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An “SDVCJ Fix”—Paths Forward in Tribal Domestic Violence Jurisdiction

JOSHUA B. GURNEY[†]

Domestic violence has riddled the indigenous communities of the United States for decades. Within this problem lies another—non-Indians perpetrate crimes of domestic violence against Indian women at disproportionately high rates. Exacerbating this issue is the complicated web of criminal jurisdiction split between federal, state, and tribal governments. To ostensibly solve the problem, Congress enacted the Violence Against Women Reauthorization Act of 2013. The Act contained an important provision that returned criminal jurisdiction to tribes, called “Special Domestic Violence Criminal Jurisdiction.”

Special Domestic Violence Criminal Jurisdiction, by most accounts, has been a resounding success. But it suffers from critical limitations, namely, requirements that make its implementation impossible for most tribes. This Note proposes a solution to these limitations that would allow all tribes to exercise criminal jurisdiction over crimes of domestic violence: an SDVCJ fix. By examining Supreme Court precedent and applying a more consistent constitutional analysis, this Note advances a theory by which tribes could prosecute non-Indian defendants notwithstanding the inability to provide all facets of due process.

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INTRODUCTION

Few stories in American history are as appalling as our government’s protracted mistreatment of the indigenous peoples of the United States. By way of “manifest destiny,” subjugation, and centuries of progressive erosion of tribal sovereignty at the hands of our government and its highest court, our country’s collective ambition has left in its wake a trail of hardship and pain.¹ Today, the scores of tribal nations scattered across our country face some of the most challenging economic and educational conditions in America.² It was in this environment that domestic violence began—and still continues—to proliferate in native communities.³ To make matters worse, the very laws of the United States encouraged, rather than hindered, the perpetration of domestic violence

1. See James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *Report on the Rights of Indigenous Peoples*, U.N. Doc. A/HRC/21/47, at 10–13 (July 6, 2012); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 585 (1823) (holding the “exclusive power to extinguish” the “Indian right of occupancy” resided in the U.S. government).

2. Jens Manuel Krogstad, *One-in-Four Native American and Alaska Natives Are Living in Poverty*, PEW RES. CTR. (June 13, 2014), <http://www.pewresearch.org/fact-tank/2014/06/13/1-in-4-native-americans-and-alaska-natives-are-living-in-poverty>.

3. See Anaya, *supra* note 1, at 10–11.

against native women by non-Indian men.⁴ For nearly forty years, tribes were completely unable to hold criminally accountable any non-Indian offenders who committed acts of domestic violence against Indian people, owing to our own Supreme Court.⁵

Fortunately, the status quo did not go unchallenged. By the beginning of this past decade, a chorus of outrage from tribal leaders and victims of domestic violence finally convinced Congress to take action.⁶ On March 7, 2013, Congress enacted the Violence Against Women Reauthorization Act of 2013 (VAWA 2013) giving hope to tribes which, for so long, had been unable to adequately protect their people against domestic violence.⁷ This Act contained a unique provision, called “special domestic violence criminal jurisdiction” (SDVCJ), which recognized the inherent power of a tribe to exercise criminal authority over all people who commit crimes of domestic violence against their people and on their lands.⁸ Now set to expire, a new VAWA is once again moving towards reauthorization in Congress.⁹ Soon SDVCJ may be a thing of the past, substituted for a retooled “special tribal criminal jurisdiction,” with new attendant powers (discussed in more depth *infra* Part II).¹⁰

This Note identifies some of the critical weaknesses of VAWA 2013—weaknesses not corrected in current reauthorization bills—and proposes a novel, constitutionally acceptable expansion of tribal jurisdiction over non-native perpetrators of domestic violence. It argues for new expansions of VAWA and the Indian Civil Rights Act that allow *all* tribes to criminally prosecute and imprison non-Indian defendants who commit crimes of domestic violence against tribal members, have sufficient ties to the victim, and do not successfully complete tribal programs initially offered to the defendant as an alternative to incarceration. This Note proposes that making this expansion available to all tribes, or most tribes, is necessary, even though many tribes will not be able to offer non-Indian defendants due process completely consistent with the Indian Civil Rights Act and the United States Constitution.

4. See *infra* Part I.

5. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (discussed *infra* Part I).

6. See Sari Horwitz, *Arizona Tribe Set to Prosecute First Non-Indian Under a New Law*, WASH. POST (Apr. 18, 2014), https://www.washingtonpost.com/national/arizona-tribe-set-to-prosecute-first-non-indian-under-a-new-law/2014/04/18/127a202a-bf20-11e3-bcec-b71ee10e9bc3_story.html?utm_term=.1f4dea3c7942.

7. Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, 127 Stat. 54.

8. See 25 U.S.C. § 1304(b)(1) (Supp. I 2013).

9. Violence Against Women Reauthorization Act 2018, H.R. 6545, 115th Cong. (2018); Sarah D. Wire, *Landmark Violence Against Women Act May Expire While Congress Tends to Other Business*, L.A. TIMES (Sept. 13, 2018, 1:25 PM), <https://www.latimes.com/politics/la-na-pol-violence-against-women-expire-20180913-story.html>; cf. Rebecca Nagle, *What the Violence Against Women Act Could Do in Indian Country—and One Major Flaw*, HIGH COUNTRY NEWS (Dec. 11, 2018), <https://www.hcn.org/articles/tribal-affairs-what-the-violence-against-women-act-could-do-in-indian-country-and-one-major-flaw> (“If VAWA lapses, it will not change any statutes in the existing law or even necessarily cut funding. During the last reauthorization fight, for example, VAWA expired for 500 days, and yet program funding continued. But whether or not the bill is reauthorized, it still must go through the appropriations process, in which Congress allocates the necessary money.”).

10. See H.R. 6545 § 906.

This Note seeks to strike a balance between the ideal and the feasible, especially given the potential for decades of a conservative majority on the Supreme Court that could ultimately decide the constitutionality of a retooled VAWA.¹¹ Issues of tribal sovereignty and self-determination will always underlie the relationships between tribal and state and federal governments.¹² This Note recognizes the importance of those issues but focuses primarily on the problem unique to the context of SDVCJ—the unacceptably high rates of domestic violence. This Note’s thesis thus focuses on how the laws of the United States can best serve tribal victims¹³ of domestic violence, perpetrated by non-natives on Indian lands.

The Introduction and Part I provide contextual information about domestic violence generally, the prevalence of domestic violence in Indian country, and the historical development of criminal jurisdiction on Indian lands, all of which set the stage prior to the enactment of VAWA 2013. Part II reviews the implementation of SDVCJ and discusses current developments and criticisms. Finally, Part III offers a path forward by arguing for a constitutionally consistent expansion of SDVCJ based on Supreme Court precedent and the dire need to address the situation in Indian country.

A. DOMESTIC VIOLENCE IN INDIAN COUNTRY

According to André B. Rosay’s National Intimate Partner and Sexual Violence Survey, nearly forty percent of American Indian and Alaska Native women reported experiencing at least one form of domestic violence in 2015.¹⁴ Native women are among the most susceptible to violence of any ethnic group

11. See Adam Liptak & Alicia Parlapano, *Conservatives in Charge, the Supreme Court Moved Right*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/interactive/2018/06/28/us/politics/supreme-court-2017-term-moved-right.html>. However, the confirmation of Justice Neil Gorsuch—who previously served on the Tenth Circuit—brings the Supreme Court significant federal Indian law experience and perhaps a fresh perspective. See John Dossett, *Justice Gorsuch and Federal Indian Law*, 43 HUM. RTS. 7, 8 (2017) (“Justice Gorsuch has significantly more experience with Indian law cases than other recent Supreme Court nominees. His opinions have commonly recognized tribes as sovereign governments and have addressed issues such as state police incursion onto tribal lands, sovereign immunity, religious freedom, accounting for trust funds, exhaustion of tribal remedies, and Indian Country criminal jurisdiction.”).

12. For a discussion of the implications of SDVCJ on tribal sovereignty, see generally Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564 (2016); Catherine M. Redlingshafer, Note, *An Avoidable Conundrum: How American Indian Legislation Unnecessarily Forces Tribal Governments to Choose Between Cultural Preservation and Women’s Vindication*, 93 NOTRE DAME L. REV. 393 (2017).

13. This Note will use the phrases “victim” and “survivor” interchangeably.

14. ANDRÉ B. ROSAY, U.S. DEP’T OF JUSTICE, NAT’L INST. OF JUSTICE, VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN 2 (2016), <https://www.ncjrs.gov/pdffiles1/nij/249822.pdf> (interpreting data from the National Intimate Partner and Sexual Violence Survey (NIPSVS), a report launched by the Center for Disease Control and Prevention and partially funded by the National Institute of Justice). NIPSVS respondents were from a nationally representative sample of over 4,000 adults who identified themselves as either American Indian or Alaska Native. The female respondents reported violence in 2015 in the following categories: 14.4% experienced sexual violence, 8.6% experienced physical violence by an intimate partner, 11.6% experienced stalking, and 25.5% experienced psychological aggression by an intimate partner. *Id.*

in the United States.¹⁵ In the year studied, Rosay found American Indian and Alaska Native women were 1.7 times more likely to experience violence compared to white women.¹⁶ Of all American Indian and Alaska Native survey respondents who reported experiencing violence in their lifetime, *ninety-seven percent* had experienced violence by a non-Indian, non-native person.¹⁷

As astounding as these numbers are, statistics alone likely do not tell the whole story. Domestic violence is typically under-reported. “For many reasons that include the stigma often attached to intimate partner violence, the fear of retaliation from their perpetrators, and numerous other safety concerns, estimating incidence rates of this violence has always been a difficult task.”¹⁸ Available statistics are unclear on whether reported rates of victimization are increasing or decreasing on Indian lands.¹⁹ Nevertheless, the present victimization rate—nearly one in seven—remain unacceptably high.

An examination of the nature of domestic violence is helpful in trying to grasp the magnitude of the problem of domestic violence in Indian country. Domestic violence, and more specifically intimate partner violence, are much broader phenomena, with more derivative behaviors, than the terms suggest. As one might expect, domestic violence manifests through acts of physical abuse such as battering and strangulation, but also through less obvious forms of harm such as financial abuse, psychological abuse, and stalking.²⁰ At its core, domestic violence is a pattern of behavior in which an abuser attempts to exert *control* over his victim.²¹ Dr. Lenore Walker, a key psychological theorist in the field of domestic violence, has described and illuminated tactics used by abusers in carrying out this control:

[B]atterers consciously isolate women from others; women also withdraw from society to protect others from harm and themselves from embarrassment. Three times as many battered women as nonbattered women are isolated financially because they have “no access to cash.” And twenty-two percent of women in abusive relationships (versus only thirteen percent in nonabusive relationships) have no access to a car. Regarding other controlling behaviors . . . whereas battered women were not permitted to go places three-quarters of the time,

15. *See id.* (comparing the domestic violence rates of Natives to those experienced by non-Hispanic whites); *see also* STEVEN W. PERRY, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE, 1992–2002, at iii–v (2004), <https://www.bjs.gov/content/pub/pdf/aic.pdf> (comparing rates of violent victimizations experienced by Natives to those of other U.S. racial or ethnic groups).

16. Rosay, *supra* note 14, at 2.

17. *Id.* at 4. The NIPSVS does not specify a percentage of survey respondents who were victims of domestic violence by non-Indians in 2015. *See id.*

18. RONET BACHMAN ET AL., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN 27 (2008).

19. *Compare id.* at 47 (“American Indian and Alaska Native women have the highest rate of victimization (18.2) . . .”), with ROSAY, *supra* note 14, at 2 (finding 14.4% have experienced sexual violence and 8.6% experienced physical violence in the year prior to the study).

20. *See* Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1116–18 (2009).

21. *Id.*

nonbattered women were not permitted to go places only one-quarter of the time. Also, batterers, unlike nonabusive partners, knew where their victims were at almost all times.²²

These are just a few of the many behaviors used by batterers to isolate and abuse their partners.

In the specific context of violence against women in Indian country, other unique concerns also play a role. Colonization and historical trauma experienced by Indian communities also played a role in making Indian women uniquely vulnerable to domestic violence.²³

[Federal policies of] [r]emoval, relocation, and assimilate[on] resulted in loss of traditional homelands and lifestyles, creation of dependency on the federal government, loss of identity and traditional cultural knowledge, the placement of Native women at greater risk for violence, disruption in family life and parenting, and loss of familiar and communal support systems.²⁴

This background leaves Native women in a position unique among any victimized group.²⁵ As discussed in more depth in *infra* Parts I and II, several problems relate to and exacerbate the epidemic facing women in Indian country such as insufficient funding, unclear jurisdiction for law enforcement, and victims' lack of trust in federal law enforcement.²⁶

Sometimes overlooked in the academic discussion of SDVCJ are the lasting negative consequences that the inability to hold batterers accountable has on victims in tribal communities. When perpetrators of domestic violence are enabled to continue their abuses, victims suffer. While this is the exact problem that SDVCJ sought to fix, again, for so many tribes it is simply not possible to implement the measures required to use it, and as a result, victims continue to suffer.²⁷ An ineffective criminal justice system effectively silences victims, who are discouraged from reporting abuses for fear of retaliation, and emboldens offenders, thereby perpetuating a cycle of violence in tribal lands.²⁸

Additionally, the collateral consequences of domestic violence on Indian lands are another cause for alarm. One of the leading causes of homelessness among women is domestic violence.²⁹ American Indian and Alaskan Native

22. *Id.* at 1119 (footnotes omitted); see also LENORE E. A. WALKER, *THE BATTERED WOMAN SYNDROME* 7 (4th ed. 2017) ("Men continue to use physical, sexual, and psychological abuse to obtain and maintain power and control over women and children, because they can.").

23. Roe Bubar & Pamela Jumper Thurman, *Violence Against Native Women*, 31 *SOC. JUST.* 70, 73 (2004).

24. *Id.*

25. *Id.* at 73–75.

26. BACHMAN ET AL., *supra* note 18, at 9.

27. See Lorelei Laird, *Indian Tribes Are Retaking Jurisdiction over Domestic Violence on Their Own Land*, A.B.A. J. (Apr. 2015), http://www.abajournal.com/magazine/article/indian_tribes_are_retaking_jurisdiction_over_domestic_violence_on_their_own.

28. See NAT'L CONG. OF AM. INDIANS, *VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 4* (2018) [hereinafter *FIVE-YEAR REPORT*] (discussing how the rulings that tribes did not have jurisdiction over non-Indians perpetuated victims living in fear because of the lack of accountability by abusers).

29. See Rose Quilt et al., *Domestic Violence and Housing Across Tribal Nations, Alaska Native Villages and Indian Communities*, NAT'L INDIGENOUS WOMEN'S RESOURCE CTR. (Dec. 14, 2017),

women face homelessness at five times the national level.³⁰ Making matters worse, out of the 573 federally recognized tribes, there are only sixty tribal domestic violence shelters.³¹ These problems underlie the thesis advanced in this Note.

I. HISTORICAL BACKGROUND ON TRIBAL JURISDICTION

As described by Professor Angela R. Riley,³² “[t]he criminal justice crisis that exists in Indian country today is a manifestation of a failure of law so extreme that it has actually caused reservation crime to flourish.”³³ Indeed, the current struggle on Indian lands is a product of federal government policymaking that has steered American Indian affairs throughout U.S. history.³⁴ Historically, federal policy has been guided by two overarching, competing principles: the first respects the distinctness of Indian people and recognizing tribal sovereignty; and the second focuses on a steady assimilation of Indians into non-Indian society.³⁵ The tension between these two views provides a backstop for the jurisdictional conflict created by federal policy, and was only partially resolved by the SDVCJ provision in VAWA 2013. While an exhaustive look into the history of federal-Indian relations is outside the scope of this Note, a brief overview provides context.³⁶

<http://www.niwrc.org/resources/domestic-violence-and-housing-across-tribal-nations-alaska-native-villages-and-indian> (noting that collateral crimes such as assaults on arresting police officers are not covered by VAWA).

30. *Id.*

31. *Id.*

32. Angela R. Riley is a Professor of Law at UCLA School of Law and the Director of UCLA’s Native Nations Law and Policy Center.

33. Riley, *supra* note 12, at 1574.

34. See RESTATEMENT OF THE LAW OF AM. INDIANS, intro. note (AM. LAW INST., Tentative Draft No. 1, 2015).

35. See *id.*; WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 13 (6th ed. 2015) (“At some times, the prevailing view has regarded the tribes as enduring bodies for which a geographical base would have to be established and more or less protected. At other times, the dominant position has been that the tribes are or should be in the process of decline and disappearance, and that their members should be absorbed into the mass of non-Indian society.”).

36. For a comprehensive historical summary of federal-Indian relations, see RESTATEMENT OF THE LAW OF AM. INDIANS, intro. note (AM. LAW INST., Tentative Draft No. 1, 2015).

A. CULTURAL AND HISTORICAL UNDERPINNINGS & THE “JURISDICTIONAL MAZE”³⁷ OF FEDERAL, INDIAN, & STATE CRIMINAL JURISDICTION

The United States Constitution addresses interactions between the Indian tribes and the United States in the so-called Indian Commerce Clause,³⁸ and in the treaty power outlined in Article II, Section II.³⁹ In a trilogy of early Indian law cases decided and authored by then-Chief Justice Marshall,⁴⁰ the U.S. Supreme Court interpreted the federal government’s constitutional powers and established that the federal government had exclusive authority over affairs with Native Americans, superseding both individual citizens’ and states’ influence.⁴¹ The Marshall Court articulated tribes’ status as that of “domestic dependent nations,” embodying simultaneous characteristics of sovereigns and “wards” of the federal government.⁴² When it comes to tribal criminal jurisdiction, a central theme has been the steady erosion of tribal sovereignty at the hands of the federal power outlined in the Marshall Trilogy and expanded throughout the twentieth century.⁴³

The earliest days of interaction between tribes and the United States were vastly different from today. Professor Catherine Struve⁴⁴ provides a useful synopsis of this early history of Indian sovereignty:

Prior to European contact, Indian tribes exercised full sovereign authority; after contact, the European powers dealt with the tribes by means of treaties. The young United States continued the practice of treating tribes as sovereigns, negotiating and entering into treaties with them until 1871. In substance, the federal and state governments’ treatment of Indian nations sometimes ranged from the unfair to the genocidal. During the early nineteenth century, for

37. See generally Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976) (“This Article, by providing the historical context from which this labyrinth emerged, hopefully provides an historical guide through the *jurisdictional maze* that presently exists.” (emphasis added)). For a useful graphic comparison of criminal jurisdiction in Indian lands, see JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 71–72, 185 (3d ed. 2016).

38. U.S. CONST. art. I, § 8, cl. 3 (“[The Congress shall have Power to] regulate Commerce . . . with the Indian Tribes.”).

39. U.S. CONST. art. II, § 2, cl. 2; see also RESTATEMENT OF THE LAW OF AM. INDIANS, intro. note (AM. LAW INST., Tentative Draft No. 1, 2015) (“The constitutional text addresses two means by which Indian tribes and the United States interact.”); Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657, 670 (2013) (“The sparse guidance the Constitution itself provides on the status of America’s native peoples seems to place Indian tribes in an intermediate category between foreign and domestic states.”).

40. The “Marshall Trilogy” of cases (*Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)) were a series of Supreme Court opinions that framed the boundaries of tribal-state-federal relations as they would come to be interpreted by the Supreme Court. For a well-framed overview, see Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L.J. 137, 140–42 (2004).

41. RESTATEMENT OF THE LAW OF AM. INDIANS, intro. note (AM. LAW INST., Tentative Draft No. 1, 2015). For further discussion into the drafting and constitutional interpretation of the Indian Commerce Clause, see FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION* 57–63 (2009).

42. Price, *supra* note 39, at 670.

43. See POMMERSHEIM, *supra* note 41, at 59–63; Riley, *supra* note 12, at 1579.

44. Catherine Struve is a Professor of Law at the University of Pennsylvania Law School, where she teaches and researches in the fields of civil procedure and federal courts.

example, non-Indians used pressure tactics and violence in their efforts to obtain tribal lands, and the federal government ultimately pressed on the southeastern tribes the policy of “removal” from the tribes’ homelands to lands west of the Mississippi. It was a brutal policy; when the last Cherokees east of the Mississippi moved west along the Trail of Tears, the conditions before, during and after the journey were so harsh that some 4,000 of them died. In form, however, the federal government treated the tribes as sovereign entities. Thus, for example, the removal of the southeastern tribes occurred pursuant to “treaties” purportedly entered into by those tribes.⁴⁵

Tribes would continue to suffer this drain of their original status at the hands of the federal government, whether by force or court decision.⁴⁶ This, of course, underlies the frustration felt by Native American advocates in the domestic violence realm.

Sovereignty has a direct corollary to authority over criminal activity. When it comes to criminal authority, a tribe’s power to govern and employ jurisdiction over crimes committed within its territory is a direct product of its sovereignty.⁴⁷ As the prevailing doctrine of federal law holds, such power can only be diminished when a tribe voluntarily cedes it, or when Congress acts affirmatively to take that power away through its authority based in the Marshall Trilogy.⁴⁸ This core doctrine, coupled with the concept of “implicit divestiture,” conflicts directly with the sovereignty tribes rightfully have and never properly relinquished.⁴⁹

Of course, this Note would not have a purpose were it not for the present problems in tribal criminal jurisdiction. A complicated web of history and law laid the groundwork for these issues. The earliest symptoms of our current jurisdictional issues started benignly enough—by the late 1700s, certain treaties between tribes and the federal government allowed for shared criminal jurisdiction over certain interracial crimes.⁵⁰ But two major federal laws enacted in the 1800s created a far different jurisdictional landscape in Indian country, namely, the General Crimes Act of 1817⁵¹ and the Major Crimes Act of 1885.⁵² While the General Crimes Act extended federal criminal laws to apply in Indian country, it specifically did not apply to internal crimes between Indians.⁵³ Going a step further, the Major Crimes Act removed tribes’ jurisdiction entirely from serious crimes like murder and kidnapping, regardless of whether the perpetrator

45. Struve, *supra* note 40, at 138–40 (footnotes omitted).

46. *See id.* at 139–43.

47. *See* Jacqueline P. Hand & David C. Koelsch, *Shared Experiences, Divergent Outcomes: American Indian and Immigrant Victims of Domestic Violence*, 25 WIS. J.L. GENDER & SOC’Y 185, 196 (2010); Riley, *supra* note 12, at 1576–77.

48. Hand & Koelsch, *supra* note 47, at 196. For further discussion, see *infra* Part II.

49. *See* discussion of *Oliphant*, *infra* text accompanying note 65.

50. Riley, *supra* note 12, at 1577. For an expansive analysis of tribal jurisdiction during the treaty period, see Robert N. Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 953–58 (1975).

51. *See* 18 U.S.C. § 1152 (2012).

52. *See id.* § 1153.

53. Riley, *supra* note 12, at 1577.

and/or victim were Indian.⁵⁴ This latter statute grew directly in response to the Supreme Court's decision in *Ex Parte Crow Dog*, which held federal courts lacked jurisdiction to try a member of the Brule Sioux tribe for the murder of a Brule Sioux Chief.⁵⁵

The most significant complications in criminal jurisdiction on Indian lands took place in the past century. Congress enacted Public Law 280 in 1953, which transferred federal criminal jurisdiction to certain *states*, giving those states jurisdiction over crimes perpetrated in the Indian country located within the states' borders.⁵⁶ In Public Law 280, Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin (the "mandatory states"), assumed partial federal criminal jurisdiction over the Indian country within their state boundaries.⁵⁷ The resulting system was a complicated web of concurrent and exclusive jurisdictions between the tribal, state, and federal governments that differed based on location, crime, offender, and victim.⁵⁸ Public Law 280 was essentially a post-war federal budget reduction policy.⁵⁹ Consequently, tribes falling in Public Law 280 jurisdictions found themselves in the midst of a criminal justice system with confused boundaries and essentially no guaranteed funding.⁶⁰ And since states typically had little interest in devoting resources to Indian country law enforcement, tribes in Public Law 280 states quickly found themselves in a vacuum of adequate policing and supporting judicial infrastructure.⁶¹ The Indian Civil Rights Act of 1968 further defined the nature of Indian justice proceedings, setting forth the rights Indian governments must guarantee to individual Indians and limiting the penal authority of tribal courts beyond imposing a \$5,000 fine or one year of imprisonment.⁶²

The discussion so far has largely brushed over exactly what criminal authority was exercised by tribes before Western interference. In fact, the classic Western adversarial criminal justice model "was imposed onto tribes in the

54. Hand & Koelsch, *supra* note 47, at 196.

55. 109 U.S. 556, 572 (1883); *see also* Clinton, *supra* note 50, at 963. The Sioux tribal council found Crow Dog responsible for the murder of a tribal chief, and under an application of traditional Brule Sioux law, Crow Dog was ordered to pay restitution to the victim's family. Sidney L. Haring, *Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 AM. INDIAN L. REV. 191, 198-99 (1998).

56. Act of Aug. 15, 1953, ch. 505, Pub. L. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2012)). Public Law 280 specifically exempted certain tribes, and thus does not apply to all situations within certain states subjected to Public Law 280 jurisdiction. *See id.*

57. Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1632 (1998).

58. DUANE CHAMPAGNE & CAROLE GOLDBERG, CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280, at 6-9 (2012).

59. *Id.* at 13.

60. *See id.*

61. *See* Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1417-18 (1997).

62. Indian Civil Rights Act of 1968, Pub. L. 90-284, tit. II, 82 Stat. 77 (codified as amended at 25 U.S.C. §§ 1301-04 (2012)); *see also* Riley, *supra* note 12, at 1581. The Act originally provided for lower punishment authority, but it was amended in 1986 to raise penal limits to a \$5,000 fine and one year of imprisonment. Indian Civil Rights Act of 1968 § 202(B).

nineteenth century, specifically to disrupt and destroy tribal cultures, Indian justice systems, and traditional dispute resolution practices.”⁶³ Before this meddling, many tribes practiced local, restorative justice, which bore little resemblance to the proceedings often required today.⁶⁴ Some of these practices will play a key role in the discussion *infra* Parts II and III.

Arguably the most significant development in tribal criminal jurisdiction, however, was the Supreme Court’s 1978 decision in *Oliphant v. Suquamish Indian Tribe*, which held that Indian tribes have no criminal jurisdiction over non-Indians.⁶⁵ The Court based its holding in large part on the theory that tribes “submit[ted] to the overriding sovereignty of the United States,” thereby forfeiting the power they may have had earlier.⁶⁶ This “implicit divestiture” doctrine, as it later came to be known, formed the foundation for a new and controversial principle that shaped decades of the Court’s federal Indian law jurisprudence.⁶⁷ The fallout from *Oliphant* left tribes powerless and completely reliant on the federal government (or state governments in Public Law 280 states) to investigate and prosecute crimes committed by non-Indians on Indian lands.⁶⁸ Geographic isolation and mistrust made federal law enforcement and prosecutors uniquely ill-suited to enforce criminal laws—particularly those as personal and localized as domestic violence laws—on tribal lands as crime and violence flourished over the ensuing years.⁶⁹ Federal policy languished at this nadir of injustice for nearly forty years.

B. RECENT DEVELOPMENTS: THE TRIBAL LAW AND ORDER ACT OF 2010 & THE VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2013

Major change in Federal Indian policy eluded tribal leaders and survivors of domestic violence for decades.⁷⁰ Finally, by the mid-2000s, recognition of the problem on Native lands began to move into the national spotlight.⁷¹ A “convergence of media coverage, targeted advocacy, coalition building, and lobbying” would be the foundation upon which Congress enacted two laws signaling a marked change: the Tribal Law and Order Act of 2010 (TLOA) and, soon after it, VAWA 2013.⁷²

63. Riley, *supra* note 12, at 1579 (footnotes omitted).

64. *See id.* at 1579, 1620.

65. 435 U.S. 191, 212 (1978).

66. *Id.* at 210; *see also* POMMERSHEIM, *supra* note 41, at 219 (discussing the *Oliphant* decision).

67. Lance F. Sorenson, *Tribal Sovereignty and the Recognition Power*, 42 AM. INDIAN L. REV. 69, 82–89 (2017).

68. *See* Hand & Koelsch, *supra* note 47, at 197.

69. *Id.* at 197–98; Riley, *supra* note 12, at 1582–83.

70. Riley, *supra* note 12, at 1584.

71. SARAH DEER, THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA 99 (2015).

72. Riley, *supra* note 12, at 1584–85.

1. *The Tribal Law and Order Act of 2010*

TLOA was based on several key findings, among them that the complex criminal jurisdiction scheme in Indian country has had a significant adverse effect on public safety in Indian communities.⁷³ TLOA contains three key provisions. First, TLOA grants enhanced sentencing authority to tribes (amending the Indian Civil Rights Act), which allows tribes to sentence criminal defendants to up to three years imprisonment and a \$15,000 fine.⁷⁴ But the enhanced penal authority under TLOA is only available to tribal courts that ensure certain procedural safeguards,⁷⁵ and may only be exercised over specific crimes.⁷⁶ TLOA did nothing to expand the jurisdictional reach of tribal courts, leaving in place the framework of *Oliphant*. Second, TLOA contains a transparency measure that requires the federal government to compile and report crimes that occur in Indian country that federal prosecutors decline to prosecute.⁷⁷ The third key provision was the creation and funding of the Indian Law and Order Commission, tasked with conducting a “comprehensive study of law enforcement and criminal justice in tribal communities.”⁷⁸ The Indian Law and Order Commission’s charter resulted in the 2013 publication *A Roadmap for Making Native America Safer*, which advocated for tribe-centric solutions and greater cooperation from federal and state law enforcement agencies.⁷⁹

2. *The Violence Against Women Reauthorization Act of 2013*

Shortly after the passage of TLOA, another radical shift in federal Indian policy occurred in response to the epidemic of domestic violence in Indian country. In the wake of *Oliphant*, stories emerged of non-Indian batterers emboldened to victimize their Indian partners *because* of the immunity they enjoyed on Indian lands.⁸⁰ The story of survivors like Diane Millich, a native of the Southern Ute Tribe in southern Colorado, sent chills all the way to Congress:

At age twenty-six Millich married a white man, and the couple moved to her home on the Southern Ute reservation in Colorado. Shortly after they were

73. See Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234, 124 Stat. 2279 (codified as amended at 25 U.S.C. § 1302 (2012)).

74. *Id.*

75. Among the requirements, the tribal court must: (1) provide equivalent effective assistance of counsel, (2) provide a judge licensed to practice law in any jurisdiction, and (3) make records publically available. *Id.*

76. *Id.*

77. *Id.* §§ 211–12. For the most recent TLOA report as of this Note’s publication, see U.S. DEP’T OF JUSTICE, INDIAN COUNTRY INVESTIGATIONS AND PROSECUTIONS 3, 29–30 (2018), <https://www.justice.gov/tribal/page/file/1113091/download> (reporting 891 declined prosecutions in calendar year 2017, 37% of the DOJ’s Indian country caseload). The DOJ maintains that “[d]eclinations alone do not provide an accurate accounting of the [United States Attorney’s Offices’] handling of Indian country criminal cases.” *Id.* at 38.

78. Tribal Law and Order Act of 2010 § 235, 124 Stat. at 2282, 2283 (codified as amended at 25 U.S.C. § 1302).

79. INDIAN LAW & ORDER COMM’N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES vii (2013), https://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf [hereinafter ROADMAP].

80. RICHLAND & DEER, *supra* note 37, at 188.

married, he began beating her. During repeated bouts of violence, Millich called tribal police and county sheriffs, but to no avail. Because her husband was non-Indian, the Southern Ute Tribal Police had no jurisdiction over him; because she was a Native American on tribal land, the La Plata County sheriff deputies had no jurisdiction either. In this “jurisdictional black hole” only federal law enforcement officials could prosecute the perpetrator, and Millich’s pleas for help went nowhere. Millich has recounted that, “[a]fter one beating, my ex-husband called the tribal police and the sheriff’s department himself, just to show me that no one could stop him.” Eventually, he stormed into her workplace with a gun and shot her coworker, who took a bullet to the shoulder to save her life. The perpetrator was only arrested after investigators “use[d] a tape measure to sort out jurisdiction, gauging the distance between the barrel of the gun and the point of bullet impact to persuade the local police to intervene.”⁸¹

Stories like these were all too common in the post-*Oliphant* world.

Along with tribal advocates and others, Congress responded with a groundbreaking piece of legislation in VAWA 2013, which sweepingly declared “the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.”⁸² This SDVCJ provision, or “partial-*Oliphant* fix” as commentators referred to it, mended part of the hole left by *Oliphant* by restoring tribal jurisdiction over crimes of domestic violence committed by non-Indians on tribal lands.⁸³ VAWA 2013 also provided tribal courts “full civil jurisdiction to issue and enforce protection orders involving any person,” allowing tribes to enforce civil protection orders consistent with federal law and due process.⁸⁴

Tribal use of the SDVCJ provisions, however, is limited in several respects. The crime itself must be “domestic violence or dating violence that occurs in the Indian country of the participating tribe,” or a violation of a protection order issued against the non-Indian defendant that is enforceable by the Indian tribe.⁸⁵ Additionally, a tribe can only exercise jurisdiction over non-Indian defendants

81. Riley, *supra* note 12, at 1590–91 (alterations in original) (footnotes omitted) (first quoting Jonathan Weisman, *Measure to Protect Women Stuck on Tribal Land Issue*, N.Y. TIMES (Feb. 10, 2013), <http://www.nytimes.com/2013/02/11/us/politics/violence-against-women-act-held-up-by-tribal-land-issue.html>; then quoting Laird, *supra* note 27; and then quoting Weisman, *supra*).

82. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54 (codified as amended at 25 U.S.C. § 1304(b)(1) (Supp. I 2013)).

83. See RICHLAND & DEER, *supra* note 37, at 188; Riley, *supra* note 12, at 1591.

84. Violence Against Women Reauthorization Act of 2013 § 905, 127 Stat. 54 (codified as amended at 18 U.S.C. § 2265(e) (Supp. I 2013)).

85. 25 U.S.C. § 1304(c)(1). The Act 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 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.

Id. § 1304(a)(2). The Act defines “dating violence” as “violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.” *Id.* § 1304(a)(1).

with sufficient “ties to the Indian tribe,” defined as a defendant who: (1) resides in the territory of the Indian tribe; (2) is employed by the Indian tribe; or (3) is a “spouse, intimate partner, or dating partner” of a member or resident of a participating Indian tribe.⁸⁶

As with TLOA, a tribe may only exercise SDVCJ if the tribe provides heightened procedural protections to defendants—protections the tribe would not otherwise be required to provide to Indian defendants.⁸⁷ If the tribe seeks to punish by any term of imprisonment, all procedural requirements of TLOA must be satisfied, including providing the defendant effective assistance of counsel, using a presiding judge licensed to practice law, and making records of the proceeding publically available.⁸⁸ In addition to the TLOA requirements, tribes exercising SDVCJ must provide defendants a right to jury trial representing a “cross section of the community” that does not specifically exclude any group of people.⁸⁹ Defendants must also be notified of all their procedural rights, including the right to stay their detention by the tribe after filing a writ of habeas corpus in federal court.⁹⁰ If a tribe cannot provide or fails to provide the requisite protections to a non-Indian defendant, the tribe has no power under the law to convict that defendant.⁹¹

Finally, VAWA 2013 authorized \$5 million to be appropriated each fiscal year from 2014 through 2018 to aid tribes in their exercise of SDVCJ and to assist tribal victims of domestic violence.⁹² This generally recognizes the extraordinary costs that coincide with implementing an often entirely new justice system that is compatible with SDVCJ. As Professor Riley notes, VAWA 2013’s funding provisions also act to support and recognize tribes’ inherent rights to exercise, where appropriate, their own “culturally suitable” alternatives to incarceration.⁹³ However, the funding authorized in VAWA 2013 has fallen short of expectations in several respects.⁹⁴

86. *Id.* § 1304(b)(4)(B).

87. *See generally id.* § 1302 (discussing constitutional restraints).

88. *Id.* § 1304(d) (incorporating by reference sections of the Tribal Law and Order Act of 2010).

89. *Id.*

90. *Id.* § 1304(e)(2). For further discussion of the implications of the habeas relief available under SDVCJ prosecutions, see generally Hunter Cox, *ICRA Habeas Corpus Relief: A New Habeas Jurisprudence for the Post-Oliphant World?*, 5 AM. INDIAN L.J. 596 (2017).

91. Another VAWA 2013 provision requires a tribe exercising SDVCJ to provide “all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.” 25 U.S.C. § 1304(d)(4). Congress debated this provision but declined to clarify it prior to passage of the Act. Riley, *supra* note 12, at 1594 n.151 (“Although there was some discussion and debate about this provision of the statute, its scope and content was not clarified prior to the pass of the Act.”).

92. 25 U.S.C. § 1304(h).

93. *Id.* § 1304(f)(1)(G) (including as an option for strengthening tribal criminal justice systems “culturally appropriate services and assistance for victims and their families”); Riley, *supra* note 12, at 1592.

94. *See infra* Part II.

II. WHERE WE ARE TODAY

This Part discusses the early effect SDVCJ has had on tribal nations, relying largely on the 2018 National Congress of American Indians (NCAI)⁹⁵ report on the five-year effects of VAWA 2013. This Part closes with an examination of contemporary criticisms and the constitutional arguments for and against tribal exercise of SDVCJ.

A. EARLY EFFECTS & THE NCAI FIVE-YEAR REPORT

Although VAWA 2013 was signed into law on March 7, 2013, the SDVCJ provisions had a two-year delaying feature, preventing any tribe from exercising SDVCJ for the Act's first two years unless the tribe was accepted to participate in the "pilot project" administered by the United States Department of Justice.⁹⁶ Three tribes participated in the pilot long enough to provide data to a report organized by the National Congress of American Indians to study early effects and give recommendations.⁹⁷ The three tribes, the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) in Oregon, the Pascua Yaqui Tribe in Arizona, and the Tulalip Tribes of Washington, were approved to implement SDVCJ in February 2014 and all had cases during the pilot program window.⁹⁸

In the year spanning February 20, 2014 through March 6, 2015, "the three original pilot tribes had a total of 27 SDVCJ cases involving 23 separate offenders. Of the 27 cases, 11 were ultimately dismissed for jurisdictional or investigative reasons, 10 resulted in guilty pleas, 5 were referred for federal prosecution and 1 offender was acquitted by a jury."⁹⁹ These results were generally seen as a resounding success for the tribal communities, particularly those involved in the program.¹⁰⁰ Reporting rates are up, which in the context of

95. The National Congress of American Indians (NCAI) is an organization representing the interests of American Indian and Alaska Natives. Its stated purposes are:

to serve as a forum for unified policy development among tribal governments in order to: (1) protect and advance tribal governance and treaty rights; (2) promote the economic development and health and welfare in Indian and Alaska Native communities; and (3) educate the public toward a better understanding of Indian and Alaska Native tribes.

About NCAI, NAT'L CONG. AM. INDIANS, <http://www.ncai.org/about-ncai> (last visited Mar. 19, 2019).

96. 25 U.S.C. § 1304(h).

97. Three other tribes, approved to implement SDVCJ on March 6, 2015, were the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation in Montana and the Sisseton Wahpeton Oyate of the Lake Traverse Reservation in North and South Dakota. NAT'L CONG. OF AM. INDIANS, SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION PILOT PROJECT REPORT 40 (2015), http://www.ncai.org/attachments/NewsArticle_VutTUSYSfGPRpZQRYzWcuLekuVNeeTAOBBwGyvkWYwPRUJOioqL_SDVCJ%20Pilot%20Project%20Report_6-7-16_Final.pdf.

98. *Id.* at 1–2.

99. *Id.* at 5.

100. See 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 on S. 2785, S. 2916, and S. 2920 Before the S. Comm. on Indian Affairs*, 114th Cong. 15 (2016) (prepared statement of Tracy Toulou, Director, Office of Tribal Justice, U.S. Department of Justice) ("The three original Pilot Project tribes achieved notable success implementing SDVCJ during the Pilot Project period from February 2014 through March

domestic violence in Indian communities is likely a positive sign—signifying an increased confidence that perpetrators will be held accountable.¹⁰¹ But Professor Riley also identified that the pilot tribes already had essentially all of the procedural requirements in place to implement SDVCJ, such as law-trained judges and recognition of indigent defendants' right to counsel.¹⁰² Other tribes without the resources and judicial infrastructure to take advantage of VAWA 2013 simply do not have any reasonable ability to implement these laws on their own lands.¹⁰³

To date, eighteen of the 573 federally recognized tribes¹⁰⁴ are known to have implemented SDVCJ, most of which have already begun to prosecute non-Indian perpetrators of domestic violence.¹⁰⁵ Those implementing tribes vary in size, population, diversity, and geographic location. They include widely diverse populations of non-Indians living on their tribal lands, and are located in the Northwest Coast, the American Southwest, the Great Plains, and the Southeast.¹⁰⁶ Additionally, fifty total tribes participate in the Inter-Tribal Technical Assistance Working Group (ITWG), a collaborative group established by the U.S. Department of Justice to facilitate the sharing of information and best practices in implementing SDVCJ.¹⁰⁷

The 2018 NCAI report on the five-year effects of SDVCJ, the first of its kind, provides a comprehensive overview of the current status and effectiveness

2015.”); Riley, *supra* note 12, at 1595 (“By most accounts, TLOA and VAWA stand as enormous victories for Indian country.”).

101. Riley, *supra* note 12, at 1605; *cf.* BACHMAN ET AL., *supra* note 18, at 27 (describing domestic violence as a historically underreported crime).

102. Riley, *supra* note 12, at 1606.

103. *See id.* at 1596 (“For some tribes—particularly—those that do not already have criminal courts in place, have very small reservation populations to draw from for human capital, or have limited funds with overwhelming social problems requiring their scant resources—implementation may not be feasible or even desirable.”).

104. Jefferson Keel, President, Nat’l Cong. of Am. Indians, Remarks at the Sixteenth Annual State of Indian Nations Address (Feb. 12, 2018).

105. FIVE-YEAR REPORT, *supra* note 28, at 1, 5 n.iv, 42–60 (“Since the end of the pilot period, tribes are not required to notify the DOJ if they begin exercising SDVCJ. This report covers the 18 implementing tribes that have reported implementation to NCAI and its partner technical assistance providers, although it remains a possibility that there are other tribes implementing SDVCJ.”). Those eighteen implementing tribes are: the Pascua Yaqui Tribe in Arizona, the Tulalip Tribes in Washington, the Confederated Tribes of the Umatilla Indian Reservation in Oregon, the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation in Montana, the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation in North and South Dakota, the Little Traverse Bay Band of Odawa Indians in Michigan, the Alabama-Coushatta Tribe of Texas, the Choctaw Nation in Oklahoma, the Eastern Band of Cherokee Indians in North Carolina, the Seminole Nation in Oklahoma, the Sac and Fox Nation in Oklahoma, the Kickapoo Tribe of Oklahoma, the Nottawaseppi Huron Band of Potawatomi in Michigan, the Muscogee (Creek) Nation in Oklahoma, the Standing Rock Sioux Tribe in North and South Dakota, the Sault Ste. Marie Tribe of Chippewa in Michigan, the Chitimacha Tribe of Louisiana, and the Lower Elwha Klallam Tribe in Washington. *Id.* at 6.

106. *Id.* at 17–18.

107. *Id.* at 1; *see also* NAT’L CONG. OF AM. INDIANS, POLICY UPDATE 20–21 (2017), http://www.ncai.org/attachments/PolicyPaper_zZTmwUgiMOBFwXQKgNIDMPzHsGLyRoEARrzjCwRJJz nxBGJFJ_Annual%20Policy%20Update%202017%20-%20Final%2010.13.pdf.

of the law.¹⁰⁸ The report compiles critical data and stories from all corners of the SDVCJ-exercising world, with some of the key prosecution numbers as follows:

Of the 143 arrests for SDVCJ-related crimes, 52 percent have resulted in convictions, while 18 percent have resulted in acquittals or dismissals. Of the cases that were ultimately filed, 21 percent were dismissed or resulted in acquittals. Tribes report that the cases are dismissed, or they are unable to prosecute for a range of reasons including: uncooperative witnesses, insufficient evidence, determination that the tribe lacks jurisdiction, filing errors, plea deals on other cases, or detention by another jurisdiction.¹⁰⁹

As with most American court systems, the majority of SDVCJ convictions came through plea bargains, with relatively few jury trials.¹¹⁰ In Summer 2017, the Pascua Yaqui Tribe became the first to convict a defendant by jury trial through an exercise of SDVCJ.¹¹¹ Recognizing the roles non-Indian defendants may have in tribal communities, the exercising tribes also emphasized batterer intervention or other tribal rehabilitation programs in their proceedings.¹¹² The report concluded by recognizing the serious limitations the current law imposes on tribes implementing SDVCJ, including a bevy of ancillary crimes not chargeable by the tribe such as child abuse and drug and alcohol crimes.¹¹³ Although VAWA 2013 authorized \$5 million to be spent on SDVCJ implementation each fiscal year from 2014 to 2018, “[o]ver the past two years, OVW has awarded \$5,684,939 in competitive grant funds to 14 different tribes to support their implementation of SDVCJ. Only four implementing tribes—Tulalip, Little Traverse Bay Band, Eastern Band of Cherokee Indians, and Standing Rock—have received any of these grant funds.”¹¹⁴ Launching and exercising SDVCJ is still prohibitively expensive for nearly all tribes.¹¹⁵

In encouraging recent news, it appears the Justice Department has committed to providing additional funds in fiscal year 2018. By the end of September 2018, the Office on Violence Against Women (OVW) will award nearly \$55 million to tribes and tribal nonprofit organizations through VAWA

108. See generally FIVE-YEAR REPORT, *supra* note 28.

109. *Id.* at 18.

110. *Id.* at 19.

111. Debra Utacia Krol, *Pascua Yaqui Tribe First to Use VAWA to Prosecute Non-Indian*, INDIAN COUNTRY TODAY (June 9, 2017), <https://newsmaven.io/indiancountrytoday/archive/pascua-yaqui-tribe-first-to-use-va-wa-to-prosecute-non-indian-DaUpRysbBkCp7qEnIVXnJQ/>.

112. FIVE-YEAR REPORT, *supra* note 28, at 20.

113. *Id.* at 22–26.

114. *Id.* at 30 (footnote omitted); see also OFFICE ON VIOLENCE AGAINST WOMEN (OVW), U.S. DEP’T OF JUSTICE, OVW FISCAL YEAR 2017 GRANTS TO TRIBAL GOVERNMENTS TO EXERCISE SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION 1 (2017), <https://www.justice.gov/ovw/page/file/915261/download> (providing an example of a spending program application authorized pursuant to 25 U.S.C. § 1304(f), described *supra* Part I).

115. FIVE-YEAR REPORT, *supra* note 28, at 29–30.

programs, which includes a carve-out for the exercise of SDVCJ.¹¹⁶ It remains to be seen what portion of that funding will go towards SDVCJ implementation.

B. CURRENT CRITICISMS

The academic and popular discourse around SDVCJ is, on the whole, very positive. By most accounts, the passage of VAWA 2013 was a tremendous victory for tribal nations nationwide, signifying an incremental step towards federally supported Indian self-determination.¹¹⁷ Indigenous leaders like Keith Harper, a former ambassador to the United Nations Human Rights Council, described SDVCJ as placing tribal communities “in a better posture to address the challenges they face,” while making “safer and ultimately more prosperous communities.”¹¹⁸ But like all things, SDVCJ is not without its share of skeptics. This Part addresses some of the major criticisms and concerns regarding SDVCJ.

1. *Constitutionality of Special Domestic Violence Criminal Jurisdiction*

SDVCJ has never been challenged in court. As such, the debate surrounding its constitutionality remains only academic. But that is not to say such debate is irrelevant. Given the significance of defendants’ procedural rights in criminal proceedings and the prospect of avoiding criminal punishment on constitutional grounds, it is only a matter of time before a defendant decides to challenge SDVCJ. The weight of such a decision and the uncertainties in relevant constitutional doctrines, discussed in depth below, could very well prompt the Supreme Court to take up any eventual appeal.

Prominent among critics of SDVCJ is Paul Larkin of the Heritage Institute,¹¹⁹ who has argued that by enacting VAWA 2013’s SDVCJ provisions, Congress violated structural constitutional safeguards in Articles II and III of the United States Constitution.¹²⁰ Article II provides for the appointment power of all “Officers of the United States” in the President, by and with the advice and consent of the Senate.¹²¹ Larkin’s argument asserts that SDVCJ runs afoul of the Executive’s Article II appointment power because tribal judges are appointed according to tribes’ own law and custom and not by the President of the United

116. *Acting Associate Attorney General Jesse Panuccio Delivers Keynote Address at 2018 Violence Against Women Tribal Consultation*, U.S. DEP’T JUST. (Aug. 21, 2018), <https://www.justice.gov/opa/speech/acting-associate-attorney-general-jesse-panuccio-delivers-keynote-address-2018-violence>.

117. *See, e.g.*, Brian Cladoosby, President, Nat’l Cong. of Am. Indians, Remarks at the Twelfth Annual State of Indian Nations Address (Jan. 30, 2014).

118. Krol, *supra* note 111 (internal quotation marks omitted) (quoting Keith Harper, Cherokee attorney and former ambassador to the U.N. Human Rights Council).

119. Paul Larkin is a Senior Legal Research Fellow at the Heritage Institute, an organization with a mission to “formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense.” *About Heritage*, HERITAGE FOUND., <https://www.heritage.org/about-heritage/mission> (last visited Mar. 19, 2019).

120. *See* Paul Larkin, Jr., *Domestic Abuse on Indian Reservations: How Congress Failed to Protect Women Against Violence*, HERITAGE FOUND. (Feb. 19, 2014), https://www.heritage.org/civil-rights/report/domestic-abuse-indian-reservations-how-congress-failed-protect-women-against#_ftnref13.

121. U.S. CONST. art. II, § 2.

States.¹²² Since a tribal judge ordering a non-Indian to imprisonment through SDVCJ is “a classic example of the type of government power that only a person properly appointed under Article II can exercise,” Congress thereby improperly ‘appoints’ officers of the United States in violation of Article II when it allows tribes to exercise SDVCJ over non-Indian defendants.¹²³

Article III vests the judicial power of the United States in the Supreme Court and such inferior courts subsequently established by Congress, and provides life tenure and guaranteed salaries to judges.¹²⁴ Larkin’s Article III argument posits that tribal judges ordering non-Indians to imprisonment is a quintessential exercise of the “Judicial Power” of the United States.¹²⁵ And since tribal judges do not enjoy the protections of life tenure and salary assurances, Larkin argues, any tribal exercise of SDVCJ violates Article III on its face.¹²⁶

Larkin’s arguments are intriguing, but not quite complete. As Tom Gede,¹²⁷ former Commissioner of the Indian Law and Order Commission, has suggested, Larkin’s Article II and III arguments assume SDVCJ involves a *delegation* of U.S. criminal jurisdiction to tribes, rather than a tribal exercise of inherent authority.¹²⁸ Put another way, if the basis for exercising criminal jurisdiction over non-Indians comes from within tribes’ sovereign authority, Articles II and III simply would not pose any structural, constitutional bar to tribes prosecuting non-Indians. Under such a framework, tribal judges prosecuting non-Indians through SDVCJ would not be “Officers of the United States,” and thus would not require presidential appointment.¹²⁹ Further, tribes exercising SDVCJ under an inherent authority would not be wielding the “Judicial Power” of the United States—tribes would simply be exercising their *own* power—and thus tribal judges would not be subject to life tenure requirements and protection against salary reduction. This reasoning reflects one of the strongest positions on tribal authority, one which is consistent with the broadest views of tribal sovereignty and power.

Recall that Congress described the “Nature of the Criminal Jurisdiction” (that is, the nature of SDVCJ) as follows: “the powers of self-government of a participating tribe include the *inherent* power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.”¹³⁰ Taken at face value, this passage leaves no

122. Larkin, *supra* note 120.

123. *Id.* Larkin’s article on the Heritage.org website is an abridged version of a full-length article previously published. See Paul J. Larkin, Jr. & Joseph Luppino-Esposito, *The Violence Against Women Act, Federal Criminal Jurisdiction, and Indian Tribal Courts*, 27 *BYU J. PUB. L.* 1, 20–24 (2012).

124. U.S. CONST. art. III, § 1.

125. Larkin, *supra* note 120.

126. *Id.*

127. Thomas F. Gede is of counsel at the firm Morgan, Lewis & Bockius LLP. He has a distinguished career serving in numerous capacities in government, academia, and the private sector in the field of American Indian Law.

128. Laird, *supra* note 27.

129. See Price, *supra* note 39, at 700.

130. 25 U.S.C. § 1304(b) (Supp. I 2013) (emphasis added).

doubt as to how Congress *intended* to frame the power behind SDVCJ, which undermines Larkin's core assumption of delegation. But it remains to be seen whether congressional intent is the determinative factor.

Putting aside for a moment the effect of Congress's intent in the SDVCJ equation, there lies another, more severe obstacle for those who would propose an "inherent" basis for tribal jurisdiction under VAWA 2013—the confusion apparent in the Supreme Court's decisions regarding inherent tribal power over the last forty years.¹³¹ To start with, any view supporting SDVCJ under the theory of inherent tribal authority is inconsistent with *Oliphant* in that the Supreme Court refused to recognize any inherent power of tribes to exercise criminal jurisdiction over non-Indians.¹³² After all, in *Oliphant*, Justice Rehnquist reasoned in an argument based on historical and political deference that "absent affirmative delegation of such power by Congress," there was no right for a tribe to try a non-Indian in criminal court.¹³³ But *Oliphant* did not clarify just what "affirmative [congressional] delegation" meant and to what extent Congress could exercise such a power.

The Court's later decisions in *Duro v. Reina*¹³⁴ and *United States v. Lara*¹³⁵ answer some of these questions, but only muddy the water elsewhere. *Duro* followed *Oliphant* in holding that Indian tribes may not assert criminal jurisdiction over nonmember Indians, reasoning that tribes' "dependent status" to the federal government is inconsistent with the right to freely exert authority over external affairs.¹³⁶ Congress subsequently passed legislation abrogating the Court's holding in *Duro* (the so-called "*Duro* fix"), giving criminal jurisdiction over nonmember Indians back to tribes.¹³⁷ In the *Duro* fix, Congress—using strikingly similar language to the SDVCJ provisions in VAWA 2013—"recognized and affirmed" the "inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians."¹³⁸ Some ten years later in *Lara*, the Court upheld the *Duro* fix, reasoning that Congress had the power to "rela[x] restrictions on the bounds of the inherent tribal authority that the United States recognizes."¹³⁹ The majority supported the holding by reasoning that Congress simply modified *political* restrictions placed on tribes' exercise of inherent

131. See POMMERSHEIM, *supra* note 41, at 297 ("This pattern of doctrinal confusion has become more predominant in recent times because the Supreme Court has arrogated to itself a judicial version of plenary power that has muddied the jurisprudential waters of Indian law even further.").

132. See *Oliphant*, 435 U.S. at 206–12.

133. *Id.* at 208; see also *United States v. Lara*, 541 U.S. 193, 221 (2004) (5–4 decision) (Thomas, J., concurring in the judgment) ("*Oliphant* . . . held that tribes could not enforce their criminal laws against non-Indians.").

134. 495 U.S. 676 (1990).

135. *Lara*, 541 U.S. 193.

136. *Duro*, 495 U.S. at 686–88.

137. See Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077, 104 Stat. 1856, 1892 (amended 1991); Act of Oct. 28, 1991, Pub. L. No. 102-137, § 1, 105 Stat. 646 (codified as amended at 25 U.S.C. § 1301(2) (2012)).

138. Price, *supra* note 39, at 677 (alteration in original) (internal quotation marks omitted) (quoting Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077, 104 Stat. 1856, 1892 (amended 1991)).

139. *Lara*, 541 U.S. at 207.

power—restrictions that were not in and of themselves constitutionally based.¹⁴⁰ Lastly, and importantly, the majority reasoned that the power recognized to tribes in the *Duro* fix was not “delegated” federal authority as contemplated in *Duro* and *Oliphant*; rather, Congress achieved the same end by removing restrictions on tribal sovereignty.¹⁴¹

Contrary to the ease with which Justice Breyer reasoned through the majority opinion in *Lara*, the five-four decision and accompanying concurrences and dissents leave the Court’s past forty years of federal Indian law jurisprudence even less settled.¹⁴² As Justice Kennedy’s concurrence made clear, the issue before the Court in *Lara*—the applicability of the “separate sovereign” doctrine for defendant’s double jeopardy claim—may have limited the Court’s full analysis of the constitutional implications of the *Duro* fix.¹⁴³ Indeed, Justice Thomas (also concurring in the judgment) called on the Court to “reexamine the premises and logic” of the Court’s tribal sovereignty cases.¹⁴⁴ Further, the dissent by Justice Souter, joined by Justice Scalia, simply refused to accept any other basis for expanded tribal authority aside from a delegation of federal authority, regardless of how Congress worded the statute.¹⁴⁵

The more recent decision in *United States v. Bryant*¹⁴⁶ is also relevant. In *Bryant*, the Court considered whether an Indian defendant’s uncounseled conviction in a tribal court proceeding could serve as a predicate offense for a U.S. habitual offender statute.¹⁴⁷ The Court unanimously held that since the tribal court conviction complied with the Indian Civil Rights Act, it could be used as a predicate offense in a U.S. court without violating the defendant’s

140. *Id.* at 199–200.

141. *Id.* at 207.

142. Price, *supra* note 39, at 678–79.

143. *Lara*, 541 U.S. at 211–14 (Kennedy, J., concurring in the judgment).

144. *Id.* at 214 (Thomas, J., concurring in the judgment).

145. *Id.* at 227–28 (Souter, J., dissenting).

146. 136 S. Ct. 1954 (2016).

147. *Id.* at 1962; The Court described the background of the case as follows:

Respondent Bryant’s conduct is illustrative of the domestic violence problem existing in Indian country. During the period relevant to this case, Bryant, an enrolled member of the Northern Cheyenne Tribe, lived on that Tribe’s reservation in Montana. He has a record of over 100 tribal-court convictions, including several misdemeanor convictions for domestic assault. Specifically, between 1997 and 2007, Bryant pleaded guilty on at least five occasions in Northern Cheyenne Tribal Court to committing domestic abuse in violation of the Northern Cheyenne Tribal Code. On one occasion, Bryant hit his live-in girlfriend on the head with a beer bottle and attempted to strangle her. On another, Bryant beat a different girlfriend, kneeling her in the face, breaking her nose, and leaving her bruised and bloodied.

For most of Bryant’s repeated brutal acts of domestic violence, the Tribal Court sentenced him to terms of imprisonment, never exceeding one year. When convicted of these offenses, Bryant was indigent and was not appointed counsel. Because of his short prison terms, Bryant acknowledges, the prior tribal-court proceedings complied with ICRA, and his convictions were therefore valid when entered. Bryant has never challenged his tribal-court convictions in federal court under ICRA’s habeas corpus provision.

Id. at 1963.

Sixth Amendment right to counsel.¹⁴⁸ The Court's recognition of the severity of the domestic violence problem in Indian country, albeit in dicta, is encouraging.¹⁴⁹ And the Court's relatively narrow holding assumed, as Justice Thomas asserts in his concurring opinion, "that tribes' retained sovereignty entitles them to prosecute tribal members in proceedings that are not subject to the Constitution."¹⁵⁰ But no direct challenge to TLOA (or SDVCJ, for that matter) was before the Court, so these premises supporting tribal sovereignty may not be persuasive authority in a future case challenging SDVCJ.

All this is to say that the Court's more recent Indian law decisions do not completely clear up the issue surrounding the constitutionality of SDVCJ. In fact, one of the points relied upon by the *Lara* majority was the "limited" change at issue in that case—there, the power to prosecute nonmember Indians.¹⁵¹ Surely the Court would not view the power to prosecute a non-Indian, U.S. citizen as a "limited" change from tribes' recognized inherent power to prosecute their own members—distinguishing SDVCJ from the *Duro* fix upheld in *Lara*. Not least in the considerations is the scope of Congress's "plenary power" in Indian affairs and the effect of congressional intent to support SDVCJ.¹⁵² The recent transformation of the makeup of the Supreme Court, with the additions of Justice Neil Gorsuch and Justice Brett Kavanaugh, further casts uncertainty over the direction of future federal Indian law. While colorable arguments can be made on either side of the constitutionality of SDVCJ under the Court's current precedent, Indian victims of non-Indian perpetrated domestic violence need concrete solutions.¹⁵³

Fortunately, uncertainty in current law is not the end of the analysis. Professor Zachary Price¹⁵⁴ in his article, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, presents a compelling case for a pragmatic resolution to the problems encountered in defining the boundaries and sources of constitutional tribal jurisdiction.¹⁵⁵ Professor Price argues that, while the

148. *Id.* at 1966.

149. *See id.* at 1963 (noting that the Respondent's conduct is "illustrative of the domestic violence problem" in Indian country).

150. *Id.* at 1967–69 (Thomas, J., concurring) (calling again for a reexamination of the Court's Indian law precedent).

151. *Lara*, 541 U.S. at 204.

152. For further discussion on the plenary power doctrine and its effect on SDVCJ, see Margaret H. Zhang, Comment, *Special Domestic Violence Criminal Jurisdiction for Indian Tribes: Inherent Tribal Sovereignty Versus Defendants' Complete Constitutional Rights*, 164 U. PA. L. REV. 243, 274–76 (2015); cf. *Lara*, 541 U.S. at 224–26 (Thomas, J., concurring in the judgment) (criticizing the constitutional basis for the congressional Indian plenary power doctrine).

153. For an argument urging the constitutionality of SDVCJ under the majority opinion in *Lara*, see M. Brent Leonhard, *Closing a Gap in Indian Country Justice: Oliphant, Lara, and DOJ's Proposed Fix*, 28 HARV. J. ON RACIAL & ETHNIC JUST. 117, 171 (2012); cf. Larkin, *supra* note 119 (arguing that section 904 of VAWA, which grants Indian tribal courts concurrent jurisdiction, is unconstitutional and "should be struck down").

154. Professor Zachary Price is an Associate Professor at the University of California, Hastings College of the Law, where he specializes in constitutional law, civil procedure, and federal Indian law, among other areas.

155. *See generally* Price, *supra* note 39 (proposing a framework based on "divided sovereignty" and the parallels between tribal, territorial, and related federal-state contexts).

“inherent” versus “delegated” framework adopted by various courts and scholars is conceptually appealing, it suffers from fatal doctrinal problems that may eventually undercut the core goals of tribal sovereignty.¹⁵⁶ For instance, in the context of state-conducted Public Law 280 prosecutions, a consistent application of case law under the “inherent” authority doctrine might lead such prosecutions to be “shoehorned into the inherent authority framework by characterizing such prosecutions as exercises of a reactivated inherent authority of states over their territory.”¹⁵⁷ This has potentially damning consequences to the tribes that gained so much with the passage of VAWA 2013 by further detracting from the tribal sovereignty remaining over Indian lands. Further, the same “inherent” versus “delegated” framework has consistently led the Supreme Court to progressively curtail what little has remained of tribal sovereignty in the last forty years.¹⁵⁸

Professor Price presents his conceptual alternative by “[r]ecognizing the interplay of federal and local authority at work in tribal . . . criminal jurisdiction,” and analyzing constitutional issues based on comparisons between tribal, territorial, and state contexts.¹⁵⁹ In his view, normative considerations and practical realities can lead to a constitutionally permissible interpretive framework of “divided sovereignty,” where many of the conceptually problematic aspects of inherent authority disappear.¹⁶⁰ Instead of focusing primarily on the source of power being exercised—that is, whether a power is inherent in a subordinate government or delegated from the superior government—the relevant focus shifts to the *divisions* of power characteristic within our federal system.¹⁶¹

By adopting Professor Price’s framework, the Article II and III issues raised by Larkin essentially disappear, recognizing that the crimes of domestic violence prosecuted by tribes pursuant to SDVCJ are federally conferred, but realized through the autonomous powers of criminal enforcement in tribal governments.¹⁶² Tribal courts simply enforce and punish local prohibitions against criminal domestic violence. Such a conclusion has long since been implicitly acknowledged by a large body of case law.¹⁶³ This division of sovereignty between tribes and the federal government places SDVCJ prosecution in a separate realm from the typical structural restraints present within the federal government. Since additional practical reasons for federal

156. *Id.* at 663–64; *cf.* Zhang, *supra* note 152, at 263–72 (analyzing SDVCJ’s constitutionality through a binary application of “inherent” versus “delegated” authority).

157. Price, *supra* note 39, at 697; *see also id.* at 692–95.

158. *Id.* at 697–98.

159. *Id.* at 698; *see also id.* at 668.

160. *Id.* at 698. Professor Price notes his article comes from the perspective of “a federal decisionmaker bound to apply federal law and to seek coherent solutions within the existing legal system.” *Id.* at 667.

161. *See id.* at 699–726.

162. *See id.* at 698–99. This thesis bears some recognition to the typical inherent/delegated framework but places the emphasis in a somewhat different place. It instead views the powers of federal and tribal sovereignty as coexistent and intertwined. In places of shared sovereignty, federal individual rights may well bend to compelling tribal interests such as regulating pervasive criminal activity.

163. *Id.*

control are absent (particularly where defendants' procedural protections are mandated, like in VAWA 2013), any remaining argument that a tribal judge should qualify as an "Officer of the United States" falls apart, and no Article II appointment issues or Article III life tenure or salary guarantee issues remain.¹⁶⁴ This Note further considers this framework in conjunction with SDVCJ expansion *infra* Part III.

2. *Other Critiques*

Professor Riley discusses a paradox at the very core of SDVCJ. She elevates the concern that "Indian tribes may only be able to guarantee their sovereign rights to exercise criminal jurisdiction if they do so on the terms of the very government that has, for so long, sought to dismantle tribal justice systems."¹⁶⁵ She refers to this as the "double blind" of the tribal sovereignty SDVCJ embodies.¹⁶⁶ In a sense, tribes are left with the choice of using penal methods that likely do not conform to their history and traditions, or watching their people suffer because they have no effective authority without imitating an American criminal justice system.¹⁶⁷ While the tribes that have implemented SDVCJ appear to be operating under a familiar American-like adversarial system, tribes and tribal leaders have repeatedly expressed the desire to use alternatives to detention when feasible.¹⁶⁸ Such alternative approaches are decidedly more consistent with tribal law and custom.¹⁶⁹

Tribes have historically expressed skepticism around various procedural features of the American criminal justice system. Throughout Indian country, disputes are resolved in justice systems of many varieties, some of which may significantly deviate from American-style courts. Tribes may resolve disputes through informal mechanisms, such as families, clans, talking circles, or elder councils. Tribal leaders have in the past opposed the idea of jury trials, the encouragement of defendants not to speak as to their own guilt or innocence, and an impartial judge with no knowledge of the case, among others. Tribes may, therefore, elect to integrate traditional practices at all stages of the criminal justice process.¹⁷⁰

For example, systems like those of the Yurok Tribe in Northern California have seen strong signs of success in rehabilitating batterers in recent years.¹⁷¹ Judge Abby Abinanti, Chief Judge of the Yurok Tribal Court, has placed an emphasis on developing methods that align with tribal custom prior to Western interruption, incorporating the elder system to intervene and prevent future

164. *See id.* at 699–703.

165. Riley, *supra* note 12, at 1595.

166. *Id.*

167. *See id.*

168. *Id.* at 1624–25.

169. *See id.*

170. *Id.* at 1627 (footnotes omitted).

171. Rebecca Clarren, *Judge Abby Abinanti Is Fighting for Her Tribe—and for a Better Justice System*, NATION (Nov. 30, 2017), <https://www.thenation.com/article/judge-abby-abinanti-is-fighting-for-her-tribe-and-for-a-better-justice-system/>.

violence.¹⁷² In many ways, tribes are in a unique position to implement effective alternatives to incarceration that are tailored to the needs of a much smaller population than most American jurisdictions oversee.¹⁷³

Once again, in order to exercise SDVCJ, a tribe must provide defendants with additional procedural protections and Western judicial infrastructure that are not otherwise mandatory. As these examples have demonstrated, doing so is often directly contrary to tribal tradition and custom.¹⁷⁴ The more ideal goal, according to Professor Riley, is to seek a cultural match between tribal values and contemporary governance.¹⁷⁵ Professor Riley ultimately concludes that adoption of SDVCJ, when appropriate and fiscally possible, presents “an opportunity for tribal governments to exercise, enhance, and enrich tribal sovereignty.”¹⁷⁶

Other commentators have pushed the view that, despite VAWA 2013’s success, SDVCJ does not go nearly far enough. Some push for an expansion of tribal jurisdiction over collateral crimes to domestic violence.¹⁷⁷ Others push for more expansive jurisdiction into crimes such as acquaintance rape, stranger rape, and all child sexual crimes—crimes which are not covered by SDVCJ.¹⁷⁸ Several recent developments in the 115th Congress show significant promise on these fronts.¹⁷⁹

Senate Bill 1986, titled Justice for Native Survivors of Sexual Violence, would amend the SDVCJ section of Indian Civil Rights Act (added in VAWA 2013) to also include tribal jurisdiction over crimes of sexual violence, sex trafficking, and stalking.¹⁸⁰ This provision relies on the same constitutional framework as the *Duro* fix and SDVCJ, affirming “inherent” tribal authority to exercise jurisdiction over such acts.¹⁸¹ Another bill, Savanna’s Act, directs the United States Attorney General to address and coordinate solutions in response to the epidemic of missing and murdered indigenous women.¹⁸² Two other bills would aid funding gaps in Indian country both to survivors of violence and tribal law enforcement services.¹⁸³ One of the most recent bills, the Violence Against Women Reauthorization Act of 2018, combines many of these elements and may

172. *Id.*

173. *See id.* (“The tribe has yet to analyze its recidivism rates overall, but a handful of studies indicate that other tribal courts are achieving better success for their members than are state courts.”).

174. Riley, *supra* note 12, at 1599.

175. *Id.* at 1628.

176. *Id.* at 1574.

177. Quilt et al., *supra* note 29.

178. *See, e.g.,* DEER, *supra* note 71, at 105–06.

179. *See* Lillian Alvernaz, *Still Not Enough*, MS. JD BLOG (Feb. 15, 2018), <https://ms-jd.org/blog/article/still-not-enough>.

180. Justice for Native Survivors of Sexual Violence Act, S. 1986, 115th Cong. § 2 (2017).

181. *See id.*

182. Savanna’s Act, S. 1942, 115th Cong. §§ 1–2 (2017); Savanna’s Act, H.R. 4485, 115th Cong. (2017).

183. *See* SURVIVE Act, S. 1870, 115th Cong. (2017); Tribal Law and Order Reauthorization and Amendments Act of 2017, 115th Cong. (2017).

well form the basis for the eventual legislation.¹⁸⁴ The new legislation may transform SDVCJ to the new “special tribal criminal jurisdiction,” which covers the areas mentioned above along with crimes of child abuse.¹⁸⁵ Regarding the fate of these bills, any challenge to the constitutionality of SDVCJ will have critical implications for the bills’ potential passage, as the constitutional authority for criminal jurisdiction in each bill is shared with VAWA 2013.

III. PATHS FORWARD

This Part attempts to offer a solution focused on how SDVCJ can be improved to best serve Native American victims of domestic violence that occur on tribal lands. Effective law enforcement and penal authority on tribal communities would serve the dual functions of holding offenders accountable and garnering confidence of tribal communities in their power to respond to domestic violence. Domestic violence continues to be an issue of epidemic proportions despite the enactment of VAWA 2013. Domestic violence still occurs at an unacceptably high rate in Indian communities—five times more often than in white communities—and far too often by non-Indian perpetrators.¹⁸⁶

Drawing from the lessons learned through a close examination of the history, implementation, and early successes of SDVCJ, this Part advocates for a legislative expansion tailored to those tribes that cannot feasibly implement the requirements needed to exercise SDVCJ.¹⁸⁷ Defendants’ rights must be protected, but tribal governments should not be powerless to protect their people when the federal government will not act effectively. The safety and well-being of indigenous women depends on a viable solution.

A. PROPOSED SOLUTIONS: AN “SDVCJ Fix”

In the five years since the passage of VAWA 2013, only eighteen known tribes have been able to implement SDVCJ.¹⁸⁸ Indeed, one of the primary reasons, if not *the* primary reason, why SDVCJ has not been more broadly implemented is the lack of resources of prospective tribes.¹⁸⁹ The Pascua Yaqui Tribe described some of the concerns that face tribes looking to employ SDVCJ as follows:

In addition to the direct costs of complying with the prerequisites (indigent defender systems, jury trials, incarceration, etc.), substantial indirect costs are

184. Violence Against Women Reauthorization Act of 2018, H.R. 6545, 115th Cong. § 906 (2018).

185. *Id.* § 906.

186. FIVE-YEAR REPORT, *supra* note 28, at 3.

187. Tribes that *can* feasibly implement the jurisdiction as laid out in VAWA 2013 should still be able to where desirable in the tribe’s own circumstances. In some cases, tribes may wish to adopt this new proposed format regardless of financial considerations. Given the jurisdictional arguments advanced herein, tribes should be able to determine for themselves which type of jurisdiction is most beneficial, the basis for tribal sovereignty being the same in either circumstance.

188. *See* FIVE-YEAR REPORT, *supra* note 28, at 1.

189. *Id.* at 29.

also likely to be required. For example, who will review and propose changes to your laws and procedures? Who will train law enforcement, prosecutors, judges, court staff and defense counsel on the new laws and procedures and how they work? What funding will be required to make these changes? To pay for any additional prosecutors, judges, defense counsel, and court staff? To pay to publish the laws and regulations? To process the licensing and educational requirements? To implement the jury selection process? To pay for incarceration? Where will these funds come from? Is that source of funding stable and reliable?¹⁹⁰

By passing VAWA 2013 and failing to appropriate the funds necessary to allow it to be effective in Indian country over the first years of the program, Congress has effectively acknowledged the problem in Indian country and walked away without committing to solve it. It is time to take an alternate path that can work for *all* victims of inter-racial tribal domestic violence.

As a starting point, scholars and practitioners have advocated for encouraging alternatives to incarceration outside SDVCJ, which are consistent with many tribal traditions and cultures.¹⁹¹ Such dispute resolution procedures have firm roots in many tribes' history. When practical, as Professor Riley has noted, employing such procedures can have a positive effect for tribal sovereignty and determination, as well as on survivors and offenders.¹⁹² On another important note, many of the additional procedural burdens imposed by tribes exercising SDVCJ are only operative when a period of *imprisonment* is contemplated.¹⁹³ If a tribe "exercises" SDVCJ without imposing imprisonment on a defendant, the tribe need only provide the right to a jury trial and the right to "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant."¹⁹⁴ Of course, it is not a stretch to imagine a lack of meaningful incentive for offenders to participate when absolutely no period of imprisonment—even detention—is possible unless the tribe complies with the procedural requirements of SDVCJ. While traditional tribal dispute methods can provide meaningful solutions in many cases, in the context of domestic violence they may not be as effective. Victims simply would not be afforded the necessary protection and safety they need when tribal governments do not have concrete legal justification to detain abusers in emergency situations. This is the place where an expanded tribal authority can meet a need. I propose the following solution, an "SDVCJ fix."

As a viable SDVCJ fix, this Note proposes an amendment to VAWA and TLOA that would dramatically increase the number of tribes eligible to exercise

190. *Id.* (quoting ALFRED URBINA & MELISSA TATUM, CONSIDERATIONS IN IMPLEMENTING VAWA'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION AND TLOA'S ENHANCED SENTENCING AUTHORITY: A LOOK AT THE EXPERIENCE OF THE PASCUA TRIBE 41 (2014)).

191. See Riley, *supra* note 12, at 1620–22; ROADMAP, *supra* note 79, at 129.

192. See Riley, *supra* note 12, at 1625 n.308.

193. See 25 U.S.C. § 1304(d) (Supp. I 2013) (referencing procedural rights required by TLOA for terms of imprisonment longer than one year).

194. See *id.*

SDVCJ. Specifically, Congress should amend VAWA 2013 to allow tribes to criminally prosecute and imprison non-Indian defendants who commit crimes of domestic violence against tribal members, have sufficient ties to the victim, and do not successfully complete tribal programs offered to the defendant as an alternative to incarceration. This power would be afforded to all tribes, not simply those with the means to implement a Western court system. Such authority would include the power for tribal law enforcement to intervene at the point of conflict and detain defendants for a time commensurate with the crime they are suspected of committing. Any subsequent period of a defendant's imprisonment would not be subject to the same procedural requirements of SDVCJ, but instead would be determined by balancing the interests of tribes and defendants.

This proposal takes the current Congress as it has appeared through much of the 2010s—gridlocked, partisan, and eager to save resources. Thus, it assumes that Congress will not change the law to eliminate the prohibitively expensive procedural requirements of TLOA and VAWA 2013. It also assumes that Congress will not meaningfully fund the 573 federally recognized tribes who have not been able to implement SDVCJ to bring themselves into compliance with the procedural requirements of exercising the law.

While wider sweeping proposals might more effectively fix the SDVCJ problem, this Note offers a more nuanced solution. It attempts to strike a balance between the politically possible and the idealistic, all while striving to offer a viable solution to the victims who have not been afforded protection under SDVCJ. This proposal also attempts to strike a balance between protecting victims from abuse and protecting non-Indian defendants' rights. By potentially offsetting or delaying any period of imprisonment (aside from intervention in the act of a crime), defendants' interests in procedural protections may well be reduced in initial proceedings under this framework.

Professor Price's "divided sovereignty" approach, as previously discussed, attempted to propose an adequate and supportable doctrinal framework for addressing constitutional issues in tribal sovereignty. This Note proposes adopting that framework and uses it as a justification for this proposed SDVCJ fix.¹⁹⁵ This framework simultaneously clears a quagmire of constitutional reasoning and provides support for this Note's proposed SDVCJ fix. Professor

195. Before moving on, it is worth recalling the "inherent" versus "delegated" approach to tribal sovereignty. Under a pure version of that framework, there would be *no* procedural requirements for tribes exercising an undiluted "inherent" criminal jurisdiction over non-Indians, absent congressional mandate of tribes under the 'plenary power' doctrine. While such a reading would certainly make the SDVCJ fix analysis simple, there simply is no guarantee that the current Supreme Court would uphold SDVCJ under that framework. But on the other hand, an adoption of that doctrine with an assumption of "delegated" tribal authority would be devastating to tribal sovereignty and those who seek to remedy the epidemic of domestic violence on tribal lands. From a "delegated" standpoint, there could be absolutely no exercise of tribal criminal jurisdiction without a full accompaniment of procedural and structural rights, rendering both SDVCJ and this Note's proposed SDVCJ fix dead in the water.

Price's framework¹⁹⁶ drew from analogous circumstances of federal-state relations.¹⁹⁷ There, he found support in a balancing framework to determine which guarantees of the U.S. Constitution apply in a given circumstance.¹⁹⁸ To the extent a court would accept such a balancing framework, the "autonomy interests of the tribe might support allowing prosecution in accordance with traditional procedures of the particular prosecuting tribe, but only insofar as the accommodation of the tribe's procedural tradition does not unduly burden the individual interests underlying an asserted procedural right."¹⁹⁹ It is in this area that the critical last step—imprisonment—of the proposed SDVCJ fix would find itself.

To be clear, Congress would be making a significant exception to the Indian Civil Rights Act by eliminating certain tribal defendants' procedural rights under the scenario envisioned in this proposed SDVCJ fix. Under current precedent, Congress has the nearly universally accepted right to legislate limitations on tribal sovereignty such as requiring process in tribal courts.²⁰⁰ But under this Note's proposal, defendants could only be deprived of constitutional due process with compelling justification by any tribe exercising the proposed SDVCJ fix. And, as tribes have routinely demonstrated throughout the first five years of SDVCJ implementation, fairness is, and has always been, the goal of tribal adjudication.²⁰¹ The proceedings of different tribes will certainly vary in the degree to which they resemble Western adjudication, but through an application of tribal customary norms, tribes can simultaneously exercise and realize sovereignty and reach more tribally appropriate results.²⁰² The example set by Judge Abby Abinanti of the Yurok Tribal Court could become the norm in exercising this new jurisdiction: issuing a restraining order as an initial matter and moving immediately to offer a batterer entry into a tribally run rehabilitation program.²⁰³ In such an example, should the batterer fail to complete the program and recidivate, the tribal court would have the power to imprison the defendant under its natural proceedings with only those facets of due process absent that the tribe could not provide. These proceedings would likely take a wide range of forms, the diversity of tribal values and custom being so diverse across the nation.²⁰⁴ Skeptics of this proposal should recognize that, as in Western courts, truth-finding is a paramount concern across tribal courts.²⁰⁵ The same holds true

196. For the full analysis of the divided sovereignty doctrine, see Price, *supra* note 39.

197. *Id.* at 709–10.

198. *Id.* at 723.

199. *Id.*

200. *Id.* at 722.

201. See FIVE-YEAR REPORT, *supra* note 28, at 18–21.

202. See April L. Wilkinson, *A Framework for Understanding Tribal Courts and the Application of Fundamental Law: Through the Voices of Scholars in the Field of Tribal Justice*, 15 TRIBAL L.J. 67, 67–68 (2015).

203. See Clarren, *supra* note 171.

204. Wilkinson, *supra* note 202, at 82.

205. See, e.g., Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay*, 18 N.M. L. REV. 49, 62 (1988).

for reconciliation and healing, which perhaps receives greater focus in tribal courts than in our Western courts.²⁰⁶

Uncertainties will undoubtedly arise under an early implementation of such a plan, but it is encouraging to note that the ITWG is already in place and would be the go-to source for collaboration in an early implementation of such a plan.²⁰⁷ The federal government could provide funding for attorneys to aid in early interpretive issues surrounding procedural issues in the new law with relatively little expense.

The proposed SDVCJ fix would also encourage tribe-specific interventions and conflict resolution strategies, made more effective by the threat of imprisonment in the event of non-compliance with such programs. The last critical component would allow tribal police to intervene at the point of the crime and detain defendants, rather than only being able to remove defendants from reservations as in current non-SDVCJ implementing tribes.²⁰⁸ This is a critical step in preventing further victimization. Before any determination of guilt has been made, tribal courts could issue orders of protection to aid in the peacekeeping process before the adjudicative proceeding, as in the current SDVCJ framework.

This Part has attempted to lay out a constitutionally permissible solution to the problem facing the hundreds of tribes who cannot feasibly implement the requirements to prosecute non-Indian offenders who commit crimes of domestic violence on their tribal lands. If adopted, this would enable a significantly higher number of tribes to protect their own and retake some of the sovereignty lost under *Oliphant*.

CONCLUSION

The crisis in Indian country has gone on for far too long, abetted by the United States' failure to sufficiently address the issue it recognized in passing VAWA 2013. Domestic violence has continued to be a problem, rising to epidemic proportions before VAWA 2013 and continuing at unacceptably high rates. While the Act heralded significant progress, it does not go far enough. If we continue at the current rate, there simply is not another option besides extraordinary spending increases, which seem unlikely to happen. The tribes need funding, not just to implement the laws, but to police non-Indian crimes, report the incidents, and ensure their people are properly protected and cared for when they are harmed. The United States now has a choice: either dramatically increase funding to tribes under SDVCJ or lighten the procedural process tribes must provide non-Indian defendants accused of crimes of domestic violence.

206. See Riley, *supra* note 12, at 1624–28.

207. See FIVE-YEAR REPORT, *supra* note 28, at 1–2.

208. See 25 U.S.C. § 1304(c) (Supp. I 2013); Kevin Abourezk, *Tribes Confront Unique Problems in Battle Against Domestic Violence*, INDIANZ (Apr. 10, 2018), <https://www.indianz.com/News/2018/04/10/tribes-confront-unique-problems-in-battl.asp>.

One of the foundational principles of federal-Indian law jurisprudence is the “trust relationship” the U.S. government owes to Indian peoples.²⁰⁹ The stark reality of domestic violence and jurisdiction in Indian country demands that the United States adapt to uphold its end of the bargain. As argued in this Note, victims do not have the luxury to be held at the mercy of a federal government who cannot or will not adequately protect their well-being. As an alternative to the current trajectory, this Note proposes a path to increased tribal authority for those tribes that do not have the means to implement the judicial infrastructure required to prosecute non-Indians via SDVCJ. This proposed “SDVCJ fix” has the potential to simultaneously increase exhibition of tribal sovereignty, provided Congress acts to release some of the restrictions on procedure in limited circumstances. But more importantly, an SDVCJ fix would provide a respite for tribal victims of domestic violence who for too long have suffered at the hands of batterers enabled by the laws of the United States. Working together is the ultimate solution. It is time the United States acted on its trust responsibility and allow tribes the means to adequately protect women.

209. See RICHLAND & DEER, *supra* note 37, at 71–72; *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 2 (1831).
