that not a single rapist has ever been prosecuted for these crimes. That dynamic is a reality for many Native women—and thus for some survivors, it can be difficult to separate the more immediate experience of their assault from the larger experience that their people have endured through a history of forced removal, displacement, and destruction.”).

102. *Id.*

103. LAWRENCE A. GREENFELD & STEVEN K. SMITH, AMERICAN INDIANS AND CRIME 7 (1999), <https://www.bjs.gov/content/pub/pdf/aic.pdf> [<https://perma.cc/2AAN-H5VW>] (finding that nine in ten Indian victims of rape or sexual assault reported assailants who were white or black); FARLEY ET AL., GARDEN OF TRUTH: THE PROSTITUTION AND TRAFFICKING OF NATIVE WOMEN IN MINNESOTA 27 (2011), http://prostitutionresearch.com/pdfs/Garden_of_Truth_Final_Project_WEB.pdf [<https://perma.cc/3JLR-DUHS>].

104. GREENFELD & SMITH, *supra* note 103, at 6; STEVEN W. PERRY, AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE, 1992–2002 (2004), <https://www.bjs.gov/content/pub/pdf/aic02.pdf> [<https://perma.cc/E2M5-J5ST>] (“American Indians were more likely to be victims of assault and rape/sexual assault committed by a stranger or acquaintance rather than an intimate partner or family member.”). The relationship of the assailant to the victim is a key question for jurisdiction exercised under VAWA 2013. *See infra* Part II.

105. *See infra* Part II for a summary of VAWA 2013’s limitations.

106. U.S. COMMISSION ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING

sentencing limitations, many violent offenders may see only a fraction of the time behind bars that comparable offenders might face in the state or federal systems.¹⁰⁷

However, simply handing jurisdiction over to the federal government is not the best way to adequately punish offenders in Indian Country. In fact, roughly two-thirds of felony crimes forwarded to U.S. Attorneys for prosecution are rejected.¹⁰⁸ These prosecutions are rejected for a variety of reasons, including the difficulty of prosecuting sexual violence crimes, federal prosecutors' inexperience in trying cases involving typically state law crimes, and the confusing jurisdictional web surrounding crimes in Indian Country.¹⁰⁹ Additionally, the FBI's capacity to investigate sexual violence crimes arising in Indian Country is limited.¹¹⁰ In fiscal year 2014 the FBI had 14,050 Special Agents,¹¹¹ but only 124 worked exclusively on Indian Country investigations.¹¹² The *Denver Post*, in its series on the implications of this jurisdictional web, presented the powerful anecdote of a six-year-old girl who was sexually assaulted by a family member—after three years of investigation by the FBI with no new developments, the tribal prosecutor decided to file charges, only to discover that the tribe's statute of limitations had run.¹¹³

Little deterrence for offenders, a lack of resources to investigate and prosecute crimes, and a complicated jurisdictional web have led to a lack of meaningful law and order in Indian

AND UNMET NEEDS IN INDIAN COUNTRY 67, 68 (2003), www.usccr.gov/pubs/na0703/na0204.pdf [<https://perma.cc/T8W5-7AA6>]. According to a Department of Justice study, some tribal jails are so underfunded and overcrowded that inmates do not have basic necessities such as blankets, mattresses, and toothpaste. *Id.*

107. Michael Riley, *1885 Law at Root of Jurisdictional Jumble*, DENVER POST (Nov. 9, 2007, 3:51 PM), <http://www.denverpost.com/2007/11/09/1885-law-at-root-of-jurisdictional-jumble/> [<https://perma.cc/AZ8L-TW5G>].

108. *Id.*

109. See Cynthia Castillo, *Tribal Courts, Non-Indians, and the Right to an Impartial Jury after the 2013 Reauthorization of VAWA*, 39 AM. INDIAN L. REV. 311, 314–15 (2014).

110. See Michael Riley, *Promises, Justice Broken*, DENVER POST (Nov. 10, 2007, 12:48 PM), <http://www.denverpost.com/2007/11/10/promises-justice-broken/> [<https://perma.cc/B4GE-PSZJ>].

111. FEDERAL BUREAU OF INVESTIGATION, FY 2017 BUDGET REQUEST, <https://www.justice.gov/jmd/file/822286/download> (last visited Mar. 19, 2018) [<https://perma.cc/2EQU-D22T>].

112. U.S. DEP'T OF JUSTICE, INDIAN COUNTRY INVESTIGATIONS AND PROSECUTIONS 7 (2014), <https://www.justice.gov/tribal/file/796976/download> [<https://perma.cc/M2K3-YB5N>].

113. Riley, *supra* note 110.

Country. Amending VAWA to reaffirm tribal power to prosecute non-Indians for certain crimes was a partial solution, but it failed to recognize the unique cultural needs of both the tribes involved and the Indian victims of sexual violence.

II. THE VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2013

The Violence Against Women Act was most recently reauthorized in 2013. VAWA 2013 reaffirmed tribes' inherent right to investigate, prosecute, convict, and sentence non-Indians for a limited set of crimes committed in Indian Country.¹¹⁴ This is without a doubt an important victory for tribal sovereignty—for the first time since *Oliphant*, tribes can use their court systems to protect their citizens from non-Indian offenders. But by the same token, VAWA 2013 requires tribes to sacrifice some of their inherent sovereignty by imposing American legal structures on their procedures. No discussion of sexual violence against Indian women can proceed without an acknowledgment of VAWA 2013 and the way it expands tribes' jurisdiction. Though Part III will discuss the ways tribes can protect their communities without dealing with VAWA 2013's shortcomings, this Part acknowledges that VAWA 2013 was, overall, a good step forward for protecting Indian communities.

The Violence Against Women Act was originally passed in 1994 to address gender-motivated crimes via criminal and civil remedies, as well as to encourage social reform.¹¹⁵ It has since been reauthorized three times.¹¹⁶ The 2005 Reauthorization included a limited acknowledgment of the problems plaguing Indian Country. It increased funding to allow tribes to access national crime databases, initiate consultation sessions with the Department of Justice, and create a national tribal sex offender registry, among other things.¹¹⁷ It wasn't until an Amnesty International report was released, however, that Congress began discussing expanding tribal jurisdiction over

114. See VAWA 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013).

115. Parker Douglas, Note, *The Violence Against Women Act and Contemporary Commerce Power: Principled Regulation and the Concerns of Federalism*, 1999 UTAH L. REV. 703, 708–10 (1999).

116. DEER, *supra* note 11, at 101. VAWA 2013 is intended to be “a comprehensive federal law that approaches violence in a multifaceted way, including funding, programming, and criminal justice reform.” *Id.*

117. AMNESTY INT'L, *supra* note 78, at 82.

non-Indians.¹¹⁸ This report, entitled *Maze of Injustice*, used powerful, personal stories to highlight the virtual lawlessness of Indian Country and the utter failure of the U.S. government to protect Indian women.¹¹⁹ In 2008, Democratic Senator Byron Dorgan led the Senate Committee on Indian Affairs in circulating various proposals for legislation.¹²⁰ Though VAWA 2013 received some resistance from Republican lawmakers, it was Republican Representative Tom Cole, a citizen of the Chickasaw Nation, who helped arrange enough votes in favor.¹²¹ Ultimately, the House bill (which mirrored the Senate version) was passed on February 28, 2013, by a vote of 286 to 138.¹²² On March 7, 2013, President Obama signed VAWA 2013 into law.¹²³

A tribe that chooses to implement VAWA 2013 may prosecute a non-Indian who commits a dating violence¹²⁴ or domestic violence¹²⁵ crime, or violates a protection order enforceable by the tribe. The power to prosecute these crimes is referred to as “special domestic violence criminal jurisdiction” (SDVCJ). For the tribe to execute this jurisdiction, the defendant must have sufficient ties to the tribe, which means he: (1) resides in the Indian Country of the participating tribe; (2) is employed in the Indian Country of the participating tribe; or (3) is the spouse, intimate partner, or dating partner of a member of the partici-

118. See *id.*; DEER, *supra* note 11, at 99–100.

119. DEER, *supra* note 11, at 99–100; RJ Sangosti & Michael Riley, *Path to Justice Unclear*, DENVER POST (Nov. 13, 2007, 2:01 PM), <http://www.denverpost.com/2007/11/13/path-to-justice-unclear/> [<https://perma.cc/BT5N-SNAC>].

120. DEER, *supra* note 11, at 100.

121. *Id.* at 103–04. Cole, of Oklahoma, explained to his fellow lawmakers that, as a member of the Chickasaw Nation, he was the only one in Congress who could be held accountable for beating an Indian woman on an Indian reservation. *Id.* at 104.

122. Rob Capriccioso, *A Proud Day for Tribal Advocates of the Violence Against Women Act*, INDIAN COUNTRY TODAY (Feb. 28, 2013), <https://indiancountrymedia.network.com/news/politics/a-proud-day-for-tribal-advocates-of-the-violence-against-women-act/> [<https://perma.cc/TP9S-YBEA>]. All “no” votes were Republicans. *Id.*

123. Ennis & Mayhew, *supra* note 74, at 421.

124. 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.” 25 U.S.C. § 1304(a)(1) (2012).

125. Domestic violence is “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 who has jurisdiction over the Indian Country where the violence occurs.” *Id.* § 1304(a)(2).

pating tribe or an Indian residing in the Indian Country of the participating tribe.¹²⁶ Consequently, VAWA 2013 does not cover crimes between two non-Indians, crimes between two strangers, crimes committed by someone who lacks sufficient ties to the tribe, or instances of child or elder abuse that do not involve the violation of a protective order.¹²⁷

In addition, VAWA 2013 requires that the tribe provide defendants additional procedural safeguards beyond what TLOA and ICRA require.¹²⁸ Under VAWA 2013, non-Indian defendants have a right to an impartial jury, drawn from a fair cross-section of the community, that does not systematically exclude any distinctive groups, including non-Indians.¹²⁹ Additionally, tribes have a duty to notify non-Indian defendants of their rights to file a writ of habeas corpus in federal court.¹³⁰ VAWA 2013 also includes a catchall provision requiring tribes to provide “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.”¹³¹ A tribe is said to have implemented VAWA 2013 once it has fulfilled all of the above requirements, as well as the procedural safeguards under TLOA.

VAWA 2013 provided for a pilot program under which a limited number of tribes could implement the SDVCJ prior to VAWA 2013’s enactment date.¹³² The first three tribes to participate in the pilot program were the Tulalip Tribes, the Confederated Tribes of Umatilla, and the Pascua Yaqui Tribe.¹³³ In 2014, the Pascua Yaqui became the first Indian na-

126. *Id.* § 1304(b)(4)(B).

127. DEPARTMENT OF JUSTICE, VAWA 2013 AND TRIBAL JURISDICTION OVER CRIMES OF DOMESTIC VIOLENCE (2013), <https://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/vawa-2013-tribal-jurisdiction-overnon-indian-perpetrators-domesticviolence.pdf> [<https://perma.cc/6WEY-UYRF>]. The Act was limited to this set of crimes because “key congressional allies were willing to support the prosecution of a man who had married into the tribe, but balked when asked to support the prosecution of people who may not have ties to the reservation.” DEER, *supra* note 11, at 105.

128. In order to sentence a non-Indian defendant under VAWA 2013, the tribe must also have implemented TLOA. 25 U.S.C. § 1304(d)(2) (2012 Supp. V 2018).

129. *Id.* § 1304(d)(3).

130. *Id.* § 1304(e)(3).

131. *Id.* § 1304(d)(4).

132. VAWA 2013, 127 Stat. 54 § 908(b)(2).

133. DEER, *supra* note 11, at 105.

tion since *Oliphant* to prosecute a non-Indian defendant for a crime, after the defendant was charged with beating his intimate partner.¹³⁴

The three pilot programs have all successfully prosecuted non-Indians under VAWA 2013. The Confederated Tribes of the Umatilla Indian Reservation in Oregon received SDVCJ on February 20, 2014, and as of September 2015 had made six arrests for SDVCJ. These arrests led to four convictions of defendants who are subject to tribal probation (including the requirement to undergo abuser intervention treatment).¹³⁵ The Pascua Yaqui Tribe has arguably been the most successful tribe in exercising SDCVJ. The tribe, located in southwest Arizona, had a total of twenty-one SDVCJ cases involving fifteen non-Indian men as of September 2015.¹³⁶ These cases led to six convictions.¹³⁷ Eleven defendants had criminal records in Arizona; six had been previously arrested by the state for violent crimes, weapons, or threats; two had outstanding arrest warrants; and four were serious enough to warrant referral for federal prosecution.¹³⁸ Eleven cases involved children, all of whom were under the age of eleven.¹³⁹ Further, the fifteen non-Indian defendants had a combined total of more than eighty documented tribal police contacts, arrests, or reports attributed to them during the previous six years.¹⁴⁰ Since implementing SDVCJ, 25 percent of the tribe's domestic violence cases have involved non-Indians.¹⁴¹ The Tulalip Tribes of Oregon received SDVCJ on February 20, 2014. As of September 2015, the tribe had eleven SDVCJ cases involving twenty-eight total charges.¹⁴² These cases resulted in seven convictions, one dismissal, one federal referral, and one case still pending.¹⁴³

Tribes that did not participate in the pilot program were

134. *Id.* at 105–06. As Deer notes, “[d]espite all of the anti-VAWA rhetoric suggesting that tribal courts would not be fair, the Pascua Yaqui jury acquitted.” *Id.* at 106.

135. *Pilot Project*, NATIONAL CONGRESS OF AMERICAN INDIANS, <http://www.ncai.org/tribal-vawa/pilot-project-itwg/pilot-project> (last visited Nov. 19, 2017) [<https://perma.cc/V24N-LFJM>].

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

able to begin exercising SDVCJ on March 7, 2015.¹⁴⁴ As of October 19, 2018, twenty-two tribes have implemented SDVCJ under VAWA 2013.¹⁴⁵ Though these tribes have had varying levels of success, one interesting note is that, as of March 20, 2018, none of the 128 non-Indian abusers arrested have filed a habeas corpus petition in federal court.¹⁴⁶ However, the fact that only twenty-two of the 573 federally recognized tribes have implemented VAWA 2013¹⁴⁷ demonstrates that there remain barriers to eradicating sexual violence in Indian Country.

III. PRACTICAL ALTERNATIVES TO PROTECTING NATIVE COMMUNITIES BEYOND VAWA

Though VAWA 2013 is an important step in restoring tribes' inherent sovereignty, there are still gaps in the exercise of this sovereignty left by the history of criminal jurisdiction in Indian Country. For example, sexual assaults perpetrated by non-Indian strangers or acquaintances are left to the sole authority of the federal government, and violence against children and elders must be prosecuted by the federal government as well. And even if a tribe does have jurisdiction, there might be instances in which the traditional Anglo-American court procedures adopted by the majority of tribal courts are not the most appropriate means of seeking redress.¹⁴⁸ Even the process of implementing TLOA and VAWA 2013 can take more time and resources than the tribe can afford.¹⁴⁹

144. DEPARTMENT OF JUSTICE, *supra* note 127.

145. *Implementation Chart: VAWA Enhanced Jurisdiction and TLOA Enhanced Sentencing*, TRIBAL COURT CLEARINGHOUSE (last updated Oct. 19, 2018), <http://www.tribal-institute.org/download/VAWA/Chart.pdf> [<https://perma.cc/PP9Y-6MAX>].

146. See NATIONAL CONGRESS OF AMERICAN INDIANS, VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 1 (2018), http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf [<https://perma.cc/6LME-B9XW>]. Under ICRA, "[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303 (2012).

147. See *supra* note 145.

148. See Mullen, *supra* note 14, at 831 (highlighting the fact that VAWA 2013 requires tribes to conform to Anglo-American court systems and procedures).

149. See Finn et al., *supra* note 68, at 28 ("Instituting the necessary laws and systems would require a significant investment of both time and money. The Tribe may need to update its code to ensure defendants' rights are respected. Finally, the Tribe would have to have the capacity to police and prosecute the crimes listed in VAWA.").

Below are several mechanisms tribes have implemented to further protect their communities from sexual violence. Each subpart includes examples created by various tribes, and any other tribe may follow suit if the mechanism conforms to the unique needs and values of the tribe. As with any policy in Indian law, there is no one-size-fits-all for the 573 federally recognized tribes, but these mechanisms show that there are innovative alternatives to achieving justice outside of Anglo-American court systems. A strong mechanism is one that respects the needs and sensitivities of a sexual violence survivor, promotes tribal culture and traditions, and cooperates with, but is not subsumed by, federal or state structures. VAWA 2013 is an important tool in a post-colonial world, but it does not meet this standard because it completely neglects tribal culture and values in favor of following Anglo-American court processes and procedures. It is unrealistic to eliminate all of the effects of colonization, but as Victoria Ybanez writes in *Sharing Our Stories of Survival*, Indian people can “acknowledge [their] past and use it as a guide to shape [their] future.”¹⁵⁰

A. *Cross-Deputization*

Because of the geographical complexities of Indian Country jurisdiction, sometimes a shift in just a few feet can change what sovereign is the appropriate responder to an alleged crime.¹⁵¹ Once officers respond to an alleged crime, they must determine whether the act occurred within Indian Country¹⁵² and then determine the racial identities of the parties involved.

Cross-deputization agreements are a common remedial measure for this jurisdictional web.¹⁵³ These agreements allow different law enforcement agencies or governmental entities¹⁵⁴ to exercise jurisdiction where they otherwise would not be able;

150. SHARING OUR STORIES OF SURVIVAL, *supra* note 13, at 50.

151. *Cross-Deputization Helps Solve Jurisdictional Issues*, INDIAN COUNTRY TODAY (June 4, 2007), <https://indiancountrymedianetwork.com/news/cross-deputization-helps-solve-jurisdictional-issues/> [<https://perma.cc/S956-SQCJ>].

152. Defined *supra* note 33.

153. *Cross-Deputization Helps Solve Jurisdictional Issues*, *supra* note 151; Matthew L.M. Fletcher et al., *Indian Country Law Enforcement and Cooperative Public Safety Agreements*, 89 MICH. B.J. 42, 43 (2010).

154. See *infra* notes 166–167 and accompanying text for a discussion of how prosecutors can be “cross-deputized” to work in the courts of another sovereign.

for example, an agreement might allow state officers to respond to a crime in Indian Country between two Indians.¹⁵⁵ This measure is particularly beneficial in instances in which a tribe lacks sufficient law enforcement officers but the state or surrounding county does not.¹⁵⁶ In the case of sexual violence, cross-deputization agreements can ensure there is a prompt and efficient law enforcement response without the preliminary jurisdictional questions. Tribal police officers generally have the right to arrest non-Indian suspects within their territorial boundaries and detain them until state police arrive.¹⁵⁷ However, cross-deputization agreements can increase tribal authority to investigate, pursue, and detain suspects.

Cross-deputization agreements have become relatively common in Indian Country. For example, in 2007 the Chickasaw Lighthouse Police Department had twenty-eight cross-deputization agreements in place.¹⁵⁸ The Bay Mills Indian Community has an agreement by which tribal officers may enforce state law, but the county sheriff does not have the reciprocal ability to enforce tribal law or enter tribal land.¹⁵⁹ And when the Little Traverse Bay Band of Odawa Indians negotiated a cross-deputization agreement with surrounding counties in Michigan, the tribe first wanted its officers to have the authority to enforce state laws within reservation boundaries.¹⁶⁰ Ultimately, after discussions among the tribal attorney, the county sheriff, and the state prosecutor, the parties reached a mutually agreeable decision to limit tribal authority to enforce state laws to tribal trust lands on the reservation.¹⁶¹

155. *Id.*; AMNESTY INT'L, *supra* note 78, at 38.

156. Hannah Bobee et al., *Criminal Jurisdiction in Indian Country: The Solution of Cross Deputization* 12 (Mich. State Univ. C. of L., Indigenous L. & Pol'y Ctr., Working Paper No. 01, 2008) (stating that in such an instance, the Bureau of Indian Affairs is in charge of law enforcement on the reservation, and may choose to enter into such agreements to strengthen the policing on tribal lands).

157. *Fresh Pursuit from Indian Country: Tribal Authority to Pursue Suspects onto State Land*, 129 HARV. L. REV. 1685, 1688 (2016). It is well settled that tribal police officers have the right to arrest non-Indian suspects within their territorial boundaries and detain them until state police arrive; however, it is less settled whether tribal police officers can engage in fresh pursuit if the suspect is non-Indian. *See generally id.*

158. *Cross-Deputization Helps Solve Jurisdictional Issues*, *supra* note 151.

159. Fletcher, *supra* note 153, at 44.

160. Bobee et al., *supra* note 156, at 18.

161. *Id.*; Fletcher, *supra* note 153, at 44. This means that tribal officers do not have authority to arrest or investigate non-Indians living on fee land within the

A state can enter into a single cross-deputization agreement applicable to all tribes within its borders. On the one hand, these agreements generally do not expire, which makes them less vulnerable to changes due to political shifts.¹⁶² On the other hand, it is important to acknowledge that state-wide agreements might increase liability issues. For instance, tribal law enforcement officers might have to meet standards of conduct imposed on state officers, which could mean expending additional time and money for training.¹⁶³ Additionally, the agreement could render the state liable for misconduct by tribal officials acting under its authority.¹⁶⁴ Finally, some agreements might be unconstitutional—if tribal officers are cross-commissioned by the Bureau of Indian Affairs and effectively act as federal officers, issues could result from such officers being both federal and state officials.¹⁶⁵

Alternatively, tribal attorneys general can be deputized to serve as deputy state attorneys. This arrangement was made between the Oglala Sioux tribal attorney general, who was deputized as a deputy state attorney in Bennett County, South Dakota.¹⁶⁶ This arrangement allows the tribal attorney general to participate in cases that are tried in state court, where she can ensure that non-Indian offenders of crimes arising within reservation boundaries, including sexual violence, are held accountable.¹⁶⁷

In a similar vein, one of TLOA's directives is the appointment of at least one Tribal Special Assistant United States Attorney (Tribal SAUSA) in each federal judicial district where there is Indian Country.¹⁶⁸ These arrangements allow tribal

reservation. *Id.* This is an example of how cross-deputization agreements can be agreements between parties with equal bargaining power to create mutually agreeable results.

162. Bobee et al., *supra* note 156, at 23 (acknowledging that sometimes a sheriff might decline to deputize a tribal official, but if an agreement of this nature is in place, then the tribe may still enforce state laws against non-Indians within their jurisdiction).

163. *Id.* at 25.

164. *Id.*

165. *Id.*

166. Finn et al., *supra* note 68, at 38; see also Robert N. Clinton, *Comity & Colonialism: The Federal Court's Frustration of Tribal ← → Federal Cooperation*, 36 ARIZ. ST. L.J. 1, 20 (2004) (describing other examples of tribal attorneys being deputized as special assistant United States Attorneys).

167. Finn et al., *supra* note 68, at 38.

168. DEPARTMENT OF JUSTICE, DUTIES IMPOSED ON UNITED STATES ATTORNEYS BY THE TRIBAL LAW AND ORDER ACT OF 2010, <https://www.justice>.

prosecutors to receive training on federal laws and to prosecute crimes in both tribal and federal court.¹⁶⁹ They also increase communication and cooperation between the federal government and tribal governments in the prosecution of crime. These arrangements have proven successful in prosecuting sexual violence crimes. For example, in April 2014, the Tribal SAUSA in the District of New Mexico brought a case against a Navajo man who was charged with and pleaded guilty to aggravated sexual assault.¹⁷⁰

Such an arrangement could be valuable for many reasons. Some tribes might not have the resources to bring their criminal and civil codes into TLOA and VAWA 2013 compliance,¹⁷¹ or they might lack the resources to thoroughly investigate sexual violence crimes regardless of the identity of the offender. Involvement at the state or federal level allows a tribe to have a central role in the prosecution and punishment of someone who has wronged the tribal community. Other tribes might participate in these sorts of agreements because they ensure that prosecutions occurring outside of the tribal court system are still sensitive to tribal values. Finally, a tribe's participation in the Tribal SAUSA program means that an offender can be tried in both federal and tribal court. The protection against double jeopardy does not apply if a defendant is tried for crimes arising from the same facts in both federal and tribal court.¹⁷² So, in theory, a defendant could receive the maximum punishment in tribal court under TLOA as well as a sentence in federal court for the same crime.¹⁷³

[gov/sites/default/files/usao-az/legacy/2010/10/14/Tribal%20Law%20and%20Order%20Act%20of%202010%20Summary.pdf](https://www.usdoj.gov/sites/default/files/usao-az/legacy/2010/10/14/Tribal%20Law%20and%20Order%20Act%20of%202010%20Summary.pdf) (last visited Mar. 19, 2018) [<https://perma.cc/M5E2-K5PW>].

169. *Id.*

170. Press Release, U.S. Attorney's Office District of New Mexico, Ramah Navajo Man Pleads Guilty to Aggravated Sexual Abuse of Navajo Teenager (Apr. 3, 2014), <https://archives.fbi.gov/archives/albuquerque/press-releases/2014/ramah-navajo-man-pleads-guilty-to-aggravated-sexual-abuse-of-navajo-teenager> [<https://perma.cc/26VG-LK7F>].

171. See *supra* notes 89–95 and 128–131, respectively, for a discussion of the statutory requirements tribes must implement to exercise TLOA and VAWA 2013.

172. *United States v. Wheeler*, 435 U.S. 313, 329–30 (1978) (holding that the defendant could be charged in both Navajo tribal court for disorderly conduct and then later in federal court for statutory rape charges with both prosecutions arising out of the same facts).

173. See *id.* This is compatible with the goal of the Tribal SAUSA program, which, in part, is to make sure that “every viable violent offense against Native women is prosecuted in either federal court or tribal court, or both.” Press

Besides the fact that these deputization agreements can make law enforcement easier from a logistical standpoint, they are also a good exercise in tribal self-determination. Tribes can determine the scope of these agreements in terms of liability, sovereign immunity, and indemnification.¹⁷⁴ Negotiable provisions also include the duration of the agreement¹⁷⁵ and whether the state or local government will reciprocate the powers the tribe receives.

Tribes should be cognizant, however, of the potential dangers of such agreements. Allowing state officers to arrest tribal members in Indian Country might exacerbate racial disparities in arrests.¹⁷⁶ Cross-deputization might also decrease the perceived importance of tribal police forces and courts, thus working against a foundational element of tribal self-governance.¹⁷⁷ And cross-deputization agreements might not take into account the other social issues plaguing Indian Country, such as poor health, poverty, and lack of education, an understanding of which contributes to effective crime prevention and management.¹⁷⁸ A tribe must also create statutory authority to enter into agreements with state and/or local governmental agencies, and some tribes might first require that an ordinance or resolution be passed before authorizing any grant of authority to outside law enforcement.¹⁷⁹

Release, U.S. Attorney's Office District of New Mexico, Shiprock Man Sentenced to Prison for Federal Assault Conviction (Feb. 3, 2015), <https://www.fbi.gov/contact-us/field-offices/albuquerque/news/press-releases/shiprock-man-sentenced-to-prison-for-federal-assault-conviction> [<https://perma.cc/X63Z-G744>].

174. Bobee et al., *supra* note 156, at 12, 38–39.

175. Compare Robert N. Clinton, *supra* note 166, at 21 (encouraging tribes to adopt a fixed duration so that they are not locked into an agreement that might not be beneficial down the road), with Fletcher, *supra* note 153, at 44 (encouraging indefinite duration to prevent having to sign a new agreement each time a new sheriff is elected, for example).

176. Andrew G. Hill, Comment, *Another Blow to Tribal Sovereignty: A Look at Cross-Jurisdictional Law-Enforcement Agreements Between Indian Tribes and Local Communities*, 34 AM. INDIAN L. REV. 291, 295 (2009–2010) (arguing that law enforcement in Indian Country is the only jurisdiction in which prosecutorial decisions necessarily rest on the race of the offender, which is in violation of constitutional guarantees).

177. *Id.* at 306–07; Bobee et al., *supra* note 156, at 13 (pointing out that non-tribal police departments can be insensitive to a tribe's culture or lack necessary cultural awareness).

178. Hill, *supra* note 176, at 299 (proposing that these agreements require some sort of diversity training so non-tribal officers are aware of tribal values and the intersectionality of crimes with social issues facing the tribe).

179. Bobee et al., *supra* note 156, at 16 (noting, too, that some acts of Congress

Overall, cross-deputization agreements have the potential to strengthen tribal sovereignty. Because a tribe has equal bargaining power with outside law enforcement agencies, it can ensure that the agreement is sensitive to the tribe's needs and the needs of citizens who will be affected by the agreement. Cross-deputization agreements also facilitate cooperation with outside governments without sacrificing tribes' internal criminal investigation and prosecution capabilities.

B. *Civil Infractions*

Civil infractions can be an indirect way to punish non-Indian offenders for criminal offenses because tribes have greater authority to exercise civil jurisdiction over non-Indians than they do to exercise criminal jurisdiction. The guiding case, *Montana v. United States*, held that although a tribe inherently lacks civil jurisdiction over non-Indians, two exceptions apply.¹⁸⁰ First, a tribe may regulate the activities of non-members who "enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."¹⁸¹ Second, a tribe retains inherent civil jurisdiction over "the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."¹⁸²

In *Strate v. A-I Contractors*, the Supreme Court clarified that the *Montana* exceptions apply to tribal adjudicative power.¹⁸³ Though *Montana*, like *Oliphant*, relies on the implicit divestiture doctrine,¹⁸⁴ it also provides tribes with some oppor-

seem to encourage tribal-state agreements, such as the Indian Child Welfare Act and the Indian Gaming Regulatory Act).

180. 450 U.S. 544, 565 (1981).

181. *Id.* at 565. In *Smith v. Salish Kootenai College*, the Ninth Circuit held that the consensual relationship need not be a commercial transaction in order to qualify for a *Montana* exception. 434 F.3d 1127, 1127 n.4 (9th Cir. 2006).

182. *Montana*, 450 U.S. at 566. There is some indication that the Supreme Court only intended this decision to apply to non-Indian land within reservation boundaries, but the court held otherwise in *Nevada v. Hicks*. 533 U.S. 346 (2001).

183. 520 U.S. 438, 453 (1997). The Court also held that these provisions are applicable to tribal regulatory authority over non-Indians but that is not relevant to the discussion of holding non-Indian criminal offenders responsible for their actions. *Id.*

184. Krakoff, *supra* note 50, at 1208–09 (arguing that *Montana* is a broader interpretation of the doctrine than *Oliphant* was).

tunities for preventing criminal activity on their lands. Some examples of civil penalties imposed by tribes on non-Indians include community service, monetary penalties, banishment, civil commitments, mandatory substance-abuse treatments, and restitution.¹⁸⁵ For instance, the Nottasawepi Huron Band of Potawatomi includes a chapter of civil infractions which, among other things, covers that of “Disorderly Person.” This infraction includes “abus[ing] or threaten[ing] a person in a manner calculated to place the threatened person in fear of bodily harm”¹⁸⁶ and “engag[ing] in fighting or in violent, tumultuous or threatening behavior.”¹⁸⁷ Additionally, the tribe’s civil infraction section relies on the language from *Montana*, stating that the purpose of the section is to “promote the health, safety, and general welfare of the tribe.”¹⁸⁸ Sexual violence arguably involves abuse calculated to place the victim in fear of bodily harm and is an inherently violent act; thus, sexual violence would fit under both of these infractions.

Some tribes also implement banishment as punishment for sex crimes. For example, the Eastern Band of Cherokee provides that defendants who fail to register as sex offenders are subject to exclusion from the reservation.¹⁸⁹ And the Sac & Fox Tribe of the Mississippi in Iowa allows for banishment if someone is convicted of raping or attempting to rape a tribal member, employee of the tribe, or any person in the Settlement¹⁹⁰ or if someone has sexual contact with, or attempts to have sexual contact with, a member of the tribe or person living on the Settlement who is under the age of sixteen.¹⁹¹

Another proposed way of imposing civil jurisdiction over non-Indians is through in rem forfeiture. In rem forfeiture is a

185. Leah Jurss, *Halting the “Slide Down the Sovereignty Slope”*, 16 RUTGERS RACE & L. REV. 39, 57 (2015).

186. Nottawaseppi Huron Band of the Potawatomi Indians Law and Order Code tit. VIII, ch. 8.9, § 18.C.

187. *Id.* at § 18.E.

188. *Id.* at tit. VIII, ch. 9, § 2.A (2012).

189. Eastern Band of Cherokee Indians Code § 14-50-13.

190. Sac & Fox Tribe of the Mississippi in Iowa Code § 13-8202(b) (2011). As used by the Sac & Fox Tribe of the Mississippi in Iowa, the “Settlement” is still the land over which the Tribe exercises its sovereign authority, but it was purchased privately instead of being a grant of public land set aside by the United States, so it is not a “reservation.” *History*, MESKWAKI NATION SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA, <https://www.meskwaki.org/about-us/history/> (last visited July 11, 2018) [<https://perma.cc/3C2H-FRES>].

191. Sac & Fox Tribe of the Mississippi in Iowa Code § 13-8202(c) (2011).

civil proceeding by which the government seizes property bearing some connection to a criminal act and then brings an action to perfect title to the property.¹⁹² The process is based on the legal fiction that the property itself is guilty of a crime, but in rem forfeiture does not first require a conviction of the owner to secure title.¹⁹³ Not only does this procedure bypass the strict limitations imposed by *Oliphant*, but it might also avoid *Montana* analysis because the action is against a piece of property rather than a person.¹⁹⁴ In rem forfeiture encourages tribal self-determination because the tribe is taking action to protect its community; but by the same token, these proceedings are inherently assimilationist because in rem forfeiture is a creation of Anglo-American law.¹⁹⁵ Additionally, these proceedings might be more appropriate for crimes other than sexual violence, such as gambling and drug offenses.¹⁹⁶ Nonetheless, if property was used in the commission of a sexual assault, in rem forfeiture can indirectly provide some justice to the victim.

Civil suits initiated by the victim against the assailant are another, and sometimes easier, way for a victim to seek redress following an assault. Not only is the burden of proof lower in civil cases than in criminal cases, but also a damages award can serve as a sort of punishment for the offense. Such an action might be especially useful when the perpetrator has access to a good deal of money.¹⁹⁷ Additionally, tribal courts might find it easier to hear a civil case than to take the necessary steps to implement SDVCJ.¹⁹⁸ It is important to note, however, that for the tribe to hear a victim's case, the victim must file suit herself and, in so doing, she faces unique hurdles—she might be subject to broader discovery than in a criminal case, the suit can last many years, and she will be forced to confront

192. Noyes, *supra* note 87, at 311.

193. *Id.* at 311–12. There are three types of forfeiture. The first is contraband, which is property that is considered guilty because the seizing sovereign has prohibited its importation, exportation, or possession. Second, instrumentalities are property connected to illicit activity. And, third, proceeds are revenues generated due to illicit activity. *Id.* at 313.

194. *Id.* at 319–20.

195. *Id.* at 311; *see generally* United States v. Stowell, 133 U.S. 1 (1890).

196. Noyes, *supra* note 87, at 311.

197. DEER, *supra* note 11, at 155.

198. *Id.* at 154–55.

her attacker.¹⁹⁹ And despite the fact that it might be easier to hold someone accountable for sexual violence, a civil judgment cannot be the basis of a prison sentence. Even if incarceration cuts against traditional tribal values, some offenders are dangerous enough that imprisonment is in the best interest of the victim and the community.

Moreover, civil jurisdiction in Indian Country is in a precarious position. If tribes begin exercising what the Supreme Court perceives to be too much power, then the Court might take notice and decide to address the scope of tribal jurisdiction.²⁰⁰ In order to avoid a potentially disastrous Court ruling, at least one scholar has recommended that tribes limit their exercise of civil jurisdiction and take extra precautions to ensure that non-Indian litigants receive adequate procedural safeguards.²⁰¹ Additionally, civil jurisdiction is not perfect because tribes still must adhere to ICRA, which grants Anglo-American civil liberties to litigants in both civil and criminal tribal court proceedings, regardless of whether the litigants are non-Indian. And if an imposed punishment is deemed to be “detention”—meaning the punishment imposes a “severe actual or potential restraint on liberty”—a litigant may file a habeas corpus petition to challenge it.²⁰² Though constitutional rights intuitively seem like a good thing, imposing these requirements on Indian tribes is a blow to tribal sovereignty. The tribes were not parties to the drafting of the Constitution and thus have had no say in the creation of any of the constitutional provisions.²⁰³

Despite these shortcomings, civil jurisdiction allows tribes to bypass some of the strict requirements the federal government has imposed on tribes in exercising control over non-Indians. Additionally, there are many different ways in which a tribe can exercise civil jurisdiction such that the procedure can

199. See Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55, 76 (2006).

200. Jurss, *supra* note 185, at 40.

201. *Id.* at 75–76.

202. *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 880 (2d Cir. 1996) (stating that physical custody is not a prerequisite before filing a habeas corpus petition).

203. See *Talton v. Mayes*, 163 U.S. 376 (1896) (holding that the Cherokee Nation was not bound by the Fifth Amendment because its inherent sovereignty predates the Constitution).

be tailored to the needs of a particular victim or the culture of a tribe. For example, civil jurisdiction could be useful for a tribe that does not believe in incarceration because it can allow for restitution or community service instead. And in rem forfeiture proceedings can give tribes an alternative if they lack the means to prosecute someone, as an individual, for a sexual violence crime. All in all, civil jurisdiction is a vital component of tribal sovereignty, and its continued exercise helps further the argument that sovereignty strengthens tribal communities while still ensuring non-Indians are treated fairly in tribal court.²⁰⁴

C. *Peacemaking Courts*

Peacemaking is likely the most traditional of these alternatives, and it is vastly different from adjudication in Anglo-American courts. Peacemaking is a non-adversarial form of justice in which the goal is neither to punish someone nor to establish guilt or innocence, but rather to ensure the wellbeing of participants and the community at large.²⁰⁵ The parties are considered equals—they both get a chance to speak their minds and neither is represented by attorneys.²⁰⁶ The conversation is facilitated by a respected third party, such as an elder or a family member of one of the participants.²⁰⁷ Usually, this facilitator is personally interested in reaching a consensus, as opposed to a disinterested judge; this allows the facilitator to draw on a personal or cultural moral code in encouraging resolution.²⁰⁸ The parties and peacemaker work to reach a mutually agreeable resolution. Enforcement of that resolution depends on the participants' intrinsic desire to remain in good communal standing, rather than the fear of a punitive sentence. Often times, enforcement comes via "response mechanisms such as ridicule, ostracism, and banishment."²⁰⁹

204. See Jurss, *supra* note 185, at 69.

205. Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 257 (1997).

206. See *id.* at 252–53.

207. *Id.* at 252.

208. Nancy A. Costello, *Walking Together in a Good Way: Indian Peacemaker Courts in Michigan*, 76 U. DET. MERCY L. REV. 875, 880 (1999); Porter, *supra* note 205, at 253.

209. Porter, *supra* note 205, at 254; see also Gloria Valencia-Weber & Christine

The leading example of Peacemaking in the modern day is the Navajo Peacemaking Program. The program was established in 1982 as a way to move from Anglo-American court proceedings toward a process more compatible with traditional Navajo values.²¹⁰ Though the program only heard an average of six cases a year for the first decade, greater awareness in the 1990s increased the average to over four hundred cases a year.²¹¹ Today, courts can refer matters to the Peacemaking Program, as can the Division of Social Services, schools, and other agencies and professionals.²¹² If a Navajo individual is referred to Peacemaking, he or she must undergo the process; non-Navajos are encouraged, but not required, to do so.²¹³ Alternatively, tribal members may request Peacemaking themselves.²¹⁴ In fact, some Navajo women utilize the program to address domestic violence situations instead of relying on restraining orders.²¹⁵

The Navajo ceremony starts with a prayer after which the party who requested the Peacemaking tells his or her side of the story.²¹⁶ Next, all participants are allowed to voice their grievances relating to the issue at hand to which the peacemaker will reply with a traditional story reflecting a relevant lesson.²¹⁷ Finally, the parties agree to a plan to resolve the

P. Zuni, *Domestic Violence and Tribal Protection of Indigenous Women in the United States*, 69 ST. JOHN'S L. REV. 69, 121–23 (1995) (stating that because of the unique nature of tribes, the needs of both the abuser and the victim must be addressed).

210. Porter, *supra* note 205, at 256; *Institutional History of Hózhóji Naat'aah*, THE JUDICIAL BRANCH OF THE NAVAJO NATION, <http://www.navajocourts.org/Peacemaking/Plan/insthistory.html> (last visited Nov. 19, 2017) [<https://perma.cc/7DKB-9CDY>]; Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 4 (1997) (stating that the Navajo Peacemaker Courts are successful because they blend traditional Navajo values with Anglo-American dispute resolution).

211. Costello, *supra* note 208, at 894.

212. *Peacemaking Program of the Navajo Nation*, THE JUDICIAL BRANCH OF THE NAVAJO NATION, <http://www.navajocourts.org/Peacemaking/PMP-brochure-2017.pdf> (last visited Nov. 19, 2017) [<https://perma.cc/R8BG-LTNX>].

213. Michael D. Lieder, *Navajo Dispute Resolution and Promissory Obligations: Continuity and Change in the Largest Native American Nation*, 18 AM. INDIAN L. REV. 1, 35 (1993).

214. Costello, *supra* note 208, at 894. For example, individuals struggling with substance abuse or unemployment may utilize Peacemaking to mend relationships and set a new direction for their lives. *Id.* at 895.

215. *Id.*

216. *Id.* at 897.

217. *Id.*

issue.²¹⁸ The goal is to come to an amicable resolution about which there are “no hard feelings.”²¹⁹ Then, the session closes with another prayer.²²⁰ Navajo Peacemaking relies on *k’e*, which is kinship, or a deep emotional connection to one’s clan.²²¹ Community leaders, called *naat’aanii*, serve as the peacemakers.²²² As a method of reinforcement, proceedings are recorded in case issues arise in the future.²²³

Another example of Peacemaking is Community Holistic Circle Healing (CHCH), which addresses sexual abuse in indigenous communities in Canada.²²⁴ This program works by first assembling a team of representatives from CHCH, Child and Family Services, and the Band Constable to conduct an initial investigation with an emphasis on ensuring the victim feels safe and supported.²²⁵ Then, if it is determined beyond a reasonable doubt that an assault has occurred, the assailant is charged and encouraged to admit to the assault and participate in a healing process, which takes three to five years.²²⁶ First, the abuser is evaluated to ensure that his commitment to the process is genuine rather than motivated by a fear of jail time. Then, he undergoes four different healing circles. The first requires the abuser to admit to what he has done and discuss the details of the crime. The second incorporates the abuser’s nuclear family—the abuser tells his family what he has done and the family responds. The third circle widens the participants to include the abuser’s extended family, including grandparents, aunts, and uncles. Finally, the abuser confronts the entire community to tell them what he has done and what steps he

218. *Id.* at 897–98.

219. *Id.* at 898.

220. *Id.*

221. Porter, *supra* note 205, at 256; Valencia-Weber & Zuni, *supra* note 209, at 86.

222. Valencia-Weber & Zuni, *supra* note 209, at 114; Zion & Zion, *supra* note 16, at 423 (“A *naat’aanii* is a Navajo leader who is selected on the basis of wisdom, ability and persuasiveness to solve problems by working with people.”).

223. Costello, *supra* note 208, at 898.

224. Berma Bushie, *Community Holistic Circle Healing*, INTERPERSONAL INST. FOR RESTORATIVE PRACTICES (Aug. 7, 1999), <https://www.iirp.edu/eforum-archive/4226-community-holistic-circle-healing> [<https://perma.cc/CXN2-AEH6>]. Though this example comes from an indigenous group in Canada, it can provide guidance to Indian Nations within the United States because these examples all stem from Indian nations’ inherent sovereignty, which is not dependent on the country in which the tribe is located.

225. *Id.*

226. *Id.*

has taken toward rehabilitation.²²⁷ The end goal is restitution and reconciliation with the victim, her family, and the community as a whole.²²⁸

In limited circumstances, Peacemaking can be appropriate for resolving sexual violence crimes. As long as the assailant has a strong connection to the community and the ability to be rehabilitated, this is a viable alternative to being charged in tribal or federal court. And because it is not a court proceeding, it can be utilized regardless of whether a tribe has implemented TLOA and VAWA 2013 or if the tribe has a court system at all. If both the assailant and the victim have ties to the community, bringing this community into the process might encourage reconciliation on the assailant's part and forgiveness on the victim's part. In other words, the flexibility of Peacemaking can prioritize the spiritual healing of the victim while also recognizing the humanity and rehabilitative potential of the offender.

However, Peacemaking in the context of sexual violence crimes must be approached with caution. By its very nature, it requires the victim to confront the assailant, which can be particularly difficult in instances of sexual violence. Additionally, Peacemaking is a process that requires the consent of both parties. Safeguards must be in place to make sure that victims are not coerced into agreeing and that they retain the ability to opt out of the process if at any point the experience becomes too traumatic.²²⁹ Peacemaking requires an assumption that both parties share responsibility, but as Sarah Deer points out, rape "is not a matter of disagreement between sexual partners. It has been used as a means to control and subjugate women. Minimizing this reality benefits no one."²³⁰

On a similar note, a victim might feel as though she has failed the Peacemaking process if she does not "make peace" with her rapist, which may exacerbate the mental trauma caused by sexual violence.²³¹ Peacemaking also rests on the presumption that the perpetrator can empathize with the consequences of his actions. Thus, the victim has a great deal of responsibility in the offender's success, as she must describe

227. *Id.*

228. *Id.*

229. DEER, *supra* note 11, at 129.

230. *Id.* at 131.

231. *Id.* at 125.

the crime committed against her in such detail as to elicit his empathy.²³² Further, some victims might prefer a system in which her assailant faces incarceration rather than simply participation in a rehabilitative process.²³³

One final flaw is that, as discussed above, the enforcement of Peacemaking relies on the participant's having some sort of connection to the community. There have been instances in which non-Indians have participated in Peacemaking,²³⁴ but what makes Peacemaking so effective is its incorporation of cultural values. As Carole Goldberg wrote, "terms that non-Indians use to describe the objectives of . . . peacemaking, such as balance, harmony, and healing, carry different meanings for tribal members than for outsiders who do not share this world-view."²³⁵ If a rapist cannot be deterred by the fear of being ostracized by the tribe, then there is no incentive for him to change his behavior. This means that Peacemaking is more appropriate for tribal members rather than for non-Indians, especially those tribal members who are active participants in the tribal community.²³⁶

Overall, Peacemaking can be a powerful exercise in tribal sovereignty. It likely requires little cooperation from outside governments, and it allows tribes to incorporate traditional values into the procedures used to address modern-day problems. And as previously noted, it can respect the needs and sensitivities of sexual violence survivors. However, it is likely best suited for instances in which the offender is a member of the tribe or embedded in the culture.

232. *Id.* at 129.

233. *Id.*

234. *See* Costello, *supra* note 208, at 882–83 (describing a successful case in the Navajo Peacemaking Program in which a Navajo boy beat up a non-Indian high school classmate); James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT'L COMP. L. REV. 55, 82–83 (1997) (describing a wrongful death suit between an Indian family and a non-Indian manufacturer that was resolved in a Peacemaking court after counsel for the manufacturer suggested the parties engage in Peacemaking instead of going to trial).

235. Carole Goldberg, *Overextended Borrowing: Tribal Peacemaking Applied in Non-Indian Disputes*, 72 WASH. L. REV. 1003, 1011 (1997).

236. Porter, *supra* note 205, at 299–300; *see also* Finn et al., *supra* note 68, at 2–4 (addressing the fact that an influx of migrant workers in North Dakota led to higher rates of sexual violence crimes against women and children of the Mandan, Hidatsa, and Arikara Nation).

D. Diversion Programs

Diversion programs focus on rehabilitation and treatment of other underlying problems that have contributed to the offender's wrongdoing.²³⁷ Instead of incarceration, these programs emphasize counseling, treatment for substance abuse, and behavior modification.²³⁸

One example of a diversion program in Indian Country is the Tulalip Tribes' Elders Panel, which works with first-time offenders in a rehabilitative setting.²³⁹ Every two weeks, non-violent first-time offenders meet with Tulalip elders in a program that uses traditional wisdom and experiences to discourage reoffending.²⁴⁰ Participants enroll voluntarily with the promise that their cases will be dismissed upon completion. They must make regular appearances before the panel, write apology letters, complete community service, and attend substance abuse treatment or counseling, among other requirements.²⁴¹ However, the Elders Panel only accepts those charged with nonviolent crimes, such as possession of alcohol or marijuana, or criminal mischief.²⁴² Nevertheless, this model might provide rehabilitation to someone who, if not for participation in the program, would have gone on to commit a sexual violence crime in the future.

Ke Ala Lokahi, or The Pathway to Harmony, was a Native Hawaiian diversion program for those convicted of sexual violence; it was funded by the Centers for Disease Control and

237. See Sara J. Berman, *Diversion Programs*, NOLO, <https://www.nolo.com/legal-encyclopedia/diversion-programs.html> (last visited Nov. 19, 2017) [<https://perma.cc/WC94-FG56>]; see also LeRoy L. Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 28 AM. J. CRIM. L. 255 (2001) (discussing diversion programs for offenders with mental health problems); James R. Brown, Note, *Drug Diversion Courts: Are They Needed and Will They Succeed in Breaking the Cycle of Drug-Related Crime?*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 63 (1997) (discussing the use of diversion programs for drug crimes and those with drug abuse problems).

238. Berman, *supra* note 237.

239. Brandi Montreuli, *First-Time Offenders Learn Accountability Through Diversion Program Run by Tribal Elders*, TULALIP NEWS (Mar. 19, 2014), <http://www.tulalipnews.com/wp/2014/03/19/first-time-offenders-learn-accountability-through-diversion-program-run-by-tribal-elders/> [<https://perma.cc/4U5L-D8QF>].

240. *Id.*

241. *Id.*

242. *Id.*

Prevention and piloted from 2000–2005.²⁴³ Engaging traditional Native Hawaiian values, the program sought to “restore balance in the lives of batterers who have been abusive to their intimate partners.”²⁴⁴ Participants attended two-hour sessions for twenty-four weeks and a final forty-eight-hour session at a cultural site.²⁴⁵ These sessions focused on Native Hawaiian culture through the use of “Hawaiian crafts, chants, genealogy, ceremonies, and visits to sacred places as the learning medium through which alternatives to domestic violence might emerge and evolve.”²⁴⁶ Victims could also receive support services through the program.²⁴⁷ However, participants were sometimes ordered to undergo a batterer intervention program by the courts; accordingly, Ke Ala Lokahi was not completely removed from the Anglo-American court system, cutting against tribal sovereignty.²⁴⁸

Diversion programs are advantageous because they give tribes wide latitude in exercising their sovereignty. First, tribes can determine who can participate. For example, some require that the offender first enter a guilty plea (thus giving the victim some sort of justice) with the promise that the charge will be expunged after successful completion; others do not require a plea but will prosecute the defendant if he fails to complete the program.²⁴⁹ And a tribe might determine that certain crimes are completely exempt from diversion programs, such as those that are particularly heinous or involve children or elders. Additionally, these programs can be a beneficial alternative for offenders signaling that they are capable of

243. Val Kalei Kanuha, *Ke Ala Lokahi: A Native Hawaiian Cultural Intervention*, CHANGEMAKERS, <https://www.changemakers.com/competition/endabuse/entries/ke-ala-lokahi-native-hawaiian-cultural-intervention> (last visited Nov. 19, 2017) [<https://perma.cc/QK9A-GFGE>] [hereinafter *Cultural Intervention*]; Valli Kalei Kanuha, *Ke Ala Lokahi, Native Hawaiian Batterer Intervention Program*, UNIVERSITY OF HAWAII, DEPARTMENT OF SOCIOLOGY, PROGRAM SUMMARY (July 9, 2007) [hereinafter *Program Summary*], http://www2.hawaii.edu/~kanuha/CV%20&%20Publications_files/KAL%20SUMMARY%20REPORT%20JULY%202007-1.pdf [<https://perma.cc/B38Y-M4V2>].

244. *Cultural Intervention*, *supra* note 243.

245. *Program Summary*, *supra* note 243, at 3.

246. *Id.*

247. *Cultural Intervention*, *supra* note 243.

248. *Id.*

249. This, of course, would put the offender into the tribal court, which likely exhibits some of the same procedures as the courts of the conqueror; but as it would be the tribe’s decision to implement such a process, this would not conflict with tribal sovereignty.

rehabilitation. Similar to Peacemaking Courts, diversion programs can provide a holistic approach to remedying criminal activity by incorporating the families and communities of the offenders and addressing any intersecting problems. Additionally, these programs may be supported by more survivors of sexual violence, as they do not depend on the victim's participation in order to be effective.

One downside to diversion programs, however, is that they do not provide any sort of remedy to the victim. Whereas in a criminal case the victim receives justice in knowing her offender is being punished and in Peacemaking she will be "made whole" however possible, here the focus is on the offender. This posture can logically lead the victim to feeling as though she is not an important part of the process. Because of the complexities of sexual violence in Indian Country,²⁵⁰ perhaps this is not the best method for rehabilitating offenders. Overall, diversion programs allow tribes to exercise a good deal of their inherent sovereignty but are not always the most viable option in sexual violence cases.

E. Inter-Tribal Courts and Confederated Governments

Inter-tribal courts and confederated governments are valuable for tribes that do not have the capacity to operate their own governments or court systems. These entities can help fill this gap and can be tailored to the unique needs of the participating tribes. Confederated governments function as governing bodies while inter-tribal courts provide a unified court system for the participating tribes.

One example of a confederated government is the Minnesota Chippewa Tribe. The Tribe is made up of six Chippewa (or Ojibwe) bands, each federally recognized and inhabiting individual reservations.²⁵¹ The confederated government was established on June 18, 1934, and its Constitution was approved by the Secretary of the Interior on July 24, 1936.²⁵² Each band

250. *See supra* Part I.

251. Steven J. Gunn, *Compacts, Confederacies, and Comity: Intertribal Enforcement of Tribal Court Orders*, 34 N.M. L. REV. 297, 329 (2004). The six bands are the Bois Forte Band of Chippewa Indians, the Fond du Lac Band, the Grand Portage Chippewa, the Leech Lak Band of Ojibwe, the Mille Lacs Band of Ojibwe, and the White Earth Nation. *Id.* at 330.

252. *Id.*

elects representatives to the Tribe, which has significant authority to govern the affairs of each band.²⁵³ This arrangement allows the bands to consolidate resources. The Minnesota Chippewa Tribe has passed legislation governing its member tribes, as is common for such confederated governments. Other confederated governments might be tasked with providing resources to the tribes as they update their codes to comply with TLOA and VAWA 2013.²⁵⁴

There are several robust inter-tribal courts within Indian Country. Examples include the Inter-Tribal Court of Appeals of Nevada and the Southwest Intertribal Court of Appeals. The Inter-Tribal Court of Appeals of Nevada was created by the Inter-Tribal Council of Nevada in 2003 and is funded by the Bureau of Indian Affairs.²⁵⁵ As of August 2011, the court was used by fourteen Nevada Indian tribes.²⁵⁶ Like many other appellate courts, the Inter-Tribal Court does not conduct cases de novo and it utilizes standards of review similar to state and federal courts.²⁵⁷ Additionally, ICRA's pseudoconstitutional protections apply to the Inter-Tribal Court.²⁵⁸ These appeals come with unique challenges—many trial courts lack the resources necessary to create a complete record of the proceeding, meaning the appellate court cannot adequately apply the standards of review.²⁵⁹ Many appellants and respondents proceed pro se, and serving parties who live in rural areas can be challenging.²⁶⁰

The Southwest Intertribal Court of Appeals (SWITCA) operates under similar circumstances except its participating tribes are located in New Mexico, Arizona, southern Colorado, and western Texas.²⁶¹ Membership is open to any federally rec-

253. *Id.* at 331.

254. *See, e.g.,* AMNESTY INT'L, *supra* note 78, at 77–78 (identifying sixteen tribal coalitions at the time of publication that were working against domestic and sexual violence across the United States, all with unique activities and missions).

255. Jill Greiner, *Appellate Law in Nevada Indian Country: The Inter-Tribal Court of Appeals*, NEVADA LAWYER, Aug. 2011, at 16, https://www.nvbar.org/nvlawmag-archive-957232/NVL_Aug-2011_Inter-Tribal-Court-of-Appeals.pdf [<https://perma.cc/QS84-6R68>].

256. *Id.* Nevada tribes not participating in the Court have their own system of appellate review, and membership in the Court fluctuates over time. *Id.* at 16 n.1.

257. Greiner, *supra* note 255, at 16–17.

258. *Id.* at 17.

259. *Id.*

260. *Id.*

261. *Southwest Intertribal Court of Appeals (SWITCA)*, AMERICAN INDIAN LAW

ognized tribe or pueblo in this area.²⁶² Further, participating tribes have discretion in determining the role SWITCA will play in their individual judicial systems. SWITCA allows tribes to use the court for a range of purposes including issuing advisory opinions and operating as a court of last resort.²⁶³ Like the Nevada Inter-Tribal Court, SWITCA is funded by the Bureau of Indian Affairs.²⁶⁴

These courts operate under express delegation by participating tribes.²⁶⁵ Such judicial forums might be especially useful for small tribes who—alone—could not operate an efficient court system. Though the examples above are appellate courts, there is nothing to say that a coalition of tribes could not create an inter-tribal trial court. Not only could these courts provide an additional venue for hearing both criminal or civil cases regarding sexual assault,²⁶⁶ but also a venue could reduce the danger of potentially biased tribal court judges, such as in cases where allegations are brought against an elder or other tribal member in a position of social or political power.²⁶⁷ Additionally, giving non-Indian defendants a right to appeal in tribal court could improve public opinion about the fairness of the court system and the rights afforded to litigants.

Confederated governments can lead to greater funding for governmental programs that deal with sexual violence, such as victims' services, criminal investigations, prosecutors' offices, and diversion or rehabilitation programs. Pooling tribal resources can also mean greater capacity to take the steps necessary to implement TLOA and VAWA 2013. And inter-tribal courts can increase the number of sexual violence cases heard in tribal courts where cultural values can be incorporated and intersecting issues can be better understood. Overall, these

CENTER, INC., ailc-inc.org/SWITCA.htm (last visited Nov. 19, 2017) [<https://perma.cc/VR7V-BHTM>].

262. *Id.*

263. *Id.*

264. *Id.* For more examples of intertribal councils, associations, and organizations, see Gunn, *supra* note 251, at 335–37.

265. Gunn, *supra* note 251, at 333–34.

266. See *supra* Section III.B for a discussion on tribal civil jurisdiction over non-Indians.

267. See Russel Lawrence Barsh, *Putting the Tribe in Tribal Courts: Possible? Desirable?*, 8 KAN. J. L. & PUB. POL'Y 74, 77 (1999) (noting that tribal judges are in a precarious position because they realize that they, and everyone else in their community, is related, and thus there is a presumption of familial bias underlying all of their decisions).

entities are only valuable in limited circumstances, but when done right they can protect and support the sovereignty of participating tribes.

Tribes should be cautious, however, of the history of inter-tribal courts. The Court of Indian Offenses was established in 1883 by the federal government's Department of the Interior.²⁶⁸ The goal of this court was to oppress tribes by trying individuals for polygamy, practicing as or consulting with a medicine man, and failing to comply with education and agricultural requirements.²⁶⁹ Additionally, the federal government tasked the court with addressing legal problems that legislators felt tribal councils were ill-equipped to handle on their own.²⁷⁰ Some tribal members might be wary of an inter-tribal court because of this legacy, so such courts should be established by and for tribes with cultural values in mind.

CONCLUSION

The Violence Against Women Reauthorization Act of 2013 was an important milestone in that it not only affirmed inherent tribal sovereignty but also served as a recognition by the federal government that tribal courts can be fair forums for non-Indians. However, many roadblocks remain to eradicating the extremely high rates of sexual violence against Indian women. Not only does implementing VAWA 2013 require extensive code revision for some tribes, but it also requires that tribes have the facilities and resources to grant non-Indian defendants the required safeguards. Further, VAWA 2013 is not entirely compatible with tribal sovereignty since it requires tribes to adopt Anglo-American court processes and procedures.

Exercising civil jurisdiction and entering into cross-deputization agreements allows tribes to protect survivors, promote traditions and culture, and cooperate with the federal government without giving up sovereignty. Peacemaking, diversion courts, and inter-tribal entities can do the same in limited circumstances. These mechanisms also have the added benefit of compensating for VAWA 2013's shortcomings. The

268. *North Dakota Studies*, COURT OF INDIAN OFFENSES, <https://www.ndstudies.gov/content/courts-indian-offenses> (last visited Mar. 19, 2018) [<https://perma.cc/7SNQ-UG24>].

269. See Berger, *supra* note 56, at 1110–11.

270. Mullen, *supra* note 14, at 816.

proposals made in this Comment are just a handful of options tribes have at their disposal to make their communities safer. Different mechanisms can be used alone or in combination, tailored to the specific cultural values of the implementing tribe. I recognize that no single solution or set of solutions will be appropriate for all of the 573 federally recognized tribes within the United States; I also do not purport to know what is best for any one tribe, including my own. But the programs and processes highlighted above acknowledge the mechanisms in which tribes have been protecting and will continue to protect their communities in ways that respect the best interests of victims and strengthen tribes' inherent sovereignty.