BEYOND VAWA: LOCALISM AS AN ARGUMENT FOR FULL TRIBAL CRIMINAL JURISDICTION

Deanna Tamborelli[*]

ABSTRACT

American Indian and Alaskan Native ("AI/AN" or "Native") women have faced disproportionately high rates of violence since colonists first arrived in North America. But, while non-Native communities have had the power, rooted primarily in criminal jurisdiction, to experiment and develop innovative, culturally appropriate programs aimed at eliminating domestic violence, a series of federal legislation and Supreme Court decisions stripped AI/AN tribes of such power. Today, Native communities continue to lack criminal jurisdiction over most non-Native perpetrators of crime, who are overwhelmingly responsible for acts of domestic violence against Native women. While the passage of the 2013 reauthorization of the Violence Against Women Act ("VAWA") created Special Domestic Violence Criminal Jurisdiction, the program's limited return of jurisdiction resulted only in putting tribes in the position that the rest of the country was in during the 1980s and '90s—able to prosecute and punish offenders but still unable to treat the problem of domestic violence holistically.

This Note argues that violence in Indian country will not be meaningfully reduced until tribes have full autonomy over their criminal systems. This can only be achieved when tribal criminal jurisdiction is equivalent to that exercised by states. Outside Native lands, specialized domestic violence courts have had success in reducing violence through community-based, collaborative approaches and integrated drug and alcohol treatment. With expanded criminal jurisdiction, tribes would be able to learn from the developments in antiviolence theory in practice over the last forty years, giving them the opportunity to make rapid progress in closing the gap in experience and finding what works in

[*] J.D. & Graduate Certificate in Women's, Gender & Sexuality Studies, Boston University School of Law, 2020; B.A. in Latin American Studies, Middlebury College, 2011. My deepest gratitude goes to Professors Julie Dahlstrom and Jack Beermann for their acumen, encouragement, and guidance in writing this Note. I'd also like to thank everyone on the *Boston University Law Review* for their substantive critiques during the submission process and diligent work in preparing the Note for publication, it is a stronger piece for your insights. Finally, I'd like to extend special thanks to my friends Karla Gonzalez, Rebecca Gottesdeiner, Alexa Solimano, and Summar Sparks—who somehow found time to read and edit multiple drafts of this Note no matter how busy they were with their own work and lives—for their unwavering support and friendship throughout law school.

reducing violence in their communities. Furthermore, the similarities between tribal governments and those of state and local municipalities are strong indicators that tribes should have criminal jurisdiction over all crimes committed in their territories. In dismantling tribal jurisdiction over crimes committed by non-Natives and then returning limited jurisdiction in a piecemeal fashion, the federal government has stifled the ability of tribes to develop effective responses while further entrenching a white supremacist, colonial system over sovereign peoples. It is due time for the federal government to support these communities as they seek to heal and rebuild.

CONTENTS

INTRODUCTION

Gender-based violence against American Indian and Alaskan Native ("AI/AN" or "Native")[1] women[2] can be "traced back to the legacy of abuse and systemic assault on Native culture, land, and people," as such crimes were "used by settlers as an integral part of conquest and colonization."[3] While American territorial expansion ended decades ago, this legacy of violence against Native women continues today. AI/AN women experience violence at a rate two and a half times higher than of any other population in the United States.[4] The majority of such violence is perpetrated by an intimate partner, with about half of all Native women experiencing domestic violence[5] in their lifetimes, compared to

[1] This Note adopts the terminology "American Indian" and "Alaskan Native" in accordance with the definitions of the National Congress of American Indians ("NCAI"), a nationwide, tribal-run advocacy organization. *About NCAI*, NAT'L CONGRESS AM. INDIANS, http://www.ncai.org/about-ncai [https://perma.cc/6LLZ-5T27] (last visited Nov. 14, 2020). The NCAI defines "American Indian" and "Alaskan Native" as "[p]ersons belonging to the tribal nations of the continental United States (American Indians) and the tribal nations and villages of Alaska (Alaska Natives)." NAT'L CONG. OF AM. INDIANS, TRIBAL NATIONS AND THE UNITED STATES: AN INTRODUCTION 11 (2020) [hereinafter INTRODUCTION], http://www.ncai.org/tribalnations/introduction/Indian_Country_101_Updated_February_2019.pdf [https://perma.cc/3ZYK-9DF8]. The term "Indian" is only used where the author is directly quoting the speech or writing of another.

[2] While the author recognizes that domestic violence against men in heterosexual relationships and within lesbian, gay, bisexual, transgender, and queer ("LGBTQ") communities continues to be a profound problem, the focus of this Note is on violence against cisgender, heterosexual women perpetrated by male intimate partners.

[3] *Native Women: Protecting, Shielding, and Safeguarding Our Sisters, Mothers, and Daughters: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 69 (2011) (statement of Sarah Deer, Assistant Professor, William Mitchell School of Law) [hereinafter *Native Women Hearing*].

[4] *The Violence Against Woman Act: Building on 17 Years of Accomplishments: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 202 (2011) [hereinafter *17 Years of Accomplishments*] (Appendix I: Recommended Language for Reauthorization of VAWA Title IX); STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 203097, A BJS STATISTICAL PROFILE, 1992-2002: AMERICAN INDIANS AND CRIME 7 (2004) ("The rate of violent crime victimization among American Indian females (86 per 1,000) was 2½ times the rate for all females. The victimization rate among American Indian females was much higher than that found among black females (46 per 1,000 age 12 or older), about 2½ times higher than that among white females (34), and 5 times that of Asian (17) females."), https://www.bjs.gov/content/pub/pdf/aic02.pdf [https://perma.cc/P9A2-5A98].

[5] This Note uses the term "domestic violence" because that is the term used in the 2013 reauthorization of the Violence Against Women Act ("VAWA 2013"). This term should be understood to include "intimate partner violence." VAWA 2013 defines "domestic violence" as "violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly

an average of one in four women nationally.[6] AI/AN women who experience such violence do so overwhelmingly at the hands of non-Native individuals.[7] Studies have found that 75% to 97% of domestic violence offenders who commit acts of violence against Native women are of a different race.[8] This is highly unusual in the United States where the vast majority of all crime, and domestic violence in particular, is committed by and against individuals of the same race.[9] AI/AN women are five times more likely to experience interracial domestic violence than non-Hispanic white women.[10]

situated to a spouse of the victim under the domestic- or family-violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs." Violence Against Women Reauthorization Act of 2013, 25 U.S.C. § 1304(a)(2) (2018). As used in this Note, "domestic violence" incorporates the guidance that the Inter-tribal Technical-Assistance Working Group received from the Department of Justice, which relied upon the definition of "crime of violence" found at 18 U.S.C. § 16(a). NAT'L CONG. OF AM. INDIANS, VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 28 (2018) [hereinafter SDVCJ FIVE-YEAR REPORT], http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf [https://perma.cc/D7LB-YKLV]. This definition allows tribes exercising special domestic violence criminal jurisdiction ("SDVCJ") to prosecute conduct that "involve[s] the reckless or intentional use, threatened use, or attempted use of force capable of doing injury to the victim or the victim's property." *Id.*; *see also* 18 U.S.C. § 16(a) (2018) (defining "crime of violence"). The author recognizes that other forms of domestic violence, including coercive control, emotional abuse, and financial abuse, are serious and create real harm. However, the focus of this Note is on prosecutable domestic violence under current provisions of SDVCJ.

[6] NAT'L COAL. AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE 1 (2020), https://assets.speakcdn.com/assets/2497/domestic_violence-2020080709350855 .pdf?1596828650457 [https://perma.cc/58ZK-4ZD6]; NAT'L CONG. OF AM. INDIANS, RESEARCH POLICY UPDATE: VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN 1 (2018) [hereinafter RESEARCH POLICY UPDATE], http://www.ncai.org/policy-research-center/research-data/prc-publications/VAWA_Data_Brief__FINAL_2_1_2018.pdf [https://perma.cc/WMR9-76R3]; SDVCJ FIVE-YEAR REPORT, *supra* note 5, at 3.

[7] *17 Years of Accomplishments*, *supra* note 4, at 202; SDVCJ FIVE-YEAR REPORT, *supra* note 5, at 3; Rebecca A. Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CALIF. L. REV. 185, 190 (2008); André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, NAT'L INST. JUST. J., Sept. 2016, at 38, 42.

[8] *17 Years of Accomplishments*, *supra* note 4, at 202 (citing 88% figure); SDVCJ FIVE-YEAR REPORT, *supra* note 5, at 3 (citing 90% figure); Hart & Lowther, *supra* note 7, at 190 (citing 75% figure).

[9] RESEARCH POLICY UPDATE, *supra* note 6, at 2; *cf.* PERRY, *supra* note 4, at 9 ("Violent crime against white and black victims was primarily intraracial, committed by a person of the same race. Among the white victims of violence, 70% of the offenders were white, and among black victims, 80% were black.").

[10] RESEARCH POLICY UPDATE, *supra* note 6, at 2.

Outside Native reservations and villages,[11] history and data have led to an evolution in theory and best practices for reducing domestic violence. For much of American history, courts and law enforcement viewed domestic violence almost exclusively as an interfamilial issue not suitable for judicial intervention.[12] However, backed up by (now-questioned) social science research and criminal theory, second-wave feminists of the late 1970s and '80s pushed for mandatory arrest and prosecution policies on the belief that treating domestic violence as a serious crime with harsh punishments would deter future violence.[13] In particular, they relied on Lenore Walker's theory of "battered women's syndrome," which argued that "battered women could only be cured of learned helplessness by being forcefully separated from their abusive partners" and on the Minneapolis Domestic Violence Experiment, which indicated arrest and prosecution deterred future violence.[14] Second-wave feminists pushed for more intervention from all levels of the state criminal apparatus despite early concerns "over substituting one form of oppression, male domination, with another: state control."[15]

The movement was largely convincing, and in the 1980s and '90s, Congress and state legislatures passed waves of legislative and policy reforms across the

[11] The term "reservations" as used in this Note refers to defined territories the boundaries of which are recognized by the federal government. Alaskan Native "villages" are distinguished from reservations because the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1629 (2018), settled land claims in that state differently than in the contiguous United States. INTRODUCTION, *supra* note 1, at 26.

[12] Claire Houston, *How Feminist Theory Became (Criminal) Law: Tracing the Path to Mandatory Criminal Intervention in Domestic Violence Cases*, 21 MICH. J. GENDER & L. 217, 253-54 (2014); Betsy Tsai, Note, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285, 1289-90 (2000).

[13] Mary A. Finn, *Evidenced-Based and Victim-Centered Prosecutorial Policies: Examination of Deterrent and Therapeutic Jurisprudence Effects on Domestic Violence*, 12 CRIMINOLOGY & PUB. POL'Y 443, 443-44 (2013); Houston, *supra* note 12, at 260-71.

[14] Houston, *supra* note 12, at 252, 261-62; *accord* Lawrence W. Sherman, Janell D. Schmidt, Dennis P. Rogan & Douglas A. Smith, Patrick R. Gartin, Ellen G. Cohn, Dean J. Collins & Anthony R. Bacich, *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137, 138 (1992). The Minneapolis Domestic Violence Experiment found that arrest is associated with lower rates of domestic violence recidivism, but the results of this study have since been questioned. LAWRENCE W. SHERMAN & RICHARD A. BERK, THE MINNEAPOLIS DOMESTIC VIOLENCE EXPERIMENT 1 (1984), https://www.policefoundation.org/wp-content/uploads/2015/07/Sherman-et-al.-1984-The-Minneapolis-Domestic-Violence-Experiment.pdf [https://perma.cc/ZC48-L79X]. *But see* LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE 14 (2018) [hereinafter DECRIMINALIZING DOMESTIC VIOLENCE] ("Replication studies found that mandatory arrest laws had deterrent effects in some locations, no effect in other locations, and contributed to increases in violence in others.").

[15] Houston, *supra* note 12, at 254.

country that included stringent policies on arrests and prosecutions and the imposition of severe punishments for perpetrators of domestic violence.[16] Despite steps towards criminalizing the behavior, however, rates of domestic violence remained prevalent.[17] Some social scientists and feminist scholars began to argue that domestic violence is not effectively combatted through increased enforcement efforts because—unlike other violent crime—it is distinctly personal and involves emotional ties between parties.[18]

More recently, feminist thinkers have once again revolutionized their understanding of domestic violence, this time critiquing the overreliance on criminal responses even as they recognize some limited benefits.[19] Studies have found, for example, that while mandatory interventions reduce violence for white women, they may actually increase the number of incidents of violence faced by African American women.[20] These thinkers, known as third-wave feminist theorists, focus on intersectional analysis, increasing survivor[21] autonomy and choice, and decreasing the reliance on the criminal legal system.[22]

---

[16] Tsai, *supra* note 12, at 1290-91.

[17] *Id.* at 1291-92 (documenting mid-1990s studies as evidence for legal reforms' failure to "stem the tide of domestic violence itself, as reflected in the sheer numbers of women who continue[d] to be affected by domestic abuse").

[18] *See id.* at 1293-94.

[19] DECRIMINALIZING DOMESTIC VIOLENCE, *supra* note 14, at 15-16 (listing among the benefits of mandatory arrests and prosecutions "distance from abuse," immediate intervention in an ongoing act of violence, prevention of unwanted contact, mandating therapeutic intervention programs for batterers, sending a message of the seriousness of domestic violence, providing resources to victims, ensuring accountability, and satisfying a desire for retribution); *id.* at 16-22 (noting several critiques of criminalization generally and domestic violence interventions in particular: disproportionately high incarceration rates in the United States, decrease in effectiveness and meaningfulness of carceral punishments, an appearance of action that does nothing to actually solve America's social problems, long-lasting impacts on communities of color, increased rates of victim arrest or dual arrests, increased state control over women and children, disempowerment of victims, and diverting economic resources away from supportive services like housing and economic assistance).

[20] Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 566 (1999) (citing Sherman et al., *supra* note 14, at 158-63) ("[I]f three times as many African-Americans as whites are arrested in Milwaukee (which would be typical given police practices in that city), a mandatory arrest policy would prevent 2504 acts of violence primarily against white women, at the price of 5409 acts of violence primarily against African-American women.").

[21] This Note uses the term "victim" and "survivor" interchangeably in recognition that each individual who experiences domestic violence undergoes a highly personal and individualized healing journey through which only they can determine when each of these terms applies to them.

[22] *See, e.g.*, Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257, 1260 (1991). This Note recognizes this critique while maintaining that some state intervention is helpful in reducing

Professor Leigh Goodmark has gone so far as to call for the decriminalization of domestic violence.[23] In her recent book, Goodmark argues that the approaches advocated by second-wave feminists disempower survivors, reduce their choices, and apply a single methodology to a diverse set of experiences all while, in many situations, worsening violence and further entrenching the social challenges that increase the likelihood of violent incidents.[24] Instead, Goodmark promotes local control and restorative justice approaches as a meaningful alternative to carceral approaches to domestic violence.[25]

Local municipalities, facing the unique nature of domestic violence crimes and aligning with some of these newer theories and critiques, began experimenting with specialized domestic violence courts as early as 1976 and with increasing momentum in the 1990s.[26] Modeled after drug courts, this approach implemented theories of therapeutic jurisprudence, a multidisciplinary framework focused on "enhancing the positive effects of the law on individuals' mental and physical well-being."[27] While varying in form, specialized domestic violence courts generally share traits of interdisciplinary response teams, dedicated courtrooms, dockets or calendar dates, and specially trained personnel at all levels of the criminal system.[28] Most share the dual goals of "victim safety and offender accountability."[29] Many, although not all, emphasize offender treatment, including a focus on substance abuse treatment and monitoring, over

incidents of domestic violence and ensuring survivor safety, particularly where those interventions may rely less on carceral systems. Within the context of Native communities, which are currently limited in their ability to respond to domestic violence via criminal mechanisms, the author acknowledges expanded criminal jurisdiction may lead to an increase in prosecution and punishment. *See infra* Section II.D (surveying increase of domestic violence prosecution since tribes began exercising SDVCJ).

[23] DECRIMINALIZING DOMESTIC VIOLENCE, *supra* note 14, at 1.

[24] *Id.* at 20.

[25] *Id.* at 33.

[26] See Tsai, *supra* note 12, at 1297-1306, for discussion of Quincy, Massachusetts's comprehensive domestic violence program (established in 1976 as one of the nation's first comprehensive domestic violence courts) as well as the special domestic violence court systems of New York City (established in 1997); Dade County, Florida; and the District of Colombia. For further discussion, see Sections II.B & III.B. Experts estimate that more than 200 such courts existed in the early 2000s. Angela R. Gover, John M. MacDonald & Geoffrey P. Alpert, *Combating Domestic Violence: Findings from an Evaluation of a Local Domestic Violence Court*, 3 CRIMINOLOGY & PUB. POL'Y 109, 110-11 (2003); Jennifer Koshan, *Investigating Integrated Domestic Violence Courts: Lessons from New York*, 51 OSGOODE HALL L. J. 989, 1000 (2014).

[27] Tsai, *supra* note 12, at 1288 (citing Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 2 PSYCHOL. PUB. POL'Y & L. 184 (1997)).

[28] *See, e.g., id.* at 1296-1306.

[29] Koshan, *supra* note 26, at 1003.

incarceration.[30] Partially due to their wide variety in form and underlying policies, few empirical studies have been conducted on the overall effectiveness of specialized domestic violence courts.[31] However, those programs that have been studied, particularly those implementing community-based, collaborative approaches and those integrating drug and alcohol treatment for offenders, have been found to effectively reduce recidivism rates and improve survivor safety.[32] Such programs offer signs of hope and potential lessons for other communities wishing to combat domestic violence.[33]

But while specialized domestic violence courts seem to be a promising tool to reduce domestic violence, AI/AN women remain largely unable to access these innovative solutions. In the majority of tribal communities, except for the most severe crimes, which Assistant U.S. Attorneys may prosecute, domestic violence offenses go unprosecuted and unpunished.[34] This failure rests at the intersection of the incredibly high rate of interracial domestic violence in tribal communities outlined above, a complex web of jurisdiction that has resulted in an almost complete erasure of tribal power to prosecute non-Native perpetrators of violence, and limited access to the economic resources needed to exercise jurisdiction where such opportunities exist. The current jurisdictional gap has been called "a breakdown in the administration of justice to such a degree that

[30] Gover, MacDonald & Alpert, *supra* note 26, at 111-12 (discussing successes of specialized domestic violence court programs that focus on rehabilitative treatments for offenders).

[31] *Id.*

[32] *See id.*; Koshan, *supra* note 26, at 1021 (providing case study of Manhattan's integrated domestic violence court and finding this court, among other things, provided "[b]etter monitoring of offenders" and "greater availability of services for victims, offenders, and children"); *see also infra* Sections II.B & III.B.

[33] Abolitionist feminist scholars would be unlikely to endorse specialized domestic violence courts as these courts continue to be closely tied to the carceral system. *See, e.g.*, Aya Gruber, *A "Neo-Feminist" Assessment of Rape and Domestic Violence Law Reform*, 15 J. GENDER RACE & JUST. 583, 613 (2012). Particularly for communities of color and Indigenous communities, any relationship to the carceral state may be seen as further entrenching racist and colonial systems of oppression. Lena Palacios, *Challenging Convictions: Indigenous and Black Race-Radical Feminists Theorizing the Carceral State and Abolitionist Praxis in the United States and Canada*, 15 MERIDIANS 137, 145 (2016) (highlighting the relationship between the prison-industrial complex and "oppressive systems of racism, classism, sexism, and homophobia operating within white settler societies such as the United States"). The author recognizes these critiques and offers specialized domestic violence courts as an intermediate solution on the road towards abolition, one that returns power to local communities to use in a manner they customize to align with local culture and goals. *See infra* Section II.B (heralding specialized domestic violence courts' potential to be particularly responsive to local communities' needs).

[34] *17 Years of Accomplishments*, *supra* note 4, at 203 (Appendix I: Recommended Language for Reauthorization of VAWA Title IX); *see also infra* Section I.B (decrying forced reliance on federal prosecutors who fail to exercise their jurisdiction in Indian country).

Indians are being denied due process and equal protection of the law."[35] This system has allowed violent offenders to target tribal communities, seeing them as "places they have free reign, where they can hide behind the current ineffectiveness of the judicial system."[36]

For thirty-five years, while states and municipalities experimented with alternatives to strict carceral responses to domestic violence, tribes completely lacked jurisdiction over the majority of individuals perpetrating violence in their communities. Sidelined tribes were thus unable to develop the types of innovative, community-based, and culturally appropriate solutions spreading throughout the rest of the United States. While the 2013 reauthorization of the Violence Against Women Act ("VAWA 2013")[37] expanded tribal criminal jurisdiction over domestic violence committed by non-Natives, challenges and expenses associated with exercising this Special Domestic Violence Criminal Jurisdiction ("SDVCJ") have limited its implementation to only twenty-five[38] of the 574 federally recognized tribes.[39] VAWA 2013 created an opening for tribes, but its limited return of criminal jurisdiction resulted only in putting tribes in the position the rest of the country was in during the 1980s and '90s—able to prosecute and punish offenders but still unable to treat the problem of domestic violence holistically. Even the most successful tribes that have implemented VAWA 2013's SDVCJ have commented that they feel like they are working with "one hand tied behind their backs."[40]

VAWA 2013, and proposals for additional expansions of tribal jurisdiction included in the House/Democratic version of the 2019 Violence Against Women Act Reauthorization bill ("VAWA 2019"),[41] are important steps forward;

[35] Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1636 (1998) (quoting SENATE COMM. ON INTERIOR & INSULAR AFFAIRS, 94TH CONG., BACKGROUND REPORT ON PUBLIC LAW 280, at 29 (Comm. Print 1975)).

[36] SDVCJ FIVE-YEAR REPORT, *supra* note 5, at 4 (quoting S. REP. NO. 112-265, at 7 (2012)).

[37] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified in relevant part at 25 U.S.C. § 1304).

[38] *Currently Implementing Tribes*, NAT'L CONG. OF AM. INDIANS, http://www.ncai.org/tribal-vawa/get-started/currently-implementing-tribes [https://perma.cc/4KCW-2R4V] (last updated June 2019).

[39] Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 85 Fed. Reg. 5462 (Jan. 30, 2020).

[40] SDVCJ FIVE-YEAR REPORT, *supra* note 5, at 22.

[41] Violence Against Women Reauthorization Act of 2019, H.R. 1585, 116th Cong. § 903 (2019). The House passed H.R. 1585 on April 4, 2019, but the bill stalled in the Senate. Jay Willis, *Why Can't the Senate Pass the Violence Against Women Act?*, GQ (Dec. 13, 2019), https://www.gq.com/story/senate-violence-against-women-act [https://perma.cc/K6TG-YHCB]. After bipartisan negotiations failed, primarily over firearms restrictions for intimate partner abusers and Native American sovereignty issues, Democratic Senator Diane Feinstein

however, violence against AI/AN women will not be meaningfully reduced until tribes have full autonomy over their criminal systems. This can only be achieved when tribal criminal jurisdiction is equivalent to that exercised by states. The specialized domestic violence courts of non-Native communities demonstrate what is possible with full criminal adjudicatory powers and the power to treat domestic violence holistically. In dismantling tribal jurisdiction over crimes committed by non-Natives and then returning limited jurisdiction in a piecemeal fashion, the federal government has stifled the ability of tribes to develop effective responses while further entrenching a white supremacist, colonial mindset over sovereign peoples. It is due time for the federal government to support these communities as they seek to heal and rebuild.

It may seem contradictory to lay out the benefits of less carceral responses to violence while simultaneously arguing for the restoration of tribal power to adjudicate criminal acts. While an increase in the ability to punish domestic violence offenders may lead to an initial focus on prosecution and punishment, many tribes have already demonstrated an early interest in rehabilitation and collaborative problem-solving.[42] With expanded criminal jurisdiction tribes would be able to benefit from both the positive developments in domestic violence enforcement and the lessons from third-wave feminist critiques of carceral approaches to antiviolence, giving them the opportunity to make rapid progress in closing the gap in experience towards finding what works in reducing violence in their communities. As Professor and Chief Justice of the Prairie Island Indian Community Court of Appeals Sarah Deer points out, no federal law requires tribes to impose Western carceral punishments if they exercise expanded jurisdiction.[43] Hopefully, many tribes will choose not to use a Western adversarial system at all, opting instead for noncarceral restorative justice models based on tribal custom or other principles.[44] The important thing is that each tribe have the opportunity to create systems which reflect their own cultural

introduced S. 2843, which tracks the House's version, while Republican Senator Joni Ernst introduced a "Republican" version S. 2920. Violence Against Women Reauthorization Act of 2019, S. 2843, 116th Cong. (2019); Violence Against Women Reauthorization Act of 2019, S. 2920, 116th Cong. (2019); *see also* Willis, *supra*.

[42] SDVCJ FIVE-YEAR REPORT, *supra* note 5, at 8, 20 (reporting 51% of SDVCJ defendants were sent to rehabilitation programs as part of their sentences); *see also infra* Section II.D (discussing tribal inclinations towards rehabilitation models of criminal justice over retribution).

[43] Sarah Deer, *Native People and Violence Crime: Gendered Violence and Tribal Jurisdiction*, 15 DU BOIS REV. 89, 103 (2018).

[44] *See* Barbara Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 MICH. J. RACE & L. 317, 357 (2013) ("[T]ribes do not have to implement the adversary system in all matters. The sovereign prerogative allows tribes to induce justice and fairness through their own systems.").

values as well as their contemporary experiences.[45] Under principles of inherent tribal sovereignty, tribes have the prerogative to make such choices for their communities. However, in reality their choices are currently limited by the contours of their jurisdiction.[46]

The disparity in rates of violence against AI/AN women is nothing new to scholarly writing or testimony before Congressional committees. Specifically, articles arguing for expanded criminal jurisdiction for tribes have focused on expanding VAWA 2013's current provisions to include additional crimes such as child abuse[47] or even all misdemeanors committed on tribal lands.[48] Other articles have explored expanding the pool of individuals who could be subject to tribal jurisdiction to include all "community members"[49] or all intimate or dating partners regardless of whether they have "sufficient ties" to the tribe.[50] One article proposes that "jurisdictional clarity" has the potential to eliminate

[45] Hart & Lowther, *supra* note 7, at 216 ("A cookie-cutter approach to constructing culturally appropriate legal structures that does not account for variances among tribes will not aid Native American women. No pan-tribal identity exists; therefore one single legal code or court cannot appeal to every tribe's individual values. Instead, each tribe must craft culturally appropriate domestic violence codes that will work to end abuse. In doing so, tribes will not only work with victims of domestic violence to increase their physical safety, but weaken the colonization process that teaches Native American women to feel shame in their ethnicity.").

[46] In the context of tribal criminal jurisdiction, "tribal sovereignty means the right of tribes to determine their own internal court practices and procedures." Creel, *supra* note 44, at 321. Indian law scholars and the Supreme Court have long recognized pre-Constitutional, inherent tribal sovereignty. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978); Talton v. Mayes, 163 U.S. 376, 383 (1896); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 519 (1832); Creel, *supra* note 44, at 331-32; Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 TULSA L. REV. 661, 683 (2002); Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and* United States v. Lara*: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651, 654 (2009).

[47] *See generally* Brittany Raia, Note, *Protecting Vulnerable Children in Indian Country: Why and How the Violence Against Women Reauthorization Act of 2013 Should Be Extended to Cover Child Abuse Committed on Indian Reservations*, 54 AM. CRIM. L. REV. 303 (2017).

[48] *See generally* Tyler Kennedy, *Expanding Jurisdiction: Increasing Tribal Ability to Prosecute Criminal Behavior on Native American Land*, 15 SEATTLE J. SOC. JUST. 465 (2016).

[49] Addie C. Rolnick, *Tribal Criminal Jurisdiction Beyond Citizenship and Blood*, 39 AM. INDIAN L. REV. 337, 389-427 (2015).

[50] Maura Douglas, Comment, *Sufficiently Criminal Ties: Expanding VAWA Criminal Jurisdiction for Indian Tribes*, 166 U. PA. L. REV. 745 (2018).

the problems created by the "jurisdictional maze" in Indian country,[51] and some articles have even argued, as this Note does, for full tribal criminal jurisdiction.[52]

This Note expands upon the literature clamoring for expanding jurisdiction for AI/AN communities by delving into several new rationales and data sources in support of jurisdictional parity. First, Part I of this Note begins by criticizing the racist, white supremacist rationales relied upon by the Supreme Court in *Oliphant v. Suquamish Indian Tribe*,[53] laying bare the unsupportable foundation for removing tribal jurisdiction over non-Native defendants, and exploring how these problematic rationales led to the current system of limited criminal jurisdiction, which leaves Native women vulnerable to high levels of violence. Second, Part II explores arguments around localism in the criminal system, particularly as it relates to efforts to combat domestic violence, highlighting specialized domestic violence courts as an example of effective localism in violence reduction. This analysis illustrates the possibilities for tribal solutions presently out of reach. The Part then goes on to illustrate how tribal governments, while simultaneously national and local in nature, are inherently responsive to the needs of their members and are therefore uniquely situated to combat domestic violence in their communities. Additionally, by looking at AI/AN tribes' experiences with the first five years of SDVCJ, this Note illuminates concrete, real-world justifications for the argument that jurisdictional parity is the most effective way to combat violence against women because it gives tribes the necessary autonomy to implement holistic, comprehensive responses. Together these rationales form the basis of an argument that combatting domestic violence exemplifies the need for full tribal criminal jurisdiction. Finally, Part III discusses the efforts to expand SDVCJ proposed as part of the version of VAWA 2019 which passed the House of Representatives in April 2019[54] and why those efforts do not go far enough.

I. A RACIST PAST AND A PROBLEMATIC PRESENT

Over 150 years ago, in his foundational defense of republicanism, *Considerations on Representative Government*, John Stuart Mill declared criminal concerns to have implications beyond the purely local nature of crimes

[51] Emily Mendoza, Note, *Jurisdictional Transparency and Native American Women*, 11 CALIF. L. REV. ONLINE 141 (2020), http://www.californialawreview.org/jurisdictional-transparency-native-american-women/ [https://perma.cc/47JJ-WN2U].

[52] *See, e.g.*, Kennedy, *supra* note 48, at 468 (arguing for opt-in program where tribes could take steady steps towards expanded jurisdiction); Robert J. Wild, Note, *The Last Judicial Frontier: The Fight for Recognition and Legitimacy of Tribal Courts*, 103 MINN. L. REV. 1603 (2019) (discussing need for expanded jurisdiction and full faith and credit with states).

[53] 435 U.S. 191 (1978).

[54] The proposed 2019 VAWA reauthorization included a provision to add the crimes of stalking, sex trafficking, child violence, and violence against law enforcement officers. Violence Against Women Reauthorization Act of 2019, H.R. 1585, 116th Cong. § 903 (2019).

themselves. He wrote, "It would not be a matter personally indifferent to the rest of the country if any part of it became a nest of robbers or a focus of demoralization . . . ."[55] Reflecting much the same mindset, Congress passed the Major Crimes Act of 1885, which began the process of chipping away at Native American criminal jurisdiction.[56] Congress justified its action by stating that

> [i]t is an infamy upon our civilization, a disgrace to this nation, that there should be anywhere within its boundaries a body of people who can, with absolute impunity, commit the crime of murder, there being no tribunal before which they can be brought for punishment.[57]

Steeped in paternalistic attitudes and colonial assumptions of white supremacy, themes persistently perpetrated throughout the history of Federal Indian law,[58] Congress framed the legislation as necessary to combat "lawlessness" in Indian country.[59] Ironically, these policies resulted in the federal government creating the very problem it was purportedly aiming to solve: a system of impunity on AI/AN reservations and villages where crimes ranging from rape, to assault, to child abuse and more have no meaningful avenue for resolution so long as the perpetrator is non-Native.

---

[55] John Stuart Mill, *Considerations on Representative Government*, *in* LYNN A. BAKER, CLAYTON P. GILLETTE & DAVID SCHLEICHER, LOCAL GOVERNMENT LAW: CASES AND MATERIALS 11, 11 (5th ed. 2015).

[56] Major Crimes Act of 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153 (2018)).

[57] 16 CONG. REC. 934 (1885) (statement of Mr. Cutcheon).

[58] For example, when Public Law 280, Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2018), 25 U.S.C. §§ 1321-22 (2018), 28 U.S.C. § 1360 (2018), was passed in 1953, "Congress expressed three concerns. . . : lawlessness on reservations, the desire to assimilate Indian tribes into the population at large, and a shrinking federal budget for Indian affairs." Jiménez & Song, *supra* note 35, at 1659. This paternalistic fear again surfaced in 1968 with the passage of the Indian Civil Rights Act, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended in scattered sections of 12, 18, 25, and 42 U.S.C.), which imposed limits on the punishments tribal courts could impose on criminal defendants. This legislation codifies an express assumption that tribes cannot be trusted to impose serious criminal punishments, particularly when they may be imposed against non-Native defendants. *See also* discussion *infra* Section I.A (analyzing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)).

[59] This Note uses the legal term of art "Indian country" which is defined by statute as "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . , (b) all dependent Indian communities with the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. § 1151.

A. *The Modernization of Anti-Native Racism:* Oliphant v. Suquamish Indian Tribe

There exists extensive literature on the historical reductions in tribal criminal jurisdiction which this Note will not recount in detail here. Suffice it to say, from the Major Crimes Act of 1885, which placed seven crimes under the jurisdiction of U.S. federal courts if they were committed on tribal lands,[60] to Public Law 280 ("PL 280"), which delegated federal criminal (and civil) jurisdiction over tribal territory to six states encompassing more than 65% of all recognized tribal lands and native villages,[61] the U.S. government has a long history of assuming tribal communities are incapable of maintaining peace in their sovereign territory.[62] This is despite the fact that many tribes have had sophisticated systems for dealing with disputes since before the United States developed its own courts.[63]

The result of this diminution of tribal sovereignty is a confusing web of jurisdictional allocations which depends not only on the race of the parties but also on the state encompassing the reservation or village where the crime occurred. Confusion as to the foundation and extent of delegated jurisdiction resulted in an "uneven administration of justice in terms of respect for [tribal] authority, [tribal] eligibility for state and federal funding, the effectiveness of

---

[60] Major Crimes Act of 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153 (2018)). The original list of crimes included: "murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny." *Id.* The statute has since been expanded to include kidnapping, maiming, sexual abuse, incest, assault with a dangerous weapon, assault against a minor, felony child abuse or neglect, and robbery. 18 U.S.C. § 1153 (2018).

[61] Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-22, 28 U.S.C. § 1360); *see also* Jiménez & Song, *supra* note 35, at 1634 ("The tremendous impact of Public Law 280 stems from the fact that while it initially addressed only six states, these states alone contain within their borders 359 of the over 550 federally recognized tribes and Native Villages."). The Department of the Interior currently recognizes 574 Tribal entities. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 85 Fed. Reg. 5462 (Jan. 30, 2020).

[62] For additional reading on historical reductions in Native criminal jurisdiction see, for example, Joshua B. Gurney, Note, *An "SDVCJ Fix"—Paths Forward in Tribal Domestic Violence Jurisdiction*, 70 HASTINGS L.J. 887, 893-901 (2019); Hart & Lowther, *supra* note 7, at 190; Jiménez & Song, *supra* note 35, at 1636; Cassity Reed, Note, *Are We There Yet? An Analysis of Violence Against Native American Women and the Implementation of Special Criminal Domestic Violence Jurisdiction*, 10 J. RACE GENDER & POVERTY 1, 7-10 (2019).

[63] For example, the Cherokee Nation Supreme Court opened in 1825, twenty years before the state of Georgia opened its supreme court, in what was previously the home of the Cherokee Nation before forced mass removal. Mary Kathryn Nagle, *Nasty Native Women*, *in* NASTY WOMEN: FEMINISM, RESISTANCE, AND REVOLUTION IN TRUMP'S AMERICA 157, 160 (Samhita Mukhopadhyay & Kate Harding eds., 2017).

[tribal] justice systems, and the level of participation and cooperation with state and federal justice systems."[64] Such turmoil and confusion around the division of roles, responsibilities, and funding between state, federal, and tribal law enforcement stymied the development of tribal justice systems and resulted in a "devastating impact on . . . the safety of Indian women."[65]

The final blow to tribal criminal jurisdiction, and the one with the most negative impact on Native survivors of domestic violence, was dealt by the Supreme Court's 1978 ruling in *Oliphant v. Suquamish Indian Tribe*.[66] Two non-Native residents of the Port Madison Suquamish Indian Reservation filed habeas corpus petitions after being arrested and charged under tribal law.[67] They argued the Suquamish Indian Provisional Court lacked criminal jurisdiction over them as non-Natives.[68] The Supreme Court found an "unspoken assumption" that tribes lacked criminal jurisdiction over non-Natives rooted in historical treaty provisions, legislative and executive branch actions, and lower court opinions.[69] The Court analyzed the 1855 Treaty of Point Elliott in light of this presumption and held, in the absence of clear Congressional edict on the issue of criminal jurisdiction over non-Natives and with the tribe's express acknowledgment of its "dependence on the government of the United States," tribal courts lacked the authority to try non-Natives.[70]

In discussing the reasoning behind their holding in *Oliphant*, the Supreme Court relied on, and even quoted, paternalistic, racist language of the 1800s. For example, the Court quotes the 1891 case, *In re Mayfield*,[71] which held that congressional legislation was intended to limit tribes to "such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them

[64] Jiménez & Song, *supra* note 35, at 1636.

[65] *17 Years of Accomplishments*, *supra* note 4, at 190 (written statement of the Nat'l Cong. Of Am. Indians Task Force on Violence Against Women); Ada Pecos Melton & Jerry Gardner, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, AM. INDIAN DEV. ASSOCIATES, LLC, http://www.aidainc.net/Publications/pl280.htm [https://perma.cc/2NXN-F8ZZ] (last visited Nov. 14, 2020).

[66] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978).

[67] *Id.* at 193-95.

[68] *Id.*

[69] *Id.* at 203; *see also* CONG. RESEARCH. SERV., R43324, TRIBAL JURISDICTION OVER NONMEMBERS: A LEGAL OVERVIEW 2 (2015) [hereinafter CRS REPORT] ("In most cases, tribal criminal jurisdiction over non-Indian offenders is clear—as a general rule, Indian tribes do not have it.").

[70] *Oliphant*, 435 U.S. at 206-07 (quoting Treaty of Point Elliott art. IX, Jan. 22, 1855, 12 Stat. 927) ("By acknowledging their dependence on the United States, . . . the Suquamish were in all probability recognizing that the United States would arrest and try non-Indian intruders who came within their Reservation."); *see also* CRS REPORT, *supra* note 69, at 2.

[71] 141 U.S. 107 (1891).

as far as possible in raising themselves to our standard of civilization."[72] Additionally, the Court sidesteps long-standing precedent which would have been favorable to AI/AN communities including *Worcester v. Georgia*[73] from 1832, which held that only the Cherokee Nation could exercise jurisdiction on tribal lands.[74] Rather, the Court favored the outwardly racist 1823 holding in *Johnson v. M'Intosh*[75] used to justify imposing the doctrine of discovery on the uncivilized Native "savages," which allowed the United States to claim legal title to vast swaths of the continent.[76] By depending on these precedents to justify their ruling, the Supreme Court takes rationales from when the U.S. government was openly, consciously colonial and white supremacist and pulls them forward into the twentieth century. But the modernization of invidious discrimination violates the Equal Protection Clause of the Fourteenth Amendment.[77]

The Supreme Court explicitly rejected such a pulling forward of discriminatory traditions and legal legacies in twentieth century equal protection jurisprudence around sex-based discrimination. Rather than relying on history as a rationale for maintaining the status quo, in *United States v. Virginia*,[78] Justice Ginsburg, writing for a seven-justice majority, marshals the long history of gender discrimination as fuel for the fire of change, holding that "neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature."[79] In so arguing, the Court "directs judges to consider history in scrutinizing sex-based state action, so that the government does not carry forward practices that perpetuate inferiority or second-class status in new forms."[80] The long history of anti-Native racism and oppression should similarly be marshalled to argue that the Court wrongly decided *Oliphant*. The federal government must stop using history to justify continued paternalistic, racist attitudes and instead should move in the opposite direction paralleling Justice Ginsburg's gender-based rationales. Law which denies to AI/AN survivors of domestic violence judicial concern for their safety, solely on the basis of the race

[72] *Id.* at 115-16; *accord Oliphant*, 435 U.S. at 204 (citing *In re Mayfield*, 141 U.S. at 115-16).

[73] 31 U.S. (6 Pet.) 515 (1832).

[74] *Id.* at 520 ("The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves . . . ."); *see also* Nagle, *supra* note 63, at 158.

[75] 21 U.S. (8 Wheat.) 543 (1823).

[76] *Id.* at 590; *see also* Nagle, *supra* note 63, at 160.

[77] U.S. CONST. amend XIV, § 1.

[78] 518 U.S. 515 (1996).

[79] *Id.* at 532.

[80] Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J. F. 450, 484 (2020).

of their perpetrator, relegates Native women to second-class citizens as surely as gender-based discrimination prevents women from exercising full citizenship.

B. *The Resulting Problem and the Insufficient* Oliphant *"Fix"*

After *Oliphant*, AI/AN victims of crimes occurring on tribal lands had to rely on federal officials[81] to investigate and prosecute crimes committed by non-Natives.[82] This framework is particularly troubling when it comes to crimes of domestic violence and child abuse which tend to cycle, escalating with each revolution.[83] The exercise of jurisdiction by law enforcement personnel and courts has the potential to serve as a point of intervention, interrupting or even ending such cycles of violence.[84] Federal prosecutors, however, often fail to exercise their jurisdiction on Native lands for a variety of reasons including lack of federal law enforcement personnel authorized to investigate domestic violence, failure to prioritize domestic violence prosecutions, and limited financial resources.[85] From 2005 to 2009, "US attorneys failed to prosecute 52% of all violent criminal cases, 67% of sexual abuse cases, and 46% of assault cases

[81] Or state officials if the territory is located in a PL 280 state. Melton & Gardner, *supra* note 65.

[82] Hart & Lowther, *supra* note 7, at 204.

[83] *See Hearing on S. 1763, S. 872, and S. 1192 Before the S. Comm. on Indian Affairs.*, 112th Cong. 8 (2011) [hereinafter *Hearing Before the S. Comm. on Indian Affairs*] (statement of Thomas J. Perrelli, Associate Att'y Gen., U.S. Department of Justice) ("[V]iolence against Native women has reached epidemic rates. Tribal leaders, police officers, and prosecutors tell us of an all-too-familiar pattern of escalating violence that goes unaddressed, with beating after beating, each more severe than the last, ultimately leading to death or severe physical injury. Something must be done to stop the cycle of violence."). It should be noted that while the traditional three-stage Cycle of Violence has come under criticism recently for, among other things, focusing solely on actions of abusers (rather than centering the multitude of actions that survivors take towards ending abuse, thereby reducing rational survivors to "helpless" victims, *see, e.g.*, Jane K. Stoever, *Transforming Domestic Violence Representation*, 101 KY. L.J. 483, 506-11 (2012), and for failing to fully account for the diverse experience of survivors, *see, e.g.*, Crenshaw, *supra* note 22, at 1257-58), it remains the dominant understanding of domestic violence used by legal authorities. Stoever, *supra*, at 510-11. The Cycle of Violence model continues to be helpful for nonexperts to understand the powerful and complicated forces that compel survivors to remain in unhealthy relationships; newer models, including the Stages of Change Model, are also cyclical. *Id.* at 510-11, 518 (noting the historical significance of the Cycle of Violence to reflect the experience of some, though not all, survivors and comparing it to the Stages of Change Model, which also tracks progress in a "cyclical and dynamic sequence rather than in a linear fashion"). This cyclical nature is the quintessential characteristic that the author relies upon.

[84] *See infra* Section II.A (highlighting the importance local courts' rapid response and intervention at the misdemeanor level to "reduce the number and lethality of violent episodes" and better facilitate healing using cultural and psychological competency approaches).

[85] Hart & Lowther, *supra* note 7, at 204.

occurring on Indian lands."[86] Further divisions of jurisdiction between federal, state, and tribal courts as a result of the vague language of PL 280 deepened confusion over the scope and foundations of tribal authority, increasing reluctance by states to exercise authority designated to them.[87] AI/AN scholars have argued this breakdown led directly to an increase in "lawlessness in Indian country" and has "encouraged non-Indian perpetrators to target Indian reservations."[88]

In 2010, the federal government began a limited recognition of tribal capabilities and rights to the administration of justice in their territory when Congress passed the Tribal Law and Order Act,[89] which recognized that "with sufficient resources and authority [tribes] will best be able to address violence in their own communities."[90] Building on themes of Native empowerment, three years later Congress sought to resolve some of the complex jurisdictional issues through the passage of VAWA 2013, which included an "*Oliphant* fix."[91] SDVCJ, established by Title IX of VAWA 2013, recognizes the "inherent power" of tribes to exercise concurrent criminal jurisdiction over all persons, Native and non-Native alike, who perpetrate crimes of domestic and dating violence on tribal lands when the victim is Native.[92]

For the exercise of SDVCJ to apply, two criteria must be met. First, the accused must have "ties to the Indian tribe."[93] A non-Native satisfies this requirement if they reside on the tribal land, are employed by the tribe, or are a current or former spouse or intimate partner of an AI/AN who resides on tribal land.[94] Second, SDVCJ is limited to the crimes of domestic violence, dating violence, and the violation of certain protection orders.[95] The exercise of SDVCJ is entirely voluntary, but tribes that choose to participate are required to provide

[86] *17 Years of Accomplishments*, *supra* note 4, at 203 (Appendix I: Recommended Language for Reauthorization of VAWA Title IX); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-167R, DECLINATIONS OF INDIAN COUNTRY MATTERS 3 (2010).

[87] Jiménez & Song, *supra* note 35, at 1636.

[88] *17 Years of Accomplishments*, *supra* note 4, at 203 (Appendix I: Recommended Language for Reauthorization of VAWA Title IX); Jiménez & Song, *supra* note 35, at 1636.

[89] Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(2), 124 Stat. 2258, 2262 ("Congress and the President have acknowledged that— (A) tribal law enforcement officers are often the first responders to crimes on Indian reservations; and (B) tribal justice systems are often the most appropriate institutions for maintaining law and order in Indian country.").

[90] *Native Women Hearing*, *supra* note 3, at 6 (statement of Thomas J. Perrelli, Associate Att'y Gen., U.S. Department of Justice).

[91] Violence Against Women Reauthorization Act of 2013, 25 U.S.C. § 1304(b)(1) (2018).

[92] *Id*.

[93] *Id.* at § 1304(b)(4)(B); *see also* SDVCJ FIVE-YEAR REPORT, *supra* note 5, at 39.

[94] 25 U.S.C. § 1304(b)(4)(B); *see also* SDVCJ FIVE-YEAR REPORT, *supra* note 5, at 39.

[95] 25 U.S.C. § 1304(c); *see also* SDVCJ FIVE-YEAR REPORT, *supra* note 5, at 38.

substantial protections for defendants.[96] These rights include all rights afforded to criminal defendants under the U.S. Constitution, most civil rights that would be available in state courts, and the right to trial by a jury that does not systematically exclude non-Natives.[97] As of June 2019, twenty-five federally recognized AI/AN tribes have elected to implement SDVCJ.[98]

This expanded jurisdiction represents a step forward for implementing tribes because it empowers them to provide increased safety and security for their people. While arrests, prosecutions, and criminal punishments will not erase domestic violence from tribal communities, survivors are now able to see their own law enforcement taking actions to end impunity.[99] This shift has effects beyond the sheer increase in the number of domestic violence adjudications which formerly would have gone unresolved.[100] Many participating tribes are anecdotally reporting an increase in victims seeking help outside the criminal apparatus due to the awareness SDVCJ brings to the issue of interpersonal violence.[101] Service providers have reported that the implementation of SDVCJ has increased community awareness of domestic violence and that survivors see it as a public commitment by their tribe to end such violence.[102] Additionally, the implementation of SDVCJ has promoted better relationships with nontribal authorities including state and federal agencies and personnel. Intertribal collaboration efforts have simultaneously improved though the Inter-Tribal Technical-Assistance Working Group, which facilitates the exchange of "views, information, and advice about how tribes may best implement SDVCJ, combat domestic violence, recognize victims' rights and safety needs, and safeguard defendants' rights."[103]

However, due to statutory limitations, VAWA 2013 continues to cripple tribal ability to leverage their expanded jurisdiction to effectively combat violence through holistic approaches.[104] Most importantly, SDVCJ only extends to a narrow set of offenses and qualifying defendants.[105] Thus, tribes cannot

[96] *SDVCJ Five-Year Report*, *supra* note 5, at 38.

[97] *Id.* at 39-40; 25 U.S.C. § 1302(c)-(d).

[98] *Currently Implementing Tribes*, *supra* note 38.

[99] SDVCJ FIVE-YEAR REPORT, *supra* note 5, at 14.

[100] *Id.* at 7-8.

[101] *Id.* at 13 (citing, *inter alia*, *Tribal Justice: Prosecuting Non-Natives for Sexual Assault on Reservations*, PBS NEWSHOUR (Sept. 5, 2015, 1:08 PM) [hereinafter PBS NewsHour], https://www.pbs.org/newshour/show/tribal-justice-prosecuting-non-natives-sexual-assault-indian-reservations).

[102] *Id.*

[103] *Id.* at 34.

[104] *See infra* Section II.D (explaining effectiveness of and statistics on SDVCJ).

[105] Violence Against Women Reauthorization Act of 2013, 25 U.S.C. § 1304(b) (2018) (codifying that only defendants residing or employed in the "Indian country" of the

prosecute many crimes that may occur concurrently with domestic violence. Specifically, a SDVCJ-implementing tribe lacks jurisdiction to adjudicate child abuse, assault on law enforcement personnel, drug and alcohol offenses, and any forms of domestic violence committed by non-Natives that do not involve physical violence.[106] Additionally, because defendants must have ties to the tribe to fall under SDVCJ, physical violence and rape committed by non-Natives without such ties continue to go unresolved. Finally, the scope of SDVCJ does not capture all violent crimes that disproportionately victimize women and for which AI/AN women continue to be at a disparate risk, including sex trafficking and stalking.[107] These limitations impede that ability of tribes to holistically tackle the challenges of violence against women on their lands.

The passage of the House/Democratic version of VAWA 2019,[108] which would place child abuse,[109] stalking, human trafficking, and assault on a law

participating tribe, or who are spouses or the partner of a member of the participating tribe or resident of the relevant "Indian country," fall under tribal SDVCJ).

[106] SDVCJ FIVE-YEAR REPORT, *supra* note 5, at 22-27; *see also* PBS NewsHour, *supra* note 101.

[107] 25 U.S.C. § 1304(c). Almost half (48.8%) all of AI/AN women will be stalked in their lifetime. RESEARCH POLICY UPDATE, *supra* note 6, at 1. Additionally, although there is little information on the exact number of instances of sex trafficking involving AI/AN victims, community members believe this is also a significant problem often cooccurring with other forms of violence against women. *See Hearing Before the Comm. on Indian Affairs*, *supra* note 83, at 20 (statement of Suzanne Koepplinger, Executive Director, Minnesota Indian Women's Resource Center). Just as tribes are in the best position to find solutions to the challenge of domestic violence in their communities, it stands to reason that, due to their unique position as the locally responsive authority who is also culturally connected to survivors, tribes would also be in the best position to develop innovative solutions to reducing these violent crimes.

[108] Violence Against Women Reauthorization Act of 2019, H.R. 1585, 116th Cong. § 903 (2019).

[109] AI/AN children are subject to 2.5 times the level of trauma as their non-Native peers. SDVCJ FIVE-YEAR REPORT, *supra* note 5, at 25. Like their mothers, many of these children face violence in their own homes at the hands of family members who are non-Natives and whose crimes therefore fall into the same jurisdictional gap as pre-2013 domestic violence. From 2010-2013 rates of child abuse committed against Native children were the second highest of any racial group (behind only Black children) reaching 12.5 per 1,000 in 2013, compared to just 8.1 per 1,000 for white children. Raia, *supra* note 47, at 308. Seventy percent of these crimes are perpetrated by individuals who are of a different race then their child victims. *Id.* at 310. Child abuse often occurs simultaneously with domestic violence, making it subject to the same cycles and requiring the same early interventions and quick responses which local governments are more effective in providing. *Id.* (citing Valerie J. Gilchrist & Ann Carden, *Domestic Violence*, *in* 1 FAMILY MEDICINE: PRINCIPLES & PRACTICE 250, 252 (Robert B. Taylor et al. eds., 5th illustrated ed. 1998); ATTORNEY GENERAL'S ADVISORY COMM. ON AM. INDIAN/ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE, ENDING VIOLENCE SO CHILDREN CAN THRIVE 72 (2014) [hereinafter ENDING VIOLENCE],

enforcement personnel[110] within the reach of tribal jurisdiction, to be renamed Special Tribal Criminal Jurisdiction ("STCJ"), could resolve some of these issues.[111] However, other limitations outlined above would persist. For example, in the first five years of expanded jurisdiction, tribes reported that 51% of incidents eligible for SDVCJ involved drugs or alcohol.[112] While multiple tribes, including some of those exercising SDVCJ, already have experience working with drug and alcohol offenders through their specialized Wellness to Healing courts, jurisdictional boundaries make these programs accessible only to tribal members.[113] This is just one example of where jurisdictional parity with states would enable tribes to more holistically respond to violence and work towards eradication of its root causes.

II. HOPE FOR THE FUTURE: TRIBES ARE IN THE BEST POSITION TO TACKLE THE PROBLEM OF DOMESTIC VIOLENCE

With this understanding of the shaky ground upon which limited tribal jurisdiction rests, as well as the present realities and limitations of VAWA 2013 and 2019's "*Oliphant* fixes," this Note now turns to the question of what hope

https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2014/11/18/finalaianreport.pdf [https://perma.cc/8XEV-RFAX]); *see also id.* at 305 ("[T]he federal government is not the best body to handle these cases, which require quick investigation and prosecution rather than the slow and methodological procedures the federal government commonly employs."). Moreover, abuse, and even witnessing domestic violence, can put children at a greater risk of becoming victims or perpetrators of domestic violence as adults. *Cycle of Abuse*, CHILD WELFARE INFO. GATEWAY, https://www.childwelfare.gov/topics/can/impact/long-term-consequences-of-child-abuse-and-neglect/abuse/ [https://perma.cc/825U-J7VH] (last visited Nov. 14, 2020); *see also* Raia, *supra* note 47, at 311 (citing ENDING VIOLENCE, *supra*, at 74). This suggests that efforts to end child abuse and neglect, and to heal child victims, may be one of the most effective means of putting an end to domestic violence by stopping the intergenerational cycle of violence.

[110] Domestic violence calls are some of the most dangerous for law enforcement in any area of the country, yet currently tribes have no jurisdiction when an officer is assaulted while responding to a domestic violence incident. Natalie Schreyer, *Domestic Abusers: Dangerous for Women – and Lethal for Cops*, USA TODAY (Apr. 9, 2018, 6:00 AM), https://www.usatoday.com/story/news/nation/2018/04/09/domestic-abusers-dangerous-women-and-lethal-cops/479241002/ [https://perma.cc/A6KE-A5AE] ("In 2017, more officers were shot responding to domestic violence than any other type of firearm-related fatality, according to the National Law Enforcement Officers Memorial Fund.").

[111] Violence Against Women Reauthorization Act of 2019, H.R. 1585, 116th Cong. § 903 (2019).

[112] SDVCJ FIVE-YEAR REPORT, *supra* note 5, at 8.

[113] *See* PAT SEKAQUAPTEWA & LAUREN VAN SCHILFGAARDE, TRIBAL LAW & POLICY INST., TRIBAL HEALING TO WELLNESS COURTS: THE POLICY AND PROCEDURES GUIDE 29-32 (2015) (sampling various tribes' eligibility criteria documents which all require participants of Healing to Wellness programs to be members of a federally recognized tribe); *see also supra* Sections I.A-B (outlining current jurisdictional boundaries for tribal criminal courts).

exists for the future of reducing violence faced by AI/AN women. This Part argues for full tribal criminal jurisdiction through four interrelated discussions: (1) local control over criminal adjudication represents the best hope for reducing domestic violence; (2) specialized domestic violence courts are an example of customizable, effective local responses achieving positive outcomes in domestic violence reduction; (3) tribes, as inherently local and responsive to their communities, are uniquely placed to respond to domestic violence on their lands; and (4) the successes of the first five years of SDVCJ demonstrate that tribes are capable, when sufficiently supported and financed, of taking on difficult challenges like violence against women. Together, this four-part argument leads to a conclusion that criminal jurisdictional parity, bolstered by sufficient federal funding and support, is an effective solution to crime in Native communities.

A. *Localism: An Integral Approach to Addressing Domestic Violence*

One of the foundational arguments for multitiered, federalist forms of government is that local governments are more responsive to local problems, more accountable to local populations, and more adaptive to local needs.[114] The closer the government is to the people, the more immediately accountable elected representatives must be to the concerns of individuals, which in turn leads to a fuller realization of democratic ideals.[115] Particularly where the majority of individuals in a local community are minorities, federalism can have the additional benefits of "maintaining opportunities for creation or preservation of diverse cultures,"[116] and "enhancing personal and group liberty or empowerment, by providing multiple layers of government to which citizens may appeal."[117]

These rationales extend to the American criminal legal system where, in the majority of communities, prosecutors and trial judges are democratically elected

[114] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 328 (5th ed. 2015) ("[S]tates are closer to the people and therefore more likely to be responsive to public needs and concerns.").

[115] DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 91-92 (1995).

[116] Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2213-14 (1998) (citing WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 26-31 (1995); Alexander Murphy, *Belgium's Regional Divergence: Along the Road to Federation*, *in* FEDERALISM: THE MULTIETHNIC CHALLENGE 73-100 (Graham Smith ed., 1995); Barry L. Strayer, *The Canadian Constitution and Diversity*, *in* FORGING UNITY OUT OF DIVERSITY 157 (Robert A. Goldwin, Art Kaufman & William A. Schambra eds., 1985)); *see also* INTRODUCTION, *supra* note 1, at 22 ("Self-government is essential if tribal communities are to continue to protect their unique cultures and identities.").

[117] Jackson, *supra* note 116, at 2214 (citing Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 538 (1995); Martha Minow, *Putting Up and Putting Down: Tolerance Reconsidered*, *in* COMPARATIVE CONSTITUTIONAL FEDERALISM 77, 96-99 (Mark Tushnet ed., 1990)).

in "an effort to hold them directly accountable to the local community."[118] This system of state and local control of criminal apparatuses goes almost unquestioned in the United States. Localism in criminal justice is "entrenched . . . in American criminal practice" and is viewed, "on the whole, as beneficial in our country—a feature that promotes the sound operation of the criminal justice system by keeping law enforcement accountable to the wishes and values of the communities it serves."[119] Furthermore, localism in criminal matters is protected by the Sixth Amendment which mandates that criminal cases be adjudicated in "the State and district wherein the crime shall have been committed."[120] More than just a venue requirement, the Sixth Amendment provides insight into the American conception of crimes as "not merely offenses against . . . a distant sovereign; [but] also wrongs against the local communities where they were committed."[121] The Sixth Amendment also protects the right to an impartial jury drawn from that same state or district, indicating that in American criminal systems, juries are more than arbiters of the truth but are also "representatives of the local communities aggrieved by the alleged conduct of the accused."[122] Despite the importance of local control of criminal apparatuses, local governments on Native reservations and villages lack autonomy to develop and employ innovative solutions to address local criminal problems through the mechanism of their own judicial systems.

The federal government's sweeping jurisdictional control over crimes on tribal lands, and limited grants of power through VAWA 2013, have reduced the tools that tribal governments have at their disposal to address criminal activity in their communities. With domestic violence specifically, this limited toolbox is problematic because it prevents tribal governments from employing the most effective methods of addressing domestic violence—those rooted in theories of holistic problem-solving through localized and culturally appropriate approaches. Cabining tribal jurisdiction to a specific list of crimes and specific individuals prevents them from addressing contributing factors like alcoholism, drug abuse, and related crimes. This impedes tribal governments' abilities to adopt the very approach that many social scientists and feminist scholars see as most effective in combatting domestic violence—specialized domestic violence

[118] Stephen F. Smith, Response, *Localism and Capital Punishment*, 64 VAND. L. REV. EN BANC 105, 111 (2011) (citing William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 533-35, 533 n.117 (2001)).

[119] Smith, *supra* note 118, at 112 (citing Richard Briffault, "*What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1305 (1994)).

[120] U.S. CONST. amend VI. It is important to note that the Sixth Amendment, as well as the rest of the Bill of Rights, does not apply within Indian court proceedings due to the recognition of the preconstitutional inherent sovereignty of Native American tribes.

[121] Smith, *supra* note 118, at 111 n.19.

[122] *Id.*

courts.[123] Instead, as outlined above, most tribes must rely on federal law enforcement and prosecutors to respond to the majority of domestic violence incidents which occur on their lands. But, the federal government is not well-equipped to handle these cases.[124] As it relates to prevention, intervention, and healing, federal responses to domestic violence fall short where local responses could excel.

Because domestic violence is cyclical in nature,[125] rapid response and intervention at the misdemeanor level can be essential to ensuring survivor safety by reducing the number and lethality of violent episodes. Additionally, local approaches better facilitate healing after incidents of domestic violence have occurred because they consider the cultural and psychological realities of both survivors and offenders.[126] Domestic violence is "intimately connected with broader social structures that implicate all kinds of intersections with class and cultural, as well as gender, relations."[127] The most effective judicial programs countering domestic violence collaboratively engage multiple agencies to address "the many mental health and social issues, such as the effects on family, children, finances, and psychological functioning, that are an integral part of domestic violence."[128] The most effective services for both survivors and offenders will be those which are culturally appropriate, because they have the dual effects of taking into consideration the background of the individuals being served,[129] while simultaneously removing fears that individuals will be subject

[123] *See infra* Section II.B (discussing success of locally controlled programs that cater to communities' culture and needs through a variety of creative structures and approaches).

[124] Raia, *supra* note 47, at 305. PL 280 states that non-VAWA implementing tribes must rely on state law enforcement to respond to the majority of domestic violence offenses. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2018), 25 U.S.C. §§ 1321-1322 (2018), 28 U.S.C. § 1360 (2018)).

[125] April Paredes, Donalene Roberts, Lauren Ruvo & Taylor Stuart, *Domestic Violence*, 19 GEO. J. GENDER & L. 265, 281-82 (2018) (citing LENORE E. WALKER, THE BATTERED WOMAN, at xv (1980)).

[126] *See infra* Sections II.B-C (arguing that tribal communities function like small governing entities and could successfully create coordinated community responses to result in significantly less reoffending).

[127] Erica Burman, Sophie L. Smailes & Khatidja Chantler, *'Culture' as a Barrier to Service Provision and Delivery: Domestic Violence Services for Minoritized Women*, 24 CRITICAL SOC. POL'Y 332, 351 (2004) (citing Janice Haaken, *Stories of Survival: Class, Race, and Domestic Violence*, *in* THE SOCIALIST FEMINIST PROJECT: A CONTEMPORARY READER IN THEORY AND POLITICS 102, 102-20 (Nancy Holmstrom ed. 2002); HOME TRUTHS ABOUT DOMESTIC VIOLENCE: FEMINIST INFLUENCES ON POLICY AND PRACTICE *passim* (Jalna Hanmer & Catherine Itzin with Sheila Quaid & Debra Wigglesworth eds., 2000)).

[128] Tsai, *supra* note 12, at 1297.

[129] Burman, Smailes & Chantler, *supra* note 127, at 338; Tameka L. Gillum, *The Benefits of a Culturally Specific Intimate Partner Violence Intervention for African American Survivors*, 14 VIOLENCE AGAINST WOMEN 917, 921 (2008) ("Culturally appropriate

to racism and marginalization at the hands of service providers.[130] Failure to attend to culturally appropriate issues of class and gender relations within communities can have the opposite of the desired effect, perpetuating issues that led to domestic violence in the first place rather than reducing them.[131]

Culturally appropriate responses may be particularly valuable to Native communities who fear loss of their cultural identity.[132] While there are close to 600 federally recognized AI/AN tribes living in more than 300 reservations and Native villages throughout the United States, each with their own rich cultural history, "respect for the physical integrity of women is not an area where cultural values among tribes differ significantly."[133] Most, if not all, tribes have deep cultural histories of valuing female members as complementary equals, whose health and well-being are necessary for the success of the tribe.[134] Violence

interventions are those designed specifically for a target population. They use language and settings familiar to the culture of the target population as well as staff that represent that culture. They are designed in collaboration with members of the target population and take into account their culture-specific values, norms, attitudes, expectations, and customs. These interventions are delivered in synchrony with the participants' cultural framework and use channels of information dissemination that will successfully reach the target population." (citations omitted)).

[130] Burman, Smailes & Chantler, *supra* note 127, at 338 ("Minoritized women often have well-founded expectations, if not actual experiences, of racism from services . . . .").

[131] *Id.* at 335 ("Hence in drawing attention to constructions of 'culture' and 'community', we highlight two related issues: first, the links between gender and class oppression *within* communities as well as, secondly, how a failure to attend to, or challenge, these can perpetuate them.").

[132] Gloria Valencia-Weber & Christina P. Zuni, *Domestic Violence and Tribal Protection of Indigenous Women in the United States*, 69 ST. JOHN'S L. REV. 69, 95-96 (1995) (explaining that traditional values emphasizing family and clan honor help reduce problems that come with physical and psychological abuse, and restore community participation).

[133] *Id.* at 71.

[134] Gloria Valencia-Weber and Christina Zuni discuss some of the different, but similar, ways in which Native tribes conceptualize the role of women in their cultures: "Under Navajo common law, violence toward women, or mistreatment of them in any way, is illegal." *Id.* at 69 (quoting James W. Zion & Elsie B. Zion, *Hozho' Sokee'—Stay Together Nicely: Domestic Violence Under Navajo Common Law*, 25 ARIZ. ST. L.J. 407, 413 (1993)). In the Lakota tradition, "[a] man who battered his wife was considered irrational and thus could no longer lead a war party, a hunt, or participate in either. He could not be trusted to behave properly. . . . He was thought of as contrary to Lakota law and lost many privileges of life and many roles in Lakota society and the societies within the society." *Id.* (alteration in original) (quoting Debra Lynn White Plume, *The Work of Sina Waken Win Okolakiciye—Sacred Shawl Women's Society*, *in* CAROLYN REYER, CANTE OHITIKA WIN (BRAVE HEARTED WOMEN) IMAGES OF LAKOTA WOMEN FROM THE PINE RIDGE RESERVATION, SOUTH DAKOTA 67 (1991)). And a Yankton Sioux member related, "We were always taught that women were sacred and that everything in the home belonged to the women. Our extended families used to live

against women is condemned under such cultural frameworks.[135] Using tribal courts or problem-solving fora to resolve incidents of violence against women empowers tribes to reassert these values while using cultural practices of problem-solving and community building, thereby strengthening their cultural heritage and rejecting changes imposed through colonization.[136]

B. *Specialized Domestic Violence Courts Exemplify Success of Localism*

In an attempt to lower rates of domestic violence, jurisdictions across the United States have established specialized domestic violence courts.[137] From Lexington County in South Carolina to New York City, these specialized, locally controlled programs allow survivors to access innovative, multiagency justice collaboratives. The variety in structures and approaches utilized by these courts is one indicia of how state and local criminal apparatuses can creatively customize responses to the challenge of domestic violence according to their communities' culture and needs. These examples of what is possible with full local control over a community's domestic violence response offer signs of hope.[138]

Quincy, Massachusetts was one of the earliest localities to adopt a specialized domestic violence program, and its domestic violence court has seen tremendous success. In Massachusetts, the number of domestic violence homicides rose from one every twenty-two days in 1986, to one every four days in 1995.[139] But within the jurisdiction of Quincy District Court's specialized domestic violence program, only one domestic violence homicide occurred in the sixteen-year period between 1979 and 1995.[140] The court's success is largely attributed to the

together and no one would have ever thought of abusing women and children." *Id.* at 70 (quoting Charon Asetoyer, *Public Denial, Private Pain*, HEALTHWIRE, Jan. 1994, at 1).

[135] *Id.*

[136] *Id.* at 72; Hart & Lowther, *supra* note 7, at 192 (discussing the connection between colonization and violence against women and finding "mechanisms that attempt to reinforce traditional tribal values may be an important means of combatting domestic violence. . . . Tribal remedies not only bolster the sovereignty of tribes, but they aid Native American women in reclaiming self-determination over their bodies").

[137] See Tsai, *supra* note 12, at 1297-1306 for discussion of Quincy, Massachusetts's comprehensive domestic violence program—one of the nation's first—as well as the special domestic violence court systems of New York City; Dade County, Florida; and the District of Colombia.

[138] Gover, MacDonald & Alpert, *supra* note 26, at 111-12 ("A limited amount of research suggests that increased collaborative efforts between agencies that increase victim participation and hold offenders accountable can lead to reductions in domestic violence recidivism."); Koshan, *supra* note 26, at 1021.

[139] Tsai, *supra* note 12, at 1318 (citing JUSTICE RESEARCH & STATISTICS ASS'N, INNOVATIVE COURTS PROGRAMS: RESULTS FROM STATE AND LOCAL PROGRAM WORKSHOPS (1995), https://www.ncjrs.gov/txtfiles/portland.txt [https://perma.cc/9BNQ-XSX2]).

[140] *Id.*

coordinated community response, which united efforts at all levels of the criminal system, including social service providers and drug and alcohol monitoring through the probation office, in the service of survivors and offenders.[141]

Unique in its innovative integrated "batterer substance abuse treatment program," the Dade County, Florida specialized domestic violence court is another example of success. A 1996 survey found Dade County's integrated program to be even more successful than the control group participating in a standard specialized domestic violence court program in enrolling and retaining participants.[142] Furthermore, participants in the integrated program were found to reoffend against the same victims at a rate half that of individuals in the control group (6% compared to 14%).[143]

Specialized domestic violence courts have also been successful in rural communities. A statistical analysis of the specialized domestic violence program in Lexington County, South Carolina—a majority white, working-class, rural county of 220,000 residents located in the midlands region of the state[144]—found that offenders who went through the specialized domestic violence court process were 50% less likely to reoffend in the eighteen months immediately following their initial arrest.[145] While varying in their form and policies, in addition to their geographic locations and the cultures of the communities they serve, the successes of these programs indicate that localized, integrated, innovative responses hold huge potential for communities seeking to reduce incidents of domestic violence. Unfortunately, for thirty-five years tribal communities were

[141] *Id.*; Elena Salzman, Note, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 B.U. L. REV. 329, 349-50 (1994).

[142] Gover, MacDonald & Alpert, *supra* note 26, at 111.

[143] *Id.*

[144] *Id.* at 112.

[145] *Id.* at 120-22. Note, there have been criticisms of specialized domestic violence courts. *See, e.g.*, Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between "The Truly National and the Truly Local,"* 42 B.C. L. REV. 1081, 1129 (2001) ("Ultimately, special domestic violence courts may be an administrative expedience with the net effect of further stigmatizing domestic violence cases."); Allison Cleveland, *Specialization Has the Potential to Lead to Uneven Justice: Domestic Violence Cases in the Juvenile & Domestic Violence Courts*, 6 MOD. AM. 17, 18-19 (2010) (presenting critiques of specialized courts including burnout of specialized court staff, replacing legislative authority with court-made rules, jurisdictional confusion, and contradictory results depending on the specialty of the court); Anat Maytal, Note, *Specialized Domestic Violence Courts: Are They Worth the Trouble in Massachusetts?*, 18 B.U. PUB. INT. L.J. 197, 227 (2008) (arguing specialized domestic violence courts may exhibit an antidefense or provictim bias).

not able to benefit from these innovations in domestic violence response because the lack of jurisdiction sidelined tribes from prosecuting perpetrators.[146]

C. *Tribes are Inherently Local in Their Responsiveness to Community Needs*

If localism is the best response to domestic violence, it is worth asking, are tribes local? This Note argues that tribes should have criminal jurisdiction on par with states and local municipalities because the practical ways in which tribes are similar to smaller governing entities are precisely those characteristics that make local governments better suited to respond to violence in their communities. However, there are many ways in which tribal communities are distinct from states or municipalities. Tribes are considered "domestic dependent nations," residing somewhere between the status of a state and that of a foreign nation.[147] Like states, they have recognized inherent sovereignty.[148] However, unlike state sovereignty, which is constitutionally guaranteed, tribal sovereignty is "of a unique and limited character[, existing] only at the sufferance of Congress and is subject to complete defeasance."[149] Additionally, tribes are said to have a special "trust relationship" with the federal government, in which the federal government has a fiduciary—and possibly moral—duty to tribal communities.[150] Finally, unlike states, tribes are also national in nature.

---

[146] *See supra* Introduction & Section II.B (relating the development of domestic violence jurisprudence in non-Native localities).

[147] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) ("[Native American tribes] may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage."). Today it could be argued that States occupy a similar "state of pupilage," relying on federal funding to provide essential services, such as transportation and Medicaid, to their citizens. On average, in 2015 federal funds make up nearly a third of all states' general fund revenues. Mike Maciag, *How Much Do States Rely on Federal Funding?*, GOVERNING (May 22, 2017), http://www.governing.com/topics/finance/gov-state-budgets-federal-funding-2015-2018-trump.html [https://perma.cc/896F-TNGA].

[148] United States v. Wheeler, 435 U.S. 313, 320 (1978) (discussing dual sovereignty of the American federalist system in which "[both States and the Federal Government have] the power, inherent in any sovereign"); *id.* at 322 ("The powers of Indian tribes are, in general, '*inherent powers of a limited sovereignty which has never been extinguished.*'") (emphasis in original) (quoting F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945)).

[149] *Id.* at 323.

[150] Hart & Lowther, *supra* note 7, at 200-01 (explaining that while this relationship lacks clear statutory or judicial origin, past Supreme Court cases may serve as point of establishment); *see also* INTRODUCTION, *supra* note 1, at 21 (noting that federal trust responsibility is one of the most important doctrines in federal Indian law and that the Supreme Court has defined it as a moral obligation).

When tribal governments interact with the federal government of the United States, they do so via a unique nation-to-nation relationship.[151]

Despite these differences, modern tribal governments parallel their state counterparts in many ways.[152] While the structures of tribal governments vary greatly, most share common characteristics with state governments. Tribes typically have an elected legislative body, often called a "tribal council," and an executive officer, called a "tribal chairman," "president," "governor," or "chief," both of which typically govern according to a written constitution or code.[153] In terms of size, the largest tribal Nations are similar to small-to-medium-sized states, while smaller tribes have reservations that are similar in size to counties or even individual cities and towns.[154] Furthermore, tribal governments serve many of the same functions as their state and local government counterparts. Tribal governments are responsible for many of the governmental powers typically left to states, including "education, law enforcement, judicial systems, health care, environmental protection, natural resource management, and the development and maintenance of basic infrastructure such as housing, roads, bridges, sewers, public buildings, telecommunications, broadband and electrical services, and solid waste treatment and disposal."[155] Tribes, like states, receive financial assistance from the federal government in the areas of "health care, education, housing, economic development, and agricultural assistance."[156] The federal government has recognized this local government-like responsibility of tribes for over a century.[157]

The structure, size, and responsibilities of tribal governments, all similar to that of states or municipalities, enable tribes to be much more accountable to their communities than the federal government has been. Further, although federal agencies are required to consult with tribes in the manner of government-to-government,[158] there is no direct representation of tribal nations in federal legislative bodies. In the entire history of the United States, there have been only twenty-three members of Congress with documented tribal ancestry or affiliation, with two women becoming the first female AI/ANs elected to

[151] Valencia-Weber & Zuni, *supra* note 132, at 75.

[152] INTRODUCTION, *supra* note 1, at 20 ("Tribal governments and state governments have a great deal in common . . . .").

[153] *Id.* at 22.

[154] *Id.* at 24 ("Some reservations are as small as a few acres, and some tribes hold no land at all.").

[155] *Id.* at 21.

[156] *Id.* at 16.

[157] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831) (describing the Cherokee Nation as "a distinct political society, separated from others, capable of managing its own affairs and governing itself").

[158] INTRODUCTION, *supra* note 1, at 31.

Congress in November 2018.[159] Without their own elected representatives in the national government, tribes must rely on their state's members of Congress to represent their interests at the national level. There may be little incentive for these representatives to consider tribal interests because, even in the states in which AI/ANs are most numerous, they make up less than 16% of the population.[160]

Tribal governments and law enforcement, as inherently local in nature, are therefore in the best position to respond to the epidemic of domestic violence occurring in their communities. The similarities between tribal governments and those of state and local municipalities are strong indicators that tribal governments should have criminal jurisdiction over all crimes committed in their territories, just as states do. There is no obvious reason why the general contours of power in the criminal system should not be the same throughout the United States.[161] Since local prosecutorial districts have the power to set priorities and develop programs aimed at reducing violence in their communities, such as the specialized domestic violence courts discussed above, tribes should have similar controls and powers over the administration of criminal adjudications on their lands. Reauthorizing full tribal criminal jurisdiction is the first step in empowering tribes to respond to the crisis of domestic violence in their communities in a way that works for their unique needs. The early successes of expanded tribal jurisdiction through the SDVCJ program are a strong indication of the power of localism to reduce violence on tribal lands.

---

[159] Simon Romero, *Native Americans Score Big Victories in Midterms After Years of Efforts*, N.Y. TIMES, Nov. 8, 2018, at F18 (identifying first two female AI/AN Congresswomen as Sharice Davids and Deb Haaland); *see also* JERRY D. STUBBEN, NATIVE AMERICANS AND POLITICAL PARTICIPATION 171 tbl.5.2 (2006); Caroline Kelly, *First Native American Congresswomen Hug After Swearing-In*, CNN POL. (Jan. 3, 2019, 6:16 PM), https://www.cnn.com/2019/01/03/politics/first-native-congresswomen-hug/index.html?utm_content=2019-01-04T00%3A00%3A04&utm_source=fbCNN&utm_term=link&utm_medium=social [https://perma.cc/BNN6-PWT6].

[160] *Quick Facts*, U.S. CENSUS BUREAU https://www.census.gov/quickfacts/geo/chart/US/RHI325217#viewtop (last visited Nov. 14, 2020) (showing that AI/ANs make up 15.6% of the population in Alaska, 11% of the population in New Mexico, 9.4% of the population in Oklahoma, and 9.0% of the population in South Dakota).

[161] Mill, *supra* note 55, at 11 ("[T]here is no good reason why police, or gaols, or the administration of justice should be differently managed in one part of the kingdom and in another."); *see also* Rolnick, *supra* note 49, at 415-16 (exploring possible reasons for federally imposed limitations on tribal jurisdiction, which included concern over inferiority of tribal courts and lack of guaranteed constitutional protections for defendants therein). *But see supra* Section I.B (explaining how VAWA 2013 eliminated these concerns by imposing all constitutional due process requirements on implementing tribes).

D. *Tribes are Capable: The Successes of SDVCJ*

If localism is the best tool for combatting domestic violence, as exemplified by specialized domestic violence courts, and tribes are inherently local, power to administer their own community-based approaches to domestic violence must be returned to tribes. However, critics of expanded criminal jurisdiction for Native communities have argued tribes lack the infrastructure and experience necessary to prosecute crimes in a manner compliant with the standards of due process.[162] Some have suggested that the solution is expanded funding and resources for the federal law enforcement agencies currently tasked with responding to domestic violence in AI/AN territories.[163] There are several problems with this criticism: First, as discussed in Sections II.A-B., local responses to domestic violence are not only more culturally appropriate, they have also been shown to be more effective in reducing violence. Additionally, as exemplified by the historic reduction in tribal criminal jurisdiction prior to 2010, the federal government is itself responsible for dismantling tribal justice systems[164] and should therefore assume the responsibility for rebuilding these systems.[165] Rather than spending taxpayer money on ineffective federal

[162] Heritage Action for America encouraged senators to vote "no" on VAWA 2013, highlighting their opposition to SDVCJ by stating,

> [F]or the first time in our nation's history, the bill would allow non-Native Americans accused of domestic violence on tribal lands to be tried in those tribal courts, thereby eliminating the right of the accused to face a jury of their peers. Under VAWA, men effectively lose their constitutional rights to due process, presumption of innocence, equal treatment under the law, the right to a fair trial and to confront one's accusers, the right to bear arms, and all custody/visitation rights. It is unprecedented, unnecessary and dangerous.

KEY VOTE: "NO" on the Violence Against Women Act (VAWA), HERITAGE ACTION FOR AM. (Feb. 4, 2013) [hereinafter *Key Vote*], https://heritageaction.com/key-vote/no-on-the-violence-against-women-act-vawa [https://perma.cc/8FNJ-TALE].

[163] In 2013, former Republican Senator Tom Coburn of Oklahoma sought to amend VAWA 2013 to remove SDVCJ and replace it with a mandate that federal law enforcement prosecute domestic violence on tribal lands more vigorously, claiming that SDVCJ would "trample on the Bill of Rights of every American who is not Native American[.]" Ramsey Cox, *Senate Rejects Coburn-Amendment to VAWA on Tribal Jurisdiction*, HILL (Feb. 11, 2013, 11:28 PM) https://thehill.com/blogs/floor-action/senate/282361-senate-rejects-coburn-amendment-to-vawa-on-tribal-jurisdiction [https://perma.cc/5WJP-DJ26].

[164] *See, e.g.*, Melton & Gardner, *supra* note 65 (explaining how federal law PL 280, which delegated jurisdiction over crimes committed on tribal lands to states, resulted in the "redirecting [of] federal support on a wholesale basis away from Indian Nations in the 'Public Law 280 states,'" including the Bureau of Indian Affairs "refus[ing] to support tribal law enforcement and tribal courts [in PL 280 states] on the grounds that Public Law 280 made tribal criminal jurisdiction unnecessary").

[165] *See supra* Sections I-I.A (outlining some of the federal legislative and judicial actions which greatly reduced tribal criminal and civil jurisdiction and noting that, without

programs, federal dollars could be more efficiently and effectively used to support Native-run initiatives.

Second, "today, the similarities between tribal and non-tribal courts usually outweigh the differences."[166] While the Indian Civil Rights Act of 1968 was a paternalistic and problematic infringement on tribal authority,[167] it did extend most of the constitutional protections related to criminal procedure, equal protection, and due process to individuals prosecuted in tribal courts.[168] This was significant in increasing confidence in tribal court systems both within and outside tribal communities.[169] Furthermore, where Congress has in recent years returned jurisdiction to Native communities through the Tribal Law and Order Act and VAWA 2013,[170] it has predicated such actions on the closing of remaining procedural gaps between tribal and non-Native courts.[171] Critics can therefore be assured that if tribes choose to introduce specialized domestic violence courts or less-carceral alternatives, all basic constitutional and due process protections are required.[172]

jurisdiction, and with limited resources, tribes lacked motivation to maintain sophisticated court infrastructure).

[166] Rolnick, *supra* note 49, at 417.

[167] *See, e.g.*, INDIAN LAW & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES 17 (2013) [hereinafter ROADMAP] ("Without question, ICRA infringes on Tribal authority . . . ."); Deer, *supra* note 43, at 99.

[168] Indian Civil Rights Act of 1968, Pub. L. No. 90-284, tit. II, 82 Stat. 73, 77-78 (codified as amended in scattered sections of 12, 18, 25, and 42 U.S.C.). It is now the "broadly accepted norm for [tribes to provide] assistance of counsel in adversarial, punitive proceedings," going above and beyond the requirements of the Indian Civil Rights Act. ROADMAP, *supra* note 167, at 19.

[169] ROADMAP, *supra* note 167, at 19.

[170] *See supra* Section I.B.

[171] For example, TOLA and VAWA 2013 do require tribes to provide "the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution" including "at the expense of the tribal government . . . provid[ing] an indigent defendant the assistance of a defense attorney." 25 U.S.C. § 1302(c)(1)-(2) (2018); *see also* Rolnick, *supra* note 49, at 417-18.

[172] Note, while these legislative returns of sovereignty premised on adherence to Western constitutional norms have been criticized by many as colonial and white supremacist, *see, e.g.*, Mary K. Mullen, Comment, *The Violence Against Women Act: A Double Edged Sword for Native Americans, Their Rights, and Their Hopes of Regaining Cultural Independence*, 61 ST. LOUIS L.J. 811, 812 (2017) ("While VAWA grants Native Americans more power over non-native perpetrators, it does so with the expectation that tribal courts will conform to Anglo-American criminal procedure, creating further assimilation of tribal courts and robbing Native Americans of their cultural uniqueness."), Deer points out with expanded criminal jurisdiction tribes have or would have the freedom to engage in noncarceral alternatives to violence. *See* Deer, *supra* note 43, at 103.

Finally, and most significantly, a quantitative analysis of the first five years of SDVCJ suggests that the limited experiment in renewed criminal jurisdiction for AI/AN tribes has been a success on numerous levels.[173] In May 2018, the National Congress of American Indians published a report on the SDVCJ adjudications by the eighteen tribes, located in eleven states, exercising this expanded jurisdiction in their communities.[174] Cumulatively, they had made 143 arrests of 128 non-Native offenders. The arrests resulted in 125 domestic or dating violence cases and 34 protection order violation charges.[175] These charges resulted in 74 convictions, 73 guilty pleas, 5 acquittals, and 21 dismissals, with 24 cases pending at the time the report was published.[176] A total of 6 cases went to trial, 5 of which were jury trials with 1 bench trial.[177] One jury trial resulted in a conviction while the others resulted in dismissals or acquittals.[178] This results in an approximate 52% conviction rate with 21% of defendants being dismissed or acquitted.[179] Many of the defendants who were ultimately prosecuted through SDVCJ had pre-SDVCJ contact with tribal law enforcement. In fact, 85 defendants accounted for 378 prior contacts with tribal law enforcement which, prior to 2013, was powerless to engage with these individuals.[180] In the first five years of SDVCJ, no petitions for habeas corpus were filed in federal court.[181] These numbers tell us three important things about

[173] SDVCJ FIVE-YEAR REPORT, *supra* note 5, at 2. *See generally S. 2785, A Bill to Protect Native Children and Promote Public Safety in Indian Country; S. 2916, A Bill to Provide that the Pueblo of Santa Clara May Lease for 99 Years Certain Restricted Land and for Other Purposes; and S. 2920, the Tribal Law and Order Reauthorization Act of 2016: Hearing Before the S. Comm. on the Indian Affairs*, 114th Cong. (2016).

[174] SDVCJ FIVE-YEAR REPORT, *supra* note 5, at 5, 15-16.

[175] *Id.* at 7-8. As of June, 2019, the 25 SDVCJ-implementing tribes had reported "237 arrests of non-Indian abusers leading to 95 convictions." OFFICE ON VIOLENCE AGAINST WOMEN, U.S. DEP'T OF JUSTICE, 2019 UPDATE ON THE STATUS OF TRIBAL CONSULTATION RECOMMENDATIONS 16 (2019) [hereinafter DOJ 2019 UPDATE], https://www.justice.gov /file/1197171/download [https://perma.cc/EH3M-62UK]. However, no additional details of the breakdown of these cases is currently available, so the 2018 data is used for this analysis.

[176] SDVCJ FIVE-YEAR REPORT, *supra* note 5, at 7.

[177] *Id.*

[178] *Id.*

[179] *Id.* at 18. A 2008 Bureau of Justice Statistics study found that 87% of defendants charged with aggravated domestic violence assault were ultimately convicted. Of defendants charged with domestic violence sexual assault, 89% were prosecuted and 98% were convicted. Of those convicted, 80% were convicted of domestic violence sexual assault. ERICA L. SMITH, MATTHEW R. DUROSE & PATRICK A. LANAGAN, BUREAU OF JUSTICE STATISTICS, NCJ 214993, STATE COURT PROCESSING OF DOMESTIC VIOLENCE CASES 1 (2008), https://www.bjs.gov/content/pub/pdf/scpdvc.pdf. [https://perma.cc/6QXS-QUGW].

[180] SDVCJ FIVE-YEAR REPORT, *supra* note 5, at 8, 14.

[181] *Id.* at 1, 19. As of June 2019, there continued to be zero habeas petitions filed as a result of SDVCJ. DOJ 2019 UPDATE, *supra* note 175, at 16.

the first five years of SDVCJ: (1) SDVCJ is customizable enough that culturally and geographically diverse tribes can successfully implement it,[182] (2) SDVCJ is increasing safety for survivors and has the potential to end the problem of impunity for non-Native offenders of domestic violence on tribal lands, and (3) tribes are committed to exercising SDVCJ fairly and justly.

The high number of SDVCJ defendant contacts with tribal law enforcement prior to the implementation of tribal jurisdiction demonstrates that SDVCJ can be successful in putting an end to impunity.[183] Each of these prior contacts represents an incident when tribal law enforcement responded only to find they were unable to intervene because of the race of the offender. True to the cyclical nature of domestic violence,[184] these offenders who had gone unpunished for previous acts of violence continued to behave violently toward their domestic partners. The ability to increase accountability for offenders, made possible through SDVCJ, coupled with many tribes' emphasis on rehabilitation over retribution, suggests hope in reducing the number and lethality of violent domestic violence incidents in Indian country.[185] Often, defendants are spouses and parents of tribal members and are seen as part of the tribal community.[186] As such, many tribes are committed to rehabilitation as an integral part of healing their community.[187]

The number of acquittals and dismissals demonstrate fairness in the SDVCJ process and a "commit[ment] to getting it right."[188] There are a number of reasons why tribes have been unable, or unwilling, to go through with prosecution in a SDVCJ cases, including "uncooperative witnesses, insufficient evidence, determination that the tribe lacks jurisdiction, filing errors, plea deals on other cases, or detention by another jurisdiction."[189] Many of these are common challenges to prosecuting domestic violence cases nationally and show the similarity, or even heightened nature, of protective standards for the prosecution of domestic violence by tribal courts as compared to state courts. Additionally, the four jury trial acquittals demonstrate that non-Native defendants can get a fair trial in tribal courts, even when presided over by AI/AN

[182] SDVCJ FIVE-YEAR REPORT, *supra* note 5, at 16-17 (discussing how implementing tribes are in eleven different states and have varying political structures, histories, cultures, and sized land bases and populations).

[183] *Id.* at 14.

[184] *See supra* Section II.A (discussing cyclical nature of domestic violence and why rapid response and intervention is essential to ensure survivors' safety).

[185] SDVCJ FIVE-YEAR REPORT, *supra* note 5, at 8, 20 (reporting 51% of SDVCJ defendants were sent to rehabilitation programs as part of their sentences).

[186] *Id.* at 20-21.

[187] *Id.* at 20 ("Many tribes are committed to ensuring that non-Indian defendants—who are usually partners and parents of tribal members—get help in addition to punishment.").

[188] *Id.* at 19.

[189] *Id.* at 18.

judges before a majority-Native jury.[190] This is an early sign of success, as many opponents of SDVCJ argued that non-Natives could never get a fair trial in tribal courts.[191] Finally, the fact that no defendants have filed habeas corpus petitions, despite being affirmatively notified of their right to do so, indicates the level of the care and fairness with which tribes have approached the implementation of SDVCJ.[192] In fact, some defendants have even told tribal officials they prefer the tribal court adjudication process because it was "less formal, less intimidating, offered more focus on treatment and showed more respect to defendants."[193]

Finally, with the expansion of jurisdiction under SDVCJ, the Tulalip Tribes of Washington have recently established a "separate Domestic Violence Court docket where non-Indian domestic violence cases are handled, along with a specialized prosecutor and Tribal Court Public Defense Clinic in partnership with the University of Washington," proving that expanded jurisdiction can empower tribes to implement the most effective solutions for reducing violence.[194] The Tulalip Tribes' court is culturally unique by building on the Healing to Wellness court model currently used in several tribal jurisdictions.[195] Used primarily in drug and alcohol related contexts, the Healing to Wellness model "brings together alcohol and drug treatment, community healing resources, and the tribal justice process by using a team approach to achieve the physical and spiritual healing of the individual participant, and to promote Native nation building and the well-being of the community."[196] In addition to this cultural responsiveness, the court features some characteristics similar to those employed by specialized domestic violence courts in non-Native communities including specially trained court personnel, requiring all

[190] *Id.* at 19.

[191] While Republican lawmakers have not gone on the record to express their reservations about the expansion of SDVCJ contained within the proposed reauthorization, conservative think tanks, such as Heritage Action for America, encouraged senators to vote "no" on VAWA 2013. *Key Vote*, *supra* note 162; *see also supra* note 163 (noting former Republican Senator Tom Coburn's proposed amendment to VAWA 2013).

[192] SDVCJ FIVE-YEAR REPORT, *supra* note 5, at 1, 19.

[193] *Id.* at 19.

[194] Brief of *Amici Curiae* National Indigenous Women's Resource Center, Tribal Nations, & Additional Advocacy Organizations for Survivors of Domestic Violence & Assault in Support of Petitioner at 25, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526); *see also* NAT'L AM. INDIAN COURT JUDGES' ASS'N, A DOMESTIC VIOLENCE COURT PLANNING ROAD MAP: THE TULALIP TRIBES' EXPERIENCE 1 (2019) [hereinafter NAICJA ROAD MAP], https://www.courtinnovation.org/sites/default/files/media/documents/2019-05/handout_naicja_05282019.pdf [https://perma.cc/775N-ZQ7Y].

[195] NAICJA ROAD MAP, *supra* note 194, at 1.

[196] SEKAQUAPTEWA & VAN SCHILFGAARDE, *supra* note 113, at 7.

defendants to undergo offender intervention programs, and cooperation with existing nonlegal service providers.[197]

Despite these early signs of success, tribes continue to experience frustrations and challenges associated with exercising SDVCJ. The most important challenges relate to the limited nature of the law. Although tribes reported that 51% of incidents eligible for SDVCJ involved drugs or alcohol and 58% percent involved children, tribes are unable to prosecute offenders for these related crimes.[198] As with domestic violence, tribes are similarly well situated to finding community-based local solutions to drug abuse and crimes against children, if only they have the authority to do so. In fact, tribes already use community-based specialized courts to intervene in substance abuse and juvenile justice issues through Healing to Wellness courts.[199] Current jurisdictional boundaries, however, limited the accessibility of these programs to tribal members.[200] Additionally, although SDVCJ removed one factor—the defendant's race—from the determination of whether or not tribes have jurisdiction, SDVCJ continues to require complex analyses prior to prosecution of the victim's race, the relationship between the victim and the defendant, and the legal status of the location of the crime. By exchanging one type of complexity with another and requiring additional time and resources, these analyses limit the tribes' effectiveness of reducing overall indicants of domestic violence.[201]

Finally, SDVCJ is expensive because it requires tribes to revise their criminal codes, train law enforcement and court personnel, implement new processes for jury selection, and make arrangements for incarceration of defendants.[202] Non-implementing tribes have listed lack of resources as one of the two primary reasons that SDVCJ has not been implemented more broadly.[203] Notwithstanding these challenges, the successes of SDVCJ demonstrate that when tribes have sufficient resources, they have the capacity to manage expanded jurisdiction, and that should be a strong rationale for expanding jurisdiction as proposed by VAWA 2019 and beyond. These challenges can be effectively dealt with by expanding tribal criminal jurisdiction to the point of parity with states and by providing tribes with more funding, resources, and services to support implementation.[204]

---

[197] Brief of *Amici Curiae*, *supra* note 194, at 25; NAICJA ROAD MAP, *supra* note 194, at 1-2.

[198] SDVCJ FIVE-YEAR REPORT, *supra* note 5, at 8.

[199] SEKAQUAPTEWA & VAN SCHILFGAARDE, *supra* note 113, at 1 ("Essentially, a Tribal Healing to Wellness Court, like a state drug court, integrates substance abuse treatment with the criminal justice system . . . .").

[200] *Id.* at 29-32.

[201] SDVCJ FIVE-YEAR REPORT, *supra* note 5, at 3, 20.

[202] *Id.* at 29.

[203] *Id.*

[204] *Id.*

III. DOMESTIC VIOLENCE EXEMPLIFIES THE NEED FOR EXPANDED TRIAL JURISDICTION

The early successes of SDVCJ demonstrate that, with adequate support and increased funding, tribes are in the best position to take on complex challenges, including domestic violence, in their communities. Local tribal criminal infrastructures should be relied upon to keep the peace locally except where tribes require additional time and money to meet due process standards.

A. *VAWA 2019*

In the short term, the Senate should take up and pass the expansion of SDVCJ proposed as part of the House/Democratic version of VAWA 2019,[205] enabling tribes to exercise criminal jurisdiction over the additional crimes of child abuse, stalking, trafficking, and assault on law enforcement personnel.[206] As discussed earlier, one of the biggest challenges for tribes implementing SDVCJ is the narrowness of the law which returns criminal jurisdiction to tribes only when domestic violence, dating violence, or violation of a protection order is committed. The other crimes included in VAWA 2019's proposed expansions of tribal sovereignty are similarly vital to ensuring tribal ability to protect their communities.

The future of VAWA, its proposed expansion of tribal jurisdiction, and its federal grant programs available to tribes implementing SDVCJ/STCJ, is in jeopardy. VAWA, in its current form as reauthorized in 2013,[207] officially expired on February 15, 2019.[208] The specific Native-jurisdiction-expansion provisions of VAWA 2019, which passed the House on April 4, 2019,[209] faced criticism from Republicans who continue to express concern for the rights of criminal defendants despite the successes outlined in the National Congress of American Indians' 2018 Report.[210] Prior to leaving the committee, Republican

---

[205] Violence Against Women Reauthorization Act of 2019, H.R. 1585, 116th Cong. § 903(2) (2019).

[206] *Id.* at § 906.

[207] Eyder Peralta, *House Reauthorizes Violence Against Women Act*, NPR (Feb. 28, 2013, 11:58 AM), https://www.npr.org/sections/thetwo-way/2013/02/28/173150486/house-reauthorizes-violence-against-women-act [https://perma.cc/K4VK-YFGV].

[208] *Violence Against Women Act Reauthorization Threatened*, ABA (Mar. 16, 2019), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/may2019/vawa_update/ [https://perma.cc/ANB6-CTEM].

[209] 168 CONG. REC. H3012-28 (2019).

[210] Jennifer Bendery, *GOP Tries to Gut Protections for Native Women in Violence Against Women Act*, HUFFPOST (Mar. 13, 2019, 3:51 PM), https://bit.ly/2ngidyH [https://perma.cc/EV9Q-RS9W] ("[Rep. Jim Sensenbrenner] claimed that non-Native domestic abusers' constitutional rights might not be upheld if they harm a Native woman on tribal land and have to go before a tribal court."); *see also supra* note 191; Section II.D (outlining the successes of the first five years of SDVCJ).

Representative Jim Sensenbrenner of Wisconsin attempted to amend VAWA 2019 to rescind SDVCJ as passed in VAWA 2013.[211] After the bill passed the House, bipartisan negotiations in the Senate broke down primarily over the issue of gun rights for individuals convicted of domestic violence.[212] As a result, Senator Feinstein (D-CA) introduced S. 2843, which tracks the version passed by the House, while Senator Joni Ernst (R-IA) introduced her own version of the bill, S. 2920, one week later.[213] In addition to removing the more protective firearms restrictions, tribal members and advocates argue Ernst's bill "erodes tribal sovereignty and attacks the independence of our tribal judicial systems, and would prevent us from protecting our woman and children from perpetrators."[214]

Of particular concern to tribes are three additions included in Ernst's bill, drafted without input by AI/AN communities, which undermine tribal sovereignty by perpetuating paternalistic attitudes that the federal government has long held towards tribal court systems.[215] First, the bill "suggests that tribal courts need more scrutiny and oversight" by imposing audits of tribal justice systems by the Attorney General.[216] Second, the bill would impose a 90-day turnaround requirement on tribal appellate decisions, a limit that does not apply

[211] Bendery, *supra* note 210.

[212] Michael Macagnone & Katherine Tully-McManus, *Senate Talks on Crafting Bipartisan Violence Against Women Act Break Down*, ROLL CALL (Nov. 7, 2019, 4:17 PM), https://www.rollcall.com/2019/11/07/senate-talks-on-crafting-bipartisan-violence-against-women-act-break-down/ [https://perma.cc/9XTX-ADYW] ("The most contentious provision in the House-passed bill would lower the criminal threshold to bar someone from buying a gun to include misdemeanor convictions of stalking and a broader swath of domestic abuse crimes. The law currently applies to felony convictions."); *see also* Willis, *supra* note 41 (citing disagreements over closing the "boyfriend loophole" which currently "excludes people convicted of stalking or abusing a non-spouse partner from the scope of laws that limit an abuser's ability to obtain firearms").

[213] *Compare* Violence Against Women Reauthorization Act of 2019, S. 2843, 116th Cong. (2019), *with* Violence Against Women Reauthorization Act of 2019, S. 2920, 116th Cong. (2019).

[214] Press Release, Nat'l Indigenous Women's Res. Ctr., New Senate VAWA Bill Would Leave Native Women Less Protected and Infringe on Tribal Sovereignty (Nov. 21, 2019), https://www.niwrc.org/news/new-senate-vawa-bill-would-leave-native-women-less-protected-and-infringe-tribal-sovereignty [https://perma.cc/Z63V-9BEB]; *see also* Jourdan Bennett-Begaye, *Senate VAWA Bill 'Undercuts Tribal Sovereignty,'* INDIAN COUNTRY TODAY (Nov. 22, 2019), https://indiancountrytoday.com/news/senate-vawa-bill-undercuts-tribal-sovereignty-p5lxqJzSSUqSnbKKMTVB9A [https://perma.cc/47RJ-VBPP].

[215] Bennett-Begaye, *supra* note 214.

[216] *Id.* (quoting Sarah Deer of the Muscogee (Creek) Nation, who is a lawyer, advocate, professor at the University of Kansas, and Chief Justice for the Prairie Island Indian Community Court of Appeals); *accord* Violence Against Women Reauthorization Act of 2019, S. 2920, 116th Cong. § 204(b)(6)(B) (2019).

in state or federal courts.[217] Finally, the bill undermines tribal sovereignty by including a provision which would allow convicted defendants to skip tribal appeals courts and appeal directly to the federal system.[218] Rather than creating the space for the tribal judicial system to flourish and succeed, these provisions suggest tribes are incapable of exercising expanded sovereignty and require additional oversight. "It's an insult to tribal governments when you read between the lines," Chief Justice for the Prairie Island Indian Community Court of Appeals Sarah Deer said.[219]

In addition to fostering a partisan divide over the issue of tribal sovereignty, the inability of the Senate to agree on and pass a bipartisan reauthorization of VAWA jeopardizes the continued funding of federal grants authorized by VAWA and upon which many tribal communities rely while simultaneously sending a message to survivors everywhere that domestic violence is not a priority of the federal government.[220] While grants already awarded under VAWA will not be affected by VAWA's expiration, future payment requests will be delayed until the law is reauthorized.[221] This could severely hinder the ability of tribes to continue to provide the services required for the implementation of the SDVCJ currently in place, will limit the expansion of jurisdiction, and will continue to inhibit tribal ability to develop local, customized responses to the serious problems of domestic violence, child abuse, drug and alcohol abuse, and other challenges facing their communities.

B. *Beyond VAWA 2019*

The passage of STCJ as proposed by VAWA 2019 would be an important, although limited, step forward in returning jurisdiction to tribes. However, VAWA 2019 should not be the end of the road. In order for Native tribes to effectively respond to the violence plaguing their communities, they must have the capacity to address problems holistically. Such a holistic response is impossible without full criminal jurisdiction over all crimes committed on their

[217] Violence Against Women Reauthorization Act of 2019, S. 2920, 116th Cong. § 804 (f)(1).

[218] Violence Against Women Reauthorization Act of 2019, S. 2920, 116th Cong. § 804 (g)(1)-(h)(1) (2019).

[219] Bennett-Begaye, *supra* note 214.

[220] Kate Thayer, *The Violence Against Women Act Has Expired. Advocates Say that Sends A Dangerous Message and Are Pushing for Permanent Protections.*, CHI. TRIB. (Feb. 21, 2019), https://www.chicagotribune.com/lifestyles/ct-life-violence-against-women-act-expired-20190220-story.html.

[221] Jenny Gathright, *Violence Against Women Act Expires Because of Government Shutdown*, NPR (Dec. 24, 2018, 3:21 PM) https://www.npr.org/2018/12/24/679838115/violence-against-women-act-expires-because-of-government-shutdown [https://perma.cc/8MY4-UMXK].

lands.[222] The current inability of tribes to prosecute drug and alcohol offenses, which co-occurred with 51% of the episodes of domestic violence prosecuted in the first five years of SDVCJ, exemplifies this need.[223]

The high rates of domestic violence co-occurring with drug or alcohol abuse is not unique to violence perpetrated against AI/AN women. In fact, a multisite study of abuse intervention programs found similar results: 56% of participants were found to have alcoholic tendencies, and 31% had severe behavior problems associated with drinking.[224] Another study found that "the odds of severe male-to-female physical aggression were over five times higher on days of drinking and nearly three times higher on days of cocaine use."[225] This interrelation between domestic violence and substance abuse has led researchers and stakeholders to advocate for the expansion of integrated treatment and court programs for the last two decades.[226] Despite this advocacy, such programs are "still the exception rather than the rule."[227]

The only such program which appears to have been studied systematically is the Dade County Domestic Violence Court, discussed above. A statistical analysis of the initial trial phase of Dade County's integrated abuser-substance use program found that it had more success enrolling and keeping offenders in the prescribed treatment, and participants were about half as likely to reoffend (6% as compared to 14%) against the same victim in the seven months following their initial arrest.[228] These findings are particularly significant because the control group against which these results were measured participated in a "traditional" specialized domestic violence court (one which did not seek to

[222] For a discussion of expanding tribal sovereignty over all misdemeanor crimes, see Kennedy, *supra* note 48.

[223] SDVCJ FIVE-YEAR REPORT, *supra* note 5, at 8.

[224] Edward W. Gondolf, *Characteristics of Court-Mandated Batterers in Four Cities: Diversity and Dichotomies*, 5 VIOLENCE AGAINST WOMEN 1277, 1284 (1999).

[225] William Fals-Stewart, James Golden & Julie A. Schumacher, *Intimate Partner Violence and Substance Use: A Longitudinal Day-to-Day Examination*, 28 ADDICTIVE BEHAVIORS 1555, 1566 (2003).

[226] JOHN S. GOLDKAMP WITH DORIS WEILAND, MARK COLLINS & MICHAEL WHITE, THE ROLE OF DRUG AND ALCOHOL ABUSE IN DOMESTIC VIOLENCE AND ITS TREATMENT: DADE COUNTY'S DOMESTIC VIOLENCE COURT EXPERIMENT 8 (1996) ("It would appear that the more promising violence-reduction approaches that a court might adopt for a domestic violence caseload ought to be integrated into an overall treatment package that addresses the variety of influences that may contribute to violent offending, including substance abuse problems."); Randal B. Fritzler & Leonore M.J. Simon, *The Development of a Specialized Domestic Violence Court in Vancouver, Washington Utilizing Innovative Judicial Paradigms*, 69 UMKC L. REV. 139, 169 (2000); Gregory L. Stuart, *Improving Violence Intervention Outcomes by Integrating Alcohol Treatment*, 20 J. INTERPERSONAL VIOLENCE 388, 391 (2005).

[227] Fritzler & Simon, *supra* note 226, at 176.

[228] GOLDKAMP ET AL., *supra* note 226, at xvii-xviii.

concurrently treat substance abuse), which was itself successful in moving domestic violence cases towards diversion and probation treatment programs.[229]

Some AI/AN tribes already have experience and successes running specialized substance use courts through the Healing to Wellness court initiative. "Designed with and from tribal, team, collaborative, and imaginative perspectives," Healing to Wellness courts adapted the traditional local drug court model to meet the needs of AI/AN communities by focusing in particular on community and nation building.[230] By 2014 it was estimated that seventy-two tribal Healing to Wellness courts were in operation including adult, juvenile, and whole family variations.[231] This experience, in addition to the restorative and reparative justice focus many tribal justice systems always had,[232] indicates that tribes are already well positioned to integrate domestic violence and substance use courts. For this to work, however, tribes must have jurisdiction over drug and alcohol offenses.

CONCLUSION

Rather than an isolated problem which can be solved by piecemeal grants of jurisdiction, violence against AI/AN women exemplifies the need for full tribal criminal adjudicatory authority. With severely limited jurisdiction, tribes lacked sufficient power to experiment with community-based, culturally appropriate responses to the problem of domestic violence, such as specialized domestic violence courts, like more than 200 of their non-Native local counterparts. This is particularly problematic because tribes, which are similar to state or local municipalities in size, structure, and authority, are inherently responsive to their local populations. Therefore, they are in the best position to develop customized, culturally appropriate solutions to the challenge of domestic violence in their communities.

The return of jurisdiction over some crimes in the form of SDVCJ authorized by VAWA 2013 was an essential first step in recognizing inherent tribal sovereignty and restoring the ability of tribes to protect their members. In the first five years of this expanded jurisdiction, implementing tribes have shown that with increased funding they are more than capable of meeting heightened due process requirements and providing just, fair adjudications for non-Native defendants. However, in order to make up for the loss of thirty-five years, it is essential that SDVCJ be expanded, eventually resulting in the restoration of full criminal jurisdiction over all crimes committed on tribal lands, regardless of the

[229] *Id.* at 45-46.

[230] Joseph Thomas Flies-Away & Carrie E. Garrow, *Healing to Wellness Courts: Therapeutic Jurisprudence*, 2013 MICH. ST. L. REV. 403, 407.

[231] SEKAQUAPTEWA & VAN SCHILFGAARDE, *supra* note 113, at 2, 4.

[232] Joseph Thomas Flies-Away, Carrie Garrow & Miriam Jorgensen, *Native Nation Courts: Key Players in Nation Rebuilding*, *in* REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 115, 121 (Miriam Jorgensen ed., 2007).

race of the perpetrator. Tribes will certainly face challenges in the transition to full criminal jurisdiction, but this Note demonstrates that tribal jurisdiction has the highest chance of being effective, is in line with the federalist philosophy of local control of criminal issues, and represents progress in reversing and recounting for the federal government's racist and colonial past approaches to AI/AN communities. It is past time that tribes have the full criminal jurisdiction that their inherent sovereignty demands.