Reimagining the Violence Against Women Act for Tribes in 2022

Ashleigh Lussenden*

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* Associate, Sidley Austin, San Francisco, CA; J.D., 2021, Berkeley School of Law. The author thanks the members of the Berkeley Journal of Criminal Law for their suggestions and edits during the publishing process. She also thanks Professor Seth Davis, Berkeley School of Law, for his guidance and feedback during the writing process.

INTRODUCTION

Louise Erdrich's novel *The Round House* tells the story of Joe, an Ojibwe boy trying to make sense of justice in Indian Country after his mother's brutal rape. Watching his mother attempt to recover from her attack, he notes that the family "had the sense that she was ascending to a place of utter loneliness from which she might never be retrieved." He refers to her attacker as "the man who severed my mother's spirit from her body." As is true with many Native women, Joe's mother is housebound with fear and grief until the man who assaulted her is apprehended. Upon learning that no body of law enforcement has the jurisdictional right to hold him and that he has been released, she becomes fragile and vulnerable again, fearful of his return.

The failure to protect Native women from violence is not a new phenomenon in this country. Instead, this violence has been used as a tool of conquest, a staple of the American colonial project from first contact.[1] It is through this violence that the ongoing genocide of Native people has been so successful.

As a contemporary form of historical oppression, impunity to perpetrators of violence against Native women creates conditions ripe for the continuation of this violence. 84.3% of Native women experience violence at some point in their life, 97% of which is committed by someone who is not a member of their own race.[2] Native women are 2.5 times more likely to be a victim of sexual assault or domestic violence

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

[2] André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, 277 NAT'L INST. JUST. J. 38, 39–41 (2016).

than any other population in the United States. Yet, because of a variety of legislative rules and judicial opinions that restrict Native nations' jurisdiction over the perpetrators, Native women are one of the least likely populations to find recourse or justice.[3]

Native women are so often left in a state of suspended existence between the death of who they were before their assault and the rebirth of who they can become once healing happens and justice is found. Just as Joe's mother regains a sense of normalcy after her attacker is arrested, many women report a sense of relief and rebirth once justice has been served and the inability to do so until that point.[4] While Congress has attempted to address these jurisdictional issues and find avenues for justice for Native women, including with the 2013 Violence Against Women Act (VAWA) Reauthorization and the pending 2022 VAWA Reauthorization, its efforts have consistently fallen short. As it stands, VAWA simultaneously limits the ability for Native nations to properly protect their citizens, decreases the sovereign governance abilities of these nations, and disincentivizes non-carceral options for justice. Despite the efforts of VAWA, Native women still experience the highest rates of violence against women in this country, including significant rates of poly-victimization and severe injury or death.

As the most recent VAWA Reauthorization has yet to be signed, this Article provides recommendations for its continued improvement to better serve the needs of Native people. This Article will first identify and analyze the contemporary legislative acts and judicial opinions that have created this jurisdictional maze and lack of justice. Then, it will assess the current proposed VAWA 2022 Reauthorization. Finally, it will propose recommendations for VAWA 2022 to better protect not only Native women but Native nations' sovereignty and reduce policies rooted in colonialism, including a focus on restorative justice options that Native nations can engage in absent any congressional authorization or oversight.

Audre Lorde famously said, "I am not free while any woman is unfree, even if her shackles are very different from my own." For many Native women, those shackles are the jurisdictional maze that hold them in a sort of suspended animation until they can find justice. The

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[3] NCAI POLICY RESEARCH CENTER, POLICY INSIGHTS BRIEF, STATISTICS ON VIOLENCE AGAINST NATIVE WOMEN (Feb. 2013), http://www.ncai.org/attachments/PolicyPaper_tWAjznFslemhAffZgNGzHUqIWMRPkCDjpFtxeKEUVKjubxfpGYK_Policy%20Insights%20Brief_VAWA_020613.pdf.

[4] Candace Sweat, *'I was exhausted, broken:' On heels of proposed Survivor Act, rape survivor shares her journey*, AP NEWS (Jan. 30, 2019), https://apnews.com/ca58657591731061130a6d40ff0929bf.

reauthorization of VAWA provides a unique opportunity to reassess those shackles and consider how decolonizing our approach to justice for violence against women can better serve to protect all women.

I. THE PROBLEM OF CRIMINAL JURISDICTION IN INDIAN COUNTRY

A. The *Oliphant* Problem

Though the United States has always recognized the inherent sovereignty of Native nations, it has consistently impeded their ability to exercise that sovereignty. Legal involvement in the colonialization of the United States stretches back almost as far as colonial contact itself. While numerous legislative and judicial actions have affected the American colonial project, the most damaging of these for the present issue is unquestionably *Oliphant v. Suquamish Indian Tribe*.[5]

While not a case directly stemming from violence against Native women, the implications have forever changed the ability of Native women to find justice. In *Oliphant*, the Court held that tribes are prohibited from exercising their inherent criminal jurisdiction over non-Indian defendants, even if the crime was committed in Indian Country.[6] This decision effectively gutted the ability of tribal courts to protect their citizens, especially in light of the fact that *at least* 57% of all instances of sexual assault or sexual violence are committed by non-Indian males with no ties to the reservation and 97% of all violence against Native women is committed by non-tribal members.[7]

B. *Oliphant*'s Jurisdictional Vacuum is the Main Cause of Violence Against Native Women

Oliphant's departure from commonly understood principles of inherent sovereignty created a vacuum of accountability in Indian Country, allowing non-Indian defendants to effectively act with impunity, immune from prosecution by the tribe and often by the state. Directly because of the *Oliphant* decision, only U.S. Attorneys can prosecute non-

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[5] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).

[6] *Id.*

[7] RONET BACHMAN ET AL., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN (Aug. 2008), https://www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf (unpublished grant report to the U.S. Dep't of Just.). I say "at least" because data collection is largely based on report and arrest data, which falls short of the real number of incidents due to lack of jurisdiction of tribal police, the unwillingness of federal officials to make arrests, and the hesitation of Native women to file reports that will ultimately go nowhere.

Indian defendants for crimes committed in Indian Country. 65% of cases related to violence against women that are reported to the federal government are not prosecuted.[8] This is a staggering number of cases, even if every assault by a non-Indian was reported to the federal government. However, a significant number of assaults are not reported, making the total number of violent actions towards Native women by non-Indians that go unprosecuted significantly higher.

The Court notes in the opinion that the prevalence of non-Indian crime in Indian Country is something the court is aware of but has "little relevance" to the decision they made in *Oliphant*.[9] This purposeful blindness by the Court as to the repercussions of the *Oliphant* decision has led some to argue that in *Oliphant*, the Supreme Court effectively legalized rape in Indian Country.[10]

1. Oliphant *Undermines Tribal Sovereignty*

The ability to sustain law and order within a nation is fundamental to functional sovereignty and autonomy. As such, even though jurisdiction was never explicitly granted, it follows that as part of the inherent sovereignty of Native nations, they would retain jurisdiction over their territory. It is a standard understanding that sovereign nations can prosecute crimes that happen within their territory,[11] yet *Oliphant* "bizarrely disaggregated" criminal jurisdiction in Indian Country from geography.[12]

Much of the Court's logic in *Oliphant* stemmed from the idea that Congress never explicitly gave the tribes jurisdiction, nor was jurisdiction explicitly laid out in the treaties with tribes.[13] As justification for its

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[8] U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-167R, U.S. DEPARTMENT OF JUSTICE DECLINATIONS OF INDIAN COUNTRY CRIMINAL MATTERS (2010), http://www.gao.gov/new.items/d11167r.pdf.

[9] 435 U.S. at 212.

[10] Clara Martinez, *The Evolution of Judicial Power: How the Supreme Court Effectively Legalized Rape on Indian Reservations*, 2 LINFIELD J. UNDERGRADUATE RSCH. 1, 12–15 (2016).

[11] Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 4 (2002).

[12] Angela Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1581 (2016).

[13] *See generally* Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609, 616–37 (1979) (providing an in-depth discussion of the overgeneralizations and false logic that the Court uses in analyzing treaties).

decision, the Court effectively created the principle of diminished tribal sovereignty, stating "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status.'"[14] The Court viewed Native nations' status as one where they "retain elements of 'quasi-sovereign' authority after ceding their lands to the United States and announcing their dependence on the Federal Government."[15] Because of this perceived "subm[ission] to the overriding sovereignty of the United States," the Court determined that tribes "[gave] up their power to try non-Indian citizens" and thus implicitly divested tribes of their prosecutorial powers.[16] The Court's failure to recognize Native nations' inherent sovereignty solidified the presumption that this sovereignty survives only unless and until it is expressly revoked by Congress.

As Angela Riley posits, "without basic public safety, communities deteriorate . . . [and] tribal members lose faith in tribal governments as well as in the federal system."[17] Without jurisdiction, Native nations are handicapped in their ability to govern and exercise their own inherent legal authority, complete with their own customs and procedures. The ability for a government to protect its citizens and preserve the culture and traditions of its people is an essential characteristic of sovereignty.[18] Astronomically high rates of violence against Native women not only affect the basic health and safety of the tribe and all its members, but also creates conditions where it becomes nearly impossible for tribes to maintain culture and traditions. *Oliphant* strips autonomy and sovereignty from Native nations, where "it is impossible to have a truly self-determining nation when its members have been denied self-determination over their own bodies."[19]

C. Clarifying *Oliphant*: *Wheeler*, *Duro*, and the Pyrrhic Victory of *Lara*

Several successive cases have clarified the limits of *Oliphant*'s applicability across Indian Country and reaffirmed the Court's presumption that Native nation's sovereignty only survives unless and

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[14] *Oliphant*, 435 U.S. at 208.

[15] *Id.*

[16] *Id.* at 210.

[17] Riley, *supra* note 12, at 1583.

[18] Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL'Y 121, 143 (2004); Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 HOUS. L. REV. 701, 719 (2006).

[19] DEER, *supra* note 1, at xvi.

until Congress abrogates it.

The Court's theory of diminished tribal sovereignty created in *Oliphant* was elaborated in *United States v. Wheeler*.[20] In *Wheeler*, a Navajo man was convicted of offenses in both Navajo and federal court for crimes stemming from the same incident.[21] Wheeler argued that this was a violation of double jeopardy, as the federal government was exercising its power to try him twice, with the tribal court acting as an arm of the federal government.[22] The Court disagreed, holding that the tribe exercised its own inherent and retained power to prosecute a tribal member.[23] Reasoning that "the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status,"[24] the Court solidified the theory first put forward in *Oliphant*—tribes retain only inherent power to prosecute member Indians, not non-Indians.

Limiting prosecutorial power to member Indians was solidified in *Duro v. Reina*, where the Court furthered *Wheeler* by clarifying that a tribe's jurisdiction only covered members of that tribe, holding that non-member Indians and non-Indians were both exempt from tribal jurisdiction.[25] In *Duro*, a non-member Indian was prosecuted in tribal court for the murder of a member of that tribe.[26] In deciding that the tribe did not have jurisdiction over non-member Indians, the Court reasoned that tribal-retained sovereignty "does not include the authority to impose criminal sanctions against a citizen outside its own membership."[27] The Court justified this membership distinction by reasoning that the dependent status of Native nations limited their powers of self-government to internal affairs and relations solely between tribal members.

In response to *Duro*, Congress amended the Indian Civil Rights

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[20] United States v. Wheeler, 435 U.S. 313, 332 (1978).

[21] *Id.*

[22] *Id.* at 318–19.

[23] *Id.* at 328 ("In sum, the power to punish offenses against tribal law committed by tribe members, which was part of the Navajos' primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority. It follows that when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the Federal Government.").

[24] *Id.* at 326.

[25] Duro v. Reina, 495 U.S. 676 (1990).

[26] *Id.* at 676.

[27] *Id.* at 679.

Act of 1968 (ICRA)[28] to extend tribal criminal jurisdiction over all tribal members, not just members of the specific tribe exercising jurisdiction.[29] This legislation was tested in *United States v. Lara*, where a non-member Indian argued that subsequent federal and tribal prosecution for the same offense was barred by the Double Jeopardy Clause. The Court held that Congress intended for the ICRA amendment to allow for the prosecution of non-member Indians and to "recognize and affirm . . . inherent tribal power," restoring an aspect of inherent sovereignty.

While these decisions ultimately allowed for limited tribal criminal jurisdiction in Indian Country, they also reaffirmed Congress's plenary power and ability to abrogate Native nation's inherent sovereignty at any time. The juxtaposition of these decisions highlights what many call the double bind of federal Indian law. On one hand is a close embrace of plenary power, which at times can work in tribes' favor but still cedes the fundamental notion of inherent sovereignty, and on the other, a form of sovereignty in which tribes retain inherent self-governance but its application spans no more than what the American judiciary is willing to honor. "Judicial plenary power bites as hard as the congressional variant: there is no practical distinction between the two; both have colonialist consequences."[30] This is, at best, a Faustian bargain. These cases also stand to provide an example of why both legislative and judicial recognition of inherent tribal sovereignty is vital for the safety and longevity of Native nations.

II. THE LEGISLATION BEHIND THE JURISDICTIONAL MAZE IN INDIAN COUNTRY

A. The Indian Civil Rights Act

The issue of civil rights, procedural requirements, and criminal jurisdiction in Indian Country was first addressed in ICRA.[31] Before ICRA was enacted, federal Constitutional provisions, including those relating to criminal procedure and civil rights, were inapplicable to Indian nations within the borders of the Unites States.[32] Federal courts

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[28] For a more detailed discussion of ICRA, *see infra*, Section II.

[29] 25 U.S.C. § 1301(2) (2005).

[30] William Bradford, *"Another Such Victory and We Are Undone": A Call to an American Indian Declaration of Independence*, 40 TULSA L. REV. 71, 96 (2004).

[31] Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 77 (codified as amended at 25 U.S.C. § 1302 (2000)).

[32] *See* United States v. U.S. Fidelity & Guar. Co., 309 U.S. 506, 513 (1940); Michael Smith, *The Constitutional Status of American Indians*, 6 C.R. DIG. 12, 14 (1973).

repeatedly upheld this by ruling against extending Constitutional restrictions to tribes and their members.[33]

Concerned about the civil rights of Native American citizens, Congress enacted ICRA in 1968.[34] Congress drew on its extensive plenary power to incorporate a selective bill of rights into ICRA,[35] forcing Native nations to adopt these provisions, elevating the rights of Native Americans at the expense of tribal sovereignty. These rights included many of the First, Fourth, and Fourteenth Amendment rights as well as protection against compelled self-incrimination, double jeopardy, and most notably for this Article, a due process clause.[36] ICRA also included the right to counsel but only at the defendant's expense, a consideration of the extreme financial burden this would place on the tribes otherwise.[37] A right to indictment by a six-member grand jury was not included in ICRA.[38] Sentencing limits were also imposed by ICRA, limiting tribes to punishments of either six months in prison or a $500 fine per count, and not authorizing felony sentencing.[39] Unsurprisingly, Congress did not include an opt-out clause or any recognition for tribes that already guaranteed any of these civil rights or due process protections to its litigants.[40]

Initially, Congress intended that these ICRA provisions be

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[33] *See* Talton v. Mayes, 163 U.S. 376, 384 (1896) (applying the Fifth Amendment); Oliver v. Udall, 306 F.2d 819, 823 (D.C. Cir. 1962) (applying the First Amendment); Native Am. Church v. Navajo Tribal Council, 272 F.2d 131, 134 (10th Cir. 1959) (applying the First Amendment); Barta v. Oglala Sioux Tribe, 259 F.2d 553, 557 (8th Cir. 1958) (applying the Fourteenth Amendment), *cert. denied*, 358 U.S. 932 (1959); Martinez v. S. Ute Tribe, 249 F.2d 915, 919 (10th Cir. 1957) (applying the Fifth Amendment), *cert. denied*, 356 U.S. 960, *and rehearing denied*, 357 U.S. 924 (1957); United States v. Seneca Nation, 274 F. 946, 951 (W.D.N.Y. 1921).

[34] *The Constitutional Rights of the American Indian: Hearings before the Subcomm. on Const. Rts. of the Comm. on the Judiciary*, 87th Cong. 24 (1961) [hereinafter The 1961 Hearings]; *The Constitutional Rights of the American Indians: Hearings before the Subcomm. on Const. Rts. of the Comm. on the Judiciary*, 88th Cong. 823 (1963) [hereinafter The 1963 Hearings].

[35] 25 U.S.C. §§ 1302–1303 (1986).

[36] 25 U.S.C. § 1302.

[37] *Id.*

[38] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 63 (1978).

[39] 25 U.S.C. §§ 1301–1303 (2006). These limits were changed to imprisonment for one year or a $5000 fine per count in 1986, partially in response to the restrictions that came from *Oliphant*. These sentencing restrictions were later amended in the Tribal Law and Order Act, discussed *infra*.

[40] Kelly Gaines Stoner & Lauren Van Schilfgaarde, *Addressing the* Oliphant *in the Room: Domestic Violence and the Safety of American Indian and Alaska Native Children in Indian Country*, 22 WIDENER L. REV. 239, 251 (2016).

justiciable in federal courts to preserve the integrity of the civil rights being protected.[41] However, the judiciary continually ruled in favor of tribal sovereignty, deciding many times over that federal courts did not hold the power to interpret clauses of ICRA.[42] Notably, the court in *Janis v. Wilson* held that although the language Congress used in ICRA is similar to the language used in the Bill of Rights, the meaning and application in tribal contexts may differ from the federal interpretation and application of the Bill of Rights.[43] The court also recognized Congress's intent not to use ICRA to import constitutional law onto Native nations.[44]

The Supreme Court finally solidified this deference to Native nations' sovereignty in *Santa Clara Pueblo v. Martinez*, finding that Congress's plenary power does not extend to deciding matters of tribal self-government, affording tribes significant leeway in the interpretation and application of ICRA.[45] The court also noted that Native nations should be free to resolve their own disputes as they see fit, and that if the federal government steps in to resolve these disputes it could seriously undermine Indian officials' authority.[46] This decision also solidified the writ of habeas corpus as the only means for federal court review of tribal court decisions, leaving tribes to interpret and enforce the tenants of ICRA in accordance with their own customs and practices.[47]

Regardless of the deference to Native nations regarding the interpretation and application of ICRA, the fundamental nature of ICRA

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[41] The 1961 Hearings, *supra* note 34, and early drafts of ICRA included this point and a cause of action for federal courts. The ICRA draft that was finally passed did not include this cause of action, likely due to tribal lobbying.

[42] Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079, 1082 (8th Cir. 1975) (holding that ICRA should protect individual peoples without jeopardizing tribal self-government and tribal cultural identity); Rosebud Sioux Tribe v. Driving Hawk, 534 F.2d 98, 100 (10th Cir. 1976) (holding that the federal government should not interfere in tribal elections, and those decisions do not need to be based on election standards of the Constitution); Tom v. Sutton, 533 F.2d 1101, 1104 n.5 (9th Cir. 1976) (holding the terms "due process" and "equal protection" in ICRA should be construed with regard for the historical, cultural, and governmental values of individual tribes). *But see* Daly v. United States, 483 F.2d 700, 704–05 (8th Cir. 1973) (holding that the federal one-person-one-vote principle must apply in tribal elections); White Eagle v. One Feather, 478 F.2d 1311, 1314 (8th Cir. 1973) (stating the same holding as *Daly*).

[43] Janis v. Wilson, 385 F. Supp. 1143, 1150 (D.S.D. 1974), *remanded on other grounds*, 521 F.2d 724 (8th Cir. 1975).

[44] *Id.*

[45] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 61 (1978).

[46] *Id.*

[47] *Id.*

strips tribal autonomy. The ability to govern independently is fundamental to sovereignty, and requiring Native nations to adhere, even through their own interpretation, to a set of Eurocentric, Americanized civil rights requirements undermines the fundamental nature of self-governance.[48] Native nations existed long before the United States and afforded tribal members rights and respect throughout this entire period.[49] It is, in fact, the introduction of ideas of American justice that have created a significant human rights issue within Indian Country, largely because of the limits placed upon Native nations through ICRA and *Oliphant*.[50] Not only has this American oversight and control created a bigger issue, but it has signaled to Indian Country, the greater United States, and the world that the United States still views Native nations as the savage nations they conquered hundreds of years ago, unable to properly care for themselves and their people.[51] Assuming the need to step in and take over the administration of civil rights and justice supposes that Native nations are incapable of doing so, and allows the United States once again to assume a paternalistic role in the oversight of Indian Country, the same role that led to forced assimilation, forced removal, and genocide.[52]

B. The Tribal Law and Order Act and the Violence Against Women Reauthorization of 2013

Given the dearth of criminal justice options then available to Native nations, advocates started to push for expansion of criminal jurisdiction in Indian Country. Recognition of the fact that three-quarters of those living in Indian Country are non-Indian,[53] combined with

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[48] *See generally* Rashwet Shrinkhal, *"Indigenous sovereignty" and right to self-determination in international law: a critical appraisal*, 17 ALTERNATIVE: AN INT. J. INDIGENOUS PEOPLES 1 (2021).

[49] *Id.*

[50] AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 27–39 (Amnesty International Publications 2007).

[51] Adam Crepelle, *The Time Trap: Addressing the Stereotypes that Undermine Tribal Sovereignty*, 53 COLUM. HUM. RTS. L. REV. 189, 192–95 (2021).

[52] *Id.*

[53] TINA NORRIS ET AL., THE AMERICAN INDIAN AND ALASKAN NATIVE POPULATION: 2010 13–14 (U.S. Dep't of Com. 2012), https://www.census.gov/history/pdf/c2010br-10.pdf.

effective media campaigns[54] and an Amnesty International report,[55] led to Congress passing the Tribal Law and Order Act of 2010 (TLOA),[56] and the VAWA Reauthorization of 2013.[57] Both TLOA and VAWA, recognizing the need to fix the jurisdictional issues created by *Oliphant*, attempt to do so by increasing the scope of tribal courts sentencing provisions and expanding their jurisdiction over non-Native defendants. In doing so, however, they force tribes to make a trade off—taking this increased sentencing and jurisdictional reach in exchange for agreeing to provide criminal defendants additional due process protections that are regulated and monitored by the federal government—what Angela Riley has called the "double bind."[58]

The due process expansion in TLOA includes providing defendants the right to effective counsel at least equal to what they would get in a U.S. court at the tribes' expense.[59] It further requires that the presiding tribal court judge be licensed in the United States,[60] and that the tribe maintain a public record of the tribal laws[61] and a record of the criminal proceedings.[62] TLOA also includes provisions that enhance sentencing for defendants that tribes already had jurisdiction over, increasing punishments to up to three years in prison and up to $15,000 in fines, given the specific procedural protections mentioned above.[63] Tribes can also stack sentences under TLOA, allowing for sentences of up to nine years in prison.[64]

VAWA also created an opt-in system where tribes are granted special domestic violence criminal jurisdiction (SDVCJ) over certain non-Indian defendants for covered crimes, but must adopt specific procedural

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[54] Michael Riley, *Path to Justice Unclear*, DENVER POST (Nov. 13, 2007), https://www.denverpost.com/2007/11/13/path-to-justice-unclear/; Troy Eid, *Keeping the Law in Indian Country*, DENVER POST (June 21, 2007), https://www.denverpost.com/2007/06/21/keeping-the-law-in-indian-country/; Timothy Williams, *Higher Crime, Fewer Charges on Indian Land*, N.Y. TIMES (Feb. 20, 2012), http://www.nytimes.com/2012/02/21/us/on-indian-reservations-higher-crime-and-fewer-prosecutions.html.

[55] AMNESTY INT'L, *supra* note 50.

[56] Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258, 2280 (2010); 25 U.S.C. § 1302.

[57] Violence Against Women Reauthorization Act of 2013, 25 U.S.C. § 1304 (2013).

[58] Riley, *supra* note 12, at 1595.

[59] 25 U.S.C. § 1302(c)(1).

[60] 25 U.S.C. § 1302(c)(3).

[61] 25 U.S.C. § 1302(c)(4).

[62] 25 U.S.C. § 1302(c)(5).

[63] 25 U.S.C. § 1302(a)(7)(C).

[64] 25 U.S.C. § 1302(a)(7)(D).

elements to their judicial systems.[65] The covered crimes in VAWA 2013 are limited to domestic violence, dating violence, and criminal violations of protection orders.[66] Additionally, SDVCJ is reserved for certain defendants—tribes may only prosecute those individuals that have sufficient ties to the tribe.[67] The defendant must either reside in the territory of the participating tribe, be employed in the territory of the specific tribe, be a spouse, intimate partner, or dating partner of a member of the specific tribe, or be a non-member Indian residing in the territory of the specific tribe.[68] SDVCJ does not cover non-Indians or non-Indian crimes committed within the territory of the specific tribe, nor does it cover crimes that did not take place within the territory of the specific tribe, regardless of who is involved.[69]

The procedural elements tribes are requirements to implement include the TLOA due process requirements, ensuring that non-Indian defendants are provided with an impartial jury that "(A) reflect[s] a fair cross section of the community; and (B) do[es] not systematically exclude any distinctive group in the community, including non-Indians," and "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."[70]

III. INFLATED DUE PROCESS CONCERNS IN SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION

Notably, neither of the extensions of due process requirements in TLOA and VAWA were in response to twenty-first century research findings on tribal constitutional due process protections, tribal court processes, responses to habeas litigation of due process violations, or recent hearings on perceived deficiencies in tribal courts.[71] Nor have any of these extensions taken into account that the number of tribal courts has doubled since the passage of ICRA, and many have received significant

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[65] 25 U.S.C. § 1304.
[66] 25 U.S.C. § 1304(c).
[67] 25 U.S.C. § 1304(b)(4).
[68] *Id.*
[69] 25 U.S.C. § 1304(d).
[70] *Id.*
[71] *See* Rob Roy Smith, *Enhancing Tribal Sovereignty by Protecting Indian Civil Rights: A Win-Win for Indian Tribes and Tribal Members*, AM. INDIAN L. J. 41, 54 (2012); *see generally* Hunter Cox, *ICRA Habeas Corpus Relief: A New Habeas Jurisprudence for the Post-Oliphant World?*, 5 AM. INDIAN L. J. 597 (2017).

budgetary and tribal governmental support in the intervening years.[72] Most of the extensions, in fact, seem to come from misconceptions carried over from the original Senate Constitutional Committee's concerns in the drafting of ICRA.[73]

A. Positive Trends From VAWA 2013 Pilot Project Tribes

While concerns over due process in 1968 may have been more founded, current data clearly shows extending SDVCJ to tribes is essential to creating a safer, more just environment, and that imposing robust due process procedural requirements on tribes is unnecessary and counterproductive. An examination of the data of tribes that have participated in the VAWA pilot project shows that out of 28 arrests there were 13 guilty pleas, 2 referrals for federal prosecution, 1 acquittal, 11 dismissals, and not a single habeas petition filed.[74] Moreover, a case study from the Confederated Tribes of Umatilla highlights the power of SDVCJ for Native nations:

> The defendant is an Iraq war veteran who suffers from PTSD, and he reportedly missed taking his medication immediately preceding the assault. He wished to take responsibility at arraignment; however, the Tribe suggested that they appoint him an attorney. After being appointed an attorney, the defendant ultimately pled guilty to felony DV assault with terms consistent to what he would see if prosecuted in the State. Specific terms include compliance with his VA treatment recommendations and completion of a tribally funded 12-month batterer's intervention program. He is currently on track to graduate from the batterer's program in February and will be the first tribal VAWA defendant to graduate, while otherwise remaining under tribal supervision for another 2 years.[75]

This data shows that tribal courts are more than equipped to fully execute the justice desperately needed in Indian Country and can do so with culturally appropriate sentencing and respect for the defendant's civil rights. Further, these cases, while preliminary, tend to suggest that

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[72] Matthew L. M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. COLO. L. REV. 59, 73 (2013).

[73] *See generally id*.; The 1961 and 1963 Hearings, *supra* note 34.

[74] NATIONAL CONGRESS OF AMERICAN INDIANS, SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION PILOT PROJECT REPORT 5 (2015), http://www.ncai.org/attachments/NewsArticle_VutTUSYSfGPRpZQRYzWcuLekuVNeeTAOBBwGyvkWYwPRUJOioqI_SDVCJ%20Pilot%20Project%20Report_6-7-16_Final.pdf.

[75] *Id*. at 12.

tribes can and do respect the fundamental rights of defendants, and would even without statutory requirements. This may best be shown by the fact that all the pilot project tribes provide lawyers to all who want one, regardless of the crime and whether they are required to under TLOA and VAWA.

Research shows that prior to the pilot project, tribes felt powerless in protecting tribal members, especially with respect to domestic violence, which makes up a large portion of many nations' court dockets.[76] Additionally, since the implementation of the pilot project, tribes point to a significant increase in domestic violence reports, which is likely explained not by an overall increase in domestic violence but by a feeling of safety and availability of justice leading to increased reporting.[77] Further, as Angela Riley notes, there is no indication that tribes seek to abuse non-Indian defendants, as this would signal that tribes are "incapable of functioning as legitimate governments" which is "entirely against larger tribal objectives of greater self-determination, jurisdiction, and respect."[78]

B. A Writ of Habeas Corpus Left Unused

Another indicator that tribes do not need a statutory requirement to ensure appropriate due process is the number of habeas petitions that have been filed by non-Indians since the adoption of ICRA. The data can be split into two categories, those whose exhaustion of tribal court remedies requirement was waived and those who exhausted tribal court remedies.[79] Since 1968, there have been only four cases where the federal court did not require exhaustion, two of which are *Oliphant* and *Duro*.[80] The other two were granted a writ because they were not members of a tribe and thus the tribe had no jurisdiction over them.[81] Of those who had exhausted all tribal remedies, there are only four cases where the federal court granted habeas, only one of which involved a true civil rights violation.[82] In *Wounded Knee v. Andera*, a tribal judge also served as the prosecutor, which a federal court found to be a violation of due process.[83]

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[76] Riley, *supra* note 12, at 1603.
[77] *Id.* at 1605.
[78] *Id.* at 1613.
[79] Carrie E. Garrow, *Habeas Corpus Petitions in Federal and Tribal Courts: A Search for Individualized Justice*, 24 WM. & MARY BILL RTS. J. 137, 151 (2015).
[80] *Id.*
[81] *Id.* at 152.
[82] *Id.* at 154.
[83] Wounded Knee v. Andera, 416 F. Supp. 1236, 1240 (D.S.D. 1976).

Further, there have been fourteen habeas petitions dismissed for failure to exhaust tribal remedies, six cases where tribal court remedies have been exhausted and habeas was denied, and of the cases that were denied habeas for not exhausting their tribal court remedies, none were refiled after exhaustion.[84] This clearly shows that due process violations are the very rare exception, not the rule, within tribal courts. The exhaustion requirements also indicate that notions of traditional justice within tribal courts are respected within the U.S. court system and afforded the same deference by federal courts as any other court they are reviewing.

C. Navajo Nation: A Qualitative Case Study

Tribal due process protections can be further illustrated with a qualitative case study of the Navajo Nation court system—a "resolution based" tribal council created by officials within the Department of the Interior that had previously adopted ICRA but recently moved away from ICRA in its tribal court jurisprudence in favor of a growing body of tribal common law.[85]

Navajo Nation is the second largest tribal nation in the country,[86] and does not govern through a written constitution.[87] Instead, the Navajo Nation uses a Navajo Nation Council to govern by resolution, and allows the Navajo Nation judiciary to apply tribal customary and traditional law in their courts.[88] Additionally, the Navajo Nation ratified a Navajo Bill of Rights in 1967 and amended the Navajo Bill of Rights in 1986 to include a recognition of due process rights, which reads as follows:[89]

> Nor be deprived of life, liberty or property, without due process of law . . . . In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, and shall be informed of the nature and cause of the accusation; shall be confronted with the witnesses against him or her; and shall have compulsory process for obtaining witnesses in their favor. No person accused of an offense punishable by imprisonment and no party to a civil action

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[84] Garrow, *supra* note 79, at 137, 148.

[85] Fletcher, *supra* note 72, at 85; Paul Spruhan, *The Meaning of Due Process in Navajo Nation*, *in* THE INDIAN C.R. ACT AT FORTY 4–8 (UCLA Am. Indian Stud. Ctr. Publ'ns, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2030436.

[86] Tom Wanamaker, *Census Names Top 10 Tribes*, INDIAN COUNTRY TODAY (Feb. 15, 2002), https://indiancountrytoday.com/archive/census-names-top-10-tribes.

[87] *See* Spruhan, *supra* note 85.

[88] *Id.*

[89] As an editorial note, I will ignore the commonplace practice of avoiding block quotations in order to fully showcase and respect the original meaning and intent of the tribal courts' laws and opinions.

> at law, as provided under 7 N.N.C. § 651 shall be denied the right, upon request, to a trial by jury of not less than six persons; nor shall any person be denied the right to have the assistance of counsel, at their own expense, and to have defense counsel appointed in accordance with the rules of the courts of the Navajo Nation upon satisfactory proof to the court of their inability to provide for their own counsel for the defense of any punishable offense under the laws of the Navajo Nation.[90]

Navajo Nation courts have repeatedly reinforced these rights while applying traditional Navajo notions of justice and fairness. In *Navajo Nation v. Rodriguez*, the court discusses the principle of *hazho'ógo*—the requirement for a "patient, respectful discussion with a suspect explaining his or her rights before a waiver is effective."[91] The right being waived in *Navajo Nation* was the right against self-incrimination, but the Court has discussed this principle with regard to many of the fundamentals of due process.[92] In *Atcitty v. District Court for the Judicial District of Window Rock*, the court also recognized a right to due process for recipients of public housing benefits, even when that finding was contrary to federal rulings on similar questions, and grounded this reasoning in the Navajo concept of *k'é*:

> The Navajo principle of k'é is important to understanding Navajo due process. K'é frames the Navajo perception of moral right, and therefore this Court's interpretation of due process rights. K'é contemplates one's unique, reciprocal relationships to the community and the universe. It promotes respect, solidarity, compassion and cooperation so that people may live in hozho, or harmony. K'é stresses the duties and obligations of individuals relative to their community. The importance of k'é to maintaining social order cannot be overstated. In light of k'é, due process can be understood as a means to ensure that individuals who are living in a state of disorder or disharmony are brought back into the community so that order for the entire community can be reestablished.[93]

Six years after the *Atcitty* decision, the Navajo Nation Council passed a statute recognizing the "Fundamental Laws" of the Dine, the four types of fundamental laws important to Navajo justice: traditional law, customary law, natural law, and common law.[94] Following the passage

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[90] NAVAJO NATION CODE ANN. tit. 1, §§ 3, 7 (2014)

[91] Navajo Nation v. Rodriguez, 5 Am. Tribal Law 473, 479 (Navajo 2004); Eriacho v. Ramah Dist. Ct., 6 Am. Tribal Law 624, 630 (Navajo 2005).

[92] *Navajo Nation*, 5 Am. Tribal Law at 479–80; *Eriacho*, 6 Am. Tribal Law at 629–30.

[93] Atcitty v. Dist. Ct. for the Jud. Dist. of Window Rock, 7 Nav. R. 227, 230 (Navajo 1996).

[94] NAVAJO NATION CODE ANN. tit. 1, §§ 203–206 (2014)

of this statute, the Navajo Nation court mandated that American federal interpretations of ICRA be used as non-binding precedent, and instructed that they should be used as only part of a more comprehensive analysis that also includes traditional Navajo customs and values.[95] The Navajo Nation court recently applied this approach in *Office of the Navajo Nation President v. Navajo Nation Council*, where the court struck down a statute that allowed the Navajo Nation Council to place the Navajo Nation president on leave without any sort of hearing or ability to defend the charges or contest the allegations against him.[96] The court pointed to the notion of *k'é* to strike down the statute for lack of appropriate due process protections for the president.

Not only does the Navajo conception of justice include vast due process protections, but it extends those due process protections to Navajo versions of restorative justice. Paul Spruhan discusses the notion that *k'é* and Navajo traditions of fairness look to the good of the community and the individual.[97] This concept is best illustrated in *Haungooah v. Greyeyes*, where the Court found a violation of due process for Haungooah (a non-Navajo Indian), an unhoused man who was arrested on a bench warrant without first being served a probation revocation petition, even though his probation officer was aware that Mr. Haungooah did not currently have a place of residence and was forced to leave the immediate area to find shelter.[98] The court dictated that the most egregious violation of Mr. Haungooah's due process rights was that his parole officer neither informed the trial court of petitioner's notifications of lack of shelter (leading the court to think wrongly that Mr. Haungooah had fled without notice), nor "tried practically to address or accommodate his shelter issues."[99] The concept that it is the justice system's duty to treat all who engage with the system with respect and dignity, and to make every attempt to ensure basic needs are met along the way, showcases the capability of tribal courts to ensure fairness and justice, even in the case of non-Indians or non-tribal members. This example clearly shows that tribal courts are more than equipped to deal with issues of fairness and due process, regardless of the defendant's identity, in a manner equal to any state or federal court. The false assumption that tribal courts are not up to the task or are unable to adjudicate fairly does not support the

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[95] *Eriacho*, 6 Am. Tribal Law at 629 n.1.

[96] Office of the Navajo Nation President v. Navajo Nation Council, 9 Am. Tribal Law 46, 51 (Navajo 2010).

[97] *See* Spruhan, *supra* note 85, at 127.

[98] Haungooah v. Greyeyes, 11 Am. Tribal Law 171, 173 (Navajo 2013).

[99] *Id*. at 176.

premise that tribal courts need strict regulations imposed upon them.

D. The Promise of Habeas Corpus Ensures Human Rights

Finally, and perhaps most importantly, any objection that a non-Indian defendant's constitutional rights have been violated can be reviewed through a habeas petition. Congress extended federal habeas jurisdiction over tribal convictions long ago, meaning that all tribal court convictions would eventually have to "pass federal constitutional muster."[100] This option has always been available to non-Indian defendants, undermining the argument that tribal court convictions would be able to bypass Constitutional protections for defendants.

IV. THE VIOLENCE AGAINST WOMEN ACT REAUTHORIZATION OF 2022

The situation created by these statutes is a double-bind, forcing tribes to choose between protecting their members (by opting for limited jurisdiction in exchange for adopting western justice ideals and oversight from the U.S. government) and protecting their sovereignty and autonomy (by rejecting oversight and adoption of these requirements, thus retaining their ability to decide how their own courts function, but with full knowledge that this choice is perpetuating the violence in Indian Country). This places tribes in a position of being forced to weigh what is more important to them, to choose the lesser of two evils, and to potentially sacrifice something that is vital to their community. This decision becomes especially fraught given the lack of contemporary data supporting concerns about due process violations in tribal courts.

A. An Analysis of the Violence Against Women Act Reauthorization of 2022

With the next reauthorization of VAWA currently waiting to be signed into law,[101] it appears that Congress is again forcing tribes to choose to either assimilate or risk the health and safety of their members, while full well knowing the cost of both options. The latest version of the

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[100] MATTHEW FLETCHER, ADDRESSING THE EPIDEMIC OF DOMESTIC VIOLENCE IN INDIAN COUNTRY BY RESTORING TRIBAL SOVEREIGNTY 11 (Am. Const. Soc'y for L. and Pol'y 2009), https://www.indianlaw.org/sites/default/files/Addressing%20the%20Epidemic%20of%20DV%20in%20Indian%20Country_Matthew%20Fletcher_2009.pdf.

[101] Susan Davis, *Violence Against Women Act reauthorization is added to a $1.5 trillion spending bill*, NPR (March 9, 2022), https://www.npr.org/2022/03/09/1085495317/the-violence-against-women-act-catches-a-ride-on-1-5-trillion-spending-bill.

VAWA Reauthorization was approved as part of the 2022 omnibus bill in March 2022.[102]

VAWA 2022 expands coverage of jurisdiction over crimes related to domestic violence, including sexual assault, child abuse, stalking and violation of protection orders, human trafficking, assault on a law enforcement officer, and obstruction of justice.[103] The expansion of jurisdiction also extends to anyone being prosecuted for one of the covered crimes.[104] This is a major departure from VAWA 2013, which only extended tribal jurisdiction to a defendant with ties to the tribe.

The other victory for Indian Country in VAWA 2022 is the inclusion of Native populations in Hawai'i, Alaska, and Maine.[105] This expansion of jurisdiction and tribal court abilities and inclusion of previously neglected Native populations goes a long way in targeting the violence against Native women, and yet still allows Congress to exert its plenary power over tribal courts to import American judicial procedures and due process standards. Additionally, the Reauthorization includes provisions for non-mandatory data sharing, allowing Native nations access to criminal information databases, as well as training for court personnel and infrastructure costs to serve this purpose.[106]

While this update to VAWA provides several necessary solutions for safety in Indian Country, all power to the tribal courts is being given through Congress, the solutions are limited to circumstances that were created because of, not in spite of, this jurisdictional maze, and these solutions are still under the guidelines of ICRA and TLOA. Tribes are given no meaningful choices, only an all-or-nothing, in-or-out option. There is no indication in any of this legislation to create a system, or even an option, where tribes create and service their own justice systems—systems which would be mindful of the cultural and community values and needs, and which would derive their existence and legitimacy from the Native nation's own sovereignty, and not from an extension of Congress's plenary power. Nor is there a compromise option, where tribes give up control over portions of their justice system while maintaining their autonomy in sentencing or the ability to exercise or apply traditional notions of justice.

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[102] *Id.*
[103] Violence Against Women Reauthorization Act of 2022, S.3623 § 804 (2022).
[104] *Id.*
[105] *Id.* at §§ 811–814.
[106] *Id.* at §§ 801–804.

V. A SOLUTION: JURISDICTION FOR ALL AND AN OPT-IN CHOICE FOR TRIBES

I propose a two-fold, opt-in solution. First, extend SDVCJ to all tribes, but without any of the financial or infrastructural support currently outlined in VAWA, and second, allow an opt-in choice for tribes that provides them with two choices for VAWA implementation: i) adopt the current version of VAWA, gain the funding and infrastructure support included therein, and require tribes who choose this option to adhere to the oversight and procedural requirements; or ii) adopt a limited version of VAWA which would grant limited financial and infrastructural support for law enforcement and evidence collection, and allows the parties involved to choose to either go through a non-carceral restorative justice program created and facilitated by the tribe or have the case heard in federal court. Tribes would be able to opt-in after an internal decision-making process and would be strongly encouraged to rely heavily on the wishes of women in the tribe when making the decision. Tribes would be able to opt-in at any point with notice to the appropriate Attorney General and could change their opt-in status annually.

This solution attempts to solve the *Oliphant* problem, granting tribes enough authority to protect their citizens and create safer conditions for those living on tribal land, without forcing tribes to engage in jurisdiction baiting or trade their sovereignty and autonomy for the ability to protect their people. The opt-in choices, however, offer a compromise for tribes that require additional assistance to create or develop a robust legal system and attempts to address the main concerns from non-tribal members about being subject to tribal jurisdiction.

A. Jurisdiction Without Strings, or Funding: A Default Baseline Special Domestic Violence Criminal Jurisdiction

This solution would extend SDVCJ to all tribes, granting them complete control over their legal and judicial system, including allowing tribal law enforcement to intervene and make arrests, determine sentencing terms within the existing ICRA framework, manage jury selection, establish attorney and judge minimum qualifications, establish due process requirements, and attend to other related matters. Under this default SDVCJ, tribes would not receive any grant money or reimbursements offered to tribes that opt in to either the limited or full VAWA implementation. Further, tribal courts would be limited to sentences allowed by ICRA for non-member Indians and non-Indians—

one year or a $5,000 fine per offense.[107] Additionally, tribes would be required to maintain the ability for a defendant to file a habeas petition after their tribal court options are exhausted or within a reasonable time period if the tribal court has not moved forward with the case.

Allowing tribes to retain SDVCJ while opting out of both the financial and infrastructural support would allow tribes to choose both sovereignty and to protect their members. Additionally, establishing a track record of successful prosecutions that lead to positive outcomes for survivors and offenders and showcase the efficacy and fairness of tribal courts would also set the stage for granting tribes even broader territorial jurisdiction in the future. However, this may not be the best option, or even a feasible option, for every tribe. Some tribes may want or need the additional infrastructure or financial assistance in order to establish or expand their law enforcement and court systems, ensuring proper infrastructure, funding, and staffing for a permanent and sustainable legal system.

B. Opt-In Choices That Provide Tribes Extra Support

If tribes feel that they would like more support from the U.S. government, I propose these two opt-in options: 1) commit to the current scheme under VAWA, allowing tribes to accept grant money and gain full SDVCJ while still requiring tribes to adhere to the restrictions in sentencing, due process, etc., or 2) a hybrid approach in which SDVCJ is given to law enforcement personnel in the form of cross-deputization, grant money is given to tribes to provide for evidence collection and storage procedures in line with U.S. evidentiary law, and tribal courts provide those involved in the violence the option to either participate in a form of tribal justice that does not involve incarceration (which is also eligible for federal grant money), go through a tribal court's limited baseline SDVCJ with the associated ICRA sentencing limits, or have their case handled by federal courts.

1. Implement VAWA 2022

If tribes take the first option, implementation of VAWA would follow the letter of VAWA 2022.[108] Under this option, the federal government would dictate the general due process, sentencing, and jurisdictional reach for tribal courts and in exchange, would provide

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[107] 25 U.S.C § 1302(a).

[108] Violence Against Women Reauthorization Act of 2022, S.3623 §§ 801–804, 811–814 (2022).

funding and support, as outlined in the legislation. This option would provide tribes with the ability to receive what may amount to fairly significant funding and reimbursements to develop and hone their court systems and general justice infrastructure but would be required to follow the rules and regulations set forth by the United States.[109] This option may provide access to funding that tribes would not otherwise have, and which may be necessary for creating and maintaining a fully functional tribal justice system. It would also allow for enhanced sentencing measures as specified under TLOA and VAWA—three years or a $15,000 fine per incident, with the ability to stack sentences up to nine years.[110]

For some tribes, the cost-benefit analysis of this option may make sense, especially if their court systems require a substantial amount of financial support in the coming years. Further, the flexibility of the opt-in solution allows tribes to utilize funding and support from the United States in times where this funding may trump other concerns surrounding cultural and legal autonomy in tribal courts, with the option of revisiting these priorities in the future to better meet the evolving needs of the tribe. If or when the tribe decides that it no longer requires the financial support from the United States, it may inform the Department of the Interior (DOI) that it wishes to cease participation in the program and would work with DOI to establish a transition plan. The tribe may choose to accept less funding for greater flexibility with more limited oversight or may cease accepting funding altogether and revert back to limited baseline SDVCJ.

2. A Compromise Option: A Choice Between Restorative Justice or Federal Court

For tribes that do not feel as though the default option or the first opt-in option serve their needs, the second opt-in option presents a compromise. Under this option, tribes would have slightly expanded jurisdiction over the default baseline SDVCJ, but have a more limited sentencing power and receive less funding than if they adopted VAWA 2022.

a. Expanded Jurisdiction

The expanded jurisdiction would allow tribal police the ability to arrest and detain perpetrators until they can appear in front of a tribal court

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[109] *See generally* DEP'T OF JUSTICE, OVW FISCAL YEAR 2021 GRANTS TO TRIBAL GOVERNMENTS TO EXERCISE SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION SOLICITATION (2021) (discussing the variety of grants given to tribal entities under VAWA).

[110] 25 U.S.C §§ 1302(a)(7)(C), 1302(b).

for a preliminary hearing.[111] This preliminary detention would have a time limit; after the limit has passed, the defendant could petition for a writ of habeas corpus to alleviate concerns of indefinite detention or lack of a speedy trial. Expanded tribal police jurisdiction could take several forms, including funding and institutional assistance for cross-deputization of tribal police,[112] granting tribal police territorial jurisdiction over anything within their tribes' territory, or granting tribal police jurisdiction over anything that falls under SDVCJ.

b. The Choice for the Path Forward

When the individual who was arrested appears in front of the tribal court, the tribe would present both parties with options: choose to participate in the tribal court system where, if the defendant is convicted, it would end with a tribal reconciliation or restorative justice process;[113] go through the tribal court process with limited sentencing options as dictated by ICRA; or be transferred to federal custody and hand the case to the FBI for further investigation and subsequent prosecution.

Under this first option, the tribe would be free to set guidelines for the tribal court and tribal restorative justice program as it saw fit, applying culturally relevant models of justice and fairness in the process. Each tribe would also be able to set a dispute resolution framework for potential disagreements on which option to choose between survivor and perpetrator, utilizing tribal norms for dispute resolution. If no consensus can be reached, the process will default to the tribal court with sentencing under ICRA guidelines, which is currently the standard process for the majority of tribes in the United States.

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[111] Currently, tribal police only have jurisdiction over those that are covered under SDVCJ. This often leads to confusion at the scene of the incident and can prevent tribal law enforcement from intervening or assisting. *See* Rebecca A. Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CALIF. L. REV. 185, 231 (2008); Lily Grasafi, *Living in the Blast Zone: Sexual Violence Piped onto Native Land by Extractive Industries*, 53 COLUM. J.L. & SOC. PROBS. 510, 525–28 (2020).

[112] For a more in-depth discussion of cross-deputization, see HANNAH BOBEE ET AL., CRIMINAL JURISDICTION IN INDIAN COUNTRY: THE SOLUTION OF CROSS-DEPUTIZATION (Mich. State Univ. Coll. of L. Indigenous L. & Pol'y Ctr. 2008); Kevin Morrow, *Bridging the Jurisdictional Void: Cross-Deputization Agreements in Indian Country*, 94 N.D. L. REV. 65 (2019).

[113] If convicted by a tribal court under this scheme, the conviction would still count towards habitual-offender conviction counts.

c. Restorative Justice

Implementing a restorative justice program would allow tribes to engage in community building, focus on long term solutions to the problem of violence against women in tribal communities, and do so in a way in which tribal culture is prominent in the process.[114] Further, restorative justice programs are often victim-centric and focused on healing both the individual and the community, values commonly found in Native communities.[115] The dual focus of these programs often provides better outcomes for all involved and for the community. In fact, many tribes already have a restorative justice or peacemaking process they use to settle disputes within the tribe, often having a long track record of success.[116] Applying these processes to violence against women would allow survivors a voice in their own healing and journey to justice, and would allow the perpetrators to engage with the survivor and community in a supervised, structured, and hopefully productive manner, to heal not only the individual harm, but the harm to the community and greater trauma as well.

Additionally, using a restorative justice framework that the perpetrator opts to participate in would lighten or eliminate any due process concerns as the perpetrator is a consenting participant, alleviating the need for oversight from the United States for these situations. Here, instead of sentencing the perpetrator to incarceration, and attending to all the due process concerns that would accompany, tribes can utilize restorative justice programs as an alternative path to justice. This allows tribal courts with differing capacities to meet their community's needs in terms of accountability and reconciliation and offers a non-carceral adjudicatory option.

d. Federal Court

Tribes and survivors would be at liberty to withhold the choice from, and immediately transfer to federal custody, following an emergency tribal court hearing, anyone deemed to be too violent or a threat to the community. This ensures that tribal communities are still

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[114] *See generally* Amber Halldin, *Restoring the Victim and the Community: A Look at the Tribal Response to Sexual Violence Committed by Non-Indians in Indian Country Through Non-Criminal Approaches*, 84 N.D. L. REV. 1, 16–21 (2008).

[115] *See* Nicholas R. Sanchez, *Out with the New, In with the Old: Re-Implementing Traditional Forms of Justice in Indian Country*, 8 AM. INDIAN L. J. 68, 98–100 (2020).

[116] *See generally* Jessica Metoui, *Returning to the Circle: The Reemergence of Traditional Dispute Resolution in Native American Communities*, 2 J. DISP. RESOL. 1, 7–20 (2007).

prioritizing safety of their members above all else and utilizes the federal resources available to tribes in a manner that would support safety and security of the community. The parties may also opt for transferring a case to federal jurisdiction to be tried in federal court. This option would require cooperation with federal agencies and U.S. Attorneys to fairly prosecute these cases which are transferred over, but would also include some protection in the form of increased allowable evidence collection for survivors to ensure they find justice.

This would require a significant amount of investment in and cooperation between tribal systems and the federal system. It may also require a guarantee from the federal government that higher standards be put into place when deciding whether or not to move forward with a case, and if the case is dropped, mandate reporting reasons as to why that was the decision. There may also be space here for negotiation: if the federal government decides not to prosecute the case, the tribal court could then pick it up and take the case fully with no question as to jurisdiction, while still preserving the habeas right to ameliorate due process concerns.

e. Evidence Collection

One of the main impediments cited by federal authorities as to the lack of prosecutions for violence against Native women is the lack of usable evidence. While currently the U.S. government only prosecutes one-quarter of the cases of gender violence against Native women, the reason most often cited for failure to prosecute is lack of evidence.[117] Under this option, the federal government would give grants for tribes to ensure there are appropriate evidentiary standards in place with tribal authorities that are in line with federal court standards, including availability of trained nurses, rape kits, and appropriately trained crime scene technicians. While evidence collection will continue to be a problem in some cases, cross-deputization of tribal law enforcement[118] combined with heightened and better funded evidence collection and preservation, will likely increase the number of cases the federal government prosecutes substantially.

f. Funding

Under this option, tribes would be eligible for grants to facilitate

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[117] AMNESTY INT'L, *supra* note 50, at 67.

[118] *See generally* BOBEE ET AL., *supra* note 112 (providing a more detailed analysis of the pros and cons of cross-deputization).

these programs.[119] Funding may include programs to build, expand, or help run restorative justice programs, funding that has already been contemplated in VAWA 2022. Grants may also be given to tribes to expand their court systems, tribal police abilities, or any other aspect of the judicial process. The more funding that goes to the tribal court system, the more oversight the United States is granted over that court, with an upper limit to the funding available that is lower than the amount available if the tribe fully commits to the VAWA 2022 option. This funding would be intended as an intermediate option between receiving no federal support and receiving the full support under VAWA 2022, and tribes could work with the United States to determine what level of oversight is appropriate for the level of financial support being given.

g. Overview

This option gives tribes the ability to preserve their independence by allowing them to direct the avenues for recourse for the parties while giving the parties involved more autonomy over the process and the outcome. Additionally, this option provides avenues for redress to those who may not trust either the tribal justice system or the U.S. court system and would like to have an alternative choice. Further, it gives survivors a choice about their healing and path to justice, allowing survivors to have a say in their recovery and justice process, placing autonomy and control back into their hands. It provides those who feel that they could not participate in a restorative justice program, who feel that the perpetrator should stand trial, whether in tribal or state court, or who don't feel safe without their perpetrator incarcerated, the option to allow the case to run through the judicial process, and allows others who do feel safe to heal in ways not mandated by a court.

While there are pros and cons to both choices in this compromise option, the ability to opt-in to traditional, non-carceral tribal justice frameworks nods to respecting tribal authority and sovereignty while still providing an Anglo-American carceral option to satisfy worries about effectiveness and fairness for defendants and safety for survivors. Further, this option may collect data indicating that the carceral federal court system option is rarely, if ever, used and thus not necessary at all. This data may prove to be useful for future tribal advocacy and to provide the tribes with more leverage to argue for further extensions of jurisdiction in the future. Showing that tribal courts are sophisticated mechanisms of justice that can handle cases with the same efficacy and

[119] There is already funding in VAWA 2022 for restorative justice program building.

effect as the U.S. judicial system may lend credence to tribal courts at large and encourage use of tribal courts for other types of cases.

Additionally, increased cooperation between tribal officials and federal officials may make prosecution easier regardless of the choice of court and may help those living in the community, but not directly tied to the tribe, find legitimacy and trust in tribal officials, lending further validation and respect to tribal authority. This trust, over time, may assist people in the community in viewing the tribe as an independent political entity, a sovereign to be respected and treated as such. It would also help ameliorate the problem of impunity for sexual violence in Indian Country.[120]

CONCLUSION

Congress should consider passing new VAWA legislation to first, override *Oliphant* and give, at the very least, SDVCJ back to tribes, and second, include language indicating tribes have an opt-in choice between the two choices outlined in Section V above. These choices would be extended to any tribe within the new definition of Indian Country, which includes peoples in Hawai'i, Alaska and Maine.

I argue that creating an opt-in for the VAWA requirements (while still allowing SDVCJ) for tribes who feel it is the right option for them would be the most prudent course of action, and the first step towards creating a system that recognizes the rights and needs of Native nations. This proposal would go a long way in clarifying the jurisdictional maze many Native women encounter while still retaining tribal sovereignty and autonomy. This would also give Native women a sense of self-determination, allowing them to have a greater say in the implementation of tribal justice systems and a sense of security knowing that their case would never fall into the space that Joe's mother's case did in *The Round House*—a jurisdictional black hole.

Regardless of the choice the tribe picks, under this regime tribal officials still have the right to intervene, detain, and charge perpetrators of gender violence, making it clearer and safer for Native women. The ability for tribal officials to respond to gender violence also means more efficient and accurate evidence collection and the ability for first responders to go over next steps with the survivor, regardless of the choice

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[120] *See* Jonathan Weisman, *Measure to Protect Women Stuck on Tribal Land Issues*, N.Y. TIMES (Feb. 10, 2013), https://www.nytimes.com/2013/02/11/us/politics/violence-against-women-act-held-up-by-tribal-land-issue.html?pagewanted=1&_r=1&ref=politics.

the tribe has made. And most importantly, under this regime the tribes are given the power to make the choice for themselves, something that was taken from them in *Oliphant* and never completely returned. Alleviating this jurisdictional maze while still preserving the autonomy of Native nations is the first step in beginning to alleviate the "shackles" held by Native women everywhere and allowing an exit from the bardo, a rebirth and healing for so many women who have survived for years with no justice and no recourse.