ABSTRACT

Violence Against Native American Women and Jurisdictional Barriers to Justice

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Native American women are twice as likely to be sexually assaulted than women of other racial groups. This paper explores how America's history of colonization and a series of United States legislative and judicial decisions allowed for this atrocity. Indian Country has been particularly affected by a stripping of tribal sovereignty and an inability to try non-tribal members for major crimes, of which sexual assault is included. The discussion then turns to recent legislative attempts to close jurisdictional gaps and restore tribal justice. These policies represent an important step forward but fail to eradicate the issue. Suggestions for future congressional responses to violence against women are offered at the conclusion of this thesis. Additionally, alternative methods of justice which may be employed by tribes that lack jurisdiction are presented.

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VIOLENCE AGAINST NATIVE AMERICAN WOMEN AND JURISDICTIONAL BARRIERS TO JUSTICE

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DEDICATION

To the brave survivors of sexual violence. May your strength inspire others and catapult change.

INTRODUCTION

Native American women are twice as likely as women of any other racial group to be the victim of sexual violence.[1] In this thesis, I explore the complexity of this issue and the challenges of solving it. Violence against Native Americans at large and sexual violence against Native American women in particular can be traced back to the early days of colonization. From large scale die offs of the Native American community to abuse at the hands of settlers, Native bodies were ravaged. After colonization, policies of an expanding nation focused on relocation and assimilation. These policies which targeted Native Americans left Native women vulnerable to abuse. In the present day, economic ventures such as the oil pipeline and casinos have contributed to the high level of sexual abuse experienced by Native American women.

These women are not only left vulnerable but are left without judicial remedies due to a series of laws and Supreme Court cases which stripped Indian Country of its right to self-determination and jurisdiction. Beginning with the Marshall Trilogy, tribal sovereignty was greatly reduced, and tribes became domestic dependent nations. Now subservient to the United States, Congress passed a series of laws which created a jurisdictional maze in Indian Country. The resulting jurisdictional structure prevents tribes from trying non-Indians of major crimes even when the crime takes place in Indian Country and the victim is a member of the tribe. Four recent Supreme Court cases have

1. Laura C. Sayler, "Back to Basics: Special Domestic Violence Jurisdiction in the Violence against Women Reactivation Act of 2013 and the Expansion of Inherent Tribal Sovereignty," *Cardozo Law Review De-Novo* (2014): 1-34, 2.

pushed back on this issue of jurisdiction, but rather than offering a solution, these decisions only further confused the jurisdictional maze.

Confusing jurisdiction and under resourced law enforcement groups have led to the lack of justice seen in Indian Country. Congress took note of this issue in the early 2010s and passed three laws to attempt to remedy the issue. The first and second laws are detailed at length in Chapter Three. The *Tribal Law and Order Act of 2010* aimed to improve both the federal and local responses to crime in Indian Country. While the law was well intentioned, it failed to be as far reaching as one may hope. Then in 2013, Congress reauthorized the *Violence Against Women Act*. The 2013 reauthorization paid special attention to the high rates of violence against Native American women and created the Special Domestic Violence Criminal Jurisdiction clause which restored the rights of tribes to try non-Indians in a specific set of domestic violence cases. The pilot program highlighted the strengths and weaknesses of Special Domestic Violence Criminal Jurisdiction. An analysis of the pilot program makes clear the future directions which Special Criminal Jurisdiction ought to go.

Special Criminal Jurisdiction was expanded in the *Violence Against Women Act of 2022*. More crimes against women are included in the 2022 law. The novelty of the 2022 legislation means that the long-term effects of this policy are yet unexplored and immeasurable. Thus, this thesis utilizes the policy analysis framework of MacRae and Wilde to provide a way in which the effectiveness of this law might be measured and future legislation may be refined.

Reflection on these three recent laws aimed to aid Indian Country in the prosecution of crimes against women suggests that there is still fertile ground for

legislative change. Jurisdictional gaps and under resourced law enforcement agencies continue to be issues in Indian Country. Therefore, this thesis concludes with a list of potential future solutions and an analysis of what has succeeded and failed in similarly situated nations. The changes presented aim to increase accountability and allow for alternative avenues to justice.

CHAPTER ONE

A History of Native American Relations in the United States

Why Start with History

History provides a valuable insight into communities and cultures. When considering the history of Native Americans, 1492 proves to be a clear turning point. This chapter will detail the loss of population size and political autonomy that followed Columbus's discovery of the Americas. Colonial interactions with Native Americans and early American policies of relocation and assimilation set the precedent for treatment of Native Americans. These early laws also left Native Americans vulnerable to sexual abuse. So much about current tribal communities, trauma, and rates of victimization can be uncovered by looking to the early interactions of Native Americans and American settlers. Contemporary Native American society was largely shaped by the policies and histories detailed in this chapter.

Colonization

Following Columbus's discovery of the Americas, the lives of Native Americans and the livelihood of tribal communities have been irrevocably altered. Between 1492 and 1776, the Native American population decreased by 95%.[1] Within forty years of the

1. Carly Gillespie, "Columbus's Legacy: Trafficking of Native American Women in the 21st Century," *South Carolina Law Review* 71, no. 3 (Spring 2020), 691.

first colonists' arrival, over twelve million Native Americans had died.[2] This eradication at epidemic proportions resulted from the introduction of disease and the prevalence of violence. Modern tribal communities are still affected by this loss of community and culture. The effects of population decline include intergenerational trauma and waning political power. As the population size of tribes decreased, so did political power.

High death rates among Native Americans reduced the population of tribes to small minority groups that were easier for colonists to conquer. Methods of colonization were harsh and degrading to the remaining population of Native Americans. Without a significant remaining population, tribes were often overtaken and have been subjugated to the conquering European powers ever since. Colonists waged war and drew up treaties in order to gain land. The treaties signed by conquering nations and tribal entities were fundamentally unfair as they were written in English.[3] Many tribes made unwilling concessions due to this language barrier and a naïve belief that the treaties would ensure peaceful relations between European nations and Native American tribes. Modern litigation supports these claims of injustice as the Indian Claims Commission won $600 million in their suit in the 1990s which claimed the United States government dealt unconscionably with tribes.[4] Tribes conceded land and power to conquering European powers who laid claim to the land of North America.

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2. Genevieve Le May, "The Cycles of Violence against Native Women: An Analysis of Colonialism, Historical Legislation and the Violence Against Women Reauthorization Act of 2013," *McNair Scholars Online Journal* 12, no. 1 (2018), https://doi.org/10.15760/mcnair.2018.1., 5.

3. Vine Deloria and Clifford M. Lytle, *American Indians, American Justice* (Univ. of Texas Pr., 1984), 5.

4. Deloria and Lytle, *American Indians, American Justice,* 6.

The European model of conquest granted a right to land, but this principle had never been applied to a continent prior to the American experiment.[5] In laying claim to all of North America, European conquerors instigated centuries worth of legal issues and cultural tensions still felt today. Thus, to fully understand modern day federal and tribal relationships, one must look to the history of the two groups' interactions.

Colonization represents not only the introduction of a new political order to tribal society but also a marked shift in gender roles. Prior to colonization, women were central to the functions of native society. Many communities were somewhat egalitarian in their gender roles and division of duties, and others were matrilineal.[6] Moreover, many tribes did not have a culture of rape.[7] The anti-rape sentiments held by tribes often promoted bodily autonomy. For example, the Lakota tribe was recognized by Christian missionaries as having a culture in which "the woman owned her body and the rights that went along with it."[8] However, with the conquering of the Americas and introduction of sexual assault, women were pushed to the fringes of tribal communities.[9] In this way, the patriarchy of European nations was introduced into the social structure of tribal communities.

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5. Deloria and Lytle, *American Indians, American Justice,* 2.

6. Sheena L. Gilbert, Emily M. Wright, and Tara N. Richards, "Decolonizing VAWA 2021: A Step in the Right Direction for Protecting Native American Women," *Feminist Criminology* 16, no. 4 (2021): pp. 447-460, https://doi.org/10.1177/15570851211016044, 450.

7. Sarah Deer, *Beginning and End of Rape: Confronting Sexual Violence in Native America* (Minneapolis, MN: University of Minnesota Press, 2015), 20.

8. Deer, *Beginning and End of Rape: Confronting Sexual Violence in Native America,* 20.

9. Le May, "The Cycles of Violence against Native Women: An Analysis of Colonialism, Historical Legislation and the Violence Against Women Reauthorization Act of 2013," 6.

Sexual assault was employed as a tool of genocide and conquest. There is a strong correlation between the rape of the land and the rape of indigenous women. When colonists arrived in America, they viewed the land and people as theirs for the taking. In laying claim to the land, they cut down trees and built homes and farms. In laying claim to the women, some colonists committed acts of sexual violence.[10] These violations of personal autonomy were viewed by some as a necessary step in the success of colonization.[11]

The impact of the raping Native American women extends far beyond an individual loss of autonomy. A true understanding of what rape means to these women and their communities requires an understanding of intersectionality, or the concept that this trauma is understood in light of one's identity. Rape is a traumatic experience, but in the context of tribal conquest, rape also came to be an internalized form of genocide.[12] Acts of sexual violence in tribal communities represents the history of the subjugation of Native women.[13] Native women were treated as property because of their race and gender. These acts of violence lessened women's views of themselves and can harm the entire community as will be detailed in a later discussion of generational trauma.

Truly, conquest was a form of genocide. An astonishingly high number of Native American lives were lost, and important aspects of tribal culture were altered during the

10. Andrea Smith, *Conquest: Sexual Violence and American Indian Genocide* (Scholars Portal, 2005), 12.

11. Smith, *Conquest: Sexual Violence and American Indian Genocide,* 23.

12. Smith, *Conquest: Sexual Violence and American Indian Genocide,* 12.

13. Jessica Allison, "Beyond VAWA: Protecting Native Women from Sexual Violence Within Existing Tribal Jurisdictional Structures," *University of Colorado Law Review* 90 (2019), 239.

colonial period. Colonization introduced the narrative that Native people, and particularly Native women, are less deserving of respect than their white counterparts.[14] As a result, the introduction of European society to the Americas represented a shift in tribal life that is still felt today.

Early America and Westward Expansion

After the United States gained independence from Great Britain, Indian Country was shaped by the laws of the newly founded nation. Many early American policies encouraged removal and assimilation. These policies included the *Indian Removal Act of 1830*, *Dawes Act of 1887* and the establishment of boarding schools.

Removal policies preceded assimilation policies. The *Indian Removal Act of 1830* forced the westward migration of many tribes and aimed to resolve the issue of tribal and federal relations. Most well-known for the Trail of Tears, this policy accomplished little more than postponing the issue of tribal relations as tribes were forced westward.[15] At the same time, the forced migratory policy created another opportunity for Native American women to be assaulted by white men. As women were herded along the Trail of Tears, many of them faced sexual abuse at the hands of the soldiers who led the marches.[16] Particularly vulnerable were the women who had achieved some degree of assimilation

14. Gilbert, Wright, and Richards, "Decolonizing VAWA 2021: A Step in the Right Direction for Protecting Native American Women," 451.

15. Deloria and Lytle, *American Indians, American Justice,* 7.

16. Deer, *Beginning and End of Rape: Confronting Sexual Violence in Native America,* 68.

and spoke English as they reported the highest rates of sexual assault.[17] Once again, early American policies harmed tribal culture and subjugated Native women to abuse by American men.

Like removal policies, assimilation era policies left Native American women vulnerable to abuse particularly since the culture with which Native Americans were expected to assimilate with was highly patriarchal in nature. Rape law in the United States is rooted in the English Common Law tradition.[18] According to Common Law, rape is a property crime committed against the husband of the raped woman. This interpretation of the law holds clear cultural significance and literally considers women to be the property of their husbands. Such an understanding of rape holds serious legal concerns and limits the effectiveness of rape laws. The Common Law definition denies the possibility of rape in marriage and only includes acts of penetration, failing to encompass a wider variety of sexual assault crimes. The Common Law definition was originally published in the American Model Penal Code in 1962 and was adopted by 37 states.[19] However, even prior to the formal adoption of this language, the Common Law definition was used to decide most cases.[20] The legal definition of rape serves as an indicator of the cultural views of women held by early American society. Women were considered property and granted lesser legal standing than men. This view permeated

17. Smith, *Conquest: Sexual Violence and American Indian Genocide,* 25.

18. Deer, *Beginning and End of Rape: Confronting Sexual Violence in Native America,* 140.

19. "Model Penal Code (MPC)," Legal Information Institute (Cornell Law School, July 2021), https://www.law.cornell.edu/wex/model_penal_code_(mpc)#:~:text=The%20Model%20Penal%20Code%20(or,are%20based%20on%20the%20MPC.

20. Deer, *Beginning and End of Rape: Confronting Sexual Violence in Native America,* 140.

many aspects of American culture, including assimilation policies. Furthermore, in the 19th century the rape of non-white women was legally not considered to be rape.[21] Particularly enslaved women, which many Native women were, were subject to sexual assault without a possibility of legal recourse.[22] The deep overtones of sexism and racism in the American legal system drove many of the legislative decisions of that time, decisions which still have significant effects on tribal nations today.

Efforts at assimilation painted white men as the protectors of Native American women. The narrative that was popularized asserted that white women and Native American women needed to be protected from Native American men, and only white men were able to fulfill such a role.[23] With the construction of this narrative came the implementation of many policies which sought to alter tribal cultures and assimilate Native Americans into mainstream culture.

The Dawes Act of 1887 marked the end of removal policies and a turn towards allotment and assimilation. The purpose of the act was to encourage assimilation through the introduction of European ideals of property rights and farming practices.[24] The land granted to these individual Native Americans were pieces of the reservation divided between individuals. This understanding of property rights is European in nature and ran contrary to Native American communal ideas of property. Thus, the act required an adoption of an American way of life in order for Native Americans to be granted land.

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21. Deer, *Beginning and End of Rape: Confronting Sexual Violence in Native America,* 64.

22. Deer, *Beginning and End of Rape: Confronting Sexual Violence in Native America,* 64.

23. Smith, *Conquest: Sexual Violence and American Indian Genocide,* 22.

24. Deloria and Lytle, *American Indians, American Justice,* 9.

In the same vein of assimilation policies was the creation of boarding schools. These schools aimed to strip Native American children of their culture and teach them American ways of life. In some communities and tribes, upwards of 70% of Native children were sent to boarding schools.[25] While the complexity of such a policy and the social ills of this decision are too vast to be discussed in this paper, a focus is paid to the atrocities of sexual assault which occurred at the boarding schools. Abuse was common at these schools, and reporting of abuse was not made mandatory by the Bureau of Indian Affairs until 1987.[26] This abuse, both physical and sexual in nature, continued the trend of degradation of Native women and girls.

Following attempts at assimilation, relocation policies were revisited. This time, rather than allocating land for tribes, policies encouraged Native Americans to move to cities. In 1952, the Bureau of Indian Affairs determined that they would assist Native Americans by providing a stipend for their move to the city. The program consisted of a small stipend to cover moving expenses then virtually no further assistance.[27] What was intended to be a helpful policy ultimately led to an increase in the number of Native Americans in poverty, an increase in levels of alcohol abuse within the Native American community, and left Native women vulnerable to sexual exploitation.[28] While these consequences may have been unintended, this most recent policy encouraging relocation

25. Deer, *Beginning and End of Rape: Confronting Sexual Violence in Native America*, 70.

26. Smith, *Conquest: Sexual Violence and American Indian Genocide,* 38.

27. Deer, *Beginning and End of Rape: Confronting Sexual Violence in Native America*, 73.

28. Deer, *Beginning and End of Rape: Confronting Sexual Violence in Native America*, 72.

and assimilation has continued to marginalize Native communities and increase the level of violence against Native American women.

Contemporary Native American Society

As a result of the history of abuse and cultural loss detailed above, many Native Americans suffer from intergenerational trauma. Advocate and legal scholar Sarah Deer argues that the study of trauma is important in understanding the effect of rape on Native American women, but Deer urges that the discussion of trauma include a celebration of the strength and resilience of Native people.[29] While Native communities have continued to exercise resistance, they have been undeniably affected by generations of suffering.

Intergenerational trauma refers to the way in which the experience of trauma by one generation is passed down to the next. The continued effects of poverty and discrimination which tribal communities face is evidence of intergenerational trauma.[30] This trauma is important because it changes the way in which sexual assault is perceived by Native women. They often view the attack as aimed not only at the individual but at the community as a whole.[31] This means that acts of sexual violence against Native Americans affect the tribal community at large.

Intergenerational trauma is not the only issue facing tribal communities. In fact, the industries of natural gas and gambling, which are of great economic significance to

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29. Deer, *Beginning and End of Rape: Confronting Sexual Violence in Native America,* 10.

30. Gillespie, "Columbus's Legacy: Trafficking of Native American Women in the 21st Century," 695.

31. Deer, *Beginning and End of Rape: Confronting Sexual Violence in Native America,* 113.

tribes, leave women vulnerable to sexual abuse.[32] Historically, resource extraction has led to relocation policies and forced marriages between white men and tribal women.[33] In the present day, there continues to be controversy and issues arising from the pursuit of oil on Native American reservations. Multiple current pipeline projects involve the use of land near and around tribal reservations. The men who work in the construction of the pipelines live in what is called "man camps." These camps of migrant workers are often placed near reservations.[34]

One man camp that has been subject to a more in-depth study is near Bakken, North Dakota. Evidence shows that crime rates and violence against women increased significantly following the establishment of the man camp.[35] One report on the region finds a 75% increase in the number of sexual assaults committed on the nearby reservation while nearby regions not housing pipeline workers did not report increased crime.[36] Additionally, another study found that many of the pipeline workers living near

32. Le May, "The Cycles of Violence against Native Women: An Analysis of Colonialism, Historical Legislation and the Violence Against Women Reauthorization Act of 2013," 11.

33. Ana Condes, "Man Camps and Bad Men: Litigating Violence Against American Indian Women," *Northwestern University Law Review* 116, no. 2 (2021): 515-559, 525.

34. Condes, "Man Camps and Bad Men: Litigating Violence Against American Indian Women," 528.

35. Condes, "Man Camps and Bad Men: Litigating Violence Against American Indian Women," 529.

36. Julia Stern, "Pipeline of Violence: The Oil Industry and Missing and Murdered Indigenous Women: Immigration and Human Rights Law Review," Immigration and Human Rights Law Review | The Blog, May 24, 2022, https://lawblogs.uc.edu/ihrlr/2021/05/28/pipeline-of-violence-the-oil-industry-and-missing-and-murdered-indigenous-women/#:~:text=Studies%20demonstrate%20that%20generational%20and,camps%E2%80%9D%20are%20non%2DNative.

Bakken were sex offenders.[37] Bakken reveals that a demand for manual labor amidst an oil boom will sometimes lead to the hiring of those with a significant criminal record. Furthermore, the presence of men near the reservation only serves to increase incidents of trafficking and sexual violence. Police in the region are severely under resourced considering the booming population and uptick in crimes.[38] These findings serve as strong evidence that pipeline workers pose a threat to Native women. As will be detailed in Chapter Two, the current jurisdictional framework regarding Indian Country leaves Native women particularly vulnerable to sexual assault by non-tribal members.

The other primary economic driver in Indian Country which draws in outsiders is the gaming industry. Since gambling is legal on reservations, many tribes have built casinos. Gambling has been proven to be a big economic business on tribal land and can lead to a variety of economic and social gains.[39] The narrative of gambling in Indian Country is that the economic boom it produces can fund healthcare and education for tribal members. That narrative is not untrue. Gaming tribes in New Mexico have become more financially independent than non-gaming tribes and made important investments in women's health.[40] However, there have also been reports of increased violence against women on reservations with casinos. Tribal law enforcement agencies have reported that

37. Condes, "Man Camps and Bad Men: Litigating Violence Against American Indian Women," 530.

38. Le May, "The Cycles of Violence against Native Women: An Analysis of Colonialism, Historical Legislation and the Violence Against Women Reauthorization Act of 2013," 12.

39. Thaddieus W. Conner and William A. Taggart, "The Impact of Gaming on the Indian Nations in New Mexico," *Social Science Quarterly* 90, no. 1 (March 2009): pp. 50-70, https://doi.org/10.1111/j.1540-6237.2009.00602.x., 53.

40. Conner and Taggart, "The Impact of Gaming on the Indian Nations in New Mexico," 59.

casinos are often where pimps hang out and where trafficking occurs.[41] Little data exists to quantify claims of sexual assault and trafficking at the site of casinos, but the concentration of men in the area suggests that casinos are a place where crimes against women are committed.[42]

The contemporary problem is complex and is further complicated by the fact that economic pursuits introduce perpetrators to reservations. Sexual assault is far too prevalent in Indian Country and is a result of policy decisions, complicated jurisdiction, and judicial opinions. Casinos and pipelines grant perpetrators access to tribal land and Native American women which leads to shocking statistics on sexual assault.

Sexual Assault Statistics in Native American Communities

Present day Indian Country faces many problems, one of which is epidemic rates of violence against women. According to the 1998 National Violence Against Women Study, one in three Native women will be raped in her lifetime.[43] A 2010 report by the Center for Disease Control found that 49% of Native women have experienced sexual

41. Gillespie, "Columbus's Legacy: Trafficking of Native American Women in the 21st Century," 699.

42. Gillespie, "Columbus's Legacy: Trafficking of Native American Women in the 21st Century," 699.

43. Patricia Tjaden and Nancy Thoennes, "Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey," (1998), pp. 1-16., 5.

violence.[44] The percent of Native American women who experience domestic violence and sexual violence is at least twice as high as that of any other group of women.[45]

However, it is hard to know for certain how many Native American women have experienced sexual assault in their lifetime. Most data on sexual assault comes from either victimization surveys or surveys of prostitutes. Both have significant drawbacks. One primary issue with both types of surveys is that they often underreport incidents of sexual assault.[46] Furthermore, Native Americans constitute such a small portion of the United States that not every national victimization study contains statistically significant results for Native American populations. However, every study that is statistically significant for American Indians and Alaskan Natives has revealed high levels of victimization.[47] Another issue with such studies is that they do not include a breakdown by tribal community. The prevalence of sexual violence differs by tribe, and there is no study which reflects those trends.[48]

The limitations of these studies, primarily the issue of underreporting and lack of tribal level data, have led researchers to draw conclusions of their own. Many grassroots activists and researchers assert that national data significantly underestimates the number

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44. Deer, *Beginning and End of Rape: Confronting Sexual Violence in Native America,* 4.

45. Laura C. Sayler, "Back to Basics: Special Domestic Violence Jurisdiction in the Violence against Women Reactivation Act of 2013 and the Expansion of Inherent Tribal Sovereignty," *Cardozo Law Review De-Novo* 2014 (2014): 1-34, 2.

46. Gillespie, "Columbus's Legacy: Trafficking of Native American Women in the 21st Century," 689.

47. Deer, *Beginning and End of Rape: Confronting Sexual Violence in Native America,* 3.

48. Deer, *Beginning and End of Rape: Confronting Sexual Violence in Native America,* 6.

of Native women who have experienced sexual assault. Deer along with many of her colleagues suggest that in some communities the experience of rape is nearly universal.[49]

In addition to the higher-than-average levels of victimization, there are two other notable features of sexual violence in Indian country. First, Native Americans report more violent rapes.[50] Second, Native Americans experience high levels of interracial sexual violence. Roughly 67% of rapes committed against Native women are perpetrated by a non-Native man.[51] By matter of comparison, white and black women are raped by members of their racial group in over 75% of reported cases.[52] This statistic is shocking and illustrates that sexual violence is an important issue facing Indian Country. The modern prevalence of this issue is rooted in historical transgressions and legislative decisions that have allowed this violence to take hold.

As seen throughout this chapter, violence against Native American women was largely introduced by white settlers. High rates of sexual violence have accompanied many policy decisions regarding tribal and federal relations. This chapter has established the historical nature of the degradation of Native women. The next chapter will detail the legal history which stripped tribes of jurisdiction. Together, indirect and direct legal action have created the current state of affairs in Indian Country which allows for high

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49. Deer, *Beginning and End of Rape: Confronting Sexual Violence in Native America,* 5.

50. Deer, *Beginning and End of Rape: Confronting Sexual Violence in Native America,* 4.

51. Samuel D. Cardick, "The Failure of the Tribal Law and Order Act of 2010 to End the Rape of American Indian Women," *St. Louis University Public Law Review* 31 no.2 (2012): 539–78. https://search-ebscohost-com.ezproxy.baylor.edu/login.aspx?direct=true&db=a9h&AN=79611994&site=ehost-live&scope=site., 545.

52. Cardick, "The Failure of the Tribal Law and Order Act of 2010 to End the Rape of American Indian Women," 544.

rates of sexual violence and leaves Native women vulnerable to sexual violence at the hands of non-Native men.

CHAPTER TWO

A Legal History of Tribal Jurisdiction

Why Jurisdiction Matters

This chapter will detail a series of laws and Supreme Court decisions which have prevented tribal courts from exercising jurisdiction over non-members. Jurisdiction allows a court system to arrest, try, and punish offenders. As mentioned in Chapter One, most perpetrators of violence against Native women are non-Native. As a result, jurisdiction over sexual violence in Indian Country is limited. Without the ability to hold offenders accountable, tribal governments must rely on federal or state intervention. Only 13% of reported rapes of Native Americans result in an arrest and conviction.[1] Tribes' lack of jurisdiction has therefore given way to a lack of justice.

Anecdotal stories highlight the lack of justice that follows from the inability of tribes to exercise jurisdiction over domestic violence and sexual assault perpetrated by non-tribal members. Dianne Millich's story illuminates how important jurisdiction is in both the prosecution and prevention of crime. Dianne is a Native American woman who married a non-Indian man. He was abusive and routinely beat her. Due to the tribal legal history that will be documented in this chapter, Dianne's husband knew he was untouchable by the law. On one occasion, he called the sheriff on himself, a show of

1. Samuel D. Cardick, "The Failure of the Tribal Law and Order Act of 2010 to End the Rape of American Indian Women," 2012. *St. Louis University Public Law Review* 31 no. 2 (2012): 539–78, 543.

power and invincibility, knowing there would be no consequences for his actions.[2] Without the jurisdiction to arrest and try non-tribal members who commit crimes on tribal land, Native American communities are forced to let known offenders go free.

Pre-Colonial Legal Systems

Prior to colonization, Native American tribes were sovereign. Individual tribes had developed differing forms of rule but maintained political rule. Despite being considered savages by early colonists, Native American tribes had complex legal systems.[3] These legal systems often included courts that were victim centered and took crimes such as rape very seriously.[4] Few documents detailing the function of tribal courts and tribal rape law exist, but anecdotal evidence offers some insight into how such cases were handled.[5] It is evident that incidents of violent crime, and particularly of crimes against women, were low. However, when cases arose, they were typically viewed as a crime against the tribe as a whole.[6] Punishments often entailed a loss of status or political power and sometimes resulted in exile.[7]

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2. Shefali Singh, "Closing the gap of justice: providing protection for Native American women through the special domestic violence criminal jurisdiction provision of VAWA," *Columbia Journal of Gender and Law* 28 no. 1 (2014): 197+, 197.

3. Rebecca A. Hart and M. Alexander Lowther, "Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence," *California Law Review* 96 no. 1 (2018): 185–233, 196.

4. Sarah Deer, *Beginning and End of Rape: Confronting Sexual Violence in Native America* (Minneapolis, MN: University of Minnesota Press, 2015), 22.

5. Deer, *Beginning and End of Rape: Confronting Sexual Violence in Native America,* 21.

6. Deer, *Beginning and End of Rape: Confronting Sexual Violence in Native America,* 22.

7. Deer, *Beginning and End of Rape: Confronting Sexual Violence in Native America,* 22.

Originally, tribes claimed broad jurisdiction over crimes committed against their members. However, due to a series of Supreme Court decisions and laws, much of this jurisdiction has been lost. The following sections of this chapter will follow the historical progression of jurisdiction in Indian Country.

Marshall Trilogy

The Marshall Trilogy references three Supreme Court decisions decided under Chief Justice John Marshall. All three of these decisions deal with issues of tribal sovereignty. While not every case focuses on issues of jurisdiction, these three cases constitute an important framework of understanding federal and tribal relations. The slow erosion of tribal sovereignty which these cases caused has allowed for the complication of laws and sovereignty today. Furthermore, these cases establish precedents and a doctrinal basis by which cases involving federal and tribal interactions are to be decided.[8]

Johnson v. M'Intosh (1823)

The first case of the Marshall Trilogy, *Johnson v. M'Intosh*, was decided in 1823. The case dealt with a land dispute between the heirs of Thomas Johnson and William M'Intosh. In 1775, Thomas Johnson purchased land from the Piankeshaw Tribe. Upon Johnson's death, he left this land to his heirs. In 1818, William M'Intosh purchased land from Congress, some of which included the land that Johnson had originally purchased.

8. Philip J. Prygoski "From Marshall to Marshall: The Supreme Court's Changing Stance on Tribal Sovereignty," *Compleat Lawyer* 12 no. 4 (1995): 14–17. http://www.jstor.org/stable/23778992, 14.

Thus, the two parties had competing claims to land. Therefore, the question before the court was: Can a title be conveyed by Native Americans?[9]

Chief Justice Marshall delivered the unanimous opinion of the Court. In concluding that a title of land cannot be conveyed by Native Americans, he appealed to the Doctrine of Discovery and the signing of treaties. Marshall claimed that the Doctrine of Discovery set forth a clear idea that the discovering European power has the exclusive right to sell that land. Following the American Revolution, all territorial land holdings by Great Britain were granted to the United States. Furthermore, Marshall asserted that Native Americans possess a mere right to occupancy. Marshall appealed to the precedent set by *Fletcher v. Peck (1810)*. In *Fletcher v, Peck*, the Court examined the right of tribes to make contracts and found that they lack such a power. The case also determined that the ultimate title comes from discovery, meaning that the conquering European nation can lay claim to land, leaving Native Americans with only a title of occupancy.[10] Therefore, the Court upheld the lower court's ruling and found that *M'Intosh* had the rightful claim to the land.[11]

This case represents an important interpretation of tribal and federal relations. Notable is the establishment of the Doctrine of Discovery in Marshall's reasoning. This language appears in the other Marshall Trilogy opinions. The use of the Doctrine of

9. Johnson v. M'Intosh, 21 U.S. 543 (Supreme Court of the United States 1823).

10. *Johnson v. M'Intosh*

11. *Johnson v. M'Intosh*

Discovery in this case significantly limits the sovereignty of tribes.[12] Following this decision, tribes lacked the ability to convey land to private parties without government consent. What this ruling indicates is that European conquest somehow diminished a tribe's right to sovereignty. The Court found that tribes lack complete sovereignty over their land.[13]

Cherokee Nation v. Georgia (1831)

The second Marshall Trilogy case was decided in 1831 and regarded a motion for an injunction to prevent several acts passed by the State of Georgia to go into effect in Cherokee Nation. Together, these acts disregarded past treaties and gave the State of Georgia sole jurisdiction over the land belonging to Cherokee Nation. Cherokee Nation, thus, sought an injunction from the Court.

However, this raised a question as to whether Cherokee Nation can seek an injunction from the Supreme Court. In order to have jurisdictional standing in the Court, Article III of the Constitution states that the party must be a foreign state. Thus, the question before the Court was: Are tribal nations foreign states?

Chief Justice Marshall delivered the opinion of the Court. Marshall acknowledged that the argument that that Native American are aliens who compose a foreign state is compelling but pushes back against that line of reasoning. Pointing to historical legislation, Marshall argued that Native Americans have always been considered part of

12. Singh, "Closing the gap of justice: providing protection for Native American women through the special domestic violence criminal jurisdiction provision of VAWA," 202.

13. Prygoski, "From Marshall to Marshall: The Supreme Court's Changing Stance on Tribal Sovereignty," 15.

the United States jurisdiction, particularly in terms of trade and defense. The Court concluded that tribes are not foreign states as referenced in the Constitution, and as such, cannot bring their case to the Supreme Court.[14]

Two justices wrote concurring opinions. Justice Johnson's concurring opinion centered on the argument that tribes lack the organizational capacity to be considered a state. Justice Baldwin's concurring decision asserted that there is no plaintiff in this suit. Furthermore, Baldwin argued that the Court ought not to engage in consideration of policy, a role he felt this case asked the Court to play.[15]

Justice Thompson dissented. Thompson believed that Native American tribes should be considered foreign states. He believed that much of the Court's opinion rests on an unnecessary distinction of language focusing on the separate listing of Indian tribes in the Constitution. The rights to occupancy possessed by Native Americans grant them the title of foreign state. Thompson argued that not only should this case be heard, but injunction should be granted as he found the State of Georgia to be in the wrong.[16]

The effects of this decision are vast, and they mark a significant change to federal and tribal relations. With *Cherokee Nation v. Georgia* comes the establishment of the trust relationship, or the idea that the federal government plays a protective role in its governance of tribes.[17] The trust relationship strips tribes of inherent sovereignty and

14. Cherokee Nation v. Georgia, 30 U.S. 1 (Supreme Court of the United States 1831).

15. *Cherokee Nation v. Georgia*.

16. *Cherokee Nation v. Georgia*.

17. Prygoski, "From Marshall to Marshall: The Supreme Court's Changing Stance on Tribal Sovereignty," 15.

suggests that they are incapable of managing their own affairs.[18] Particularly harmful in this decision is the language used by Marshall in which he describes tribes as "domestic dependent nations."[19] This language reduces tribes' sovereignty and allows legislative acts to be undertaken by the federal government at the tribes' expense.

Worcester v. Georgia (1832)

The final case of the Marshall Trilogy was decided in 1832. Samuel Worcester, a missionary, was arrested by the State of Georgia for residing on Cherokee land without a written permit from the governor. Since he was without a license, Worcester was found guilty and sentenced to four years in prison. Worcester appealed his sentence as he found it unconstitutional for the State of Georgia to regulate tribes in such a manner. The question before the Court was: Can states regulate the interactions between their residents and Native American tribes?[20]

Chief Justice Marshall delivered the opinion of the Court which found the Georgia law to be null and void. Marshall asserted that the Doctrine of Discovery applies only to discovering European nations. Rightly understood, this principle allowed the European nation exclusive rights to make treaties and purchase Native American land but did not compel the tribes to sell their land.[21] The tradition of treaties established that

18. Prygoski, "From Marshall to Marshall: The Supreme Court's Changing Stance on Tribal Sovereignty," 15.

19. *Cherokee Nation v. Georgia*.

20. Worcester v. Georgia, 31 U.S. 15 (Supreme Court of the United States 1832).

21. *Worcester v. Georgia*.

tribes have a right to self-determination. Marshall argued that in order for treaties to be understood, tribes must be distinct political entities from states. Marshall claimed tribes maintain their natural rights. Thus, the laws of states are separate from tribal communities.[22]

Justice M'Lean wrote a concurring opinion in which he emphasized two key points. First, M'Lean established that tribes have never been viewed as fully sovereign despite them maintaining some attributes of sovereignty. Second, M'Lean argued against the Georgia law due to its denial of an American citizens' Constitutional rights. His reasoning was that despite the Georgia law overstepping the boundaries of tribal self-determination, Worcester's standing comes from his individual denial of rights. It is Worcester's loss of property and liberty which, according to M'Lean, make the Georgia law null and void.[23] Justice Baldwin wrote the dissenting opinion. His dissent was due to procedural reasons. Baldwin argued that the writ of error was improperly returned.[24]

This case is valuable in so far as it argues in favor of attributes of tribal sovereignty. Tribes are found to be beyond the bounds of state taxation and regulation.[25] Such treatment restores a certain degree of sovereignty, allowing tribes to function without intervention from the states in which they are located. Of all the Marshall Trilogy

22. *Worcester v. Georgia.*

23. *Worcester v. Georgia*.

24. *Worcester v. Georgia.*

25. Prygoski, "From Marshall to Marshall: The Supreme Court's Changing Stance on Tribal Sovereignty," 15.

cases, *Worcester v. Georgia* is the only one to attribute any degree of sovereignty to tribes.

Overall, the Marshall Trilogy illustrates that tribes are to be considered separate political entities which rely on the United States for some degree of protection. While the Marshall Trilogy reaffirms that tribal sovereignty exists in some capacity, it nevertheless denies absolute sovereignty. *Johnson v. M'Intosh* prevents tribes from conveying land without the federal government's consent, and *Cherokee Nation v. Georgia* characterizes tribes as "dependent nations." Together, these two cases make clear that the Court does not consider tribes to be foreign nations. However, *Worcester v. Georgia* makes clear that tribes are not subject to every action of the state. Examined as a whole, the Marshall Trilogy reveals the complicated nature of tribal sovereignty and culminates in the distinction of tribes as domestic dependent nations with a right to self-determination. This language is somewhat contradictory and creates a foundation for future jurisdictional complications.

Jurisdiction Altering Legislation

The passage of three laws significantly altered jurisdiction in Indian Country. The first two laws, the *General Crimes Act of 1817* and *Major Crimes Act of 1885* grant the federal government jurisdiction. The third law, P.L. 280, grants six states jurisdiction over certain crimes. Together, the three laws discussed in this section make up what many scholars refer to as a jurisdictional maze.

General Crimes Act of 1817

Passed in 1817, the *General Crimes Act* significantly altered jurisdiction in Indian country. Preceding the Marshall Trilogy cases, this act of Congress altered tribal sovereignty. Essentially, the *General Crimes Act* granted exclusive federal jurisdiction over certain crimes committed in Indian Country. For the federal government to have jurisdiction, the crime must be a non-major crime that is perpetrated by a non-tribal member on tribal land. Unless otherwise specified by treaty, the federal government gained jurisdiction in these cases.[26] The law granted federal jurisdiction over some crimes committed by Native Americans against non-Indians and in all crimes in which a non-Indian committed a crime against a Native American. The aim of this law was to reduce violence between Native Americans and white settlers.[27] While this law prevents Native Americans from trying non-tribal members for non-major offenses, it does permit them to try Native Americans for crimes committed in Indian Country.

This law can be interpreted in two distinct ways. On one hand, you could view it as a protection of non-Natives rights. Under the *General Crimes Act*, non-Natives are able to be tried in courts which protect their Constitutional rights. On the other hand, the *General Crimes Act* can be viewed as a stripping of tribal sovereignty. Certainly, the act fails to recognize tribes as fully sovereign nations and, much like the Marshall Trilogy cases, places tribes somewhere between a sovereign nation and United States controlled territory. Neither interpretation is wrong, and together they help paint a fuller picture of

26. Cardick, "The Failure of the Tribal Law and Order Act of 2010 to End the Rape of American Indian Women," 548.

27. Deloria and Lytle, *American Indians, American Justice* (Univ. of Texas Pr., 1984), 167.

the basis for jurisdictional dispute in Indian Country. What makes the jurisdictional challenge of Indian Country unique is that the tribal status of the offender determines whether they are to be tried in a local or federal court. Conversely, if a crime is committed outside of Indian Country, the locality where the crime occurs has jurisdiction. Therefore, despite the intentions of the *General Crimes Act*, it must be acknowledged that the law contributes to jurisdictional confusion.

Major Crimes Act of 1885

The *Major Crimes Act* was passed in 1885 and is widely considered to be an assimilation era policy.[28] This act is best understood as reactionary, a congressional response to a Supreme Court decision. In *Ex parte Crow Dog*, Crow Dog, a Lakota man, murdered another member of the Lakota tribe. At the time, the Lakota government practiced traditional methods of dispute resolution and lacked a formal court system.[29] In the Case of Crow Dog, the tribe had ordered Crow Dog to pay restitution to the family of the man he killed.[30] This angered a local federal court who took matters into their own hands and tried Crow Dog, sentencing him to death.[31] This case made its way to the

28. Deloria and Lytle, *American Indians, American Justice,* 11.

29. Cardick, "The Failure of the Tribal Law and Order Act of 2010 to End the Rape of American Indian Women," 548.

30. "Ex parte Crow Dog," Oyez, accessed March 2, 2023. https://www.oyez.org/cases/1850-1900/109us556.

31. Cynthia Castillo, "Tribal Courts, Non-Indians, and the Right to an Impartial Jury after the 2013 Reauthorization of VAWA," *American Indian Law Review* 39, no. 1 (2014): pp. 311-336, 327.

Supreme Court, and in 1883 they ruled that the federal government lacks the jurisdiction to try Native Americans who murder other Native Americans in Indian Country.[32]

Much like the local federal court, Congress was not satisfied to leave the matter of punishment in the hands of tribal systems. Thus, the *Major Crimes Act* was passed into law. *Major Crimes Act* grants federal jurisdiction over all major crimes committed in Indian Country, regardless of the race of the offender.[33] The act contains an extensive list of eighteen crimes considered to be major crimes.[34] Included in those eighteen crimes are kidnapping, sexual abuse, incest, assault with a dangerous weapon, and assault resulting in serious bodily injury.[35] These offenses fall under the exclusive jurisdiction of the federal government.[36]

Unlike the *General Crimes Act*, the *Major Crimes Act* represents a paternalistic relationship between the federal government and tribes. The language and reasoning behind the law indicates a lack of trust in tribes to handle their own affairs. Whereas the *General Crimes Act* may be seen as a preservation of the rights of American citizens, the *Major Crimes Act* is devoid of such justification. The Supreme Court actually attempted to use the justification of trying one's own race in their decision in *Ex parte Crow Dog*, only for Congress to pass a law which mandates that Native Americans are not tried by

32. Cardick, "The Failure of the Tribal Law and Order Act of 2010 to End the Rape of American Indian Women," 548.

33. Cardick, "The Failure of the Tribal Law and Order Act of 2010 to End the Rape of American Indian Women," 548.

34. The Major Crimes Act, 18 U.S.C. § 1153 (1817).

35. 18 U.S.C. § 1153.

36. 18 U.S.C. § 1153.

their own people.[37] This act can be seen as forming the basis of federal intrusion into tribal jurisdiction.[38] Jurisdiction is foundational in the pursuit of justice. The following chapter will deal more with the importance of jurisdiction; however, it cannot be understated how influential the *Major Crimes Act* has been in altering criminal jurisdiction in tribal communities.

Public Law 280

Passed in 1953, P.L. 280 also alters jurisdiction in Indian Country.[39] Under P.L. 280, the states of Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin have criminal jurisdiction over Indian tribes.[40] Essentially the act transfers jurisdiction in Indian Country from the federal to the state level in these six states. The crimes which these states have jurisdiction over are those which the federal government gained jurisdiction over through the passage of the *General Crimes Act* and *Major Crimes Act*.

P.L. 280 was passed with the intention of lessening the burden placed on the federal government, although how these six states were selected is unclear in the literature.[41] Ultimately, granting states jurisdiction led to other issues as state law

37. Castillo, "Tribal Courts, Non-Indians, and the Right to an Impartial Jury after the 2013 Reauthorization of VAWA," 318.

38. Singh, "Closing the gap of justice: providing protection for Native American women through the special domestic violence criminal jurisdiction provision of VAWA," 210.

39. Deloria and Lytle, *American Indians, American Justice,* 176.

40. Public Law 83-280, 18 U.S.C. § 1162 (1953).

41. Cardick, "The Failure of the Tribal Law and Order Act of 2010 to End the Rape of American Indian Women," 549.

enforcement and legal systems were often underfunded. Furthermore, what funding they did have did not come from Native Americans as tribal members do not pay state taxes.[42]

Under P.L. 280, states can retrocede jurisdiction back to the federal government in any measure.[43] Therefore, P.L. 280 further complicates jurisdiction. In the six P.L. 280 states, jurisdictional confusion exists not merely between tribes and the federal government, but also between the state government. Intended to provide better resources, P.L. 280 contributed to greater confusion of which resources ought to be employed.

Indian Civil Rights Act

The *Indian Civil Rights Act* (ICRA) was passed in 1968 and shared the goal of P.L. 280 to improve resources and justice systems for Native Americans. The ICRA marks a shift in the federal attitude towards Native American justice as it promotes greater self-determination. One aspect of the law requires tribal consent before states not already included in P.L. 280 can gain jurisdiction.[44] At the same time, ICRA imposes procedural standards on tribes.[45] In the first portion of the law, the First, Fourth, Fifth, Sixth, and Eight Amendments to the Constitution are extended to Native Americans. Another notable portion of the law imposes limits on sentencing. In 1968, those sentencing maximums were a fine of $500 and six months in jail. Furthermore, ICRA sets

42. Cardick, "The Failure of the Tribal Law and Order Act of 2010 to End the Rape of American Indian Women," 552.

43. 18 U.S.C. § 1162.

44. Cardick, "The Failure of the Tribal Law and Order Act of 2010 to End the Rape of American Indian Women," 549.

45. Jessica Allison, "Beyond VAWA: Protecting Native Women from Sexual Violence Within Existing Tribal Jurisdictional Structures," *University of Colorado Law Review* 90 (2019), 235.

standards of operations for tribal courts. The *Tribal Law and Order Act of 2010*, discussed in Chapter Three, amended these sentencing maximums.

Most provisions of ICRA are aimed at ensuring fair trials and establishing standard legal practices. Standards include the right to a trial by jury and the right to counsel. Additionally, standards of legal education were established for tribal judges.[46] Intended to ensure the constitutional protection of Native Americans, ICRA had unintentional results. Many scholars believe that ICRA harmed tribes.[47] ICRA reduced tribes' inherent sovereignty by imposing regulations relating to criminal procedures and by mandating sentencing maximums. Under ICRA, tribes lost the ability to determine for themselves what a sentence ought to be. Additionally, the standards set by ICRA made it more difficult for tribes to prosecute and convict offenders, leading to a reduction in the prosecution of crimes.[48] As a result, fewer instances of sexual violence are tried in Indian Country.[49] The intent of ICRA was to promote justice in Indian Country and reduce civil liberty violations. However, the bill falls short of addressing civil liberty violations towards Native Americans originating in state and federal courts.[50] In many ways the ICRA is emblematic of the complicated nature of tribal sovereignty. Congressional

46. Indian Civil Rights Act, 25 U.S.C. § § 1301-1304 (1968).

47. Allison, "Beyond VAWA: Protecting Native Women from Sexual Violence Within Existing Tribal Jurisdictional Structures," 236.

48. Allison, "Beyond VAWA: Protecting Native Women from Sexual Violence Within Existing Tribal Jurisdictional Structures," 235.

49. Allison, "Beyond VAWA: Protecting Native Women from Sexual Violence Within Existing Tribal Jurisdictional Structures," 236.

50. Allison, "Beyond VAWA: Protecting Native Women from Sexual Violence Within Existing Tribal Jurisdictional Structures," 236.

efforts to promote civil liberties for Native Americans eroded tribal inherent sovereignty and failed to address the breadth of the issue.

Recent Supreme Court Cases

Following the attempt by Congress to promote self-determination through the passage of ICRA, the Supreme Court ruled on a series of cases involving the ICRA and tribal jurisdiction more broadly. In many ways, these decisions only further complicate the issue of jurisdiction in Indian Country. All four of these cases deal with the question of jurisdiction based on race and tribal status. The first of the cases determined that Congress holds the power to legislate on whether tribes can try interracial offenders while the second strips tribes of the right to try Native Americans belonging to a different tribe. Following that second decision, Congress enacted a law permitting tribes to try non-member Indians, which is then upheld in the third case below, *United States v. Lara.* The final case discussed in this section deals with the determination of whether the federal government has exclusive jurisdiction over major crimes committed in Indian Country or if states share jurisdiction.

Oliphant v. Suquamish Indian Tribe (1978)

Mark David Oliphant, a non-Indian, was charged by the Suquamish Indian Tribe for assaulting a tribal officer and resisting arrest. Daniel Belgrade, a non-Indian, was charged by the Suquamish Indian tribe for reckless endangerments after being involved in a high-speed car chase on tribal land. Both men filed a writ of habeas corpus, claiming

that the Suquamish Indian Tribe lacks jurisdiction over non-Indians. The question before the Court was: Do Indian Tribes have jurisdiction over non-Indians?[51]

In an opinion delivered by Justice Rehnquist in 1978, the Court ruled that tribes lack jurisdiction over non-Indians. Rehnquist described tribes as "quasi-sovereign entities" and points to a history of legislation beginning in 1790 which has stripped tribes of their jurisdiction. In response to arguments that such jurisdiction is necessary for the preservation of justice, Rehnquist stated that Congress ought to make that determination and pass laws accordingly.[52] In Justice Thurgood Marshall's dissent, he expressed that the inherent sovereignty of Native American tribes ought to grant them the right to punish anyone who violates tribal law on tribal land. He did not find a law which overrules this power.[53]

The decision in *Oliphant v. Suquamish* was controversial; however, it appears to suggest that Congress can permit tribes to try non-Indians.[54] Short of congressional action, *Oliphant v. Suquamish* makes clear that tribes lack jurisdiction over interracial crimes. The inherent sovereignty of tribes is denied, and it is determined that the federal government has exclusive jurisdiction over all crimes committed by non-Indians in Indian Country.[55] While no laws were passed by Congress immediately following this

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51. Oliphant v. Suquamish Indian Tribe, 435 U.S. 91 (Supreme Court of the United States 1978).

52. *Oliphant v. Suquamish Indian Tribe.*

53. *Oliphant v. Suquamish Indian Tribe.*

54. Kaitlyn Schaeffer, "Answering Constitutional Challenges to the Tribal VAWA Provisions," *NYU Journal of Law & Public Policy* 21, no. 4 (2019): pp. 993-1031, 1004.

55. *Oliphant v. Suquamish Indian Tribe.*

decision, the Violence Against Women Act of 2013–which will be discussed in depth in the following chapter–makes use of this congressional power.

Duro v. Reina (1990)

In 1990, Duro, a member of an Indian tribe, shot and killed a fourteen-year-old boy who was a member of a different tribe. The murder happened on the Salt River Reservation, but neither the defendant nor the victim belonged to that tribe. The Ninth Circuit found that this trial violates the equal protection clause of the ICRA because the defendant was not a member of the tribe that prosecuted him. The question before the Court: Do Native American tribes have jurisdiction over non-members?[56]

Justice Kennedy delivered the opinion of the Court, which concluded that tribal sovereignty does not permit tribes to exercise jurisdiction over non-members. Most of the opinion rested on an appeal to the precedents set forth by *Oliphant* and *Wheeler.* Whereas *Oliphant* determined that tribes lack jurisdiction over non-Indians, *Wheeler* found that tribes maintain criminal jurisdiction over tribal members. Kennedy determined that membership is an important aspect of tribal life and that non-members are treated more similarly to non-Indians than they are to tribal members. Thus, he concluded that inherent tribal jurisdiction extends to members only. Kennedy argued that if this decision leaves a jurisdictional gap, then Congress is the body which ought to correct it.[57] Justice Brennan wrote a dissent with which Justice Marshall joined. They concluded that since there is not

56. Duro v. Reina, 495 U.S. 76 (Supreme Court of the United States 1990).

57. *Duro v. Reina.*

an explicit law or treaty which has stripped tribes of the power to try non-members, tribes retain their inherent sovereignty to do so.[58]

The decision in *Duro v. Reina* dealt a significant blow to tribal sovereignty. However, the decision was so unpopular that six months later, Congress introduced the so-called Duro-fix. Offered as an amendment to the *Indian Civil Rights Act*, the Duro-fix returned the power of tribes to exercise jurisdiction over Native Americans who belong to another tribe.[59]

United States v. Lara (2004)

United States v. Lara examined the case of Billy Jo Lara, a Native American who was married to a member of another tribe and was living on the reservation belonging to his wife's tribe. In 2003 he was arrested for assaulting a police officer. After being convicted by a tribal court, his case went to the Federal District Court, where he was charged again. Lara appealed his case on the basis of the Fifth Amendment, claiming that these two convictions violate the Double Jeopardy Clause. The Court had to determine whether tribes maintain the inherent sovereign authority to prosecute nonmember Indians.[60]

Justice Breyer delivered the opinion of the Court. He found that the so-called "Duro-fix" legislation, which Congress had passed, allowed for tribes to exercise

58. *Duro v. Reina.*

59. Laura C. Sayler, "Back to Basics: Special Domestic Violence Jurisdiction in the Violence against Women Reactivation Act of 2013 and the Expansion of Inherent Tribal Sovereignty," 2014, *Cardozo Law Review De-Novo*: 1-34, 15.

60. United States v. Lara, 541 U.S. 193 (Supreme Court of the United States 2004).

jurisdiction of nonmember Indians. However, much of Breyer's opinion focused on whether this inherent sovereignty exists and what Congress's role in limiting or expanding it can be. Breyer found no language in the Constitution which prevented Congress from legislating under these powers. Instead, he pointed to the language of *Duro* as a demonstration of the Court's opinion that Congress is the best vehicle for such a decision to be made. Thus, Congress had exercised their plenary powers to enable tribes to prosecute Native Americans belonging to a different tribe. Therefore, conviction by both a tribe and the federal government does not constitute a violation of the petitioner's Fifth Amendment rights.[61]

Justice Stevens wrote a short concurring opinion to emphasize his strong belief that Native American tribes should be viewed as maintaining their historical inherent sovereignty.[62] Justice Kennedy also wrote a concurring opinion. He found the issue to be more complex than established in the majority opinion. Kennedy believed that there is merit to Lara's concerns regarding the Due Process and Equal Justice Clauses. He believed that the actions of the federal government to charge Lara are reasonable, but that the question before the Court would be different had Lara objected to the tribe's right to prosecute him. Since Lara only objected to the federal government's right to try him, Kennedy concurred.[63] Justice Thomas wrote a concurring opinion pointing out the previously unaddressed tension between Congress's right to regulate virtually all aspects of tribes and the concept of inherent sovereignty. Thomas believed that the Court ought

61. *United States v. Lara.*

62. *United States v. Lara.*

63. *United States v. Lara.*

to more carefully examine the question of whether Congress or the President has the power to regulate tribes and in doing so, reestablish a foundation for tribal law.[64]

Justice Souter wrote the dissent with which Scalia joined. He claimed that the precedents of *Oliphant v. Suquamish* and *Duro v. Reina* establish that tribes cannot try nonmembers in their court of law. Under the amendments to the *Indian Civil Rights Act* known as the "Duro-fix", however, tribes can exercise jurisdictional authority over nonmember Indians. When tribes employ this jurisdiction, Souter argued, the federal justice system cannot prosecute the case again as that violates the Double Jeopardy Clause.[65]

United States v. Lara is another important case in the shaping of tribal jurisdiction. Essentially, the Court upholds the "Duro-fix" and permits the federal government to prosecute defendants who have already been convicted in a tribal court. While in some regards this case represents a victory for tribal sovereignty, it also allows for the further complication of jurisdiction with the introduction of concurrent jurisdiction. Thomas is right in pointing out the contradiction of inherent sovereignty arguments and congressional power arguments. Each case and law analyzed thus far has relied on slightly different understandings of tribal sovereignty to reach their decision. The history of tribal and federal relations is complex and murky, leading to complicated Supreme Court cases which sometimes opt for too simple a decision.

64. *United States v. Lara.*

65. *United States v. Lara.*

Oklahoma v. Castro-Huerta (2022)

In the most recent Supreme Court decision released in July of 2022, the Court examined the case of Victor Manuel Castro-Huerta, who was charged by the state of Oklahoma in 2015 for child neglect. Castro-Huerta, a non-Indian, confessed to under nourishing his Cherokee stepdaughter. In 2020, before Castro-Huerta's appeal was heard, *Oklahoma v. McGirt* brought to light the fact that many boundaries of Indian Country in the State of Oklahoma were unclear. Following this case, the region of Oklahoma that had been considered Indian Country was redefined and the area in which Castro-Huerta committed his crime was now considered to be Indian Country. When Castro-Huerta's case was heard in the appellate court, he was able to get a federal sentence, which was significantly shorter than his state sentencing would have been, by claiming that the *General Crimes Act* and P.L. 280 establish that Oklahoma lacks jurisdiction over his case.[66]

Justice Kavanaugh delivered the opinion of the Court, which held that a State and the Federal government have concurrent jurisdiction in Indian Country. Kavanaugh drew this conclusion by establishing that a tribe is part of a state, since tribal territory lies within a state and states have jurisdiction over their entire territory. He concluded that states only lack this power of prosecution if the state has explicitly preempted it. Kavanaugh interpreted the *General Crimes Act* to mean that federal law merely extends into Indian Country and that, in doing so, it does not preempt state power. According to Castro-Huerta's interpretation of the law, the *General Crimes Act* would strip states of all

66. Oklahoma v. Castro-Huerta, 597 U.S. 21 (Supreme Court of the United States 2022).

jurisdictional authority in Indian Country, including in matters where the crime is committed between two non-Indians. Kavanaugh explained that this interpretation is unreasonable and thus rejected the argument. Furthermore, Kavanaugh interpreted P.L. 280 to prosecute state-law offenses, claiming that the law does not assume that non-P.L. 280 states lack all jurisdiction in Indian Country.[67]

Justices Gorsuch, Breyer, Sotomayor, and Kagan dissented. Gorsuch wrote the dissent which emphasized that the precedent established in *Worcester v. Georgia* made clear that tribes are separate entities from the states in which their territory resides. He argued that one of the primary purposes of the *General Crimes Act* is to establish a system of federal jurisdiction in Indian Country, following the holding in *Worcester v. Georgia* that tribes lack jurisdiction. The dissent traced the history of the *General Crimes Act*, *Major Crimes Act,* and P.L. 280 up to the 1968 amendment to P.L. 280 which required tribal consent for states to have jurisdiction over Indian Country. In his assessment of tribal legal history, Gorsuch concluded that the State of Oklahoma lacks jurisdiction over Castro-Huerta's case and over Indian Country.[68]

Like *United States v. Lara, Oklahoma v. Castro-Huerta* establishes a newfound concurrent jurisdiction. Analysis of the majority opinion and dissent reveal how complicated the legal history of these cases are. What is evident in the five-to-four decision is that the determination of rightful jurisdiction in Indian Country is not a partisan issue and is truly complex. It remains unclear whether laws were intended to strip entire entities of jurisdiction or offer concurrent jurisdiction. While this decision is

67. *Oklahoma v. Castro-Huerta.*

68. *Oklahoma v. Castro-Huerta.*

so recent that the impact has yet to be fully discovered, it appears reasonable to assume that in some cases, such as that of Castro-Huerta, allowing concurrent jurisdiction may lead to harsher sentencing and greater accountability. Yet the ramifications extend far beyond the individual case of Castro-Huerta and deal greatly with tribe's ability to seek justice. Not found in this case is any mention of the tribes right to prosecute offenders committing crimes on tribal land against tribal members. Such a restoration of tribal sovereignty is the discussion of the next chapter which will focus on two major pieces of legislation meant to restore tribal jurisdiction.

CHAPTER THREE

Congressional Attempts at Solution

Two Important Laws

As Chapter Two makes clear, jurisdiction in Indian Country is complicated. Along with tangled schemes of jurisdiction, tribal communities are under resourced and must learn to coordinate efforts between different authorities.[1] Thus, maintaining accountability on tribal lands is challenging and has allowed for pockets of crime to flourish. Congress has addressed this challenge to justice on tribal land in two key pieces of legislation.

In 2010, Congress passed the *Tribal Law and Order Act* which worked to improve tribal law enforcement agencies and to foster better federal and state responses to crime in Indian Country. Then in 2013, Congress amended the *Violence Against Women Act* to alter jurisdiction in Indian Country and permit states to arrest and prosecute non-native offenders in narrowly defined cases of domestic abuse. Together this legislation marks a turning tide in the federal response to crime in Indian Country and a congressional recognition of the problem of sexual assault and domestic violence targeted at Native women.

1. Rebecca Tsosie, "Indigenous Women and International Human Rights Law: The Challenges of Colonialism, Cultural Survival, and Self-Determination," *UCLA Journal of International Law and Foreign Affairs* 15, no. 1 (2010): pp. 187-237, 232.

This chapter seeks to analyze the purpose and effectiveness of these two laws. Attention is given to both their successes and their shortcomings with the goal of understanding how legislation can be tailored to fit the specific needs of Indian Country.

Tribal Law and Order Act

In response to crime in Indian Country, Congress examined the role of the federal government in the issue and passed the *Tribal Law and Order Act of 2010* (TLOA).[2] The act passed with close to unanimous support in both chambers of Congress.[3] This legislation is the first time Congress has specifically addressed the failure of legal and judicial systems on tribal land and emphasized a need for government involvement. The language of the law and the effectiveness of its various provisions are detailed below.

Findings of Congress

Accompanying the law is a list of Congress's findings. In that section, Congress addresses many of the same issues discussed in the previous chapters. The list of findings includes the fact that the jurisdictional structure of Indian Country limits tribal justice systems' ability to function and has allowed crime to become prevalent on tribal lands.[4]

2. Tsosie, "Indigenous Women and International Human Rights Law: The Challenges of Colonialism, Cultural Survival, and Self-Determination," 232.

3. Samuel D. Cardick, "The Failure of the Tribal Law and Order Act of 2010 to End the Rape of American Indian Women," 2012. *St. Louis University Public Law Review* 31 (2): 539–78, 563.

4. Tribal Law and Order Act, H.R. 725, 111th Cong. §§ 202-266 (2010).

Special attention is paid to the high levels of violence against Native American women and the lack of good data which exists.[5]

In addition to confirming many of the findings detailed in the previous chapters of this paper, the report from Congress draws conclusions about how to best remedy this situation. Importantly, Congress concludes that the United States has "distinct legal, treaty, and trust obligations to provide for the public safety of Indian Country."[6] Congress's language implies that the federal government is responsible for assisting tribal law enforcement agencies and ensuring the enforcement of public laws on tribal land. Furthermore, this language suggests that the federal government ought to take some action to remedy the current state of affairs in Indian Country. Additionally, the law includes language suggesting that tribes themselves are often the first to respond to crimes on tribal land and are often the "most appropriate" avenue for ensuring justice.[7] Therefore, the findings published in TLOA suggest a strong national responsibility to equip tribes in a manner that effectively diminishes the crime rate in Indian Country.

Provisions of the Act

In response to these findings, Congress enacted a law dealing with federal and state accountability, tribal justice systems, and sexual assault prevention efforts. The purpose of the TLOA (2010) was to promote jurisdictional clarity, increase interagency

5. H.R. 725.

6. H.R. 725.

7. H.R. 725.

coordination, empower tribal governments, reduce sexual violence, decrease rates of alcohol and drug abuse, and increase criminal data collection.[8]

Specific provisions which promote federal accountability include the creation of an Office of Justice Services which is designed to work with tribal leaders and officials.[9] Along with the creation of this office, the TLOA creates the role of Assistant United States Attorney Tribal Liaisons. These individuals are to work with the tribal officials and tribal community to address the prosecution of crimes in Indian Country. In cases of concurrent jurisdiction, these liaisons are to coordinate a response.[10] While the role of Assistant United States Attorney Tribal Liaison does not remove every challenge of jurisdiction, the job is intended to mitigate some of the negative effects of concurrent jurisdiction. Similarly, the law creates the role of Native American Issues Coordinator. These coordinators work with the United States attorneys prosecuting crimes on Native American land and interact closely with the United States Attorney General's Office.[11]

In order to improve state level responses to crime in Indian Country, the TLOA grants concurrent jurisdiction for all crimes included in the *General Crimes Act*.[12] Additionally, the law enables the Office of the Attorney General to provide additional

8. H.R. 725.

9. H.R. 725.

10. H.R. 725.

11. H.R. 725.

12. H.R. 725.

resources to local and state law enforcements and cross-deputize law enforcement in order to better combat crime in Indian Country.[13]

In order to better equip tribes, TLOA established the Indian Law Enforcement Foundation. This group works with the Office of Justice Services and the Bureau of Indian Affairs to coordinate law enforcement's response to crime on tribal land.[14] Additionally, the law provides grant opportunities for tribal law enforcement agencies.[15] These efforts aim to improve the functioning of often under resourced tribal justice systems.

Subtitle F of TLOA focuses specifically on combatting high rates of sexual assault in Indian Country. One provision of this section is an improved domestic violence and sexual assault training requirement for federal and tribal officers.[16] Furthermore, the Director of Indian Health Services is instructed under TLOA to develop standardized sexual assault policies and procedures.[17] Indian Health Services must then evaluate the response to domestic violence and sexual assault in Indian Country and submit recommendations.[18]

One of the most significant provisions of TLOA amends ICRA. As discussed in Chapter Two, ICRA imposed sentencing limits of a $500 fine and six months of jail time.

13. H.R. 725.

14. H.R. 725.

15. H.R. 725.

16. H.R. 725.

17. H.R. 725.

18. H.R. 725.

Under TLOA, sentencing limits increase to $15,000 and three years of jail time.[19] This increase offers tribes greater autonomy in determining criminal sentences.

Consequences

TLOA represents a modest improvement in tribal criminal proceedings. For instance, the role of tribal liaisons allows for better communication between federal and tribal law enforcement agencies.[20] One particular result of the law is that federal prosecutors must provide tribal prosecutors a list of all *Major Crimes Act* cases they decline to prosecute.[21] Similarly, cross-deputization allows for a more effective response by law enforcement.

TLOA is most effective in combatting intimate partner violence and drug use. The training on sexual violence that is included in TLOA will likely increase the reporting of intimate partner violence. However, domestic violence training does not include investigative training.[22] Investigation is an important skill for police forces to possess when pursuing cases of stranger rape. Thus, TLOA does not provide adequate improvements to the prosecution of rape in Indian Country. However, the other crime that the law improves tribal responses to is drug use. Cross-deputization and the increase

19. Cardick, "The Failure of the Tribal Law and Order Act of 2010 to End the Rape of American Indian Women," 564.

20. Cardick, "The Failure of the Tribal Law and Order Act of 2010 to End the Rape of American Indian Women," 568.

21. Cardick, "The Failure of the Tribal Law and Order Act of 2010 to End the Rape of American Indian Women," 568.

22. Cardick, "The Failure of the Tribal Law and Order Act of 2010 to End the Rape of American Indian Women," 575.

in sentencing power are consistent with the federal response to drug charges.[23] The ability of tribal justice systems to respond to these crimes represents a slight improvement in the enactment of justice but the law falls short of addressing all aspects of crime in Indian Country.

Failures

Despite the acknowledgement of the jurisdictional maze in the findings of the law, TLOA lacks any provisions which attempt to clarify jurisdiction. TLOA fails to close the jurisdictional gap left by *Oliphant*, making no provisions to permit the trial of non-Indians by tribes.[24] While TLOA sought to strengthen the legal response in the face of the jurisdictional maze, the law resulted in greater confusion in P.L. 280 states who can now request concurrent jurisdiction with the federal government on major crimes.[25] This confusion goes against a particular aim of the law and can be viewed as a failure.

A similar failure is the acknowledgement of high levels of sexual assault but the lack of substantive provisions to combat the issue. As mentioned in the above section, sexual assault training fails to offer adequate justice in all cases. Therefore, the primary failure of this law is the that it does not fully legislate on all issues it seeks to address.

23. Cardick, "The Failure of the Tribal Law and Order Act of 2010 to End the Rape of American Indian Women," 576.

24. Cardick, "The Failure of the Tribal Law and Order Act of 2010 to End the Rape of American Indian Women," 570.

25. Cardick, "The Failure of the Tribal Law and Order Act of 2010 to End the Rape of American Indian Women," 572.

Violence Against Women Act 2013 Reauthorization

The inadequacies of TLOA make clear the need for further legislation. While TLOA improved some law enforcement functions in Indian Country, it in no way affected jurisdictional structure. Therefore, in 2013, Congress amended the *Violence Against Women Act* (VAWA) to include a specific tribal provision relating to jurisdiction. That portion of the legislation is referred to as Special Domestic Violence Criminal Jurisdiction (SDVCJ). The remainder of this chapter will explain what the SDVCJ and VAWA entail and analyze the effectiveness of those provisions.

History of the Violence Against Women Act

VAWA was first passed in 1994 in an effort to combat domestic violence.[26] The 2005 reauthorization included language laying out specific goals to decrease the prevalence of violent crimes against Native American women.[27] However, it was not until the act was reauthorized for the third time in 2013 that substantive change was made in Indian Country.[28] For the scope of this paper, the most notable portion of the law is the SDVCJ language which is the first substantial piece of legislation aimed to improve jurisdiction in Indian Country.

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26. Laura C. Sayler, "Back to Basics: Special Domestic Violence Jurisdiction in the Violence against Women Reactivation Act of 2013 and the Expansion of Inherent Tribal Sovereignty," 2014, *Cardozo Law Review De-Novo*: 1-34, 10.

27. Shefali Singh, "Closing the gap of justice: providing protection for Native American women through the special domestic violence criminal jurisdiction provision of VAWA," 2014. *Columbia Journal of Gender and Law* 28 (1): 197+, 211.

28. Sayler, "Back to Basics: Special Domestic Violence Jurisdiction in the Violence against Women Reactivation Act of 2013 and the Expansion of Inherent Tribal Sovereignty," 10.

Special Domestic Violence Criminal Jurisdiction

In light of the jurisdictional maze described in Chapter Two, VAWA 2013 and the SDVCJ in particular offer increased justice for victims of domestic violence in Indian Country. SDVCJ allows tribal jurisdiction in specific cases otherwise prohibited by *Major Crimes Act* or *Oliphant*. There is a specific set of conditions that must be met in order for tribes to have jurisdiction and only three crimes for which this jurisdiction can be used.

Under SDVCJ, tribes are granted concurrent jurisdiction with the United States or the state to prosecute dating violence, domestic violence, and protection order violations.[29] In order for this jurisdiction to be granted, the victim must be an Indian and the defendant must have ties to the tribe. Therefore, the defendant must reside in Indian Country, be employed in Indian Country, or be a spouse, intimate partner, or dating partner of an Indian living in Indian Country or member of the tribe.[30]

Indian Civil Rights Act and Violence Against Women Act

Beyond the constraints of jurisdiction, tribes must choose to opt in to the SDVCJ program. In order to do so, there are a few requirements the tribe must meet. One such requirement is that tribal legal systems must incorporate all rights listed in ICRA.[31] As discussed in Chapter Two, ICRA is very similar in content to the Bill of Rights, although it does not extend every right listed in the Bill of Rights. The constitutional challenges

29. Violence Against Women Reauthorization Act, S. 47, 113th Cong. § 904 (2013).

30. S. 47.

31. Singh, "Closing the gap of justice: providing protection for Native American women through the special domestic violence criminal jurisdiction provision of VAWA," 219.

which this discrepancy poses will be discussed later on in this chapter. However, it is valuable to understand that there is a standard of rights which tribes must adhere to in order to prosecute crimes under SDVCJ.

Furthermore, ICRA was amended under VAWA's SDVCJ provisions to allow for a greater protection of the rights of non-Indians. The two new inclusions are a right to an impartial jury drawn from a "fair cross section of the community" and the provision "of all other rights whose protection is necessary under the Constitution."[32] These provisions, along with existing ICRA rules demand a certain level of investment from tribes in their court systems. Historically tribal courts have ranged in structure, but in order to exercise SDVCJ, tribes must conform to the American model of judicial systems. For some tribes, this transition is simple because they already adhere to a similar model. For other tribes it is more difficult and may be costly.

Grants

The whole of VAWA provides significant funding to the protection of women from violence. As a result, there are grants available which may be able to offset the cost of restructuring tribal courts and adhering to VAWA. Alternatively, these grants can fund other programs in Indian Country which aim to end violence against women.[33] Early critiques of this program were that grants were inflexible to the real needs of

32. Jordan Gross, "VAWA 2013's Right to Appointed Counsel in Tribal Court Proceedings - a Rising Tide That Lifts All Boats or a Procedural Windfall for Non-Indian Defendants?," *Case Western Reserve Law Review* 67, no. 2 (2016): pp. 379-445, 426.

33. Genevieve Le May, "The Cycles of Violence against Native Women: An Analysis of Colonialism, Historical Legislation and the Violence Against Women Reauthorization Act of 2013," *McNair Scholars Online Journal* 12, no. 1 (2018), https://doi.org/10.15760/mcnair.2018.1., 10.

communities and that the application process was challenging.[34] However, the application was updated in 2017 to be a singular application that was better able to gauge the needs of tribes.[35] This change is encouraging and suggests that implementing ICRA provisions in order to exercise SDVCJ will be more accessible for tribes.

Constitutional Challenges to Special Domestic Violence Criminal Jurisdiction

Oliphant determined that tribes lack the ability to prosecute non-Indians. VAWA 2013 goes against this decision by allowing SDVCJ. Understandably, there has been some skepticism as to whether it is constitutional for tribal courts to try non-Indians. The source of many of these concerns comes from viewing SDVCJ as delegated federal authority, not a reaffirmation of inherent sovereignty.[36] This section will first explain why VAWA is best understood as reaffirming tribal sovereignty and then proceed to respond to some specific constitutional challenges which have been raised.

Tribal Sovereignty

An originalist approach to the Constitution leads readers to believe that the framers viewed tribes as sovereign. All mentions of tribes in the Constitution either

34. Le May, "The Cycles of Violence against Native Women: An Analysis of Colonialism, Historical Legislation and the Violence Against Women Reauthorization Act of 2013," 10.

35. Le May, "The Cycles of Violence against Native Women: An Analysis of Colonialism, Historical Legislation and the Violence Against Women Reauthorization Act of 2013," 10.

36. Kaitlyn Schaeffer, "Answering Constitutional Challenges to the Tribal VAWA Provisions," *NYU Journal of Law & Public Policy* 21, no. 4 (2019): pp. 993-1031, 1023.

separate tribes from the several states or name them alongside foreign nations.[37] This language highlights the distinct nature of tribes and the lack of influence the federal government holds over them. Not only does the original text of the Constitution imply that tribes retain certain powers of sovereign nations, but Congress stated that the purpose of the SDVCJ provision was to restore tribal sovereignty.[38] The very language of VAWA 2013 is modeled after Duro-fix legislation.[39] As discussed in Chapter Two, the Duro-fix allows tribes to exercise authority over non-member Indians and was upheld by the Supreme Court in *United States v. Lara*. The similarity between *Oliphant* and *Duro* suggests that SDVCJ is constitutional.

Criminal Rights

However, the primary difference between *Oliphant* and *Duro* is that the defendant in *Oliphant* was non-Indian. As such, there has been greater fear of discrimination against non-Indians in tribal courts and a greater emphasis placed on the criminal rights of non-Indian defendants.[40] An argument set forth by Justice Kennedy in *Duro* is that SDVCJ is not constitutional because United States citizens have not consented to the government of the tribe.[41] However, this argument lacks precedent as states are capable of trying non-

37. Sayler, "Back to Basics: Special Domestic Violence Jurisdiction in the Violence against Women Reactivation Act of 2013 and the Expansion of Inherent Tribal Sovereignty," 20.

38. Schaeffer, “Answering Constitutional Challenges to the Tribal VAWA Provisions,” 1023.

39. Schaeffer, “Answering Constitutional Challenges to the Tribal VAWA Provisions,” 1026.

40. Schaeffer, “Answering Constitutional Challenges to the Tribal VAWA Provisions,” 1023.

41. Schaeffer, “Answering Constitutional Challenges to the Tribal VAWA Provisions,” 1016.

residents for crimes committed on their land.[42] At the same time, entering a sovereign's land can be interpreted as implied consent to the laws in effect there.[43]

Despite arguments that tribal courts abridge the rights of United States citizens, ICRA rules require tribes to adhere to a high standard of criminal rights. Many concerns have centered on the right to an impartial jury and the right to counsel. ICRA requirements for tribes employing SDVCJ jurisdiction have ensured both rights be met. As discussed previously, tribal juries must not systematically discriminate against any group, meaning that tribes are compelled to include non-Indian jurors in most SDVCJ cases.[44] While such a jury selection process may not consist of a non-Indian majority, it is in line with national jury selection policies.[45] The right to counsel is also a new ICRA requirement for tribes who opt to practice SDVCJ.[46] Moreover, the right to counsel found in the ICRA is often more expansive than the right guaranteed by the Constitution.[47]

While the criminal rights of defendants under ICRA may differ slightly from criminal rights under the Bill of Rights, many important protections are included. Most rights apply to non-Indians being prosecuted by a tribal court and, in the case of the right to counsel, some Constitutional rights may even be expanded. SDVCJ ought to be seen as

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42. Schaeffer, "Answering Constitutional Challenges to the Tribal VAWA Provisions," 1017.

43. Schaeffer, "Answering Constitutional Challenges to the Tribal VAWA Provisions," 1018.

44. Cynthia Castillo, "Tribal Courts, Non-Indians, and the Right to an Impartial Jury after the 2013 Reauthorization of VAWA," *American Indian Law Review* 39, no. 1 (2014): pp. 311-336, 329.

45. Castillo, "Tribal Courts, Non-Indians, and the Right to an Impartial Jury after the 2013 Reauthorization of VAWA," 336.

46. Gross, "VAWA 2013's Right to Appointed Counsel in Tribal Court Proceedings - a Rising Tide That Lifts All Boats or a Procedural Windfall for Non-Indian Defendants?," 426.

47. Gross, "VAWA 2013's Right to Appointed Counsel in Tribal Court Proceedings - a Rising Tide That Lifts All Boats or a Procedural Windfall for Non-Indian Defendants?," 427.

constitutional in its scope and application of power. Tribal prosecution is supported by the inherent tribal sovereignty of tribes and civil liberties are protected under ICRA.

In order for a tribe to implement SDVCJ on their land, they must adhere to these ICRA provisions. The cost of creating these systems may be high, limiting some tribes from utilizing SDVCJ provisions. However, the purpose is to ensure a fair trial for United States citizens who are arrested and prosecuted in tribal courts. As this chapter turns to a discussion on the SDVCJ Pilot Program, it is worth noting that only those tribes capable of adhering to ICRA guidelines were selected.

Special Domestic Violence Criminal Jurisdiction Pilot Program

The provisions of VAWA 2013 that are outlined above went into effect two years after the law passed.[48] The program requires tribes to opt in but began with a smaller pilot program in which only three tribes were selected.[49] The pilot program sought to understand how VAWA and SDVCJ would affect crime in Indian Country. The history of that program as well as the findings from initial implementation will be detailed in this section.

48. Alfred Urbina and Melissa Tatum, "On-the-Ground VAWA Implementation: Lessons from the Pascua Yaqui Tribe," *Judges Journal* 55, no. 4 (2016): pp. 1-4, 1.

49. Urbina and Tatum, "On-the-Ground VAWA Implementation: Lessons from the Pascua Yaqui Tribe," 1.

Details of the Pilot Program

In February of 2014, the Pascua Yaqui, Umatilla, and Tulalip tribes were announced as the tribes selected for the pilot program.[50] These tribes had much of the infrastructure in place to meet the ICRA requirements of SDVCJ. For instance, the Pascua Yaqui Tribe had previously made a substantial investment in their criminal justice system.[51] The Confederated Tribes of the Umatilla Indian Reservation had implemented VAWA previously and had incorporated TLOA rights.[52] This allowed the tribe to easily accommodate the need to provide certain criminal rights such as the right to counsel and the right to an impartial jury.[53]

The tribes that were selected for the pilot program underwent training on how to implement SDVCJ before the program went fully into effect on February 20, 2014.[54] The program lasted a little over a year, ending on March 7, 2015, when VAWA 2013 provisions became available to all tribes.[55] Despite the relative brevity of the pilot program, much can be learned based on its successes and failures.

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50. Urbina and Tatum, "On-the-Ground VAWA Implementation: Lessons from the Pascua Yaqui Tribe," 1.

51. Urbina and Tatum, "On-the-Ground VAWA Implementation: Lessons from the Pascua Yaqui Tribe," 2.

52. Kyndall Noah et al., "Violence Against Women Act: A Gap in Protection for Children," *Journal on Race, Inequality, and Social Mobility in America* 1 (2017): pp. 1-25, 15.

53. Urbina and Tatum, "On-the-Ground VAWA Implementation: Lessons from the Pascua Yaqui Tribe," 2.

54. Urbina and Tatum, "On-the-Ground VAWA Implementation: Lessons from the Pascua Yaqui Tribe," 2.

55. Urbina and Tatum, "On-the-Ground VAWA Implementation: Lessons from the Pascua Yaqui Tribe," 2.

Successes

The Pascua Yaqui Tribe of Arizona experienced great victory under the SDVCJ pilot program. Six days after the tribe was able to exercise SDVCJ, they made their first arrest.[56] The tribe went on to become the first Native American tribe to find a non-Indian defendant guilty of domestic violence since *Oliphant* was decided in 1978. In June of 2014, the defendant plead guilty to charges of domestic violence.[57]

There is no doubt that the pilot program served to reemphasize the need for tribal jurisdiction. Beyond the initial success of the program, the overall results provide a picture of the prevalence of domestic violence on reservations. The Pascua Yaqui Tribe made twenty-five arrests of nineteen different domestic violence offenders over the course of the pilot program.[58] The Pascua Yaqui were the pilot program tribe with the highest number of cases.[59] Not every case resulted in a conviction; in fact, the first case to face a trial by jury was dismissed due to a lack of evidence of a dating relationship.[60] What this aspect of the pilot program reveals is that by giving tribes the authority to try non-members they managed to exercise authority in a way that is reasonable and law abiding.

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56. Urbina and Tatum, "On-the-Ground VAWA Implementation: Lessons from the Pascua Yaqui Tribe," 2.

57. Urbina and Tatum, "On-the-Ground VAWA Implementation: Lessons from the Pascua Yaqui Tribe," 2.

58. Urbina and Tatum, "On-the-Ground VAWA Implementation: Lessons from the Pascua Yaqui Tribe," 1.

59. Noah et al., "Violence Against Women Act: A Gap in Protection for Children," 14.

60. Urbina and Tatum, "On-the-Ground VAWA Implementation: Lessons from the Pascua Yaqui Tribe," 2.

Patterns Revealed

The pilot program may have allowed for successful arrests, but it also served to highlight some gaps in protection. A couple of important patterns emerged during the pilot program. These patterns underscore some of the shortfalls of SDVCJ in tribal communities.

The most prominent pattern that emerged across all three pilot program tribes was the prevalence of children at the scene of the crime.[61] These three tribes also noted that trying crimes under SDVCJ was complicated by the presence of children who were either witnesses or victims of abuse.[62] Out of the twenty-five cases the Pascua Yaqui Tribe responded to, thirteen of them involved children.[63] While the next chapter will involve a more in depth analysis about what can be done to address this issue, it is important to note how often crimes against women involve the presence of children.

Another important finding from the pilot program was the limitations on justice for reoffenders. Due to the language of VAWA, tribes could not find offenders guilty of domestic abuse unless physical violence occurred. As a result, the Pascua Yaqui Tribe found that the men who dismissed for a lack of violence reoffended with physical violence.[64] Additionally, in cases where offenders had previous convictions, their

61. Noah et al., "Violence Against Women Act: A Gap in Protection for Children," 8.

62. Noah et al., "Violence Against Women Act: A Gap in Protection for Children," 14.

63. Urbina and Tatum, "On-the-Ground VAWA Implementation: Lessons from the Pascua Yaqui Tribe," 2.

64. Urbina and Tatum, "On-the-Ground VAWA Implementation: Lessons from the Pascua Yaqui Tribe," 2.

sentences could not be adjusted to reflect that.[65] The ICRA caps tribal sentencing regardless of previous criminal history. Furthermore, if an offender reoffends following tribal sentencing under SDVCJ, he will be subject to federal prosecution, not tribal prosecution.[66]

The pilot program revealed much about what SDVCJ looks like on tribal land. The three tribes' experiences indicate how valuable the ability to try non-Indians for cases of domestic violence is Indian Country. At the same time, some of the weaknesses and limitations of the law are revealed. Chapter Four will discuss how these limitations might be addressed by future legislation and the role that VAWA 2022 might play in mitigating these issues.

TLOA and VAWA 2013 are very important pieces of legislation in the context of violence against Native American women. Not only do both laws signal concern for women's issues in Indian Country but they also improve the response to crime in Indian Country. TLOA allows for concurrent jurisdiction and provides valuable training to tribes' law enforcement agencies. VAWA 2013 restores tribal jurisdiction over crimes of domestic violence. The value of those changes ought not to be downplayed. At the same time, there is still significant room for improvement of the jurisdictional structure in Indian Country. The remainder of this thesis will focus on substantive changes that can benefit tribes in a post VAWA 2013 world.

65. Noah et al., "Violence Against Women Act: A Gap in Protection for Children," 15.

66. Noah et al., "Violence Against Women Act: A Gap in Protection for Children," 14.

CHAPTER FOUR

A Policy Analysis of the Violence Against Women Act of 2022

Violence Against Women Act of 2022

The *Violence Against Women Act* was reauthorized again in 2022. The first reauthorization since 2013, the 2022 reauthorization allows for SDVCJ to expand and adds other areas of Special Criminal Jurisdiction (SCJ) to the bill. Admittedly, VAWA 2022 falls short of addressing every limitation of VAWA 2013. However, it does make the positive move of expanding SCJ provisions to include attendant crimes. The history of VAWA 2022 and its notable expansions are discussed in the following section. The policy is then analyzed according to MacRae and Wilde's framework later on in the chapter. Through the application of this framework, it is found that VAWA 2022 is a moderate policy that is politically feasible and prioritizes justice.

Bill Passage

VAWA 2022 was signed into law by President Biden in March of 2022.[1] VAWA was passed as part of the Omnibus Reconciliation Bill.[2] VAWA reauthorization was introduced to the House of Representatives in 2021 by Congresswoman Sheila Jackson Lee and to the Senate in 2022 by Senator Dianne Feinstein. The bill passed the House

1. "Fact Sheet: Reauthorization of the Violence Against Women Act (VAWA)," The White House (The United States Government, March 16, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/16/fact-sheet-reauthorization-of-the-violence-against-women-act-vawa/.

2. H.R. 2471 - Consolidated Appropriations Act, 2022.

within two weeks of its introduction.[3] In the Senate, the bill never made it out of the Senate Judiciary Committee.[4] However, VAWA was included in the *Consolidated Appropriations Act of 2022*.[5] Substantively, passage under the reconciliation process changed few if any provisions of the law. The greatest effect of this process is that it has caused the bill to appear more partisan than it likely was because the vote on the *Consolidated Appropriations Act* contains twelve appropriations bills, the reauthorization of many programs, and additional policies all of which were crafted by Democrats. The format of this bill and the lowering of the vote threshold decreased the support of Republicans and causes VAWA to appear very partisan. In reality, the Senate bill was cosponsored by eleven Republicans and forty-seven Democrats, proving a large bipartisan coalition around the reauthorization of this act.[6] The 2021 bill which passed the House received unanimous support from House Democrats and the support of twenty-nine House Republicans.[7]

Special Criminal Jurisdiction Expansions

As mentioned above, the most substantive change to VAWA's tribal provisions in 2022 was the expansion of SCJ. As explained in Chapter Three, SCJ permits tribes to prosecute non-Indian offenders who commit specific crimes in Indian Country. Under

3. H.R. 1620 - Violence Against Women Act Reauthorization Act of 2021.

4. H.R. 1620.

5. H.R. 2471.

6. S. 3623 – Violence Against Women Reauthorization Act of 2022.

7. H.R. 1620.

VAWA 2013, only domestic violence was covered.[8] However, under VAWA 2022 tribes can also exercise jurisdiction over crimes of "sexual assault, child abuse, stalking, sex trafficking, and assaults on tribal law enforcement officers on tribal lands." [9]

This expansion appears to cover two key sets of crimes and is perhaps best viewed as an expansion in two directions. The first expansion can be seen as an inclusion of more crimes against women. As has been established in previous chapters, Native American women are disproportionately victims of sexual violence.[10] Furthermore, these crimes are most often committed by non-Indian offenders, meaning that without SCJ they fall outside the jurisdiction of tribes.[11] Permitting sexual assault, stalking, and sex trafficking to be tried in tribal courts of law better allows for justice to be served.

The second expansion is the inclusion of attendant crimes. Attendant crimes are crimes which commonly occur at the same time as other crimes. Under VAWA 2022, child abuse and assault of law enforcement officers can be seen as attendant crimes. Often domestic violence incidents include child abuse or assault of an officer.[12] Allowing

8. Violence Against Women Reauthorization Act, S. 47, 113th Cong. § 904 (2013).

9. "Fact Sheet: Reauthorization of the Violence Against Women Act (VAWA)," The White House (The United States Government, March 16, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/16/fact-sheet-reauthorization-of-the-violence-against-women-act-vawa/.

10. Sarah Deer, *Beginning and End of Rape: Confronting Sexual Violence in Native America* (Minneapolis, MN: University of Minnesota Press, 2015), 20.

11. Samuel D. Cardick, "The Failure of the Tribal Law and Order Act of 2010 to End the Rape of American Indian Women," 2012. *St. Louis University Public Law Review* 31 (2): 539–78. https://search-ebscohost-com.ezproxy.baylor.edu/login.aspx?direct=true&db=a9h&AN=79611994&site=ehost-live&scope=site., 545.

12. Noah et al., "Violence Against Women Act: A Gap in Protection for Children," *Journal on Race, Inequality, and Social Mobility in America* 1 (2017): pp. 1-25, 14.

these crimes to be tried in tribal courts allows for punishment for the full scope of an individual's crimes.

These provisions seem to address necessary weaknesses of the previous iteration of VAWA. However, the novelty of this bill means that the effects are not measurable as of now. The remainder of this chapter will discuss how employing a policy analysis framework allows us to better evaluate changes to VAWA and the expansion of SCJ.

Measuring Effectiveness

The provisions of VAWA 2022 went into effect on October 1, 2022.[13] Due to the recent nature of this law, the effectiveness of these new provisions has yet to be evaluated. Therefore, this portion of Chapter Four will employ MacRae and Wilde's policy analysis framework to determine the effectiveness of the expanded SCJ. The selection of this framework and the application of it are detailed below.

MacRae and Wilde's Framework

Duncan MacRae and James Wilde are highly regarded in their field. Their book *Policy Analysis for Public Decisions* has been cited 362 times.[14] Their framework is employed in this paper due to its relative simplicity and its widespread applicability.

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13. "2013 And 2022 Reauthorizations of the Violence Against Women Act (VAWA)," The United States Department of Justice, September 20, 2022, https://www.justice.gov/tribal/2013-and-2022-reauthorizations-violence-against-women-act-vawa#:~:text=VAWA%202022's%20STCJ%20provisions%20take,in%20Indian%20country%20remains%20unchanged.

14. "Policy Analysis for Public Decisions," Google Scholar, accessed December 31, 2022, https://scholar.google.com/scholar?hl=en&as_sdt=0%2C44&q=policy+analysis+for+public+decision+macrae+and+wilde&btnG=.

Theodore Marmor, a professor of Public Policy and Political Science at the Yale School of Management writes in his review of *Policy Analysis for Public Decisions* that it is "useful for teaching…[and] has much to teach the teacher."[15] The high praise MacRae and Wilde's framework has received and its straightforward application allows it to be used well in the question of Native American jurisdiction. The framework itself consists of five steps. Each step is detailed below and specifically applied to the issue at hand.

Define the Problem

MacRae and Wilde explain defining the problem to be a two-part process. The first task is to understand how others define the problem and the second is to redefine it in a clearer manner.[16] Chapter One details the epidemic rate of violence against Native Women and Chapter Two further explains how that disproportionate rate of violence came to be. The process of redefining the problem took place when Congress sought to address violence against Native American Women in the 2013 reauthorization of VAWA. The findings of Congress which inspired legislative reform are explained in Chapter Three. As I argued in Chapter Two, the key issue affecting Native Women is that there is a jurisdictional gap in Indian Country that produces higher than average rates of sexual violence and prevents offenders from being brought to justice. This is the problem which policies seek to address.

15. T.R. Marmor. "'Policy Analysis for Public Decision', Duncan MacRae, Jr. and James A. Wilde (Book Review)." *Journal of Policy Analysis and Management* 6, no. 1 (Fall, 1986): pp. 112-114, 112.

16. Duncan Macrae and James A. Wilde, *Policy Analysis for Public Decisions* (Lanham, MD: University Press of America, 1985), 7.

Criteria for Choice

The chosen policy, according to MacRae and Wilde, must adhere to a sort of ethical, philosophical, or economic standard.[17] They refer to these as "standards of rightness [which] cannot be proved scientifically."[18] The principal issue at hand when it comes to issues of tribal jurisdiction is one of justice. Policies ought to advance the enactment of justice in a way that balances two goods. The first is the enforcement of law and order in Indian Country. The second is the preservation of the constitutionally guaranteed civil liberties of American citizens. In the case of jurisdiction in Indian Country, these two goods are often at odds. Selecting a policy that promotes both in a way that is just is one of the primary issues that legislators face. SCJ attempts to balance the two needs for justice by allowing tribes limited criminal jurisdiction so long as they adhere to ICRA guidelines which protect defendants' rights.

Alternatives, Models, and Decisions

VAWA 2022 has been described in detail above. However, policy analysis demands an assessment of alternative solutions as well. It must then be determined the ability of these alternatives to reach the desired goals while producing the least negative externalities.[19] The list of policy alternatives is extensive, and only a couple will be explored in this section. One alternative policy solution is to do nothing.[20] That

17. Macrae and Wilde, *Policy Analysis for Public Decisions*, 8.

18. Macrae and Wilde, *Policy Analysis for Public Decisions,* 9.

19. Macrae and Wilde, *Policy Analysis for Public Decisions*, 9.

20. Macrae and Wilde, *Policy Analysis for Public Decisions*, 9.

alternative was employed for many years, leading to the astonishingly high rates of sexual assault against Native American women that were reported prior to 2013.[21] This policy does not promote justice within Native American communities and instead left women vulnerable to sexual violence. Additionally, the previous scheme of jurisdiction prevented offenders from receiving retributive justice.

On the other end of the spectrum, an alternative policy is to give Native Americans complete and unbridled jurisdiction over all crimes committed in Indian Country. This sort of allowance would not require tribes to adhere to ICRA guidelines, nor would it limit sentencing. This would promote justice for the tribes. They would have a restored sovereignty and the ability to enforce the law as they see fit. However, granting tribes broad jurisdiction of this nature would endanger the rights of American citizens. Should tribes not be constrained to operate within ICRA guidelines, American defendants may have their constitutionally protected civil liberties violated in tribal courts. Beyond ICRA, there is no legislation which requires tribal courts to operate in such a way that ensures the same procedural safeguards that are present in the American legal system. Regardless of someone's status as a criminal, the Bill of Rights lays out a series of protections for criminal defendants, and those rights ought to be preserved even when a crime is committed in Indian Country.

These two alternatives may seem like extremes, but they are often the two sides of the debate on the issue of tribal sovereignty. The case of *Oliphant v. Suquamish* took up this very question of whether or not tribes could try non-Indians. The Court did not

21. Deer, *Beginning and End of Rape: Confronting Sexual Violence in Native America* (Minneapolis, MN: University of Minnesota Press, 2015), 4.

reference a middle-ground option in their decision, but instead ruled that tribes lack this jurisdiction.[22] It is VAWA that creates a grey area in which non-Indians can be tried for some crimes and not others. The jurisdictional scheme created is convoluted at times, but ultimately balances the needs of Native communities with the constitutional liberties of American citizens. Native American women demand justice for the violence they face. SCJ allows them to take their abusers to court, but the ICRA provisions ensure that the accused maintain their criminal rights as American citizens.

Political Feasibility

Given VAWA's ability to pass Congress, it is clearly politically feasible. This is no small thing in the world of policy analysis. According to MacRae and Wilde explain, "Even the best policy imaginable, as judged in ethical terms, may be impossible to put into effect."[23] In other words, a policy is only a good policy so long as it can be passed into law. VAWA 2022 has accomplished that. In many ways, VAWA 2022 is an incremental improvement to VAWA 2013. More crimes are given SCJ status on tribal land.

Even this incremental change to the 2013 law faced a degree of partisanship and political gridlock which prohibited its passage of the Senate. Examining the political feasibility of VAWA 2022 becomes difficult when one considers that it passed through the reconciliation process. This process is standard procedure but is often criticized for the large number of bills it is able to pass by making use of a lower vote threshold.

22. Oliphant v. Suquamish Indian Tribe, 435 U.S. 91 (Supreme Court of the United States 1978).

23. Macrae and Wilde, *Policy Analysis for Public Decisions*, 11.

Applying such a criticism to this law may suggest that VAWA 2022 lacked true political feasibility. Despite the use of reconciliation to eventually pass the bill, the sponsorship numbers of the original Senate bill suggest that VAWA 2022 had the needed votes to pass. With fifty-eight sponsors and co-sponsors the bill would only need two votes to pass. The reason for it being stalled in the judiciary committee are unclear. Yet solely from a voting standpoint, it does seem reasonable to believe that the incremental changes to the 2013 law and the reauthorization of VAWA proposed in 2022 was politically feasible.

However, as the next chapter will detail, VAWA 2022 is not the perfect ethical policy, there are still parts of the law which can be expanded or improved. Yet as this prong of policy analysis makes clear, there is no guarantee that those improvements to the bill would have passed Congress. The narrow scope of VAWA 2013 and SDVCJ indicates that many of the VAWA 2022 provisions would not have been likely to pass in 2013. Rather, through an examination of the implementation of VAWA 2013, VAWA 2022 was shaped and became politically feasible.

The Cycle of Policy Analysis

The final component of MacRae and Wilde's policy analysis is to repeat the process as a law goes into effect. VAWA 2022 is too new of a law to be able to perform any serious analysis of its implementation. However, as the law matures it is important to evaluate the law and to carefully consider new policy alternatives which may improve or replace VAWA 2022 with a more just law that is still politically feasible.[24]

24. Macrae and Wilde, *Policy Analysis for Public Decisions*, 11.

CHAPTER FIVE

A Path Forward

Types of Change

As Chapters Three and Four detail, TLOA and VAWA have been useful laws for reclaiming tribal jurisdiction and enforcing laws in Indian Country. However, the fact remains that Native American women face higher than average rates of sexual abuse.[1] Therefore, further change is needed, and this change may come in a variety of forms. The first type of change this chapter details is a further expansion of VAWA and SCJ. The conversation then turns towards an assessment of what other nations have done to protect Indigenous people and promote law and order. Based on those findings, this chapter concludes with an appeal for commitment changes and the suggestion of alternative forms of justice.

Possible Further Expansions of VAWA

Despite the significant step forward which VAWA 2022 signifies, there is still the possibility for further expansions under the SCJ framework. This section will detail some ways in which future VAWA reauthorizations might address some of the limitations which remain. Raising sentencing limits under ICRA and removing qualifications on the

1. "Crime Data Explorer," Cde.ucr.cjis.gov (Federal Bureau of Investigation, 2021), https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/crime-trend.

defendant's relationship to a tribe both would be positive changes that could be accomplished under a future VAWA reauthorization.

Alter ICRA Limitations

As discussed in Chapter Three, all tribes employing SCJ must adhere to ICRA limitations. Currently, the maximum sentence under ICRA is a $15,000 fine and three years of jail time.[2] These standards have not been updated since 2010 despite the introduction of SCJ provisions. Essentially, this means that a perpetrator convicted of sexual assault in Indian Country could not face more than three years of jail time for his crimes. Comparatively, the federal sentencing guidelines mandate a sentence ranging from roughly eight to ten years for a first-time offender.[3]

While VAWA 2022 is important because it allows some degree of punishment for crimes of sexual assault committed, there is still a clear disparity in the application of the law inside and outside of Indian Country. A positive step forward would be to further amend ICRA to permit Indian Country to follow federal sentencing guidelines. Permitting that change will allow a fair punitive response in Indian Country with the same degree of deterrence and retribution as punishments incurred outside of Indian Country.

[2] Samuel D. Cardick, "The Failure of the Tribal Law and Order Act of 2010 to End the Rape of American Indian Women," 2012. *St. Louis University Public Law Review* 31 (2): 539–78, 564.

[3] United States Sentencing Commission, Guidelines Manual, §3E1.1 (2021).

Removing Defendant Limitations

Another significant limitation of VAWA and SCJ is the fact that only non-Indians with preexisting relationships to the tribe can be tried in tribal court. This limitation is problematic at both a practical and theoretical level.

Practically, a group that perpetuates much of the sexual violence in Indian Country is pipeline workers who work and reside just beyond the border of the reservation.[4] These workers would not meet the criteria to be held accountable under SCJ as they do not reside in Indian Country, are not employed in Indian Country, and are not a spouse, intimate partner, or dating partner of an Indian living in Indian Country or member of the tribe.[5] Thus, the crimes of pipeline workers still go largely unpunished.

Expanding the power of the tribes to try non-Indians has theoretical backing. Beliefs of tribal sovereignty and implied consent support this expansion. Those who maintain the view that tribes are sovereign believe that tribes have a right to self-determination and ought to be able to exercise jurisdiction over anyone on tribal land.[6] They find this right to be rooted in precolonial times and affirmed through the language of the Constitution.[7] In contrast to the belief that the Constitution gives Congress the right to delegate the powers of tribes to try criminals in Indian Country, inherent sovereignty

4. Ana Condes, "Man Camps and Bad Men: Litigating Violence Against American Indian Women," *Northwestern University Law Review* 116, no. 2 (2021): 515-559., 529.

5. Violence Against Women Reauthorization Act, S. 47, 113th Cong. § 904 (2013).

6. Laura C. Sayler, "Back to Basics: Special Domestic Violence Jurisdiction in the Violence against Women Reactivation Act of 2013 and the Expansion of Inherent Tribal Sovereignty," Cardozo Law Review De-Novo 2014 (2014): 1-34, 11.

7. Sayler, "Back to Basics: Special Domestic Violence Jurisdiction in the Violence against Women Reactivation Act of 2013 and the Expansion of Inherent Tribal Sovereignty," 18.

argues that tribes as nations have the right to try non-members and non-Indians for crimes in Indian Country and ought to be permitted to exercise that power.[8]

Similarly, the theory of implied consent finds tribes to have authority over all people who have entered their land.[9] Sovereign nations exert control over their territory and have a vested interest in protecting their land and their people.[10] The theory of implied consent posits that individuals who enter a sovereign's land knowingly consent to the law of the land and thus can be prosecuted in a local tribunal system.[11] This understanding of sovereignty is not foreign to the United States and is exercised at the state level. Civil jurisdiction of a state extends to non-residents who travel via state-funded highways.[12] Admittedly what makes trial by tribal court different is the lack of protection of civil liberties. However, with the SCJ mandate that ICRA provisions be adopted by tribes therefore guaranteeing a certain degree of protection of civil liberties to defendants in Indian Country.

International Countries as a Case Study

The United States is not the only nation which experiences high levels of violence against Indigenous women. Both the United Nations and other countries have enacted

8. Sayler, "Back to Basics: Special Domestic Violence Jurisdiction in the Violence against Women Reactivation Act of 2013 and the Expansion of Inherent Tribal Sovereignty," 18.

9. Kaitlyn Schaeffer, "Answering Constitutional Challenges to the Tribal VAWA Provisions," *NYU Journal of Law & Public Policy* 21, no. 4 (2019): pp. 993-1031, 1018.

10. Schaeffer, "Answering Constitutional Challenges to the Tribal VAWA Provisions," 1018.

11. Schaeffer, "Answering Constitutional Challenges to the Tribal VAWA Provisions," 1018.

12. Schaeffer, "Answering Constitutional Challenges to the Tribal VAWA Provisions," 1019.

policies aimed at protecting Indigenous women. In considering the variety of solutions to the issue of violence against Native women, it is valuable to consider the successes and failures of international policies in addition to the successes and failures of American policies. That is precisely what this section aims to do. Specifically, Canada and Australia will be examined. These nations and the United States share a history of colonization and an adherence to English Common Law. This allows for them to be useful cases to study.

The United Nations

At an international level, the United Nations has crafted a series of declarations which, taken together, affirm the rights of Indigenous women to be free from violence.[13] In 1979, the UN General Assembly adopted the Convention on the Elimination of All Forms of Discrimination Against Women.[14] The focus of this convention is the promotion of civil rights and equality for women.[15] No attention is paid to the issue of violence against women in this convention. The United States has signed the convention, but not ratified it.[16] This means the convention lacks the force of law in the United States.

13. Rebecca Tsosie, "Indigenous Women and International Human Rights Law: The Challenges of Colonialism, Cultural Survival, and Self-Determination," *UCLA Journal of International Law and Foreign Affairs* 15, no. 1 (2010): pp. 187-237, 211.

14. Tsosie, "Indigenous Women and International Human Rights Law: The Challenges of Colonialism, Cultural Survival, and Self-Determination," 212.

15. Tsosie, "Indigenous Women and International Human Rights Law: The Challenges of Colonialism, Cultural Survival, and Self-Determination," 213.

16. "Office of High Commissioner of Human Rights Dashboard," - OHCHR Dashboard (United Nations, 2014), https://indicators.ohchr.org/.

In 1993, the UN General Assembly adopted the Declaration on the Elimination of Violence Against Women.[17] This declaration was an important step forward for the international community and offers a valuable framework for how to view issues of violence against women. The declaration links violence against women to historic patterns of oppression and views instances of violence as barriers to women's achievement of social, civil, and political equality.[18] Most of this paper has focused on the presence of violence against women and paints actions of aggression as bad in and of themselves. However, the UN Declaration on the Elimination of Violence Against Women adds the valuable context that violence against women harms women in many ways, including the limitation of equality. The UN Declaration on the Elimination of Violence Against Women also makes the important note that violence against women is particularly prevalent amongst minority groups, of which they specifically list Indigenous women as having high rates of victimization.[19]

Further attention was paid to the plight of Indigenous people in 2007 when the UN adopted the Declaration on the Rights of Indigenous People.[20] This declaration asserts the rights of Indigenous people and insists on their equality to all people.[21] As

17. "Global Norms and Standards: Ending Violence against Women," UN Women – Headquarters (UN Women), accessed December 30, 2022, https://www.unwomen.org/en/what-we-do/ending-violence-against-women/global-norms-and-standards.

18. United Nations, General Assembly. *Declaration on the Elimination of Violence Against Women*. New York, NY: UN Headquarters, (1994), 2.

19. United Nations, General Assembly. *Declaration on the Elimination of Violence Against Women*, 2.

20. Tsosie, "Indigenous Women and International Human Rights Law: The Challenges of Colonialism, Cultural Survival, and Self-Determination," 216.

21. United Nations, General Assembly. *Declaration on the Rights of Indigenous Peoples*. New York, NY: UN Headquarters, (2007), 2.

compared to other UN declarations, the Declaration on the Rights of Indigenous People seems to suggest that Indigenous communities have a right to self-determination only as it relates to local affairs.[22] Scholars note that this language affirms interpretations of tribal sovereignty such as the "domestic, dependent nation" model.[23] Regardless of this limitation, the declaration still supports the rights of Indigenous people and affirms an equality under the law. However, this declaration lacks enforcement measurements. Of the 147 voting states, only four voted against this declaration. Those four nations were the United States, Canada, Australia, and New Zealand.[24]

In 2014, the World Conference on Indigenous Peoples convened in New York.[25] Much of the conversation centered on the importance of restructuring gender attitudes and removing norms of violence.[26] The level of attention paid to the specific issue of violence against Indigenous women and girls is encouraging, as recognizing that this international problem exists is a necessary first step in combatting the issue. The conference consisted of three roundtables: one focused on UN system action to protect the rights of Indigenous people, one focused on national and local action to protect the

22. Tsosie, "Indigenous Women and International Human Rights Law: The Challenges of Colonialism, Cultural Survival, and Self-Determination," 217.

23. Tsosie, "Indigenous Women and International Human Rights Law: The Challenges of Colonialism, Cultural Survival, and Self-Determination," 217.

24. "United Nations Declaration on the Rights of Indigenous Peoples for Indigenous Peoples," United Nations (United Nations, 2007), https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html.

25. "World Conference on Indigenous Peoples for Indigenous Peoples," United Nations (United Nations, 2014), https://www.un.org/development/desa/indigenouspeoples/about-us/world-conference.html.

26. Rauna Kuokkanen, "Gendered Violence and Politics in Indigenous Communities," *International Feminist Journal of Politics* 17, no. 2 (2015): pp. 271-288, https://doi.org/http://dx.doi.org/10.1080/14616742.2014.901816, 272.

rights of Indigenous people, and one on Indigenous land and resources.[27] Additionally, the conference produced a list of action-oriented steps to combat gender violence.[28]

These UN declarations establish that women and Indigenous people ought to receive equality under the law. However, as noted throughout this section, these declarations lack the power of law in the United States. Despite the lack of enforcement power, UN declarations serve as important standards and suggest that there is hope for future legislation which may benefit Indigenous people of many UN countries. These UN declarations also reveal the international scope of the issue of violence against Indigenous women. The remainder of this section will focus on violence against Indigenous women in the countries of Canada and Australia.

Canada

Much like the United States, Indigenous women in Canada face disproportionate rates of violence. Indigenous women face rates of violence three times as high as non-Indigenous women and are five times more likely to be killed than non-Indigenous women.[29] Little has been done at the governmental level, but Indigenous women have led a grassroots movement which has garnered national attention for the issue.[30] This section will examine how Canada has responded to these high rates of violence against

27. "World Conference on Indigenous Peoples for Indigenous Peoples," United Nations (United Nations, 2014), https://www.un.org/development/desa/indigenouspeoples/about-us/world-conference.html.

28. "World Conference on Indigenous Peoples for Indigenous Peoples," United Nations (United Nations, 2014), https://www.un.org/development/desa/indigenouspeoples/about-us/world-conference.html.

29. John Borrows, "Aboriginal and Treaty Rights and Violence Against Women," *Osgoode Hall Law Journal* 50, no. 3 (2013): pp. 699-736, 700.

30. Borrows, "Aboriginal and Treaty Rights and Violence Against Women," 701.

Indigenous women and draw out any possible policies or responses that the United States ought to adopt.

Like in the United States, Canadian rates of violence against Indigenous women are largely tied to past instances of colonialism.[31] In many ways, colonialism has resulted not only in high rates of violence but also in a culture of victim-blaming in Canada.[32] This culture induces a pattern of silence amongst survivors but is one that has recently been challenged by brave women fighting for a right to self-determination.[33]

Indigenous people groups in Canada lack this right to self-determination and experience limited criminal jurisdiction, much like Native American tribes in the United States. Specifically, Section 35(1) of the *Constitution Act, 1982* grants rights to Indigenous communities.[34] However, Section 35(1) has not been determined to apply to violence against Indigenous women meaning that Indigenous communities lack jurisdiction over such crimes.[35] The Supreme Court of Canada has significantly reduced Indigenous jurisdiction.[36] Section 35(1) restores jurisdiction in a number of historic areas but is not a sweeping piece of legislation and fails to grant full jurisdiction.[37]

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31. Kuokkanen, "Gendered Violence and Politics in Indigenous Communities," 281.

32. Kuokkanen, "Gendered Violence and Politics in Indigenous Communities," 281.

33. Borrows, "Aboriginal and Treaty Rights and Violence Against Women," 702.

34. Borrows, "Aboriginal and Treaty Rights and Violence Against Women," 707.

35. Borrows, "Aboriginal and Treaty Rights and Violence Against Women," 705.

36. Borrows, "Aboriginal and Treaty Rights and Violence Against Women," 706.

37. Borrows, "Aboriginal and Treaty Rights and Violence Against Women," 707.

Ultimately, Canadian Indigenous people lack jurisdiction over violent crimes to a greater degree than Native Americans. Given the wrought history of jurisdiction in America, this fact is alarming and highlights how widespread of an issue violence against Indigenous women is. Unfortunately, Canada has taken few steps to protect Indigenous women and girls from epidemic levels of violence and have no policies which the United States ought to adopt.

One step that Canada has taken in righting historic wrongs which the United States has yet to take is the issuing of an official apology in a public manner. In 1998, the Minister of Indian and Northern Affairs read an apology on behalf of the Government of Canada for the actions taken in the establishment of boarding schools.[38] This apology was largely viewed as insincere or a "quasi-apology."[39] Mere words were not proper restitution and are often viewed as ingenuine and ineffective by Indigenous leaders.[40] The lack of a positive response to this apology once again indicates that Canada's example is not one the United States must necessarily follow.

Australia

Australia is also home to an Indigenous population that has been largely shaped by colonial era policies. As in the United States and Canada, Indigenous women report

38. Jeff Corntassel and Cindy Holder, "Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru," *Human Rights Review* 9, no. 4 (2008): pp. 465-489, https://doi.org/10.1007/s12142-008-0065-3, 473.

39. Corntassel and Holder, "Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru," 473.

40. Corntassel and Holder, "Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru," 475.

disproportionately high rates of violence.[41] The efforts by the Australian government differ from those of the United States and Canada and provide a useful point of study.

In the 1990s, Australia sought to implement a policy of reconciliation.[42] Reconciliation is defined as the employment of truth commissions and official apologies to rectify past injustice.[43] The Council for Aboriginal Reconciliation aimed to address past wrongdoings and offer restitution, but political tensions largely diluted this goal.[44] Concern over the optics of admitting past wrongdoing led the Australian government to be divided, even on symbolic acts such as instituting an annual day of apology.[45] Ultimately, Sorry Day, a national day of apology, came to pass and a monument of reconciliation was built.[46] Similar to in Canada, the language and actions of Australia's apology fell flat.[47] Many viewed the apology as ingenuine and the lack of actual restitutions did not go unnoted.

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41. Heather Nancarrow, "Restorative Justice for Domestic and Family Violence," *Restorative Justice and Violence Against Women*, 2009, pp. 1-31, https://doi.org/10.1093/acprof:oso/9780195335484.003.0006, 4.

42. Corntassel and Holder, "Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru," 475.

43. Corntassel and Holder, "Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru," 466.

44. Corntassel and Holder, "Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru," 475.

45. Corntassel and Holder, "Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru," 476.

46. Corntassel and Holder, "Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru," 477.

47. Corntassel and Holder, "Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru," 478.

Another important Australian contribution is a study that was conducted on attitudes towards restorative justice. Two Australian taskforces on violence against women conducted studies on domestic and family violence and the use of restorative justice.[48] Restorative justice is understood to be more than mediation, but a process of self-determination driven by community action.[49] Restorative justice as understood in this study, contrasts with practices of the criminal justice system.[50]This study found that Indigenous and non-Indigenous women held different views from one another on whether practices of restorative justice should be used to address domestic and family violence.[51] Domestic and family violence is a prevalent issue in Australia with one in three women reporting intimate partner violence, and is even more common amongst Indigenous women.[52] These taskforces employed semi-structured interviews in order to understand the views that women held on restorative justice.[53] Despite the relatively small sample size of ten Indigenous and ten non-Indigenous women, important findings emerge.[54] Most significant is the study's finding that Indigenous women embraced the practice of

48. Heather Nancarrow, "Restorative Justice for Domestic and Family Violence," *Restorative Justice and Violence Against Women*, 2009, https://doi.org/10.1093/acprof:oso/9780195335484.003.0006, 2.

49. Nancarrow, "Restorative Justice for Domestic and Family Violence," 17.

50. Nancarrow, "Restorative Justice for Domestic and Family Violence," 17.

51. Nancarrow, "Restorative Justice for Domestic and Family Violence," 2.

52. Nancarrow, "Restorative Justice for Domestic and Family Violence," 3.

53. Nancarrow, "Restorative Justice for Domestic and Family Violence," 14.

54. Nancarrow, "Restorative Justice for Domestic and Family Violence," 15.

restorative justice whereas non-Indigenous women preferred the formal use of the criminal justice system in responding to family violence.[55]

Takeaways from International Responses

Canada and Australia teach that America is not uniquely positioned in their rate of violence against Indigenous women. Jurisdictional issues and sexual violence are common in multiple countries. While international concern has been on the rise and the UN has discussed issues involving Indigenous women, little legislative process has been made. In Canada and Australia, apologies failed to produce meaningful change.[56] Therefore, a push for a national apology is likely energy misspent. Legislative efforts would do better to work to reform the jurisdictional system, an effort some scholars claim the United States is the leader in.[57]

While it is disheartening to see the lack of effective policies internationally, it is vital to understand what does not work. Similarly, it is important to understand what tribal communities want. The Indigenous preference for restorative justice practices indicates that permitting alternative forms of justice in tribal communities may be effective in promoting a sense of justice which Indigenous women desire. The idea of restorative justice and possible implementations of such a policy will be explored further later in this chapter.

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55. Nancarrow, "Restorative Justice for Domestic and Family Violence," 20.

56. Corntassel and Holder, "Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru," 478.

57. Borrows, "Aboriginal and Treaty Rights and Violence Against Women," 708.

Commitment Changes

Crafting legislation which allows tribes to exercise jurisdiction over crimes which occur on their land against their people is a critical step in ensuring justice for Native women. However, the ability for these tribes to adequately exercise jurisdiction is inhibited by a lack of funds and a lack of cultural sensitivity. This section will explore the ways in which emphasizing the importance of funding and cultural sensitivity can further justice for Native women.

Funding

A major barrier tribes face when opting in to SCJ programs under VAWA is the expense of adhering to ICRA standards.[58] Chapter Four explains why ICRA guidelines are valuable in the establishment of justice for all involved parties, particularly as the preserve the constitutional rights of American defendants. ICRA guidelines play an important role in promoting justice, and it is crucial that tribes adhere to them. However, tribes' ability to exercise SCJ is also necessary in the pursuit of justice, and funding should not bar tribes from opting in to such an important program.

Meeting ICRA standards is an investment. Currently, some aid is available through VAWA and the Office of Victims of Crime.[59] This funding is somewhat limited

58. Tara N. Richards, Sheena L. Gilbert, and Emily M. Wright, "Decolonizing VAWA 2021: A Step in the Right Direction for Protecting Native American Women," *Feminist Criminology* 16, no. 4 (2021): pp. 447-460, https://doi.org/10.21428/cb6ab371.16b06db7, 454.

59. Gilbert, Wright, and Richards, "Decolonizing VAWA 2021: A Step in the Right Direction for Protecting Native American Women," 455.

but also requires a certain level of access and funding to obtain.[60] Ultimately, some of the tribes that need the funding the most lack the infrastructure or awareness to even apply for grants. Those tribes which do apply may fail to receive funding if they lack resources to such an extent that they fail to have an adequate number of law enforcement officers.[61] It is important that tribes most in need of funds aren't discriminated from receiving them.

One of the greatest failures of TLOA was that it did not provide adequate funding for the program.[62] VAWA fails to remedy this and allow tribes to opt into the program regardless of financial standing. Chapter Three discusses the success that the pilot program tribes had in exercising tribal jurisdiction. It cannot be overemphasized that only those tribes which were adequately resourced were able to participate in the pilot program.[63] In reflection of their participation in the pilot program, tribes noted that having adequate funds is one of the most important questions to consider when tribes are deciding whether or not to adopt SCJ.[64] Evidently, a lack of funding and resources can bar tribes from enacting policies which promote justice. Future legislation should work to increase the availability and accessibility of grant money so that more tribes might be able to participate in SCJ.

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60. Gilbert, Wright, and Richards, "Decolonizing VAWA 2021: A Step in the Right Direction for Protecting Native American Women," 456.

61. Gilbert, Wright, and Richards, "Decolonizing VAWA 2021: A Step in the Right Direction for Protecting Native American Women," 456.

62. Samuel D. Cardick, "The Failure of the Tribal Law and Order Act of 2010 to End the Rape of American Indian Women," 2012. *St. Louis UniversitVery Public Law Review* 31 (2): 539–78, 573.

63. Alfred Urbina and Melissa Tatum, "On-the-Ground VAWA Implementation: Lessons from the Pascua Yaqui Tribe," *Judges Journal* 55, no. 4 (2016): pp. 1-4, 3.

64. Urbina and Tatum, "On-the-Ground VAWA Implementation: Lessons from the Pascua Yaqui Tribe," 3.

Cultural Sensitivity

Another area for continued growth in future legislation is the promotion of culturally sensitive laws. Currently, tribal rape laws are not written by the tribes.[65] While the careful use of language may appear superficial amidst such a grave issue, it is still valuable to use language which encompasses the experience of Native American women. As explained in Chapter One, rape of Native women is often interpreted by tribes to be an assault at both the micro and macro level. Allowing tribes to shape rape law may allow them to more fully encompass what rape means in the tribal context.[66] An example of this came out of the study of Australia referenced earlier in this chapter. Researchers found that indigenous women preferred the term family violence over domestic violence.[67]

Granting tribes the right to use language that they prefer is a small change, but is one that allows for a more tribalcentric response and asserts the dignity of Native American women and communities. Allowing tribes to define what rape means specifically to them allows for a more holistic response as tribes may choose to view rape as an "unlawful invasion of the body, mind, and spirit."[68] Researchers believe that this more complete definition of rape in tribal context would allow victims to better heal and

65. Gilbert, Wright, and Richards, "Decolonizing VAWA 2021: A Step in the Right Direction for Protecting Native American Women," 455.

66. Gilbert, Wright, and Richards, "Decolonizing VAWA 2021: A Step in the Right Direction for Protecting Native American Women," 455.

67. Nancarrow, "Restorative Justice for Domestic and Family Violence," 3.

68. Sarah Deer, *Beginning and End of Rape: Confronting Sexual Violence in Native America* (Minneapolis, MN: University of Minnesota Press, 2015), 114.

receive all the services they need.[69] The ultimate goal of such a policy would be the furtherance of care for survivors and an increase in tribal safety.

Alternative Forms of Justice

In addition to the reforms detailed above, it might be beneficial for tribes to employ alternative forms of justice. As evidenced in Australia, many Indigenous women prefer the approach of restorative justice to the employment of the criminal justice system.[70]Additionally, some tribes may find it beneficial to utilize civil torts to combat sexual violence.

Restorative Justice

As explained earlier in this chapter, some Indigenous communities in Australia were found to prefer practices of restorative justice to those of retributive justice.[71] While this does not suggest that the preference for restorative justice is universal amongst Indigenous groups, it does suggest that the practice and allowance of restorative justice may be a useful remedy to violence against Native American women.

Historically, restorative justice has been a common practice amongst tribal communities.[72] As part of the international movement to promote the rights of indigenous

69. Gilbert, Wright, and Richards, "Decolonizing VAWA 2021: A Step in the Right Direction for Protecting Native American Women," 455.

70. Nancarrow, "Restorative Justice for Domestic and Family Violence," 20.

71. Nancarrow, "Restorative Justice for Domestic and Family Violence," 20.

72. Cardick, "The Failure of the Tribal Law and Order Act of 2010 to End the Rape of American Indian Women," 551.

women, some groups have focused their efforts on encouraging the practice of restorative justice in tribal communities.[73] Practices of restorative justice include mediation, elder guided reform, and family-led accountability.[74] Employing models of restorative justice will not immediately solve the problem of violence against Native women. Restorative justice does not always promote the safety of the survivor in the way that it should, given the nature of violent crime.[75] Prominent Native American scholar Sarah Deer, argues that a combination of restorative and retributive techniques best allows Indigenous communities to respond to sexual violence.[76]

Recent legislation has focused solely on the promotion of the American legal system within tribal communities. While that degree of accountability is important, it is also valuable for tribes to be equipped with the resources necessary to respond to injustice with policies of restoration.

Torts

For tribes that lack the resources to adhere to ICRA standards or those which choose not to adopt SCJ, they may find it beneficial to utilize the civil legal system over the criminal legal system. Tort action allows for financial compensation but takes place in

73. Tsosie, "Indigenous Women and International Human Rights Law: The Challenges of Colonialism, Cultural Survival, and Self-Determination," 233.

74. Nancarrow, "Restorative Justice for Domestic and Family Violence," 17.

75. Deer, *Beginning and End of Rape: Confronting Sexual Violence in Native America*, 130.

76. Deer, *Beginning and End of Rape: Confronting Sexual Violence in Native America*, 130.

civil courts, and can be used without the adoption of VAWA.[77] Torts have been used with increased frequency in recent years to offer justice to survivors of sexual assault, even beyond the Indigenous community.[78] These torts have been useful in dealing with rape.[79] Torts have proved successful in cases where criminal charges may fail.[80] However, the use of torts as a redress for rape is criticized by some because it appears to soften the punishment for crimes of sexual assault.[81]

Despite this potential drawback, women are choosing to use tort claims for a variety of reasons.[82] Torts may prove to be particularly useful in Indian Country because no legislation change would be required in order for tribes to enact this jurisdiction.[83] Rather, survivors would need to file civil charges and tribes would need to opt to hold offenders accountable in a civil court of law. Civil courts require a lower burden of proof and offer redress in the form of financial compensation.[84] While torts fail to offer all the benefits of criminal charges, the ease with which civil cases can be tried in Indian Country may make them a valuable tool for justice.

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77. Carrie E. Garrow and Sarah Deer, *Tribal Criminal Law and Procedure*, vol. 2 (Lanham, MD: Rowman & Littlefield, 2015), 130.

78. Nikki Godden, "Claims in Tort for Rape: A Valuable Remedy or Damaging Strategy?," *King's Law Journal* 22, no. 2 (2011): pp. 157-182, https://doi.org/10.5235/096157611796769532, 158.

79. Godden, "Claims in Tort for Rape: A Valuable Remedy or Damaging Strategy?," 181.

80. Godden, "Claims in Tort for Rape: A Valuable Remedy or Damaging Strategy?," 167.

81. Godden, "Claims in Tort for Rape: A Valuable Remedy or Damaging Strategy?," 179.

82. Godden, "Claims in Tort for Rape: A Valuable Remedy or Damaging Strategy?," 180.

83. Jessica Allison, "Beyond VAWA: Protecting Native Women from Sexual Violence Within Existing Tribal Jurisdictional Structures," *University of Colorado Law Review* 90 (2019), 251.

84. Allison, "Beyond VAWA: Protecting Native Women from Sexual Violence Within Existing Tribal Jurisdictional Structures," 251.

Improvements to issues of tribal jurisdiction and response to sexual assault are still necessary despite recent improvements to SCJ. VAWA itself could continue to be expanded and improved by decreasing the restrictions placed by ICRA and removing barriers to who can be tried in Indian Country. International case studies teach of other ways to approach the issue of sexual assault of Indigenous women. Increased funding and cultural sensitivity can lead to a greater enactment of justice. Employing non-criminal sanctions such as restorative justice policies and using torts may allow for a greater response to sexual assault in Indian Country.

CONCLUSION

Violence against Indigenous women is not a novel issue, nor is it strictly a domestic issue. Native American women have been subject to high rates of violence since the colonial era. Early policies in the United States left women vulnerable to abuse and simultaneously stripped tribes of their power to prosecute violent crimes committed by non-tribal members.

These policy decisions compounded to create a jurisdictional maze. Crimes are difficult to prosecute in Indian Country. Determining jurisdiction is one frequently cited challenge and under resourced law enforcement agencies are another. These challenges limit the effectiveness of tribal justice systems. Crimes go unprosecuted at higher rates in Indian Country than they do nationwide. Crimes are also committed at higher rates because jurisdictional barriers have continued the historical trend of leaving Indigenous women vulnerable to abuse.

Recent attempts to address the issue of violence against Native American women have come in the form of federal congressional action. Laws such as TLOA and VAWA reauthorizations are best interpreted as valuable steps in remedying the issue, not an ultimate solution. These laws are important and have created some degree of change in the way that Indian Country prosecutes crime, particularly crimes against women, but these laws have failed to prevent all abuses against Native women and do not ensure adequate justice for all survivors.

Congress should continue to enact policies with the aim of preventing violence against Native women and ensuring justice on tribal land. VAWA 2022 suggests that

further expansions to SCJ are possible in future VAWA reauthorizations. Future reauthorizations ought to increase sentencing powers of tribes beyond the ICRA limitations and should include concepts of implied consent, meaning anyone who enters tribal land is subject to the laws and jurisdiction of that tribe. These changes would remove some of the limitations of tribal law enforcement agencies and grant them rights over their citizenry that is more in line with the rights of other local law enforcement agencies. Future congressional action should also focus on expanding funding to tribal judicial systems. Some tribes have been unable to adopt VAWA jurisdiction due to a lack of funding. Providing grant dollars is a measure by which jurisdiction can be made more equitable across tribes.

Beyond congressional action, tribes can adopt alternative methods of addressing violent crimes committed by non-Indians on tribal land. The use of torts and restorative justice allows tribes to avoid issues of jurisdiction by enacting justice through measures other than a criminal court. Ultimately the degree of accountability and retribution afforded by torts and restorative measures pales in comparison to traditional criminal procedures. However, these options may offer a remedy in the interim before Congress enacts laws which ensure that tribes can use criminal courts to try violent crimes against women. Additionally, the use of torts and restorative justice practices may be more culturally sensitive, particularly given the long history of tribes using restorative justice to deal with deviance.

Sexual assault rates in Indian Country are dire. The statistics are staggering. Yet recent congressional attention to the issue offers a beacon of hope. Despite these laws, there is still a gap between the ways in which tribal courts can prosecute violence against

women and the ways in which other jurisdictions can. Therefore, attention must continue to be paid to this issue. Future laws and actions hold the powerful possibility to promote justice in Indian Country and to guarantee the rights of Native American women. With adequate attention, remedies to the jurisdictional maze can return inherent sovereignty to tribes and end the epidemic rates of violence against Native women that have existed since Columbus's discovery of the Americas.

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