

**TOO MANY GAPS, TOO MANY FALLEN VICTIMS:  
PROTECTING AMERICAN INDIAN WOMEN FROM  
VIOLENCE ON TRIBAL LANDS**

JESSICA GREER GRIFFITH\*

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*“Every hour of every day an American Indian woman within the authority of a tribal court is the victim of sexual and physical abuse.”<sup>1</sup>*

## 1. INTRODUCTION

In Indian country,<sup>2</sup> violence against American Indian<sup>3</sup> women and girls has reached epidemic proportions. According to Bureau of Justice statistics, the rate of rape or sexual assault of American Indian women is 3.5 times higher than the rate of rape or sexual assault of women of any other race in the United States.<sup>4</sup> The Justice Department has reported one in three American Indian women will be raped over her lifetime,<sup>5</sup> and the Census Bureau has indicated 39% of all American Indian women have been victims of domestic violence.<sup>6</sup> Non-Indians are responsible for committing a

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<sup>1</sup> Brief for National Network to End Domestic Violence et al. as Amici Curiae Supporting Respondents at 2, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008) (No. 07-411) [hereinafter Brief for National Network to End Domestic Violence].

<sup>2</sup> “Indian country” is the legal term for the geographic territory controlled by a tribe. *Criminal Jurisdiction in Indian Country*, UANATIVE.NET, <http://www.uanativenet.com/content/criminal-jurisdiction-indian-country> (last visited Apr. 15, 2013).

<sup>3</sup> U.S. code defines “American Indians” as members of politically affiliated tribes. 25 U.S.C. § 1603 (2010); *see also* *United States v. Antelope*, 430 U.S. 641, 646 (1977) (explaining under federal criminal law, individuals are considered “Indians” for many federal jurisdictional and statutory purposes because they are enrolled members of a tribe, not because they are of the Indian race).

<sup>4</sup> Kimberly N. Alleyne, *Law Enforcement Gaps Leave Native Women Vulnerable to Rape and Domestic Violence*, AMERICA’S WIRE, <http://americaswire.org/drupal7/?q=content/law-enforcement-gaps-leave-native-women-vulnerable-rape-and-domestic-violence-1> (last visited May 7, 2013).

<sup>5</sup> Louise Erdrich, Op-Ed., *Rape on the Reservation*, N.Y. TIMES, Feb. 27, 2013 at A25; Pub. L. No. 109-162, § 901 (2006).

<sup>6</sup> The actual figure is likely much higher since many victims mistrust authorities and do not report crimes. One young American Indian girl, for example, explained her discussion about rape with her mother: “When I’m raped, we won’t report it, because we know nothing will happen. We don’t want to cause problems for our family.” Kavitha Chekuru, *Violence Against Women Act Includes New Protections for Native American Women*, HUFFINGTON POST (Mar. 10, 2013, 6:21 PM), [http://www.huffingtonpost.com/2013/03/10/violence-against-women-act-nativeamericans\\_n\\_2849931.html](http://www.huffingtonpost.com/2013/03/10/violence-against-women-act-nativeamericans_n_2849931.html). Additionally, some American Indian victims will only report atrocious crimes. As described by Sarah El-Fakahany, a sexual assault advocate at the Minnesota Indian Women’s Resource Center in Minneapolis, American Indians view domestic violence as “I almost died,’ or ‘I was kidnapped, raped and held in a basement for three days’ or ‘I was

disproportionate number of such crimes on tribal lands.<sup>7</sup>

Even though American Indian tribes possess nationhood status, maintain tribal sovereignty, and have their own court systems,<sup>8</sup> federal law has prevented tribes from prosecuting non-Indian perpetrators of crimes on tribal lands.<sup>9</sup> Complicating and contributing to the problem is the fact that the federal government, states, and tribes all share different degrees of jurisdiction over crimes committed in Indian country. If an American Indian woman is the victim of a crime of violence committed by an American Indian, with the exception of certain states, tribes and the federal government will generally have concurrent jurisdiction depending on the type of crime committed.<sup>10</sup> If an American Indian woman is the victim of a violent crime committed by a non-Indian, tribal authorities, until recently, had no authority to arrest, prosecute, or punish an offender.<sup>11</sup> Cases involving non-Indian perpetrators had to be referred to federal, and occasionally, state prosecutors.<sup>12</sup> However, federal and state prosecutors historically

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dragged by a car, but it wasn't that bad.'" Alleyne, *supra* note 4; see also Matthew L.M. Fletcher, *Addressing the Epidemic of Domestic Violence in Indian Country by Restoring Tribal Sovereignty*, AM. CONST. SOC'Y FOR L. & POL'Y, Mar. 2009, at 1 (describing the prevalence and problems associated with domestic abuse among American Indian women).

<sup>7</sup> See discussion *infra* Section 2 and accompanying notes.

<sup>8</sup> *Frequently Asked Questions*, U.S. DEP'T OF THE INTERIOR: BUREAU OF INDIAN AFF. [hereinafter BIA FAQ], <http://www.bia.gov/FAQs/> (last updated Mar. 16, 2015, 2:44 PM).

<sup>9</sup> N. Bruce Duthu, *Broken Justice in Indian Country*, N.Y. TIMES, Aug. 10, 2008, at A17, available at <http://www.nytimes.com/2008/08/11/opinion/11duthu.html>.

<sup>10</sup> This is true depending on whether the crime occurs in a PL-280 state, and if the crime falls under the Major Crimes Act, which created federal jurisdiction over a number of major crimes committed by Indians against Indians. See 18 U.S.C.A. § 1153 (2008). The Supreme Court has upheld dual prosecution of offenses under the dual sovereignty doctrine. See *United States v. Wheeler*, 435 U.S. 313 (1978) (holding double jeopardy does not apply to defendants who are charged for acts that are criminal offenses under both tribal and federal laws since distinct independent sovereign bodies prosecute the offenses); *United States v. Lara*, 541 U.S. 193 (2004) (concluding that prosecution by the tribe and federal government was permissible). Non-major crimes committed by Indians against Indians are "within the exclusive jurisdiction of the tribes" if the crime occurs in a state where PL-280 is not in effect. WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL: FIFTH EDITION* 150 (2009).

<sup>11</sup> See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) ("Indian tribes do not have inherent jurisdiction to try and to punish non-Indians."). The *Oliphant* decision was partially overruled by VAWA 2013.

<sup>12</sup> See *infra* Section 3.5. and accompanying notes.

have declined to prosecute many crimes committed against American Indian women on tribal lands due to factors that make prosecuting crimes challenging, such as a lack of resources and the distance of tribal lands. As a result, many indigenous women have been left unprotected from sexual violence, while perpetrators of crimes have remained unpunished.<sup>13</sup>

Several international law treaties, conventions, and declarations recognize a woman's right to freedom from sexual violence and a state's responsibility to prevent, investigate, and address acts of sexual violence against women.<sup>14</sup> Even though international human rights organizations work hard to raise awareness of the high levels of violence against women on tribal lands, to obtain greater legal protection for victims of gender violence and to make the United States more aware of international law obligations, Indian women continue to experience high levels of sexual violence.<sup>15</sup> As explained by Jana Walker, senior attorney and director of the Indian Law Resource Center's Safe Women, Strong Nations project, "While many in the United States take th[e] right [to be free of violence] for granted, Native women do not."<sup>16</sup>

The United States recently has taken steps to better protect American Indian women on tribal lands. The Violence Against Women Reauthorization Act of 2013 increases the jurisdiction of tribes by permitting tribes to prosecute non-Indians accused of committing certain domestic abuse and dating violence crimes in Indian country. The Tribal Special U.S. Attorney pilot program trains tribal prosecutors in federal law and permits them to act as co-counsel in federal prosecutions of violent crimes against Indian women. The federal government also participates in an increased number of discussions, consultations, and listening sessions with tribes.

Yet, these strides alone are not enough. Violence against

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<sup>13</sup> Lauren Kelly, *The Human Rights Impacts of VAWA 2013: A True Victory for Native American Women?*, DUKE IMMERSE 1 (2013), available at <http://humanrights.fhi.duke.edu/wp-content/uploads/2014/05/Kelly-The-Human-Rights-Impacts-of-VAWA-2013.pdf>.

<sup>14</sup> See *infra* Section 4.

<sup>15</sup> Amnesty International, The Indian Law Resource Center, the National Congress of American Indians Task Force on Violence Against Women, Clan Star, Inc. and the National Indigenous Women's Resource Center all work to end human right violations against American Indian women. Kelly, *supra* note 13, at 1-2.

<sup>16</sup> *Id.*

Indian women on tribal lands continues. Funding and resources are limited. Political, constitutional, and jurisdictional questions surrounding the further expansion of criminal jurisdiction of tribes have to be examined by federal, state, and tribal representatives. The United States needs to prioritize and recognize, domestically and internationally, its commitment to preventing and protecting indigenous women from violence, as well as investigate and punish more violent offenses. Impunity gaps in the law, which continue to contribute to a sense of lawlessness in Indian country, have to be addressed and rectified. Non-Indians, who do not work or live on tribal lands, or are not in a relationship with an Indian woman who resides in Indian country, are still immune from tribal prosecution of violent crimes committed against Indian women on tribal lands.

This article will discuss the problem of the high rate of violence against American Indian women on tribal lands with special attention to the current jurisdictional scheme and impunity gaps in the law. In Part 2 of the article, I provide an overview of the scope of the problem. In Part 3, I outline the history of criminal jurisdiction in Indian country. In Part 4, I discuss the international law obligations of the United States to protect indigenous women from sexual violence. In Part 5, I review recent efforts to address violence against American Indian women on tribal lands. In Part 6, I recognize the challenge of reducing violence against American Indian women on tribal lands and propose ways to begin to solve this significant problem.

## 2. SCOPE OF THE PROBLEM

Violence against American Indian women residing on Indian reservations far exceeds violence against any other population of women in the United States.<sup>17</sup> A recent Centers for Disease Control

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<sup>17</sup> See MICHAEL PLANTY ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010 (2013), available at <http://www.bjs.gov/content/pub/pdf/fvsv9410.pdf> (discussing the prevalence of female sexual violence between 1994 and 2010 by comparing age, income and race among other factors); see also CALLIE RENNISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENT VICTIMIZATION AND RACE, 1993-98 (2001), available at <http://www.bjs.gov/content/pub/pdf/vvr98.pdf> (2001) (reporting data demonstrating American Indian females suffer the highest rate of "overall violence and serious violence" as compared to other races).

and Prevention study, for example, found 46% of Native American women have experienced rape, physical violence, and/or stalking by a partner in their lifetime.<sup>18</sup> A University of Oklahoma regional survey reported nearly three out of every five Native American women have been assaulted by their spouses or intimate partners.<sup>19</sup> Rapes against American Indian women have been characterized as “exceedingly violent” and three times more likely to involve weapons than all other reported rapes.<sup>20</sup>

Non-Indians are responsible for the highest number of violent crimes committed against American Indian women. At least 70% of rapes of American Indians are inter-racial, with some studies reporting the percentage as high as 88%.<sup>21</sup> In a study by the Bureau of Justice, nearly four in five American Indian victims of rape and/or sexual assault described the perpetrator of the crime as white, and for about one in ten incidents of rape and sexual assault, described the perpetrator of the crime as black.<sup>22</sup> The percentage of interracial rapes of American Indian women is particularly high when compared to rapes of non-Indian women in the United States: 69% of rapes of Caucasian victims are committed by Caucasian individuals and 81% of rapes of African-

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<sup>18</sup> Jodi Gillette & Charlie Galbraith, *President Signs 2013 VAWA – Empowering Tribes to Protect Native Women*, WHITE HOUSE BLOG (Mar. 7, 2013, 7:07 PM), <http://www.whitehouse.gov/blog/2013/03/07/president-signs-2013-vawa-empowering-tribes-protect-native-women>.

<sup>19</sup> *Id.* A compilation of the National Crime Victimization Surveys from 1992 to 2005 reported American Indian and Alaska Native women experienced the highest rate of intimate partner violence. RONET BACHMAN ET AL., *VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN 47* (2008) [hereinafter BACHMAN RESEARCH REPORT], available at <https://www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf>.

<sup>20</sup> Duthu, *supra* note 9.

<sup>21</sup> Melissa L. Tatum, *VAWA and the Rolled-Up Newspaper of Goodness*, HUFFINGTON POST BLOG (Mar. 14, 2013, 6:31 PM), [http://www.huffingtonpost.com/melissa-l-tatum-/vawa-and-the-rolledup-new\\_b\\_2863467.html](http://www.huffingtonpost.com/melissa-l-tatum-/vawa-and-the-rolledup-new_b_2863467.html); Larry Cunningham, *Deputization of Indian Prosecutors: Protecting Indian Interests in Federal Court*, 88 GEO. L.J. 2187, 2197–98 (2000). Other accounts cite the percentage much higher. See, e.g., Brief for National Network to End Domestic Violence, *supra* note 1, at 5 (“The Department of Justice reports that white or black offenders committed 88% of all such violent victimizations [of American Indian women] during the years 1992–2001.”); Duthu, *supra* note 9, at 1 (“More than 80 percent of Indian victims identify their attacker as non-Indian.”).

<sup>22</sup> Steven W. Perry, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE, 1992–2002* (2004), [hereinafter *American Indians and Crime 1992–2002*], available at <http://www.bjs.gov/content/pub/pdf/aic02.pdf>.

American victims are committed by African-American individuals.<sup>23</sup>

The high rate of interracial sexual violence on tribal lands can be partially attributed to the large number of non-Indians who reside on reservations after purchasing land within Indian reservations and/or marry American Indian women.<sup>24</sup> Over half of all married American Indian women have non-Indian husbands.<sup>25</sup> Also contributing to the high rate of interracial sexual violence on tribal lands are individuals who do not live in Indian country, but specifically travel to reservations to rape American Indian women.<sup>26</sup> Lisa Brunner, an advocate for survivors of domestic violence and sexual assault in the American Indian community, describes sexual predators at American Indian reservations as “hunting—non-natives come here hunting. They know they can come into our lands and rape us with impunity because they know that we can’t touch them.”<sup>27</sup>

Women play significant cultural, spiritual, and physical roles in tribal communities.<sup>28</sup> Violence against American Indian women not only threatens to erode tribal sovereignty, but also to irreparably hurt the welfare of American Indian women.<sup>29</sup> Rape and sexual assault are types of crimes that can impact women physically, emotionally, and spiritually, and may ultimately cause victims to suffer higher rates of depression, alcoholism, drug abuse, and suicidal ideation than those who have not been sexually assaulted.<sup>30</sup> When American Indian women are traumatized by sexual violence, their contributions to their family and tribal

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<sup>23</sup> Tatum, *supra* note 21.

<sup>24</sup> See Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 12-15 (1995) (explaining how millions of acres of land passed from Indian tribes to non-Indian owners due to the surplus lands program and the allotment to individual Indians of tribal land that could be “alienated, encumbered, and at least as to Burke Act patents, taxed”).

<sup>25</sup> Kelly, *supra* note 13.

<sup>26</sup> *Id.*

<sup>27</sup> Elisabeth Epstein, *America’s Dark Secret: Violence Against Natives*, GIRLS’ GLOBE, Apr. 19, 2013, <http://girlsglobe.org/2013/04/19/americas-dark-secret-violence-against-natives/>.

<sup>28</sup> Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL’Y 121, 124 (2004-2005).

<sup>29</sup> Hossein Dabiri, Comment, *Kiss the Ring, But Never Touch the Crown: How U.S. Policy Denies Indian Women Bodily Autonomy and the Save Native Women Act’s Attempt to Reverse that Policy*, 36 AM. INDIAN L. REV. 385, 386 (2011-2012).

<sup>30</sup> Deer, *supra* note 28, at 123.



communities may decrease.<sup>31</sup> Domestic violence and sexual assault can lead to breakdowns of the family structure and can negatively impact an entire tribal community.<sup>32</sup>

### 3. OVERVIEW OF CRIMINAL JURISDICTION IN INDIAN COUNTRY

Tribes have the power to establish and to operate their own court systems, with their own judges and prosecutors.<sup>33</sup> Tribal justice systems, including tribal courts, tribal legal codes, and law enforcement officers, widely differ in sophistication and form.<sup>34</sup> The federal government, states, and tribes all have varying, and sometimes overlapping, degrees of jurisdiction over crimes committed in Indian country, which depend on whether a victim is a member of a federally recognized Indian tribe, whether an accused is a member of a federally recognized Indian tribe, the type of crime committed, and whether an alleged crime occurred on tribal land.<sup>35</sup>

The U.S. Constitution recognizes Indian tribes<sup>36</sup> as entities that are not taxed by state and federal governments with whom the

<sup>31</sup> *Id.* at 124.

<sup>32</sup> *Id.*

<sup>33</sup> There are more than 300 tribal courts in the United States. *Id.*; Elizabeth Ann Kronk, *American Indian Tribal Courts as Models for Incorporating Customary Law*, 3 J. CT. INNOVATION 231, 235 n.16 (2010), available at [http://law.pace.edu/sites/default/files/IJIEA/JCIKronk\\_American%20Indian%20Tribal%20Courts%20LJB%203-16\\_1\\_1\\_2.pdf](http://law.pace.edu/sites/default/files/IJIEA/JCIKronk_American%20Indian%20Tribal%20Courts%20LJB%203-16_1_1_2.pdf). See also Indian Reorganization Act of 1934, Pub. L. No. 73-383 (1934) (codified at 25 U.S.C. § 461 *et seq.*) (permitting tribes to create their own tribal courts).

<sup>34</sup> See Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1628 (1998) (“Currently, many tribal justice systems [are] widely varied in their relative sophistication and form . . .”); Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 291 (1998) (presenting a review of litigation in the tribal courts); and Gordon K. Wright, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397, 1401-03 (1985) (describing the evolution of modern tribal courts and their organization, function, and weaknesses). Over 170 tribal nations operate law enforcement agencies and over 350 tribes maintain their own judicial systems. AMNESTY INT’L, MAZE OF INJUSTICE 28 (2007) [hereinafter AMNESTY INTERNATIONAL], <http://www.amnestyusa.org/pdfs/mazeofinjustice.pdf>.

<sup>35</sup> AMNESTY INTERNATIONAL, *supra* note 34, at 27.

<sup>36</sup> “Indian tribes” are defined as “any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government.” 25 U.S.C.A. § 1301(1) (1968).

federal government shares commercial relations and makes treaties.<sup>37</sup> The Supreme Court has classified Indian tribes not as “foreign state[s],” but as “domestic dependent nations.”<sup>38</sup> Although an Indian tribe cannot enter into relations with other foreign states,<sup>39</sup> it can exercise many of the sovereign powers of government it would retain if it were a nation within the international sphere (*i.e.*, the power to determine its own form of government, the power to determine citizenship criteria, and the power to tax), unless the United States divests a tribe of an attribute of sovereignty<sup>40</sup> or the exercise of tribal sovereignty authority is inconsistent with a tribe’s domestic dependent status.<sup>41</sup>

Through a series of federal statutes and U.S. Supreme Court decisions, tribes have been divested of substantial power to prosecute individuals who commit crimes on Indian lands, resulting in a “jurisdictional puzzle of federal, state, and tribal authority in Indian Country.”<sup>42</sup> Federal and state intervention in tribal affairs, coupled with varying levels of political, legal, and financial support, has made it difficult for tribal justice systems to operate in full parity with state and federal justice systems.<sup>43</sup>

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<sup>37</sup> Judith Resnik, *Multiple Sovereignties: Indian Tribes, States, and the Federal Government*, 79 JUDICATURE 118, 118 (1995-1996).

<sup>38</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1, 17, 20 (1831). See also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978) (characterizing Indian tribes as “quasi-sovereign nations”).

<sup>39</sup> *Worcester v. Georgia*, 31 U.S. 515, 559 (1832); see also Royster, *supra* note 24, at 2 n.4 (commenting how most tribes, besides the ability to enter into foreign relations, meet the qualifications of a state: “a defined territory, a population, and a government.”).

<sup>40</sup> A tribe may voluntarily divest itself, or Congress may take action to affirmatively divest an Indian tribe, of some aspect of its sovereignty. Fletcher, *supra* note 6, at 2-3.

<sup>41</sup> *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 153-54 (1980) (“This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights.”).

<sup>42</sup> Rebecca A. Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CALIF. L. REV. 185, 187 (2008); see also BACHMAN RESEARCH REPORT, *supra* note 19, at 69. (“The impact of federal intervention in tribal affairs may have served to hinder the ability of tribal governments to effectively address violence against American Indian and Alaska Native women.”).

<sup>43</sup> See Jiménez & Song, *supra* note 34, at 1628 (“[U]neven political, legal, and financial support impedes the ability of many tribal justice systems to function in

To better understand recent developments to curb violence against American Indian women, it is important to become familiar with past developments in federal Indian law, as well as international law, in order to recognize the unique authority and position of American Indian tribes as both sovereign and dependent nations.

### 3.1. Federal Jurisdiction in Indian Country

Congress adopted the General Crimes Act in 1817, establishing federal jurisdiction over interracial crimes committed on tribal lands by Indians against non-Indians if an Indian perpetrator was not already punished by tribal law and no treaty provision applied, and establishing federal criminal jurisdiction over interracial crimes committed by non-Indians against Indians.<sup>44</sup> Crimes involving only Indian offenders and Indian victims remained within the jurisdiction of a tribe.<sup>45</sup> In *Ex Parte Crow Dog*, an 1883 case, the Supreme Court held the Sioux Tribe had criminal jurisdiction over a tribal member's alleged murder of another member of the same tribe on the reservation because the alleged murder was not a federal offense and so not cognizable under federal law.<sup>46</sup>

Congress passed the Major Crimes Act ("MCA") in response to outcry over the unpopular *Ex Parte Crow Dog* case.<sup>47</sup> Under the

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full parity with state and federal systems."); see also *Message on the Observance of Labor Day, 1997*, 33 WKLY. COMPILATION OF PRESIDENTIAL DOC. 1267, 1268 (Aug. 25, 1997), available at <http://www.govrecords.org/pd01se97-message-on-the-observance-of-labor-day-1997.html> (emphasizing President Clinton's concern that "many Indian citizens receive police, investigative, and detention services that lag far behind even this country's poorest jurisdictions").

<sup>44</sup> General Crimes Act, ch. 92, § 2, 3 Stat. 383, 383 (1817) (codified as amended at 18 U.S.C. § 1152 (2006)); M. Brent Leonhard, *Returning Washington P.L. 280 Jurisdiction to Its Original Consent-Based Grounds*, 47 GONZ. L. REV. 663, 668 (2011-2012)

<sup>45</sup> *Id.*

<sup>46</sup> *Ex parte Crow Dog*, 109 U.S. 556 (1883).

<sup>47</sup> See Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 803-05 (2006) (arguing that tribal laws were insufficient and "portraying Indian country as a lawless place" using *Crow Dog*, which allowed federal officials to successfully lobby for a major crimes law); Gideon M. Hart, *A Crisis in Indian Country: An Analysis of the Tribal Law and Order Act of 2010*, 23 REGENT U. L. REV. 139, 151 (2010) ("In response to the unpopular *Crow Dog* decision, . . . Congress passed the Major Crimes Act in 1885."); and Leonhard,

MCA, federal courts were conferred jurisdiction over certain major crimes committed by American Indians within Indian country, such as murder, rape, arson, and robbery, regardless of whether the victim of a crime was Indian or non-Indian.<sup>48</sup> Violent crimes against women,<sup>49</sup> such as aggravated assault and rape, were also designated crimes to be prosecuted at the federal level.<sup>50</sup>

The underlying impetus for creating the MCA, as described by Law Professor Philip J. Prygoski, was the sentiment that "Indian tribes were not competent to deal with serious issues of crime and punishment."<sup>51</sup> By authorizing federal jurisdiction over major crimes occurring on tribal lands, the MCA also greatly reduced the internal sovereignty of American Indian tribes. Although most case law appears to indicate that tribes have concurrent jurisdiction over crimes enumerated in the MCA,<sup>52</sup> legal scholars have noted "[t]he practical impact [of the enactment of the MCA] . . . is that fewer tribes pursue prosecution of crimes such as murder and

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*supra* note 44, at 672–73 ("Ex parte Crow Dog [led] to the enactment of the Major Crimes Act . . .") (footnote omitted).

<sup>48</sup> See Major Crimes Act, 18 U.S.C. § 1153 (2006). The MCA currently states:

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States. (b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

<sup>49</sup> After Public Law 280 ("PL-280") was passed in 1953, federal jurisdiction over major crimes, including violent crimes against American Indian women committed on tribal lands, was transferred to state governments in designated states. See generally the discussion of PL-280 *infra* Section 3.3 for details about this law.

<sup>50</sup> BACHMAN RESEARCH REPORT, *supra* note 19, at 71.

<sup>51</sup> Philip J. Prygoski, *From Marshall to Marshall: The Supreme Court's Changing Stance on Tribal Sovereignty*, 12 *COMPLEAT L.* 14, 16 (1995) (examining the changing doctrine of American Indian tribal sovereignty through analysis of U.S. Supreme Court decisions over the past 170 years).

<sup>52</sup> AMNESTY INTERNATIONAL, *supra* note 34, at 29. See, e.g., *Antelope*, 430 U.S. at 643 n.2; *Wheeler*, 435 U.S. at 329–30.

rape” and “rape cases have become the domain of the federal government.”<sup>53</sup>

### 3.2. *Public Law 280 and the Transfer of Jurisdiction in Indian Country to Specific States*

Public Law 280 (“PL-280”) was enacted by Congress in 1953, and transferred, in designated PL-280 states, jurisdiction over certain crimes committed on tribal land from federal to state governments.<sup>54</sup> Tribes were forced to accept state jurisdiction; the consent of Indian tribes was not required.<sup>55</sup> When implementing PL-280, Congress expressed three purposes: “lawlessness on reservations, the desire to assimilate Indian tribes into the population at large, and a shrinking federal budget for Indian affairs.”<sup>56</sup>

Under PL-280, both tribal and state authorities have concurrent jurisdiction over crimes committed on tribal lands by indigenous people.<sup>57</sup> Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin are six states that were required to adopt PL-280, while other states had the option of acquiring partial or total

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<sup>53</sup> Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 SUFFOLK U. L. REV. 455, 460 (2005).

<sup>54</sup> See Jiménez & Song, *supra* note 34, at 1657 (“Public Law 280 unilaterally transferred federal civil and criminal jurisdiction ‘over offenses committed by or against Indians’ within Indian country to the six designated states . . .”) (footnotes omitted); Ada Pecos Melton & Jerry Gardner, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, AIDAINC.NET, <http://www.aidainc.net/Publications/pl280.htm> (last visited Feb. 12, 2015) (“Public Law 83-280 . . . was a transfer of legal authority (jurisdiction) from the federal government to state governments . . .”); *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 177 (1973) (noting that PL-280 “grants the consent of the United States to States wishing to assume criminal and civil jurisdiction over reservation Indians, and 25 U.S.C. s 1324 confers upon the States the right to disregard enabling acts which limit their authority over such Indians.”).

<sup>55</sup> See Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 703 (2006) (“One of the striking features of Public Law 280, however, is the fact that affected tribes did not consent to its adoption and implementation.”); Melton & Gardner, *supra* note 54, § 3 (“Public Law 280 required neither the consent of the Indian Nations being affected nor even consultation with these Indian Nations.”).

<sup>56</sup> Jiménez & Song, *supra* note 34, at 1659 (referencing *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 488 (1979)).

<sup>57</sup> AMNESTY INTERNATIONAL, *supra* note 34, at 29.

jurisdictional authority over certain American Indian affairs.<sup>58</sup> A couple of tribes in these states were excluded from state criminal jurisdiction because of their lobbying efforts.<sup>59</sup> Since PL-280's enactment, many tribal leaders have viewed the law as unsatisfactory, one-sided and part of the reason why tribes lost control over several criminal and civil matters within their territory.<sup>60</sup>

In 1968, fifteen years after PL-280 was originally enacted, Congress amended the law to add a tribal consent requirement and to provide states with the option of giving back jurisdiction to the federal government.<sup>61</sup> This new tribal consent requirement applied only to future transfers of jurisdiction to states under PL-280 – not to transfers of jurisdiction that had already occurred.<sup>62</sup> However, the 1968 amendments did permit any state, which had previously assumed jurisdiction under PL-280, to offer the return of all, or any measure, of its jurisdiction to the federal government by submitting a resolution to the Secretary of the Interior.<sup>63</sup> The Secretary could then choose to accept or to reject the return of jurisdiction from a state.<sup>64</sup> The amendments notably did not include any means for Indian nations to initiate return jurisdiction on their own.<sup>65</sup>

PL-280 did not eliminate or formally reduce tribal criminal

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<sup>58</sup> See Goldberg & Champagne, *supra* note 55, at 700–01 (“Public Law 280 authorized state criminal jurisdiction over Indians and non-Indians on reservations in six named states . . . .”); Melton & Gardner, *supra* note 54, §§ 2, 6 (referring to these six states as the “mandatory states”). See also AMNESTY INTERNATIONAL, *supra* note 34, at 29 (stating that under PL-280, the U.S. Congress gave California, Minnesota, Nebraska, Oregon, Wisconsin and Alaska “extensive criminal and civil jurisdiction over Indian Country”).

<sup>59</sup> See Goldberg & Champagne, *supra* note 55, at 700–01 (mentioning the successful lobbying effort of some tribes, resulting in being free from state criminal jurisdiction).

<sup>60</sup> See AMNESTY INTERNATIONAL, *supra* note 34, at 29 (“Public Law 280 is seen by many Indigenous peoples as an affront to tribal sovereignty, not least because states have the option to assume and to relinquish jurisdiction, a power not extended to the Indigenous peoples affected.”).

<sup>61</sup> See Goldberg & Champagne, *supra* note 55, at 707 (noting amendments passed by Congress in 1968 that allowed states to return jurisdiction back to the federal government); Melton & Gardner, *supra* note 54, § 4 (“These 1968 amendments added a tribal consent requirement . . . .”).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

jurisdiction.<sup>66</sup> After the enactment of PL-280, state jurisdiction was concurrent with tribal jurisdiction.<sup>67</sup> However, PL-280 states were not allocated additional funding or federal subsidies for law enforcement and criminal justice purposes in Indian country.<sup>68</sup> The withdrawal of much federal financial and technical support in PL-280 states had the practical effect of negatively impacting the tribal criminal justice systems of some Indian nations.<sup>69</sup> The situation has gradually improved in recent years as more Indian nations have asserted their concurrent criminal jurisdiction and have begun to develop stronger criminal justice systems.<sup>70</sup> Nevertheless, PL-280 still imposes barriers that negatively impact tribal governments' abilities to criminally sanction offenders, including those who commit violence against American Indian women on tribal lands.

### 3.3. *The Indian Civil Rights Act of 1968*

The Indian Civil Rights Act of 1968 ("ICRA") was enacted in response to Congress' desire to strike a balance between "protect[ing] individuals from arbitrary and overly intrusive tribal actions" and "retaining [tribes'] legal capacity to act as self-

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<sup>66</sup> See Goldberg & Champagne, *supra* note 55, at 701 ("Public Law 280 did not eliminate or limit tribal criminal jurisdiction . . ."); Melton & Gardner, *supra* note 54, § 6 (noting that the law did not remove tribal criminal jurisdiction).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*; Deer, *supra* note 53, at 460-61; Melton & Gardner, *supra* note 54, § 3.

<sup>69</sup> *Id.*; see also AMNESTY INTERNATIONAL, *supra* note 34, at 29 ("[T]ribal and state authorities have not received sufficient funds to assume their respective law enforcement responsibilities, resulting in a sense of 'lawlessness' in some communities and difficult relations between tribal and state officials.").

<sup>70</sup> See Melton & Gardner, *supra* note 54, § 8. The relationship between the tribal criminal justice system and the state criminal justice system varies from state to state. As explained by the American Indian Development Associates ("AIDA"):

Some Public Law 280 states have been willing to retrocede Public Law 280 jurisdiction. In some states, this relationship has been particularly difficult, especially in California and Alaska. In other states, the tribal and state justice systems have been able to establish very productive relationships. For example, tribal and state courts in Wisconsin have generally established good working relationships. In fact, the Wisconsin Court of Appeals held that once an Indian Nation has a domestic abuse ordinance in place and a tribal court to enforce it, then the tribal court has exclusive jurisdiction despite Public Law 280.

*Id.* § 10.

governing entities.”<sup>71</sup> The ICRA enumerated individual civil rights akin to those in the Bill of Rights and the Fourteenth Amendment, provided a federal habeas provision for challenging tribal detention, and limited the sentencing authority of tribal courts.<sup>72</sup> Tribes were initially limited to imposing a sentence of imprisonment for a term of up to six months, fines of up to \$500, or both, for a conviction of any one offense.<sup>73</sup> In 1986, Congress increased the authority of tribes to impose a sentence of imprisonment for a term of up to one year, a fine of \$5,000, or both, for conviction of any one offense.<sup>74</sup> Congress later enacted the Tribal Law and Order Act of 2010<sup>75</sup> to permit tribes under the ICRA to impose a sentence of imprisonment up to three years, fines of up to \$15,000, or both, for a conviction of any one offense, if tribes “ensure[d] certain individual rights to an Indian criminal defendant, including the right to counsel as guaranteed by the U.S. Constitution.”<sup>76</sup> The Tribal Law and Order Act of 2010 also provided tribes with the authority to impose a maximum sentence (the total of stacking individual sentences) of imprisonment up to nine years if defendants were guaranteed certain rights.<sup>77</sup>

### 3.4. Tribal Jurisdiction over Non-Indians

A tribe’s ability to prosecute an offender of a violent crime differs based on the identities of the offender and the victim. In *Olyphant v. Suquamish Indian Tribe*, nearly a century after *Ex Parte Crow Dog*, the Supreme Court determined Indian tribes do not

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<sup>71</sup> Robert Berry, *Civil Liberties Constraints on Tribal Sovereignty After the Indian Civil Rights Act of 1968*, 1 J. L. & POL’Y 1, 1-2 (1993).

<sup>72</sup> Indian Civil Rights Act of 1968, 82 Stat. 77 (1968), 25 U.S.C. §§ 1301-1303 (1968). For a more detailed discussion of the Indian Civil Rights Act, see the discussion of the ICRA in Section 5.1

<sup>73</sup> 25 U.S.C. § 1302 (1968), amended by Pub. L. No. 99-570, 25 U.S.C. § 1302(a)(7) (1986); see also Barbara L. Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 MICH. J. RACE & L. 317, 347 (2013) (discussing the limits on tribal sentencing authority under the Indian Civil Rights Act).

<sup>74</sup> 25 U.S.C. § 1302(a)(7)(B) (1986).

<sup>75</sup> Creel, *supra* note 73, at 349; The Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234, 124 Stat. 2258 (codified at 25 U.S.C. § 1302).

<sup>76</sup> Creel, *supra* note 73, at 348.

<sup>77</sup> 25 U.S.C. § 1302(a)(7)(D); Creel, *supra* note 73, at 359 n.259.



have inherent criminal jurisdiction to arrest, criminally prosecute, and punish non-Indians who commit crimes on Indian land.<sup>78</sup> *Oliphant* created a gap in the law which divested Indian tribes of the ability to prosecute non-Indians who commit crimes in Indian country.<sup>79</sup> The *Oliphant* decision greatly reduced the sovereignty of Indian nations. Some critics regarded the Supreme Court decision as “handcuffing [Indians’] law enforcement activities” and “attacking Indians’ power to protect their own people.”<sup>80</sup>

The inability of tribal law enforcement officers to arrest and to prosecute non-Indians who committed crimes on tribal lands fostered a culture of lawlessness in Indian country.<sup>81</sup> Andrea Smith, Assistant Professor of Native Studies at the University of Michigan, explained that “non-Native perpetrators often seek out a reservation place because they know they can inflict violence without much happening to them.”<sup>82</sup> As reported in *The Atlantic*, every officer spoken to at the Fort Berthold Indian Reservation in North Dakota can recount being told by a non-Indian, “You can’t do anything to me.”<sup>83</sup> Young Bird, Director of the Fort Berthold Coalition Against Violence, similarly remarked, “Perpetrators think they can’t be touched.”<sup>84</sup> Offenders of violent crimes who are not arrested have also been found to be more likely to commit additional attacks.<sup>85</sup>

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<sup>78</sup> *Oliphant*, 435 U.S. at 191.

<sup>79</sup> See *Oliphant*, 435 U.S. at 205, 212 (concluding that “Indian tribal courts are without inherent jurisdiction to try non-Indians” and that it is for “Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians”).

<sup>80</sup> Cunningham, *supra* note 21, at 2194–95.

<sup>81</sup> Sierra Crane-Murdoch, *On Indian Land, Criminals Can Get Away with Almost Anything*, THE ATLANTIC (Feb. 22, 2013, 9:16 AM), <http://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391/>. There has been widespread critique of the *Oliphant* decision. See, e.g., Gary Fields, *On U.S. Indian Reservations, Criminals Slip Through Gaps: Limited Legal Powers Hobble Tribal Nations; Feds Take Few Cases*, WALL STREET J., June 12, 2007, at A14 (quoting University of Michigan law professor and tribal criminal-justice expert Gavin Clarkson, “If you go to Canada and rob someone, you will be tried by Canadian authorities. That’s sovereignty. . . . My position is that tribes should have criminal jurisdiction over anybody who commits a crime in their territory. The Supreme Court screwed it all up and Congress has never fixed it.”).

<sup>82</sup> AMNESTY INTERNATIONAL, *supra* note 34, at 33.

<sup>83</sup> Crane-Murdoch, *supra* note 81.

<sup>84</sup> *Id.*

<sup>85</sup> Gillette & Galbraith, *supra* note 18, at 2 (“Research shows that law enforcement’s failure to arrest and prosecute abusers both emboldens attackers

### 3.5. *The Inherent Sovereignty of Indian Tribal Courts to Prosecute Non-Member Indians*

In *Duro v. Reina*, 495 U.S. 676 (1990), the Supreme Court held Indian tribes do not have the authority to criminally prosecute a non-member Indian.<sup>86</sup> This ruling was overturned when Congress amended the ICRA in 1990 to recognize the inherent power of American Indian tribes to exercise criminal jurisdiction over all American Indians who have any federally recognized tribal affiliation.<sup>87</sup> In *United States v. Lara*, 541 U.S. 193 (2004), the Supreme Court affirmed these amendments to the ICRA by ruling that Congress had the authority to relax the restrictions on a tribe's inherent sovereignty, recognized in *Duro*, in order to restore inherent tribal powers, such as the power to prosecute non-member Indians in tribal courts.<sup>88</sup> The Supreme Court also determined that both the federal government and an Indian tribe could prosecute an American Indian for the same crime in both jurisdictions without violating the double jeopardy clause since the United States of America and tribes are separate sovereigns.<sup>89</sup>

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and deters victims from reporting future incidents.”).

<sup>86</sup> Courts use the term “non-member Indian” to refer to an individual on tribal lands who meets the legal definition of “Indian” in at least one context, but who is not registered as a member of the tribe where the individual is being prosecuted. Terrill Pollman, *Double Jeopardy and Nonmember Indians in Indian Country*, 82 NEB. L. REV. 889, 890 n.2 (2014).

<sup>87</sup> See 25 U.S.C. § 1301(2) (defining “powers of self-government” granted to Indian tribes to include the power “to exercise criminal jurisdiction over all Indians”).

<sup>88</sup> See *United States v. Lara*, 541 U.S. 193, 199–208 (2004) (“Congress, with this Court’s approval, has interpreted the Constitution’s ‘plenary’ grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority.”). Dabiri, *supra* note 29, at 401.

<sup>89</sup> See *United States v. Lara*, 541 U.S. 193 (2004). The defendant in this case, who was not a member of the Spirit Lake Nation, was charged for acts committed on the Spirit Lake Nation Reservation that were criminal offenses under both the Spirit Lake Sioux Tribal Law and the Federal United States Code. The defendant pleaded guilty to the tribal charges, but claimed the federal charges violated the Fifth Amendment’s prohibition against double jeopardy. *Id.* at 196–97. The Supreme Court held “the Double Jeopardy Clause does not prohibit the Federal Government from proceeding with the present prosecution for a discrete *federal* offense.” *Id.* at 210 (emphasis in original).

## 4. INTERNATIONAL LAW OBLIGATIONS

Since American Indian tribes are both sovereign and dependent nations, international law obligations of the United States also may impact tribes. International human rights organizations actively work to raise awareness of the high levels of violence committed against indigenous women on tribal lands.<sup>90</sup> Amnesty International, a human rights organization, has reported,

[v]iolence against women is one of the most pervasive human rights abuses . . . . Governments have a responsibility to ensure that women are able to enjoy their right to freedom from sexual violence . . . [and] Amnesty International's findings indicate that many American Indian and Alaska Native victims of sexual violence find access to legal redress, adequate medical attention and reparations difficult, if not impossible.<sup>91</sup>

International human rights organizations spend time and resources bringing international law obligations and abuses of the United States to the attention of government officials and the public.

Sexual violence against indigenous women is a violation of several human rights enumerated in a variety of international law treaties, conventions, and declarations, including the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment's establishment of the right not to be tortured or ill-treated;<sup>92</sup> the International Covenant on Civil and Political Rights' recognition of "the right to liberty and security of person;"<sup>93</sup> the Universal Declaration of Human Rights' articulation of everyone's right to "a standard of living adequate for the health and well-being of himself;"<sup>94</sup> and the United Nations Declaration

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<sup>90</sup> AMNESTY INTERNATIONAL, *supra* note 34, at 6.

<sup>91</sup> *Id.* at 1-9.

<sup>92</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, art. 2(1).

<sup>93</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, art. 9(1).

<sup>94</sup> Universal Declaration of Human Rights, G.A. Res. 217(III) A, U.N. Doc. A/RES/217(III), art. 25(1) (Dec. 10, 1948).

on the Rights of Indigenous Peoples' international human rights standards on the rights of indigenous people.<sup>95</sup> A state violates women's rights to equality before the law if it knows, or ought to know, about violations of human rights and does not take sufficient steps to prevent them.<sup>96</sup>

The Declaration on the Elimination of Violence Against Women ("DEVAW") internationally recognizes that states should "exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons."<sup>97</sup> A state, in addition to the actual perpetrator of a sexual violence crime, should also be held accountable if it does not adequately prevent, or investigate and address the crime.<sup>98</sup> As explained in the Report of the Special Rapporteur on Violence Against Women, "due diligence is more than 'the mere enactment of formal legal provisions' . . . the State must act in good faith to 'effectively prevent' violence against women."<sup>99</sup> Articles 1 and 2 of DEVAW contain a commonly used definition of violence against women:

Article 1: For the purposes of this Declaration, the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women,

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<sup>95</sup> The United Nations Declaration on the Rights of Indigenous Peoples enumerates minimum standards for the recognition and protection of the rights of indigenous peoples and advises states to take measures, in conjunction with indigenous peoples, to "ensure that indigenous women . . . enjoy the full protection and guarantees against all forms of violence and discrimination." Declaration on the Rights of Indigenous People, G.A. Res. 61/295, U.N. Doc. A/RES/61/295, art. 22(2) (Sept. 13, 2007). Amnesty International notably points out that the United States, along with Australia and New Zealand, was active "in blocking adoption of the UN Declaration on the Rights of Indigenous Peoples by the UN General Assembly at its 61st session." AMNESTY INTERNATIONAL, *supra* note 34, at 22.

<sup>96</sup> AMNESTY INTERNATIONAL, *supra* note 34, at 19–20.

<sup>97</sup> Declaration on the Elimination of Violence Against Women, G.A. Res 48/104, U.N. Doc. A/Res/ 48/104, art. 4(c) (Dec. 20, 1993).

<sup>98</sup> AMNESTY INTERNATIONAL, *supra* note 34, at 20.

<sup>99</sup> Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences on the Due Diligence Standard as a Tool for the Elimination of Violence against Women, U.N. Economic and Social Council, U.N. Doc E/CN.4/2006/61 (Jan. 20, 2006) (by Yakin Ertürk).

including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

Article 2: Violence against women shall be understood to encompass, but not be limited to, the following:

(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.<sup>100</sup>

As a U.N. General Assembly declaration, DEVAW does not have the binding legal authority of a convention or a treaty, but is applicable to all members of the United Nations as a statement of principle. Thus, to abide by DEVAW, the United States should act with due diligence to prevent violence, protect women from violence, investigate and punish violent offenses, and provide redress for victims by taking such actions as adopting or modifying legislation, addressing root causes of violence against women, helping victims (*i.e.*, protection orders, legal assistance, shelters), addressing failure of law enforcement to investigate crimes, and increasing data collection and crime reporting.<sup>101</sup>

The United States has declined to ratify both the Inter-American Convention on the Prevention, Punishment and

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<sup>100</sup> Declaration on the Elimination of Violence Against Women, *supra* note 97, arts. 1-2.

<sup>101</sup> See Study of the Secretary-General, *Ending Violence Against Women: From Words to Action*, UNITED NATIONS (2006), [http://www.un.org/womenwatch/daw/public/VAW\\_Study/VAWstudyE.pdf](http://www.un.org/womenwatch/daw/public/VAW_Study/VAWstudyE.pdf) (suggesting practices and offering recommendations for States to end violence against women).

Eradication of Violence Against Women (Convention of Belém do Pará), which involves the issue of violence against women,<sup>102</sup> and the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), which focuses on women’s rights.<sup>103</sup> Critics of CEDAW contend there is no need to ratify the convention since laws in the United States already protect women. As stated during a 2002 CEDAW hearing by Kathryn Ogden Balmforth, former director of the World Family Policy Center, the United States legal system “is so far superior to anything that exists at the United Nations in establishing the rule of law that it would be the sheerest folly to subordinate our right to legislate these purely domestic matters . . . to some international body.”<sup>104</sup> Other opponents to ratification of CEDAW have expressed their belief that “the Women’s Convention and other human rights treaties are intended for countries that have a history of human rights abuses and lack strong domestic protections, unlike the United States . . . point[ing] to the traditional cultural practices of other, non-western states such as child marriage, female genital mutilation, and honor killings . . .”<sup>105</sup> Advocates of CEDAW argue that ratifying the Convention and other human rights treaties which address violence against women should not be seen as “international interference in our own domestic system, but instead as part of our own ‘proud tradition to keep striving to do better and better here at home.’”<sup>106</sup> Advocates emphasize the need for the United States, in addition to paying attention to the human rights records of other nations, to also examine and address its own records and violence

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<sup>102</sup> See AMNESTY INTERNATIONAL, *supra* note 34, at 24 (“The Convention of Belém do Pará has been more widely ratified than any other Inter-American treaty. The USA is one of only two members of the Organization of American States which have failed to ratify it.”).

<sup>103</sup> *Id.*

<sup>104</sup> *Convention on the Elimination of All Forms of Discrimination Against Women: Hearing Before the S. Comm. on Foreign Relations, 107th Cong. 38 n.20 (2002)* (statement of Professor Harold Koh).

<sup>105</sup> Univ. of Va. Int’l Hum. Rts. Law Clinic, *Violence Against Women in the United States and the State’s Obligation to Protect: Civil Society Briefing Papers on Community, Military and Custody Submitted to the United Nations Special Rapporteur on Violence Against Women, Rashida Manjoo in Advance of Her Mission to the United States of America January 24 - February 7, 2011* (2011), at 14, *available* at <http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/vaw.pdf> (footnote omitted).

<sup>106</sup> *Id.* at 16.

against women within the United States.<sup>107</sup>

## 5. RECENT EFFORTS TO ADDRESS VIOLENCE AGAINST AMERICAN INDIAN WOMEN ON TRIBAL LANDS

In the past couple of years, the federal government has begun to enhance its communication and collaboration with American Indian tribes to combat violent crimes committed against American Indian women in Indian country. The Violence Against Women Reauthorization Act of 2013 was enacted, which allocates to tribal authorities the power to investigate, prosecute, convict, and sentence Indians, and non-Indians with ties to tribal lands, accused of committing certain domestic abuse crimes against American Indian women in Indian Country.<sup>108</sup> The U.S. Department of Justice announced a Tribal Special U.S. Attorney program, which enables tribal prosecutors to pursue cases with greater independence and to serve as co-counsel in federal investigations and prosecutions of violent crimes against women.<sup>109</sup> The federal government has also increased its communication and consultation with Indian tribes.

### 5.1. *Violence Against Women Act of 2013 (VAWA)*

Congress initially implemented the Violence Against Women Act (“VAWA”) as a part of the Violent Crime Control and Law Enforcement Act of 1994. The law’s twentieth anniversary was celebrated last year.<sup>110</sup> The purpose of the act was to criminalize, as well as to provide funding, toward investigating and

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<sup>107</sup> *Id.* at 20 (noting that the United States focuses “primarily on efforts to combat VAW abroad.”). *Id.* at 15.

<sup>108</sup> *VAWA 2013 and Tribal Jurisdiction over Non-Indian Perpetrators of Domestic Violence*, JUSTICE.GOV [hereinafter *VAWA 2013 Fact Sheet*], <http://www.justice.gov/tribal/docs/vawa-2013-tribal-jurisdiction-overnon-indian-perpetrators-domesticviolence.pdf>.

<sup>109</sup> Cheryl Cedar Face, *Justice Department Announces New Program to Combat Violence Against Women*, AMERICANINDIANREPORT.COM (June 7, 2012), <http://www.americanindianreport.com/wordpress/2012/06/justice-department-announces-new-program-to-combat-violence-against-women/>.

<sup>110</sup> See H.R. 3355, 103rd Cong. (1994) (enacted) (implementing special provisions to protect women).

prosecuting, violent crimes against females, especially violence against vulnerable populations such as American Indian women and children.<sup>111</sup> VAWA 1994 allocated 4% of its funding for grants for Services and Training for Officers and Prosecutors (STOP) to American Indian and Alaskan Native federally recognized tribes.<sup>112</sup> VAWA also provided funding for education, training, and shelters.<sup>113</sup> In addition, VAWA established the Violence Against Women Office (VAWO) – now named the Office of Violence Against Women – within the Department of Justice.<sup>114</sup> VAWA was amended in 2000 and 2005.<sup>115</sup>

Congress recently passed the Violence Against Women Reauthorization Act of 2013 (VAWA 2013), which President Obama signed into law on March 7, 2013.<sup>116</sup> This act strengthens the pre-existing Violence Against Women Act by increasing protection for American Indian women and other susceptible victims whom were previously left vulnerable by gaps in the law.<sup>117</sup> Under this law, tribes are able to exercise their sovereign power to concurrently investigate, prosecute, convict, and sentence Indians *and* non-Indians who commit domestic violence crimes against Indian spouses or dating partners.<sup>118</sup> VAWA 2013 specifies that tribal courts have full civil jurisdiction to provide American Indian women the safety and security of protection orders.<sup>119</sup> VAWA 2013 also includes a provision which “creat[es] new federal statutes to address crimes of violence, such as strangulation, committed against a spouse or intimate partner and provid[es] more robust federal sentences for certain acts of domestic violence in Indian country.”<sup>120</sup> These aspects of the law

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<sup>111</sup> Violence Against Women Act of 1994, 42 U.S.C. §§ 13701–14040 (1994).

<sup>112</sup> BACHMAN RESEARCH REPORT, *supra* note 19, at 14.

<sup>113</sup> *Id.* at 76.

<sup>114</sup> *The Facts on Violence Against American Indian/Alaskan Native Women*, FUTURESWITHOUTVIOLENCE.ORG, <http://www.futureswithoutviolence.org/userfiles/file/Violence%20Against%20AI%20AN%20Women%20Fact%20Sheet.pdf>.

<sup>115</sup> BACHMAN RESEARCH REPORT, *supra* note 19, at 76.

<sup>116</sup> Gillette & Galbraith, *supra* note 18.

<sup>117</sup> *Id.*

<sup>118</sup> VAWA 2013 Fact Sheet, *supra* note 112.

<sup>119</sup> Gillette & Galbraith, *supra* note 18 (emphasizing that VAWA 2013 gives tribal women substantially more protections).

<sup>120</sup> The United States Department of Justice, *Indian Country Accomplishments of the Justice Department* [hereinafter *Indian Country Accomplishments*], <http://www.justice.gov/tribal/accomplishments>.



are major developments in the effort to curb violence against American Indian women in Indian country, especially when taking into consideration the high percentage of non-Indian individuals who reside on reservations and/or are married to American Indians.<sup>121</sup>

The new provisions in VAWA 2013 were developed in response to human rights organizations' and American Indian women and tribal leaders' reports and petitions to the federal government detailing the negative consequences of the inability of tribes to address violent crimes committed against American Indian women on tribal lands.<sup>122</sup> The Obama Administration, led by the Department of Justice, consulted formally with tribal leaders, and subsequently developed and submitted to Congress a proposal to address the jurisdictional barriers which contribute to the high rates of violence in Indian Country.<sup>123</sup> Tribal leaders and advocates also worked with Senators and members of the House of Representatives of both parties during the passage of VAWA 2013 to ensure that the victimization of American Indian women was not politically ignored.<sup>124</sup> Ultimately, VAWA 2013 was passed in both chambers of Congress and with the support of American Indian tribes.<sup>125</sup>

Diane Millich, a member of the Southern Ute Indian Tribe in Colorado, was invited to introduce Biden at the president's signing ceremony of the VAWA Reauthorization Act of 2013. She shared a personal account of how she was abused and suffered "more than 100 incidents of being slapped, kicked, punched, and living in horrific terror" after she married a non-Indian man who moved in with her on the reservation.<sup>126</sup> The tribal police were unable to respond to her pleas for help because her husband was non-Indian, and did not act until her husband showed up at her workplace with a gun.<sup>127</sup> At the signing ceremony Diane explained, "[i]f the

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<sup>121</sup> See *supra* Section 2 and accompanying notes.

<sup>122</sup> Gillette & Galbraith, *supra* note 18 (describing the purposes and legislative history of VAWA).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Rob Capriccioso, *President Barack Obama's VAWA Law Signing Spotlights Native Women Warriors*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM (Mar. 11, 2013), <http://indiancountrytodaymedianetwork.com/2013/03/11/president-barack-obamas-va-wa-law-signing-spotlights-native-women-warriors-148105>.

<sup>127</sup> *Id.*

bill being signed today were law when I was married, it would have allowed my tribe to arrest and prosecute my abuser.”<sup>128</sup>

Crimes between two non-Indians or between two strangers are not covered by VAWA 2013.<sup>129</sup> Domestic violence and dating violence crimes committed by a person who lacks sufficient ties to the tribe also do not fall under the scope of this law.<sup>130</sup> An Indian tribe can only exercise “special domestic violence criminal jurisdiction over a defendant” if the defendant “resides in the Indian country of the participating tribe; is employed in the Indian country of the participating tribe; or is a spouse, intimate partner, or dating partner of a member of the participating tribe or an Indian who resides in the Indian country of the participating tribe.”<sup>131</sup> Thus, tribal law enforcement officers cannot prosecute non-Indians under VAWA 2013 who visit tribal lands for a brief period of time, commit crimes of violence against women, and then go back to their homes outside of Indian country.<sup>132</sup> These crimes still become federal matters.<sup>133</sup>

Tribal participation in VAWA 2013 is voluntary, and the authority of U.S. Attorneys to prosecute crimes in Indian country remains the same.<sup>134</sup> As the law stands now, tribes can issue and enforce civil protection orders, but generally will not be able to criminally prosecute non-Indian abusers until March 7, 2015.<sup>135</sup> If a tribe asks to participate in the new pilot project for VAWA 2013, it will be able to start prosecuting non-Indian abusers sooner than March 7, 2015, if its criminal justice system protects a defendant’s rights under federal law and the Justice Department grants the tribe’s request and sets a starting date.<sup>136</sup> As of November 2014, federal prosecutors have charged more than 200 defendants and obtained more than 140 convictions under VAWA 2013’s

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<sup>128</sup> *Id.*

<sup>129</sup> VAWA 2013 Fact Sheet, *supra* note 112.

<sup>130</sup> *Id.*

<sup>131</sup> Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, § 904(b)(4)(B).

<sup>132</sup> See Alleyne, *supra* note 4 (remarking that there are often spikes in attacks against Native women during hunting and fishing season since non-Native men “can go onto the reservations and then go back to their homes five hours away”).

<sup>133</sup> *Id.* (“With tribal jurisdiction, tribal police cannot touch you, and it becomes a federal matter.”)

<sup>134</sup> VAWA 2013 Fact Sheet, *supra* note 112.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

“enhanced federal assault statutes.”<sup>137</sup>

### 5.2. *Rights of Non-Indian Defendants*

A discussion of increasing a tribe’s ability to prosecute non-Indians would be incomplete without examining the fundamental rights of defendants in tribal courts. Before enacting VAWA 2013, there were concerns whether a non-Indian prosecuted in tribal courts would be tried by a jury of his or her peers and the extent to which a non-Indian would be guaranteed his or her constitutional rights. The Bill of Rights and the Fourteenth Amendment are unenforceable against tribes since they are not the federal government, states, or subdivisions of either.<sup>138</sup> Responding to these concerns, VAWA 2013 requires participating tribes to uphold the rights of the accused as defined in the Indian Civil Rights Act and guarantee the right to a trial by an impartial jury drawn from a “fair cross section of the community . . . [which] do[es] not systematically exclude any distinctive group in the community, including non-Indians.”<sup>139</sup> The law also contains a ‘catch-all’ provision, which requires tribes provide a defendant “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.”<sup>140</sup>

Congress passed both the ICRA, which is largely consistent with the federal Constitution’s Bill of Rights, and the Tribal Law and Order Act of 2010, in order to require Indian tribes to recognize specified rights of Indian and non-Indian individuals.<sup>141</sup>

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<sup>137</sup> Indian Country Accomplishments, *supra* note 122.

<sup>138</sup> See Cunningham, *supra* note 21, at 2200–02; Talton v. Mayes, 163 U.S. 376, 376 (1896) (“The powers of local government exercised by the Cherokee Nation are local powers, not created by the constitution, and hence are not operated upon by amendment 5 thereof . . .”).

<sup>139</sup> Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, § 904(d).

<sup>140</sup> *Id.*

<sup>141</sup> 25 U.S.C.A. § 1301 et seq. See generally *supra* Section 3.4 for a discussion of the ICRA. See also Dodge v. Nakai, 298 F. Supp. 26, 31 (D. Ariz. 1969) (holding that non-Indian defendants are also entitled to the protections of the ICRA). The ICRA, 25 U.S.C. § 1302(a), states:

No Indian tribe in exercising powers of self-government shall—

Although many of the provisions and civil liberties enumerated in the ICRA are similar to those in the Bill of Rights, there are some notable differences. The ICRA does not prohibit the establishment of religion by a tribe, provide for an automatic right to a jury trial, or contain a provision equivalent to that of the Second Amendment in the Bill of Rights.<sup>142</sup> The ICRA also only guarantees indigents the right to appointed counsel in a criminal proceeding if a defendant is charged with crimes with a sentence of imprisonment

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- (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
  - (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
  - (3) subject any person for the same offense to be twice put in jeopardy;
  - (4) compel any person in any criminal case to be a witness against himself;
  - (5) take any private property for a public use without just compensation;
  - (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense . . . ;
  - (7)(A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;
  - (B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of \$5,000, or both;
  - (C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of \$15,000, or both; or
  - (D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;
  - (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
  - (9) pass any bill of attainder or ex post facto law; or
  - (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

<sup>142</sup> 25 U.S.C.A. § 1302.

of more than one year.<sup>143</sup> VAWA 2013 resolves this potential Sixth Amendment violation by requiring a participating tribe to provide “all rights described in section 202(c)” of the Indian Civil Rights Act “if a term of imprisonment of *any* length may be imposed,” which provides criminal non-Indian indigent defendants with appointed counsel for all accused crimes.<sup>144</sup>

### 5.3. Tribal Special U.S. Attorney Program

#### 5.3.1. The Critical Role of U.S. Attorneys in Combating Violent Crimes

U.S. Attorneys have a significant impact on the safety of American Indian women. Prior to VAWA 2013, if a U.S. Attorney’s office declined to prosecute domestic violence crimes on reservations committed by non-Indians against Indian women, perpetrators of crimes were free from punishment.<sup>145</sup> Even after VAWA 2013, if a U.S. Attorney’s office does not prosecute a crime, non-Indians who lack sufficient ties to a tribe, or assault a woman who is a stranger, will enjoy impunity for violent crimes committed against American Indian women on tribal lands.<sup>146</sup> This gap in the law, which prevents tribes from prosecuting crimes U.S. Attorneys decline to prosecute, makes the ability and willingness of U.S. Attorneys to investigate and to prosecute violent crimes against American Indian women critical.

Unfortunately, despite the prevalence of violent sexual and domestic abuse crimes committed on tribal lands, there is a severe lack of prosecution.<sup>147</sup> According to government data, U.S. Attorneys declined to prosecute about 67% of sexual assault cases and 46% of assault matters referred from Indian Country in fiscal years 2005 to 2009.<sup>148</sup> Reasons for not prosecuting these cases

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<sup>143</sup> *Id.* § 1302(c).

<sup>144</sup> Pub. L. No. 113-4, § 904(d)(2); 25 U.S.C.A. § 1302(c)(2).

<sup>145</sup> Prior to VAWA 2013, when a non-Indian victimized an Indian, only U.S. Attorneys could file charges. See generally *supra* Section 3.2. and accompanying notes for more background on the history of tribes’ inability to prosecute non-Indians.

<sup>146</sup> VAWA 2013 *Fact Sheet*, *supra* note 112.

<sup>147</sup> Fields, *supra* note 81 (explaining the “justice gap” when non-Indian defendants are not prosecuted on Indian reservations).

<sup>148</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-11-167R, DECLINATIONS OF INDIAN

included "the long distances involved, lack of resources and the cost of hauling witnesses and defendants to federal court."<sup>149</sup> Studies also indicated that limited funding and personnel caused U.S. Attorneys to frequently focus on only the most serious of crimes.<sup>150</sup>

Domestic-abuse crimes on tribal lands frequently are challenging to prosecute. Witnesses often retract their claims, and crimes have to be severe enough to be federal felonies to confer federal jurisdiction under the MCA.<sup>151</sup> Professor Gavin Clarkson explained that even if a U.S. attorney had the resources and the desire to prosecute a domestic violence case, a felony assault charge would require a victim to have suffered "'serious bodily injury,' defined as a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty."<sup>152</sup> Accordingly, a broken nose would be insufficient grounds.<sup>153</sup> Many domestic violence cases are consequently not prosecuted.<sup>154</sup>

When federal prosecutors choose not to pursue cases because of the expense, scarcity of resources, heavy workloads, and/or the difficulty of prosecuting domestic violence cases, and tribes are prohibited from prosecuting these cases, victims may be left helpless and criminals may escape punishment.<sup>155</sup> Mr. Kilbourne, an attorney who has prosecuted cases on Cherokee lands since 2001, aptly sums up the severity of the problem, "Where else do you ask: How bad is the crime, what color are the victims and what color are the defendants? . . . We would not allow this anywhere else except Indian country."<sup>156</sup>

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COUNTRY MATTERS 3 (2010) [hereinafter GAO REPORT].

<sup>149</sup> Fields, *supra* note 81.

<sup>150</sup> *Id.* (citing a Syracuse University study showing a comparatively lower rate of prosecution for less serious offenses). Mr. Davis, an Assistant U.S. Attorney in Michigan, remarked on how severe a domestic-abuse crime that is prosecuted normally must be. "It requires stitches, almost a dead body. . . . It is a high standard to meet." *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Gavin Clarkson, *Reservations Beyond the Law*, L.A. TIMES, Aug. 3, 2007, at A27.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Fields, *supra* note 81, at A1.

<sup>156</sup> *Id.*

### 5.3.2. *The Tribal SAUSA Pilot Project*

The Tribal SAUSA Pilot Project (“Tribal SAUSA”) is a program designed to train tribal prosecutors in federal law and investigative techniques in order to equip tribal prosecutors with the means to pursue cases with greater independence and a larger capacity for legal input.<sup>157</sup> Tribal prosecutors in the program will be able to act as co-counsel in federal investigations and prosecutions of violent crimes against women arising out of their respective communities.<sup>158</sup> The goal of the Tribal SAUSA program is to increase prosecution of the number of criminal offenses committed on tribal lands in tribal court, federal court, or both.<sup>159</sup>

The four tribes participating in the pilot project are the Fort Belknap Tribe in Montana, the Winnebago Tribe in Nebraska, the Standing Rock Sioux Tribe in North Dakota, and the Pueblo of Laguna in New Mexico.<sup>160</sup> The Office on Violence Against Women (“OVW”) will fund the salaries, travel, and training costs of the qualified attorney applicants selected by the four tribes participating in the program.<sup>161</sup> Selected applicants will act as Special Assistant U.S. Attorneys. They will collaborate with the U.S. Attorney Offices in the districts of Nebraska, New Mexico, Montana, North Dakota, and South Dakota by maintaining an active caseload in tribal and/or federal court, as well as help to promote higher quality investigations, improve training, and increase inter-governmental communication.<sup>162</sup>

Tribal SAUSA was created as a result of the Justice Department’s 2009 Tribal Nation Listening Session on Public Safety and Law Enforcement, and the Justice Department’s yearly consults with tribal leaders, about violent crimes against American Indian women.<sup>163</sup> The OVW Director Bea Hanson expressed the Department of Justice’s belief that communication and cooperation

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<sup>157</sup> Face, *supra* note 113.

<sup>158</sup> *Id.*

<sup>159</sup> OVW Announces Agreements to Cross-Designate Tribal Prosecutors in NE, NM, MT, ND, and SD, INDIAN L. & ORD. COMMISSION [hereinafter *OVW Announcement*], available at <http://www.aisc.ucla.edu/iloc/news/index-a=18.html> (last visited May 3, 2013).

<sup>160</sup> Face, *supra* note 113.

<sup>161</sup> *OVW Announcement*, *supra* note 163.

<sup>162</sup> *Id.*

<sup>163</sup> Face, *supra* note 113.

are needed in order to effectively curb violence against American Indian women. She explained “restoring safety for Native women requires the type of sustained cooperation between the federal and tribal justice systems that we see in the jurisdictions participating in our Tribal SAUSA project.”<sup>164</sup> The Tribal SAUSA pilot program is designed to enhance the quality of cases, coordination of resources, and communication of priorities within and between the different law enforcement agencies with the goal of decreasing violence against American Indian women on tribal lands by increasing the number of violent crimes prosecuted.<sup>165</sup>

#### 6. CLOSING LEGAL GAPS TO PROTECT AMERICAN INDIAN WOMEN FROM VIOLENCE ON TRIBAL LANDS

Currently, there are over 560 federally recognized American Indian and Alaskan Native tribes and villages.<sup>166</sup> The U.S. federal government unilaterally decided the majority of the developments which led to Indian law becoming the jurisdictional puzzle of authority that it is today. Even though American Indian nations possess nationhood status and retain certain inherent powers of self-government,<sup>167</sup> they have not been consulted nor consented to a vast majority of federal statutes and Supreme Court decisions that influence the scope of their law enforcement authority and criminal justice systems.

Without communication and coordination between tribal, state, and federal governments, it is difficult, if not impossible, to effectively combat violence against American Indian women in Indian country. With U.S. Attorneys declining to prosecute a significant number of sexual abuse cases committed in Indian Country,<sup>168</sup> and tribes having limited funding and authority to prosecute such cases, an action plan is direly needed.

To start, the federal government should publicly acknowledge and prioritize the need to increase efforts to protect American Indian women from sexual violence. The United States should

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<sup>164</sup> *Id.*

<sup>165</sup> *OVW Announcement*, *supra* note 163.

<sup>166</sup> BIA FAQ, *supra* note 8.

<sup>167</sup> *Id.*

<sup>168</sup> GAO REPORT, *supra* note 152, at 3.



ratify international treaties for the rights of women and indigenous people to solidify its public commitment to fighting violence against women and to send a clear message that it is prioritizing efforts to protect American Indian women from violence.

The U.S. government, as a matter of policy, should increase its accountability to, and collaboration with, tribes by frequently engaging tribal nations on a government-to-government basis. Congress should not pass laws that affect a tribal government's authority to arrest, prosecute, and punish offenders without receiving the consent of a tribe.<sup>169</sup>

Due to the proximity of tribal law enforcement officers to crime scenes, and their motivation to respond quickly, tribal law enforcement officers' abilities to react to violent crimes against women on tribal lands should be increased, regardless of an offender's identity or ethnicity. Additional funding should be allocated to Indian tribes so that they are better able to police tribal lands and strengthen their criminal justice systems. Individuals should not be able to take advantage of legal loopholes that act as 'Get Out of Jail Free' cards.<sup>170</sup> Congressman Tom Cole, an American Indian, explained, "Because the jurisdiction has been weak and the law enforcement capacity limited, predators have been attracted to Indian reservations . . . . [W]e are just not giving [American Indians] the same level of protection and the same level of prosecutorial certainty that most Americans and most parts of the country can take for granted."<sup>171</sup>

A more thorough discussion and study of whether the fundamental constitutional rights of individuals are adequately guaranteed on tribal lands, and whether they will continue to be guaranteed if the jurisdiction of tribes is expanded in the future,

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<sup>169</sup> International law would support such action on the part of the federal government. As explained in a report by Amnesty International, The Committee on the Elimination of Racial Discrimination which oversees states' compliance with the International Convention on the Elimination of All Forms of Racial Discrimination "has called on states to 'recognize and respect indigenous peoples' distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation' and ensure that 'no decisions directly relating to their rights and interests are taken without their informed consent.'" AMNESTY INTERNATIONAL, *supra* note 34, at 20.

<sup>170</sup> Tatum, *supra* note 21.

<sup>171</sup> *Can Laws Protect Native American Women?*, AL JAZEERA (Mar. 1, 2013, 4:13 PM), *available at* <http://www.aljazeera.com/programmes/insidestoryamericas/2013/03/201331112052455737.html> (last modified Mar. 1, 2013).

are also needed. The amended VAWA statute currently addresses defendants' rights by incorporating all rights under the ICRA and guaranteeing the right to trial by an impartial jury selected in a way that "do[es] not systematically exclude . . . non-Indians."<sup>172</sup> The amended VAWA statute also has a "catch-all" provision protecting a non-Indian defendant's constitutional rights.<sup>173</sup> In 2015, as tribal courts begin to prosecute non-Indians who commit domestic violence offenses against American Indian women on tribal lands, it will be important to evaluate and analyze whether defendants' constitutional rights are and will be adequately protected in the future. Going forward, there should also be open conversation between the federal government and tribes concerning issues such as the right to counsel, which entity will be responsible for the cost of defense counsel, appellate procedures, jury composition for various crimes, where those convicted of crimes will serve jail time, and whether particular tribes wish to adopt the adversary system of justice implemented in the United States and/or different traditional justice systems.

The federal government should additionally research and conduct studies of the effectiveness of the Tribal SAUSA pilot program, as well as consider expanding it. The Tribal SAUSA pilot program is a way to begin to transfer jurisdiction to Indian tribes over crimes committed by non-Indians, while ensuring that the interests, concerns, and rights of Indian victims and non-Indian offenders are represented. The program will provide a means for federal and tribal attorneys to communicate and work together, as well as highlight obstacles that are likely to be debated and disputed before additional legislative action occurs.

## 7. CONCLUSION

Violent crimes are committed against American Indian women more than the rate of rape or sexual assault of women of any other race in the United States. Before the Violence Against Women Reauthorization Act ("VAWA") of 2013 was enacted, there was a sense of lawlessness in Indian country. Non-Indians were immune from all tribal criminal prosecution. Indian women who were

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<sup>172</sup> See *supra* Section 5.2.

<sup>173</sup> *Id.*

domestically abused by their non-Indian husbands had to rely on U.S. Attorney offices for protection, which declined to prosecute about 67% of sexual assault cases and 46% of assault matters referred from Indian Country in fiscal years 2005 to 2009. VAWA 2013 permits tribes to prosecute non-Indians accused of committing certain domestic abuse crimes against Indian women if perpetrators have sufficient ties to the tribe. These ties include living or working on a tribal land when such crime is committed, or being in a relationship with an Indian woman who resides in Indian country. Although VAWA 2013 indicates progress, it does not solve the problem of violence against American Indian women in its entirety. Non-Indians, without ties to a tribe, who rape, sexually assault, and/or commit violent crimes against Indian women are still immune from tribal prosecution.

To decrease the high rate of violence against American Indian women on tribal lands, the criminal jurisdiction of tribes should be further expanded. To do so, a number of constitutional, jurisdictional, and policy questions should also be addressed. The sentencing authority of tribes; the question of where individuals convicted of crimes in tribal courts serve jail time, the appeals process, and the constitutional rights of non-Indian defendants in tribal courts should be examined by federal, state, and tribal representatives.

The U.S. federal government should continue its recent efforts of addressing violence against American Indian women by increasing funding to tribes to strengthen law enforcement and criminal justice systems on tribal lands. The federal government should also solidify its international and public commitment to fighting violence against women, as well as build on recent endeavors, which encourage coordination, communication, and collaboration between federal and tribal governments.

The high rate of violence against American Indian women on tribal lands should be unacceptable to those who believe in equal protection for all under the law. Legal loopholes have to be rectified to ensure offenders are punished and American Indian women stop falling through the legal system's cracks and gaps.