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## Frontier of Injustice: Alaska Native Victims of Domestic Violence

# FRONTIER OF INJUSTICE: ALASKA NATIVE VICTIMS OF DOMESTIC VIOLENCE

*By: Laura S. Johnson<sup>1</sup>*

## I. Introduction

The village of Nunam Iqua, which means “end of the tundra” in Yup’ik, is located on a fork of the Yukon River in Alaska, close to the Bering Sea.<sup>2</sup> In October 2005, an Alaska Native resident of Nunam Iqua became violent, beat his wife with a shotgun and raped a 13-year-old girl in front of three other children.<sup>3</sup> Though the villagers called the Alaska state police, it took the state police officers more than four hours to reach Nunam Iqua; they had to charter a plane and travel 150 miles from the closest village with state police presence.<sup>4</sup> The assailant, Angelo A. Sugar, was convicted in September 2006 and sentenced to twenty-seven years imprisonment, but his “eight-hour rampage”<sup>5</sup> brings to light the particularly challenging problems that Alaska Native villages face in dealing with domestic violence. The village of Nunam Iqua is a Native entity within the state of Alaska, recognized and eligible to receive services from the Bureau of Indian Affairs by virtue of status as an Indian tribe.<sup>6</sup> After the widely publicized Sugar incident, Nunam Iqua’s Mayor acknowledged that there was no public safety officer or village police officer in Nunam Iqua because the village had run out of funding for a village police officer in 2004.<sup>7</sup> Given that domestic violence is rarely an isolated incident, the tragic events that unfolded at the end of the tundra raise questions about what remedies are available to help victims of domestic violence in Alaska Native villages

Domestic violence and sexual assault occur in staggering rates in Native communities across the United States.<sup>8</sup> As a state, Alaska’s rates of sexual assault and domestic violence are already significantly higher than the national averages, and for Alaska Native women, the likelihood that they will experience violence or abuse during their lifetimes is shocking.<sup>9</sup>

Nearly seventy-five percent of Alaskans either have experienced or know someone who has experienced domestic violence or sexual assault, compared to the national average of one in four women and one in thirty-three men.<sup>10</sup> For Native Alaskan<sup>11</sup> women, not only are the statistics worse, but also the chance that they will receive needed protection or victim assistance is grim.

Native Alaskan women are 10 times more likely to be sexually assaulted than all other Alaskan women. These women are often cut off from the avenues to justice — literally. Since many Native Alaskan women live in rural villages that have no connecting roads to the main cities with police stations, they have a difficult time filing complaints. The Alaska Network on Domestic Violence and Sexual Assault reports that 30 percent of Alaskan women have no access to victim services where they live. According to [Amnesty International], police are themselves handicapped — often underfunded — in trying to get to the villages when complaints arise. And in interviews Amnesty International conducted with Native Alaskan sexual-assault survivors, respondents said that police and medical professionals often wrote them off as being drunk when they complained. Doctors and police wouldn’t follow up on investigations.<sup>12</sup>

The extreme remoteness of many Alaskan communities remains the major obstacle to providing services to victims of domestic violence and sexual assault in Alaska.<sup>13</sup> Alaska Natives are more likely than other Alaskans to live in remote communities, far from service providers and law enforcement. As of 2009, the Bureau of Indian Affairs recognized two hundred and twenty-nine Native entities within Alaska.<sup>14</sup> Nearly every one of these Native entities is an Alaska Native village, located off the road-system, or in the “bush.”<sup>15</sup> Reservations in the lower-48 are often considered to be isolated places, and by comparison, Alaska Native villages are more than out-of-the-way.<sup>16</sup> Frequently Alaska Native villages are accessible only by plane, or perhaps snow mobile<sup>17</sup> when the rivers freeze over. Where access to legal redress and adequate victim services (such as medical assistance or counseling) is extremely difficult for many American Indians, it is virtually impossible for many Alaska Native women.

Both American Indian and Alaska Native victims of sexual assault and domestic violence must navigate a jurisdictional maze<sup>18</sup> of tribal, state and federal law in order to “achieve justice.”<sup>19</sup> For Alaska Native victims, two factors render that maze particularly complex. First, Alaska Native villages are not reservations, so the villages often do not comprise “Indian Country,” and as a result the State of Alaska has contested legally recognizing the villages as tribes. Second, Alaska is a Public Law-280 state, which means that federal jurisdiction in “Indian country” in Alaska has been transferred to the state. The confusion over where to turn to seek justice or protection from abusers leaves many Alaska Native victims of domestic violence at risk. This paper will argue that the State of Alaska could better serve and protect Alaska Native victims of domestic violence by taking affirmative steps to encourage and assist Alaska tribes in combating domestic violence in their communities.

This paper will present three pieces of a strategy to better combat domestic violence in Alaska Native communities. First, cooperation among sovereigns is critical to ensure that laws are enforced. Second, effective law enforcement can be enhanced by creative, community-based, culturally-sensitive models that respond to domestic violence through alternate forms of dispute resolution in Alaska Native communities such as tribal courts. The State of Alaska

should actively encourage the development of tribal courts to offer victims alternative forms of dispute resolution because they can offer victims more immediate, culturally-sensitive and community-based remedies. And finally, Alaska Native tribes should exercise regulatory civil jurisdiction over domestic violence crimes in their communities to help Alaska Native victims of domestic violence achieve justice and be protected from their abusers. Part I lays the foundation for a discussion of legal remedies available to Native Alaskans by briefly examining the limitations on tribal jurisdiction in Alaska. Part II presents the remedies that are currently available to Alaska Native victims of domestic violence. Part III expands from the Alaska Supreme Court’s monumental decision in *John v. Baker*<sup>20</sup> to argue that Alaska’s courts should recognize tribal jurisdiction in domestic violence cases just as Alaska’s Supreme Court recognized tribal adjudicatory jurisdiction in the family law context.

## II. A Run Through Alaska’s Jurisdictional Maze

### a. *Indian Country*

The Alaska Native Claims Settlement Act (ANCSA), passed in 1971, extinguished all Indian reservations in Alaska with the exception of the Annette Island Reservation of the Metlakatla Indian Community.<sup>21</sup> The concept of Indian country, defined in 18 U.S.C. § 1151, is critical to determining which government (tribal, state or federal) has jurisdiction to prosecute a crime.<sup>22</sup> The definition of Indian country reads:

- (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not

been extinguished, including rights-of-way running through the same.<sup>23</sup>

Thus a critical question since the passage of ANCSA has been whether the lands patented under the act constituted “dependent Indian communities within” the meaning of 18 U.S.C. § 1151.<sup>24</sup> The Supreme Court’s answer to this question has only further complicated Alaska’s jurisdictional maze. In *Alaska v. Native Village of Venetie Tribal Government*<sup>25</sup> the Court determined that the lands patented under ANCSA are not considered dependent Indian communities and are not Indian country. In other words, the *Venetie* decision established that while ANCSA itself did not intend to terminate tribal sovereignty, nonetheless “the territorial jurisdiction of Alaska tribes does not extend to the 45 million acres of land affected by ANCSA — the vast majority of Native lands in Alaska.”<sup>26</sup> After *Venetie*, to be considered a “dependent Indian community” within the definition of Indian country, two requirements must be met: “(1) the lands must have been set aside by the United States for the use of the Indians as Indian lands; and (2) the lands must be under federal superintendence.”<sup>27</sup>

The passage of ANCSA, which itself remained “silent on questions of tribal existence and jurisdiction,”<sup>28</sup> and the Supreme Court’s holding in *Venetie* left Alaska Native villages in a position of being “sovereigns without territorial reach.”<sup>29</sup> And for Alaska Native villages, that sovereignty — with or without territory — was already contested.<sup>30</sup> While federal courts have applied federal Indian law principles in dealing with Alaska Native issues and have held that some Alaska Native villages are tribes (such as in *Venetie*<sup>31</sup>), Alaska state courts continued to hold that there were no sovereign tribes in Alaska until very recently.<sup>32</sup> The tribal status of Alaska Native villages is critical to claims by Alaska Native villages that their tribal courts and councils have the authority to make legally binding decisions.<sup>33</sup> From the 1988 decision in *Native Village of Stevens v. Alaska Management and Planning*,<sup>34</sup> in which the Alaska Supreme Court examined both history and case law to conclude that “Stevens Village does not have sovereign immunity because it, like most native groups in Alaska, is not self-governing or in any meaningful sense sovereign.”<sup>35</sup> Alaska courts consistently found that Alaska Native villages were not tribes, and therefore

were not sovereign.<sup>36</sup> In 1999, however, the Alaska Supreme Court did an about-face in a child custody dispute in *John v. Baker*:

Today we must decide for the first time a question of significant complexity and import: Do Alaska Native villages have inherent, non-territorial sovereignty allowing them to resolve domestic disputes between their own members? After examining relevant federal pronouncements regarding sovereign power, we hold that Alaska Native tribes, by virtue of their inherent powers as sovereign nations, do possess that authority.<sup>37</sup>

The *Baker* decision recognized sovereignty based on membership and set forth that if Congress or the Executive branch recognized a group of Native Alaskans as a tribe, the State of Alaska must do the same.<sup>38</sup>

#### *b. Public Law 280*

Alaska is a Public Law 280 state, an added “wrinkle” to an already-complicated jurisdictional scheme.<sup>39</sup> Public Law 280,<sup>40</sup> passed in 1953, transferred federal jurisdiction over crimes occurring in Indian country to the state; Alaska was a “mandatory” Public Law 280 state and therefore was required to accept this transfer of jurisdiction.<sup>41</sup> Congress amended Public Law 280 in 1958,<sup>42</sup> resulting in an extension of Alaska state court civil jurisdiction to “private civil causes of action involving Indians in Indian country,” and giving Alaska’s state courts a further measure of criminal jurisdiction in Indian country.<sup>43</sup> Whether Congress intended Public Law 280 to divest tribes of civil and criminal jurisdiction remains a heated debate in Alaska, as well as in the lower-48.<sup>44</sup> Tribal advocates argue that under Public Law 280, tribal courts may exercise their jurisdiction concurrently with the state.<sup>45</sup> Importantly, however, in *John v. Baker*, the Alaska Supreme Court noted that the *Venetie* decision suggested that Public Law 280 had “limited application in Alaska because most Native land will not qualify for the definition of Indian country. By its very text, Public Law 280 applies only to Indian country.”<sup>46</sup> Yet even with very little recognized Indian country in Alaska, the divestiture

debate continues in Alaska.<sup>47</sup> Alaska state courts have not firmly answered the divestiture question, but under the precedent of *Baker*, Public Law 280 does not apply to Alaska Native villages that are not located in Indian country; in other words, Public Law 280 does not affect jurisdictional questions in the vast majority of Alaska Native villages. By finding that Public Law 280 did not apply in *Baker*, and holding that tribes had jurisdiction based on membership as well as on territory, the Alaska Supreme Court actually expanded Alaska tribal sovereignty outside of Indian country.<sup>48</sup>

### c. Federal Framework

The problems for Alaska tribes seeking jurisdiction occur in the larger framework of federal laws that govern jurisdiction. Today Alaska Native villages, if they are federally recognized tribes, enjoy some degree of sovereignty due to the *Baker* decision. *Baker*, however, was a domestic dispute *between* tribal members. Under federal law, the jurisdiction of Alaska Native villages partly depends on the tribal or non-tribal status of the defendant.<sup>49</sup> Jurisdiction further depends on whether the matter at issue is civil or criminal. Congress and the courts have historically limited tribal jurisdiction over criminal matters.<sup>50</sup> The Supreme Court's well-known decision in *Oliphant v. Suquamish Indian Tribe* ruled that tribes lack criminal jurisdiction over non-Indians in Indian country.<sup>51</sup> Tribal courts may exercise criminal jurisdiction over non-member Indians, however, depending on the type of criminal conduct that is at issue.<sup>52</sup> The 1885 Indian Major Crimes Act (IMCA)<sup>53</sup> extended federal jurisdiction to certain types of serious criminal conduct by Indians against other Indians within Indian country.<sup>54</sup> Public Law 280 repealed the IMCA insofar as it applied to those areas covered by Public Law 280 (effectively substituting state for federal jurisdiction).<sup>55</sup> Thus in Alaska, when certain not-serious crimes happen between Alaska Natives in Indian Country, tribal courts can exercise jurisdiction (if they are recognized as sovereign tribes). When serious crimes happen in Indian Country in Alaska, even if the parties are Alaska Natives, the State of Alaska has criminal jurisdiction due to the Public Law 280 transfer of IMCA jurisdiction over serious criminal conduct to the state.

When an Alaska tribal court exercises criminal jurisdiction over crimes between Alaska Natives, the 1968 Indian Civil Rights Act (ICRA) restricts its ability to impose punishments.<sup>56</sup> The ICRA requires tribal courts to afford due process and civil liberties to American Indians in tribal court proceedings. As part of providing federal protection to individuals facing tribal court proceedings, the ICRA limited the sentencing power of tribal courts. In spite of these limitations, though:

Nearly all tribal courts in Alaska have assumed jurisdiction over family and domestic matters, especially in cases concerning protection of children. Domestic relations is a subject area where state and tribal recognition and cooperation are building. Tribal jurisdiction over subjects such as minor crime is less clear, but many Alaska tribal courts are asserting subject matter jurisdiction in that area as civil matters in order to protect the health, safety, and welfare of tribal members... At this point in time, Alaska tribal governments assert jurisdiction over law and order matters in a civil rather than in a criminal way.<sup>57</sup>

More than one hundred Alaska Native villages currently operate tribal courts and councils to resolve domestic disputes between Alaska Natives and to address some criminal and quasi-criminal matters, working within the limitations imposed by Alaska's complicated jurisdictional maze.<sup>58</sup>

### d. Summary

A run through Alaska's jurisdictional maze leaves an Alaska Native victim of domestic violence with two general contexts that determine which statutes apply to a tribal court seeking jurisdiction over the victim's case. While at first glance these contexts may not seem that different because the State of Alaska ultimately has criminal jurisdiction over domestic violence crimes in both instances, the intricacies of the applicable statutes do make a difference. Whether Public Law 280 gives the State of

Alaska jurisdiction or not is important in the context of tribal jurisdiction.

The first context is one where a domestic violence crime occurs in Indian country. In spite of the virtual abolishment of Indian country in Alaska after ANCSA and *Venetie*, some Indian country does still exist in Alaska under U.S.C. § 1151. Some Alaska Native villages, for example, may have property that is considered an “Indian allotment” under U.S.C. § 1151.<sup>59</sup> Also, there is a recognized Indian reservation in Alaska.<sup>60</sup> Therefore, if an Alaska Native or American Indian perpetrator commits a crime of domestic violence within Indian country against an Alaska Native victim, the State of Alaska will have criminal jurisdiction over the crime under the Public Law 280 transfer of IMCA serious crimes (domestic violence, depending on the level of assault, will almost always constitute an IMCA serious crime).<sup>61</sup> If a victim’s perpetrator is non-Native, the State of Alaska will have criminal jurisdiction no matter what, even if the crime occurred in Indian country.

The other general context is one where a domestic violence crime does not occur in Indian country. Public Law 280 does not apply to crimes that do not occur in Indian country and there is no federal jurisdiction. This context applies to most Alaska Native victims of domestic violence as most villages are not considered Indian country. For these victims, there is only state criminal jurisdiction over the crimes. In this context, tribal court jurisdiction looks a little different, given that the State of Alaska and Alaska’s courts have historically been reluctant to recognize the tribal sovereignty of Alaska Native villages. Alaska’s own policies will determine whether a tribal court can exercise concurrent, albeit limited,<sup>62</sup> criminal jurisdiction over domestic violence crimes that do not occur in Indian country. Where tribal advocates have argued that under Public Law 280, tribal courts may exercise jurisdiction concurrently with the state, this argument is less clear when Public Law 280 is inapplicable.

### **III. Legal Remedies for Alaska Native Victims of Domestic Violence**

So where does this leave Native Alaskan victims of domestic violence<sup>63</sup> who seek the protection of the law or to bring their abusers to justice? The

short answer is that victims need more assistance and protection in Alaska Native villages. Not only are victim services immediately unavailable due to the lack of/distance from shelters and counselors in bush Alaska, but also state courts and the protection of law enforcement are frequently inaccessible. If a victim’s abuser is non-Native, criminal prosecution is up to the State of Alaska. If a victim’s abuser is Native and the tribal court exercises concurrent criminal jurisdiction, tribal courts are limited to sentences of only one year in prison or a fine of \$5000.<sup>64</sup> In general, legal remedies for domestic violence victims come in two forms: criminal prosecution (for charges ranging from harassment to various degrees of assault) and protective orders, which protect the victim by prohibiting contact, communication with or physical proximity to the victim.<sup>65</sup> Violations of civil protective orders can result in criminal charges, switching the matter (and the resulting jurisdictional limitations on tribal courts) from civil to criminal.<sup>66</sup> Victims may also sometimes pursue tort cases against their perpetrators, though a discussion of the complete range of civil remedies available to domestic violence victims is beyond the scope of this paper.

Domestic violence is defined in section 18.66.990 of the Alaska Statutes.<sup>67</sup> Assault with intent to commit murder, assault with a dangerous weapon, and assault resulting in serious bodily injury all fall under the IMCA, giving the State of Alaska (according to Public Law 280) jurisdiction to prosecute serious domestic violence crimes.<sup>68</sup> The lack of prosecution for serious domestic violence crimes is a source of frustration for Native Alaskan victims and Alaska tribal governments alike. In general, “tribal governments in [Public Law 280] states experience an inadequate response to violent crime” by state authorities.<sup>69</sup> “In some Public Law 280 states, a history of tension and hostility between tribal communities and state officials have resulted in jurisdictional ‘vacuums’ in which violent crime, including sexual assault, persists without response.”<sup>70</sup> In an examination of 1,281 reports of domestic violence assault to Alaska State Troopers from rural Alaskan communities in 2004, a joint study determined that 80% of the cases were referred for prosecution, and of those, 68% were accepted for prosecution.<sup>71</sup> Of the 1,281 reports examined, 47.3% were cases where the victim was Native.<sup>72</sup> While the report’s statistics may seem promising for victims

who seek legal remedies, it is important to note that the full report did not analyze the percentage of cases referred or accepted for prosecution in relation to the race of the victim.<sup>73</sup> Further research is necessary on whether a domestic violence report made by an Alaska Native victim will be referred or accepted for prosecution. It seems that Alaska Native victims are less likely to file reports at all,<sup>74</sup> and that problems with lack of patrolling and slow response times to Alaska Native villages by State Troopers also impedes Alaska Native victims' abilities to make reports that could be referred for prosecution.<sup>75</sup>

In 1996, as part of the Domestic Violence Prevention and Victim Protection Act, Alaska implemented mandatory arrest in domestic violence cases.<sup>76</sup> Section 18.65.530 of the Alaska Statutes requires a state law enforcement officer to make an arrest with or without a warrant:

...if the officer has probable cause to believe the person has, either in or outside the presence of the officer, within the previous 12 hours, (1) committed domestic violence, except an offense under AS 11.41.100-11.41.130, whether the crime is a felony or misdemeanor; (2) committed the crime of violating a protective order in violation of AS 11.56.740; (3) violated a condition of release imposed under AS 12.30.016(e) or (f) or, 12.30.027.<sup>77</sup>

However, state law enforcement does not always respond to domestic violence crimes to be able to make a mandatory arrest. State Troopers from regional centers may not respond to reports from Alaska Native villages (where there may be no local law enforcement officer) due to "the severity of weather conditions, the urgency of other matters they are dealing with in other villages, the apparent severity of the situation, and so forth."<sup>78</sup> Responses to complaints in remote Alaska Native villages often occur "after the 12 hour time period for mandatory arrest, in which case an arrest is up to the discretion of the officer."<sup>79</sup> Alaska Native villages may have tribal law officers funded by the BIA,<sup>80</sup> but most villages will only have a Village Public Safety Officer funded by the Alaska Legislature and managed by Alaska State Troopers.<sup>81</sup>

Alaska Village Public Safety Officers are not armed but are trained in "basic criminal law and arrest procedures, rural fire fighting, and emergency responder first aid."<sup>82</sup> Under Alaska law, the Village Public Safety Officer (VPSO) is not a recognized peace officer and has the same standing as a private citizen or a private security guard.<sup>83</sup> Under section 12.25.010 of the Alaska Statutes, a private person or a peace officer may arrest an individual who has committed a crime without a warrant when the crime is committed in the presence of the person making the arrest, if the person has committed a felony, or if a felony has been committed and the person making the arrest has reasonable cause to believe the arrestee committed the felony.<sup>84</sup> While VPSOs have the authority to arrest and their testimony is "given serious credibility in the State's courts when testifying in support of their arrests,"<sup>85</sup> they are not required to make arrests in domestic violence cases like state law enforcement. Additionally, the VPSO might be reluctant to make an arrest in a domestic violence case, as domestic violence cases are very personal in nature, involving families and relationships.

One of the problems with the VPSO program is that one has to be willing to arrest a cousin, uncle, sister, brother, mother, etc. The issue of one's relatives and the conflicts that arise in a closely-knit community make recruiting for VPSOs difficult. Outsiders, even if they are from the next village, have an uphill battle if they sign on as a VPSO for a neighboring village. This is a major hurdle to the effectiveness of the VPSO program.<sup>86</sup>

Law enforcement is necessary for victims to report domestic violence cases in Alaska Native villages, and reporting is essential for criminal prosecution to occur. Alaska Natives comprise over eighty percent of the individuals in Alaska who have a Village Public Safety Officer (VPSO) or a Village Police Officer (VPO) instead of trained and certified law enforcement protection.<sup>87</sup> Alaska Native victims therefore face many obstacles in seeing their perpetrators brought to justice because the prosecution of individuals for domestic violence is in the hands of the State of Alaska, from State Troopers being responsible for taking reports and arresting



defendants, to state courts having the jurisdiction to handle serious domestic violence crimes.

Congress has attempted to address the problem of sexual assault and domestic violence in Indian country on several occasions. In 1990, Congress enacted the Indian Child Protection and Family Violence Prevention Act, but failed to appropriate any significant funding to implement the law.<sup>88</sup> In 2006, the reauthorization of the Violence Against Women Act (VAWA) provided funding to support “efforts to develop education curricula for tribal court judges to ensure that all tribal courts have relevant information about promising practices, procedures, policies, and law regarding tribal court responses to adult and youth domestic violence, dating violence, sexual assault, and stalking,” as well as funding to help tribes develop an order of protection registry.<sup>89</sup> Domestic violence victims can seek protection from their abusers through the courts by receiving a protective order. Arguably, Alaska Native victims of domestic violence may receive protective orders from tribal courts against their perpetrators, regardless of the Native or non-Native status of the perpetrator,<sup>90</sup> but enforcement of protective orders remains in the hands of law enforcement. VAWA requires that states and tribes give full faith and credit to each other’s protective orders.<sup>91</sup> However, in Alaska, state law enforcement of protective orders depends on State Troopers first verifying the protective order with Alaska’s Central Registry System for Protective Orders (part of the Alaska Public Safety Information Network.)<sup>92</sup> Thus a tribal court-issued protective order must be filed with a state court clerk for state law enforcement to administer it.<sup>93</sup>

Under Alaska law, there is a 20-day minimum sentence if a defendant is found in violation of a domestic violence protection order.<sup>94</sup> In other words, violation of the protective order changes the matter from civil to criminal.<sup>95</sup> Alaska tribal courts do not have criminal jurisdiction over non-Natives who violate protective orders in Alaska Native villages.<sup>96</sup> And the ICRA limits penalties tribal courts can impose on Natives who violate protective orders in Alaska Native villages.<sup>97</sup>

In terms of sexual assault, Alaska Native villages are among the most dangerous places to live in the United States, largely because of the lack of law enforcement and access to justice services.<sup>98</sup> For Alaska Native victims of domestic violence, “tribal

governments are often the only really viable option” to receive access to justice.<sup>99</sup> In spite of the fact that the State of Alaska has been reluctant to recognize Alaska Native villages as tribes, there are in fact many Alaska Native villages operating tribal councils and tribal courts today that are increasing their dispute resolution activity. To further protect and bring justice to Alaska Native victims of domestic violence, the State of Alaska should encourage the development of tribal courts. Alaska’s courts should recognize tribal court regulatory jurisdiction and concurrent adjudicatory criminal jurisdiction over domestic violence crimes within the full extent allowed under the ICRA.<sup>100</sup>

#### **IV. Strengthening Tribal Jurisprudence to Combat Domestic Violence**

##### *a. John v. Baker*

In *John v. Baker*,<sup>101</sup> the Alaska Supreme Court concluded that Alaska Native tribes possess the inherent sovereign power to adjudicate child custody disputes between tribal members in their own courts.<sup>102</sup> The *Baker* decision recognized tribal adjudicatory jurisdiction in the family law context. The Alaska Supreme Court held that neither Public Law 280 nor the Indian Child Welfare Act (ICWA) applied in the *Baker* case.<sup>103</sup> Thus the Alaska Supreme Court found that outside of Public Law 280 and ICWA, Alaska Native villages have inherent, non-territorial sovereignty allowing them to resolve domestic disputes between their own members.<sup>104</sup> Domestic violence is by definition a domestic dispute. As has been discussed, after *Venetie*, ANCSA lands are not considered to be Indian country, and therefore Public Law 280 is unlikely to be applicable in most Alaska Native villages. ICWA’s jurisdictional provisions are not applicable in domestic violence cases (though domestic violence can of course be a factor in the removal of children from homes, so domestic violence does often factor in ICWA cases).

Most instances of domestic violence against Alaska Native victims will occur where Public Law 280 and ICWA are not applicable. Thus expanding from the *Baker* decision, which recognized the inherent sovereignty of Alaska Native villages to resolve domestic disputes between their members where Public Law 280 and ICWA don’t apply, Alaska

Native villages therefore have sovereignty to resolve domestic violence disputes between Native Alaskans — limited only by the ICRA.<sup>105</sup> Alaska tribal courts should exercise jurisdiction over domestic violence disputes and Alaska courts should recognize that jurisdiction as legitimate. Domestic violence is inherently a problem that arises out of an internal relationship. As David Case, former counsel to the Alaska Native Review Commission and an attorney with extensive experience representing Alaska Native interests, has argued:

*Baker* confirms the significance of tribal government and the authority of tribes over their members and generally over the internal relationships with their members. This likely includes jurisdiction to decide criminal matters as well as civil disputes between members over child custody, divorce, inheritance, and a host of other subjects.<sup>106</sup>

The ICRA does not limit a tribe's ability to prosecute any particular type of crime; it only limits the sanctions a tribe is able to impose.<sup>107</sup> Expanding from the precedent set by *Baker*, and staying within the confines of the ICRA, Alaska tribal courts should exercise criminal jurisdiction over Alaska Natives who commit domestic violence crimes in their communities. If the defendants were to appeal these decisions to Alaska's state courts, Alaska's state courts should extend *Baker* and recognize tribal criminal adjudicatory jurisdiction over Alaska Natives in domestic violence cases.

While Alaska's Supreme Court based its decision in *Baker* on the decisions of Congress and the Supreme Court, Alaska's Supreme Court also made policy considerations to support the recognition of concurrent tribal jurisdiction.<sup>108</sup> The Court found that tribal jurisdiction over child custody cases involving Alaska Native children would further the goal of both federal and state law in "best serving the needs of Native American children."<sup>109</sup> Specifically, the Court looked to the fact that many Alaska Native villages are located far from Alaska state courtrooms and that Alaska is home to divergent cultures.<sup>110</sup>

Because of this great diversity, barriers of culture, geography and

language combine to create a judicial system that remains foreign and inaccessible to many Alaska Natives. These differences have "created problems in administering a unified justice system sensitive to the needs of Alaska's various cultures." By acknowledging tribal jurisdiction, we enhance the opportunity for Native villages and the state to cooperate in the child custody arena by sharing resources. Recognizing the ability and power of tribes to resolve internal disputes in their own forums, while preserving the right of access to state courts, can only help in the administration of justice for all.<sup>111</sup>

Domestic violence is a crime that has uniquely devastating effects on victims. When the perpetrator of a crime is in a relationship, it takes a huge amount of courage and trust in the justice system to step outside of the home and shed light on the private situation a victim has faced. Analogous to *Baker*, barriers of culture, geography and language make the state criminal justice system inaccessible and unfamiliar to many Alaska Native victims of domestic violence. The State of Alaska and the federal government seek to help in the administration of justice for all. As such, reading *Baker* broadly and recognizing the ability and power of tribes to resolve crimes of domestic violence would further the goals of both federal and state law in serving the needs of Alaska Native victims of domestic violence.

*Baker* has arguably created an opportunity for tribal courts to expand their jurisdiction. As domestic violence is so pervasive and destructive in Alaska Native villages, Alaska tribal courts should use the holding of *Baker* to assert jurisdiction over domestic violence crimes in their communities. Further, Alaska state courts should consider this jurisdiction valid, thereby encouraging tribes to exercise jurisdiction over domestic violence crimes. This would help Alaska Native victims to participate in the criminal justice process and to bring their perpetrators to justice. The State of Alaska should also enact legislative measures to encourage the development of tribal courts in Alaska (for example,

through funding and providing training for tribal court judges) and to provide Alaska tribal courts with legislative comity.<sup>112</sup> The State of Alaska should also further encourage cooperation between the state and tribes in the area of law enforcement, perhaps using Memorandums of Understanding between tribes and state law enforcement so that Alaska Native victims of domestic violence could better benefit from existing state laws, such as mandatory arrest.

*b. Tribal Criminal Jurisdiction: ICRA Limitations and Creative Sentencing*

Tribal courts can offer victims more immediate, culturally-sensitive and community-based remedies.<sup>113</sup> While the ICRA limits tribal courts to sentences of one year or a \$5000 fine,<sup>114</sup> imposing those sentences on Native perpetrators of domestic violence crimes is a start to making abusers face consequences for their actions. Amnesty International found that:

...prosecutions for sexual violence do occur in tribal courts and some courts are able to overcome limitations on the sentences they can hand down by imposing consecutive sentences for several offences. Some tribal courts also work with sanctions other than imprisonment, including restitution, community service and probation.<sup>115</sup>

Tribal courts must be creative to have more effective sentencing within the confines of ICRA. In addition to consecutive sentencing, restitution, community service and probation, an Alaska tribal court could banish a Native perpetrator of domestic violence from the village.<sup>116</sup> In *Native Village of Perryville v. Tague*, an Alaska court affirmed the village's right to banish one of its members for violent behavior and to have the state court and state law enforcement assist in enforcement.<sup>117</sup> Sarah Deer argues that there is another significant way in which a tribal government could assert its authority outside of the context of the criminal justice system to protect Native women from violence:

If the perpetrator is an employee of the tribal nation or a tribal enterprise, the tribal government, depending on the tribal law, may have the ability to

terminate his employment. At least one tribal court has ruled in favor of terminating the employment of a sex offender, based on the tribal government's authority to terminate employees who present safety and security concerns.<sup>118</sup>

While many Alaska Native villages may have tribal codes including criminal laws on domestic violence, it seems that very few Alaska tribal courts actively prosecute criminal domestic violence cases.<sup>119</sup> Alaska Native villages should exercise concurrent criminal jurisdiction in domestic violence cases and prosecute Native offenders as effectively as possible, using both the full extent allowed by the ICRA as well as alternative punishments that can bring Native perpetrators of domestic violence to justice. This does not achieve justice for victims of non-Native perpetrators of domestic violence in Alaska Native villages, but that issue will be addressed in the Conclusion of this paper.

*c. Tribal Civil Jurisdiction: Protective Orders*

Alaska Native villages also have regulatory jurisdiction over domestic violence, arguably over both Natives and non-Natives. Public Law 280 requires "that Native 'ordinances and customs' be given 'full force and effect' in Alaska state courts whenever they are 'not inconsistent' with any applicable law of the State."<sup>120</sup> This seems to indicate that an "Alaska court hearing a civil cause of action arising under Public Law 280 would be required to apply tribal law, including customary law, if no inconsistent state law existed."<sup>121</sup> Of course, Public Law 280 does not apply in most Alaska Native villages, so this recognition, while important, is limited in scope. The Oliphant decision did not limit a tribe's ability to impose civil sanctions on non-Indians.<sup>122</sup> Thus Alaska tribal governments and courts have regulatory authority over non-Natives. Protective orders are civil orders. As tribal courts can regulate both Natives and non-Natives in civil matters, tribal courts arguably have the jurisdictional authority to issue protective orders against all perpetrators of domestic violence in their communities. "In addition, it is well established that tribes have jurisdiction over nonmembers who enter into consensual relations with them and perhaps over nonmembers in situations where the activities

of nonmembers affect tribal political integrity, health and welfare, or tribal economy.”<sup>123</sup> Again, tribal protective orders, under VAWA, are given full faith and credit by Alaska, provided that they are entered into the Central Registry System.<sup>124</sup>

The issue with protective orders, whether tribal or state court-issued, and for *all* victims of domestic violence, is their enforcement. It is up to the available law enforcement to enforce the protective orders for Alaska Native victims living in rural villages. As has been discussed, this is extremely problematic for villages where there is no law enforcement presence.

Those living in rural villages that do not have local or city police departments may receive law enforcement services from the state’s 240 State Troopers. A limited number of State Troopers serve villages throughout the state, 64 per cent of which are accessible only by airplane, boat or snowmobile. In more inaccessible communities, State Troopers tend to respond only to more serious crimes. It can take State Troopers from one day to six weeks to respond to crimes including sexual violence in villages, if they respond at all. Decisions about which crimes to respond to and how, appear to be left largely to the discretion of responding officers.<sup>125</sup>

There are also practical issues for enforcing protective orders. “A mandate that perpetrators stay 1000 feet (or some such figure) away from victims is not practical for victim safety in remote villages,” as some villages consist of just a few homes located within very close proximity.<sup>126</sup> Thus perpetrators may be temporarily or permanently banished from a Native Alaska village by the protective order, and innovative law enforcement, such as air carrier recognition of tribal protective orders, becomes essential to the effective enforcement of protective orders.<sup>127</sup> Tribal courts can act to encourage defendants to comply with protective orders, as will be discussed momentarily, but the actual enforcement of protective orders remains a serious concern in discussions of how to improve law enforcement in rural Alaska.

*d. Violations of Protective Orders: The Switch from Civil to Criminal Jurisdiction*

A violation of a protective order is a criminal matter, and so even if a tribal court issues a protective order against a non-Native individual (under its civil jurisdictional authority), the tribe has no criminal jurisdiction to prosecute non-Native individuals for violating protective orders. “The Supreme Court decision in *Oliphant v. Suquamish Indian Tribe* arguably has placed tribal communities at the mercy of non-Indian criminals.”<sup>128</sup> Perpetrators of domestic violence against Alaska Native victims are frequently not Native themselves. A larger percentage of victimizations against American Indian and Alaska Native women are committed by white offenders than by American Indian or Alaska Native offenders.<sup>129</sup> Given these statistics, Alaska tribal courts are thus hamstrung in their ability to protect Alaska Native victims from the majority of perpetrators. Alaska tribal courts can try to impose civil penalties on non-Native individuals for the violation of protective orders, but at this point are powerless to do more.

Alaska Native villages can also develop tribal codes that “reach” non-Native individuals who violate tribal protective orders, and for this, the Ninilchik Village provides an excellent innovative example.<sup>130</sup> Ninilchik Village Ordinance No. 99-01 sets forth that:

The personal and subject matter jurisdiction of the Tribal Court of Ninilchik Village under this ordinance is based on the Tribe’s inherent authority over its members, Tribal internal affairs and those who enter into consensual domestic relationships with Tribal members. The Court’s jurisdiction extends to all persons residing within the tribe’s geographic service area for the delivery of federal programs who are Tribal member of Ninilchik Village. The Court’s jurisdiction also extends to any other person who resides within the Tribe’s geographic service area who consents to the jurisdiction of the Court. *Persons who on or after the date this ordinance is adopted enter into or remain in a marriage*

*or other similar consensual, personal relationship with a tribal member shall be deemed to have consented to the Court's jurisdiction under this ordinance as long as they reside within the Tribe's geographic service area.* As used in this ordinance, the Tribe's geographic service area does not necessarily describe "Indian country." Instead, the term "geographic service area" is used in this ordinance to further define those persons over whom the Tribal Court asserts personal and subject matter jurisdiction because of their domestic relations as or with tribal members and the Tribe's inherent authority to control its internal relationships even outside "Indian Country."<sup>131</sup>

Non-Native individuals are brought under the jurisdiction of the Ninilchik tribal court when they enter into personal relationships with Ninilchik tribal members. Ordinance No. 99-01 was enacted to protect against domestic violence, and provides that individuals who violate tribal protective orders are subject to penalties including but not limited to: (1) a fine not to exceed \$1000 for each violation; (2) community service as determined appropriate by the Court and (3) in cases of repeated contempt, after notice and opportunity for a hearing, the person may be deprived of some or all benefits of tribal membership for such time as determined appropriate by the Court, not exceeding five (5) years.<sup>132</sup> Thus without exercising criminal jurisdiction over non-Natives, the Ninilchik tribal court can still effectively penalize non-Native individuals for the violation of tribal protective orders. The State of Alaska should encourage tribal courts to follow inventive models like the Ninilchik Tribal Council has, to provide immediate, community-based protection from domestic violence.<sup>133</sup>

## V. Conclusion

Civil penalties for the violation of protective orders by non-Native offenders may not be enough to ensure that protective orders are not violated.

Additionally, not being able to impose criminal sentences (within the confines of the ICRA) on non-Native offenders cripples an Alaska Native village's ability to protect its community from domestic violence. In order to truly combat domestic violence in Alaska Native villages, something along the lines of a Duro-fix<sup>134</sup> is necessary to recognize tribal jurisdiction over non-Native perpetrators in domestic violence cases. Matthew Fletcher has proposed such action in an Issue Brief recommending legislation to recognize tribal jurisdiction over non-Indians for domestic violence misdemeanors.<sup>135</sup>

This legislation would recognize the inherent authority of Indian tribes to prosecute all persons, regardless of race and citizenship, for domestic violence crimes as defined by state law, when committed in Indian Country. Congress could condition this recognition of tribal sovereignty on a requirement that tribes maintain certain minimal guarantees of fairness, such as the presence of an independent tribal judiciary, the right to appointed counsel, and the right to jury trial in all cases. This statute could also require Indian tribes to guarantee other important criminal procedure rights.<sup>136</sup>

Fletcher points out that under the ICRA tribal criminal jurisdiction is already limited to misdemeanors, and that generally tribal law is not much different than state or federal law.<sup>137</sup> Fletcher does "not recommend expanding tribal authority to punish offenders for more than one year", nor "expansion of tribal authority in cases of more serious violent crimes in Indian country, such as sexual assaults."<sup>138</sup> This paper agrees with Fletcher's premise.

The State of Alaska could do more to help Alaska Native victims of domestic violence. This paper has elaborated upon a three-part strategy to better combat domestic violence in Alaska Native communities. First, tribal courts should use the holding of *Baker* as a basis to exercise concurrent criminal jurisdiction in domestic violence cases over Native offenders and to prosecute Native offenders as effectively as possible under the ICRA coupled

with creative, alternative punishments that can bring Native perpetrators of domestic violence to justice. Alaska state courts should encourage this by upholding such jurisdiction under *Baker*. Second, Alaska tribal courts should also exercise regulatory civil jurisdiction over domestic violence crimes in their communities and the State of Alaska should encourage this by enacting legislation giving comity to tribal civil jurisdiction over domestic violence crimes and encouraging the development of tribal courts to offer victims alternative forms of dispute resolution. Third, the State of Alaska should take measures to further cooperation among sovereigns to ensure that laws are enforced. Finally, legislation recognizing the authority of Alaska tribes to exercise criminal jurisdiction over non-Native offenders in domestic violence cases would allow Alaska Native victims to overcome some of the obstacles they currently face in seeing their perpetrators brought to justice.

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### (Endnotes)

<sup>1</sup> B.A. 2002, Columbia University; M.A. 2006, Fletcher School of Law & Diplomacy; J.D. 2010, University of Iowa College of Law. I would like to thank Professor Ann Estin for supervising my research as an independent study and for her insightful comments and suggestions on earlier drafts. My research was inspired by the memory of Joan Hamilton, my Director, mentor and close friend in Bethel, Alaska. Joan Hamilton spent a lifetime working to bring attention to the issues facing Native Alaskan communities and I was honored to work with her at the Yupiit Piciryarait Museum. JM, thank you.

<sup>2</sup> Alaska Department of Commerce, Community, and Economic Development, *Alaska Community Database Community Information Summaries: Nunam Iqua*, (Aug. 14, 2012, 7:15 PM), <http://www.commerce.state.ak.us/dca/commdb/CIS.cfm>.

<sup>3</sup> Amnesty International, *Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA* 41-42 (2007), available at <http://www.amnestyusa.org/pdfs/MazeOfInjustice.pdf>.

<sup>4</sup> *Id.* at 41.

<sup>5</sup> *Village Man Arrested After Eight-Hour Rampage*, ANCHORAGE DAILY NEWS, Oct. 25, 2005 [hereinafter *Village Man Arrested*] at A1.

<sup>6</sup> Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 73 Fed. Reg. 18553, 18557 (Apr. 4, 2008).

<sup>7</sup> *Village Man Arrested*, *supra* note 5.

<sup>8</sup> See, Amnesty International, *supra* note 3 at 2 (noting that federal government studies consistently show that American Indian and Alaska Native women experience much higher levels of sexual violence than other women in the USA; statistically Native American and Alaska Native women are more than 2.5 times more likely to be raped or sexually assaulted than women in the USA in general); Ronet Bachman et al., *Violence Against American Indian and Alaska Native Women and the Criminal Justice Response: What is Known* 6-7 (U.S. Dept. of Justice Contract No. 1705-219) (2008) available at <https://www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf> (in providing an overview of the epidemiology of violence against American Indian and Alaska Native women, this report finds that rates of rape and sexual assault, as well as national annual incidence rates and lifetime prevalence rates for physical violence are higher for American Indian and Alaska Native women compared to other women); Terry Frieden, *Official: Violence to some groups of women "shocking"*, CNN, Oct. 19, 2009, available at <http://www.cnn.com/2009/US/10/19/domestic.violence/index.html> (quoting Deputy Attorney General David Ogden: "in some tribal land counties, murder rates for American Indian and Alaska Native women are ten times the national average"); See, Amnesty International, *supra* note 3 at 4-5 (noting that accurate statistical data on violence against women in Indian country is hard to come by, but recognizing that American Indian and Alaska Native women are at a higher risk of violence); P. Tjaden & N. Thoennes, *Extent, Nature and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey* (National Institute of Justice and the Centers of Disease Control and Prevention 2000) (finding that more than three out of every four American Indian and Alaska Native women will be physically assaulted during her lifetime); United States Department of Justice, *Tribal Domestic Violence and Sexual Assault Coalitions Grant Program*, <http://www.ovw.usdoj.gov/TribalCol.htm> (last visited Nov. 1, 2009) (noting that American Indians are twice as likely to experience sexual assault crimes compared to all other races and

that one in three American Indian women reports having been raped during her lifetime).

<sup>9</sup> Alaskan women were raped at a higher rate in 2008 than were women in any other state, Alaska's rate of child sexual abuse is six times the national average, and Alaska Native women are four-and-a-half times more likely to be the victims of violent crime than non-Native women. *Hey abusers, quit it*, ALASKA DISPATCH, Oct. 6, 2009, available at <http://www.alaskadispatch.com/alaska-beat/125-october-6/2302-hey-abusers-quit-it>.

<sup>10</sup> National Coalition Against Domestic Violence, Domestic Violence Facts: Alaska 1 (2009), available at <http://www.ncadv.org/files/Alaska%20revised%202.09.pdf>.

<sup>11</sup> This paper will use the terms "Alaska Native" and "Native Alaskan" interchangeably, both referring to individuals who are members of or eligible for membership in an Alaskan tribe.

<sup>12</sup> Brentin Mock, *Examining Palin's Record on Violence Against Women*, THE AMERICAN PROSPECT (Sep. 18, 2008), available at [http://www.prospect.org/cs/articles?article=palins\\_record\\_on\\_violence\\_against\\_women](http://www.prospect.org/cs/articles?article=palins_record_on_violence_against_women).

<sup>13</sup> National Coalition Against Domestic Violence, Domestic Violence Facts: Alaska, *supra* note 10.

<sup>14</sup> Native Entities Within the State of Alaska Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 74 Fed. Reg. 40057,40222-40223 (Aug. 11, 2009).

<sup>15</sup> Stephen Conn defines "bush" Alaska as referring to "sparsely-inhabited, minimally-accessible areas of the state which participate only marginally in the urban money economy." Stephen Conn, *Comparative Analysis of Alaska Law, Rules and Practice with A.B.A. Standards Relating to Criminal Justice* n.2 (1974), cited in Rachel King, *Bush Justice: The Intersection of Alaska Natives and the Criminal Justice System in Rural Alaska*, 77 OR. L. REV. 1, 4 n. 12 (1998).

<sup>16</sup> The remoteness that characterizes both Alaska Native villages and American Indian reservations in the lower-48 stems from very different situations and resultant relationships to the land itself. While American Indians frequently were relegated to isolated, inhospitable landscapes as they were pushed from their traditional homelands, Alaska Natives continue to inhabit the same territories (and hence, often also continue to live the same subsistence-based lifestyles)

that their ancestors always have. The relationships between individuals and the places they live in, particularly from an ethnographic point of view, have been the focus of a spate of academic writings and research. The author of this paper considered the roles of marginalization, land ownership and borders in Blackfoot culture, *see* *Living in the Borderland: Blackfoot Culture and Constructions of Place* (May 2002) (unpublished B.A. thesis, Columbia University) (on file with author). For further reading on rootedness, uprootedness, contestation, isolation and Native culture, *see generally* KEITH H. BASSO, WISDOM SITS IN PLACES (University of New Mexico Press 1996); SENSES OF PLACE (Steven Feld & Keith H. Basso, eds., School of American Research Press 1996); THE ANTHROPOLOGY OF LANDSCAPE: PERSPECTIVES ON SPACE AND PLACE (Eric Hirsch & Michael O'Hanlon, eds., Clarendon Press 1995).

<sup>17</sup> Otherwise known as "snow machine" in Alaskan parlance.

<sup>18</sup> See Virginia Davis & Kevin Washburn, *Sex Offender Registration in Indian Country*, 6 OHIO ST. J. CRIM. L.3, 4 (2008) (citing Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 508-513 (1976) (calling the rules of jurisdiction applicable to American Indian and Alaska Native communities a "jurisdictional maze.")) .

<sup>19</sup> Amnesty International, *supra* note 3, at 8.

<sup>20</sup> 982 P.2d 738, 743 (Alaska 1999).

<sup>21</sup> Geoffrey D. Strommer & Stephen D. Osborne, *"Indian Country" and the Nature and Scope of Tribal Self-Government in Alaska*, 22 ALASKA L. REV. 1, 5 (2005). Note that prior to the passage of ANCSA, an Alaska District Court found that the Metlakatla Indian Community was "not an Indian reservation in the traditional sense and accordingly [not] Indian country," a decision that has been criticized, but not overruled. *U.S. v. Booth*, 161 F. Supp. 269, 273 (Dist. Ct. Terr. Alaska 1st Div. 1958). After the passage of ANCSA, Alaska's Supreme Court held that the Metlakatlans located on the Annette Island Reserve did possess tribal sovereign immunity, as their reservation status set them apart from other Alaska Natives. *Atkinson v. Haldane*, 569 P.2d 151, 156 (Alaska 1977).

<sup>22</sup> CARRIE E. GARROW & SARAH DEER, TRIBAL CRIMINAL LAW AND PROCEDURE 85 (2004).

<sup>23</sup> 18 U.S.C.A. § 1151 (2009).

<sup>24</sup> Strommer & Osborne, *supra* note 21, at 5.

<sup>25</sup> 522 U.S. 520, 533 (1998). The Supreme Court held that the Native Village of Venetie could not tax a non-member contractor operating on ANCSA lands because such lands did not qualify as Indian country. *Id.* at 534.

<sup>26</sup> Strommer & Osborne, *supra* note 21, at 6.

<sup>27</sup> GARROW & DEER, *supra* note 22, at 86.

<sup>28</sup> See David S. Case, *Commentary on Sovereignty: The Other Alaska Native Claim*, 25 J. LAND RESOURCES & ENVTL. L. at 149, 149 (2005). Case argues that ANCSA “ignored the Alaska Native claim to sovereignty” and points out that “[t]he word ‘tribe’ is used only once in ANCSA, and then only as part of the definition of ‘Native village’”; Case concludes that Congress purposefully did not deal with the issue of tribal sovereignty in ANCSA. *Id.*

<sup>29</sup> Venetie, 522 U.S. at 526. This unique situation presents many problems for tribal governments in Alaska, stemming from misunderstandings and doubts about jurisdiction. To solve some of these problems, Strommer and Osborne propose the introduction of a geographic component to Alaska tribal jurisdiction — the (re)introduction of “Indian country” to Alaska — as a means to eliminate many of the uncertainties that plague Alaska tribes and to improve services for Native Alaska’s villages. Strommer & Osborne, *supra* note 21, at 23-34.

<sup>30</sup> Historically the State of Alaska has been unwilling to recognize Alaska Native villages as tribes, *supra* note 28.

<sup>31</sup> Venetie “left open the possibility that Alaska Native villages could demonstrate that they held tribal status.” Eric Smith & Mary Kancewick, *The Tribal Status of Alaska Natives*, 61 U. COLO. L. REV. 455,466 (1990). For a detailed discussion of Alaska and federal case law addressing the issue as to whether Native villages are tribes under federal law, see *id.* at 462-471.

<sup>32</sup> In 1999, the Alaska Supreme Court held that tribes may have sovereignty based either on territory or membership and that membership was a sufficient basis for the tribe to exercise jurisdiction in a child custody dispute. *John v. Baker*, 982 P.2d 738, 743 (Alaska 1999). See *infra* Part III.

<sup>33</sup> See, e.g., Smith & Kancewick, *supra* note 31, at 455-56. Further, “as a general principle of Indian

law, Indian tribes are qualified to exercise powers of self-government by virtue of their original tribal sovereignty. Thus, the question of whether Alaska Natives are sovereign tribes is important to a discussion of tribal court jurisdiction.” Susanne Di Pietro, *Tribal Court Jurisdiction and Public Law 280: What Role for Tribal Courts in Alaska?*, 10 ALASKA L. REV. 335, 338 (1993). Di Pietro emphasizes “under general principles of federal Indian law, tribal status can be recognized in three ways: (1) by Congress through statute or treaty; (2) by the executive branch, for example through the federal acknowledgement process; and (3) judicially.” *Id.* at 339.

<sup>34</sup> 757 P.2d 32 (Alaska 1988).

<sup>35</sup> *Id.* at 34.

<sup>36</sup> Case, *supra* note 28, at 152. Case writes that from the Stevens decision until the State of Alaska’s decision not to appeal the “tribal status” issue in Venetie (which, Case argues, indicated that the state’s hostile position towards all tribal government was abating at some level), Alaska courts were “the implacable foes of tribal sovereignty.” *Id.*

<sup>37</sup> Baker, 982 P.2d at 748-749.

<sup>38</sup> *Id.* at 749.

<sup>39</sup> Davis & Washburn, *supra* note 18, at 6.

<sup>40</sup> Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360 (2000)).

<sup>41</sup> GARROW & DEER, *supra* note 22, at 88.

<sup>42</sup> Act of Aug. 8, 1958, Pub.L. No. 85-615, 72 Stat. 545 (codified at 18 U.S.C. § 1162(a) (1984)).

<sup>43</sup> Di Pietro, *supra* note 33, at 345.

<sup>44</sup> *Id.* at 346.

<sup>45</sup> *Id.* In Alaska, tribal court jurisdiction has been exercised concurrently with the state, and there has even been a case where an Alaska tribe “nominally subject to state criminal jurisdiction under Public Law 280” actually exercised criminal jurisdiction exclusive of state authority. See also, Ross Naughton, *State Statutes Limiting the Dual Sovereignty Doctrine: Tools for Tribes to Reclaim Criminal Jurisdiction Stripped by Public Law 280?*, 55 UCLAL. REV. 489, 488502 (2007) (discussing *Booth v. State*, 903 P.2d 1079 (Alaska Ct. App. 1995)). In *Booth v. State*, the tribal court punished Booth for domestic violence and imposed a fine of \$400. *Id.* at 500. This later prevented Booth from being prosecuted in state court, as the Alaska Court of Appeals held that Booth had been subject



to a “conviction or acquittal” in Metlakatla court. *Id.* at 501. This conviction or acquittal gave Booth the protection of section 12.20.010 of the Alaska Statutes, which prohibits prosecution for a crime for which one has already been convicted or acquitted of in another jurisdiction. *Id.* 499-502. Bear in mind that the Metlakatla Indian Community, which effectively exercised criminal jurisdiction over Booth, is considered to be Indian country, as it was not extinguished by ANSCA, *see* GARROW & DEER *supra* note 22. *See also* Office of Tribal Justice, *Concurrent Tribal Authority Under Public Law 83-280* (Nov. 9, 2000) available at [http://www.tribal-institute.org/lists/concurrent\\_tribal.htm](http://www.tribal-institute.org/lists/concurrent_tribal.htm) (concluding that Indian tribes retain concurrent criminal jurisdiction over Indians in P.L. 280 states and that that is the shared view of the Federal Government and the vast majority of courts that have directly considered the issue.)

<sup>46</sup> John v. Baker, 982 P.2d 738, 747 (Alaska 1999).

<sup>47</sup> *See generally* Di Pietro, *supra* note 32, at 346-358 (noting that there is disagreement as to whether Congress intended the tribes and the State to share concurrent criminal jurisdiction under Public Law 280, and discussing how some argue that a 1970 amendment to Public Law 280 — the “Metlakatla Amendment” — suggests that Congress interpreted the original transfer of jurisdictions to the state to be wholly exclusive); Andy Harrington, *Exclusive of What? The Historical Context of the 1970 “Metlakatla” Amendment to PL 280*, 23 ALASKA L. REV. 1 (2006) (examining the divestiture interpretation of Public Law 280 and arguing that reliance on the 1970 amendment to Public Law 280 to support the proposition that Congress intended to divest tribes of their civil and criminal jurisdiction is based on flawed premises, and that actually the 1970 amendment and its legislative history are more supportive of a non-divestiture interpretation.)

<sup>48</sup> Baker, 982 P.2d at 748 n. 46.

<sup>49</sup> Davis & Washburn, *supra* note 18, at 6.

<sup>50</sup> Di Pietro, *supra* note 33, at 353.

<sup>51</sup> 435 U.S. 191, 212 (1978).

<sup>52</sup> After the decision in *Duro v. Reina*, 495 U.S. 676, 679 (1990), in which the Supreme Court held that tribes had no criminal jurisdiction over non-member Indians, Congress restored such jurisdiction by amending the language of the Indian Civil Rights Act in 1968. Indian Civil Rights Act, Pub. L. 90-

284, 82 Stat. 77 (codified at 25 U.S.C. § 1301 (West, 2009)). This amendment, referred to as the “Duro-fix,” recognized and affirmed the inherent power of Indian tribes to exercise criminal jurisdiction over all Indians.

<sup>53</sup> 18 U.S.C. § 1153 (2009).

<sup>54</sup> Such serious criminal conduct includes “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 Indian country.” *Id.*

<sup>55</sup> FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 344 (Rennard Strickland et al. eds., 1982 ed.).

<sup>56</sup> Under the Indian Civil Rights Act, tribal courts are prohibited from imposing for a “term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than \$5,000 but not to exceed \$15,000, or both . . . .” 25 U.S.C. § 1302 (2009).

<sup>57</sup> FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LAW (1995), available at [http://thorpe.ou.edu/AKtribalct/chapter\\_five.html](http://thorpe.ou.edu/AKtribalct/chapter_five.html).

<sup>58</sup> Di Pietro, *supra* note 34, at 335 (noting that as of 1993 at least one hundred Alaska Native villages were operating tribal councils or tribal courts that resolved local disputes as their primary or major functions, and that tribal court and council dispute resolution activity had increased greatly from 1987 to 1993). Teresa W. Carns, *A Picture of Rural Justice: Alaska Judicial Council Studies*, 10 ALASKA JUSTICE FORUM 1 (1993) (“1987 through 1990 [Alaska’s] governor’s office worked actively to encourage the continued development of . . . local dispute resolution . . . [and] additional[ly] the federal government, through the Bureau of Indian Affairs, increased funding and support for tribal courts”). So as of “1993 most [Alaska] Native non-profits had initiated formal or informal programs to encourage local dispute resolution, whether through tribal courts or through tribal councils”. *Id.* For a current list of tribal governments, contact information and websites, including links to tribal constitutions and

charters in Alaska, *see* National Tribal Justice Resource Center, Tribal Directory for AK, <http://www.nijc.org/resources.html> (Aug. 22, 2012 2:36PM).

<sup>59</sup> 18 U.S.C.A §1151 (2012)

<sup>60</sup> Alaska Community Database Community Information Systems, *Metlakatla* [http://www.commerce.state.ak.us/dca/commdb/CIS.cfm?Comm\\_Boro\\_name=Metlakatla](http://www.commerce.state.ak.us/dca/commdb/CIS.cfm?Comm_Boro_name=Metlakatla) (Aug. 22, 2012 2:45PM).

<sup>61</sup> 18 U.S.C. § 1153 (2009).

<sup>62</sup> The ICRA applies to Indian tribes regardless of the Indian country/not Indian country distinction. 25 U.S.C. § 1302 (West 2009).

<sup>63</sup> Definitions of domestic violence vary slightly from one state to the next. In general, according to the Violence Against Women Act, the term domestic violence “includes felony or misdemeanor crimes of violence committed by a current or former spouse of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.” Act of Jan. 5, 2006, Pub. L. 109-162, 119 Stat. 2960 (codified at 42 U.S.C.A. § 13925 (West. 2009)).

<sup>64</sup> Indian Civil Rights Act, *supra* note 52.

<sup>65</sup> This language is taken from 18 U.S.C. § 2262, which prohibits interstate travel (including entering or leaving Indian country) with the intent to violate a protective order.

<sup>66</sup> *See, e.g.*, David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protective Orders*, 56 OHIO ST. L. J. 1153 (1995).

<sup>67</sup> According to Alaska Statutes 18.66.990(3):

domestic violence and crime involving domestic violence mean one or more of the following offenses or an offense under a law or ordinance of another jurisdiction having elements similar to these offenses, or an attempt to commit the offense, by a household member against another household member:

- (A) a crime against the person under AS 11.41;
- (B) burglary under AS 11.46.300 — 11.46.310;
- (C) criminal trespass under AS 11.46.320 — 11.46.330;
- (D) arson or criminally negligent burning under AS 11.46.400 — 11.46.430;
- (E) criminal mischief under AS 11.46.475 — 11.46.486;
- (F) terrorist threatening under AS 11.56.807 or 11.56.810;
- (G) violating a protective order under AS 11.56.740(a)(1); or
- (H) harassment under AS 11.61.120(a)(2) — (4).

ALASKA STAT. § 18.66.990 (2009).

<sup>68</sup> 18 U.S.C. § 1153 (2009)..

<sup>69</sup> Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14-FALL KAN. J. L. & PUB. POL’Y 121, 126 (2004).

<sup>70</sup> *Id.*

<sup>71</sup> Marny Rivera, et al., *Assaults in Domestic Violence Incidents Reported to Alaska State Troopers*, 25(3) ALASKA JUSTICE FORUM 7 (2008) *available at* [http://justice.uaa.alaska.edu/forum/25/3fall2008/a\\_dvassaults.html](http://justice.uaa.alaska.edu/forum/25/3fall2008/a_dvassaults.html)

<sup>72</sup> *Id.*

<sup>73</sup> Marny Rivera, et al., *Descriptive Analysis of Assaults in Domestic Violence Incidents Reported to Alaska State Troopers: 2004* (University of Alaska Anchorage, 2008), *available at* <http://justice.uaa.alaska.edu/research/2000/0601intimatepartnerviolence/0601.04.dv-assaults.html>

<sup>74</sup> Domestic violence and sexual assault are both known to be extremely underreported crimes. Alaska Natives may also have mistrust for the criminal justice system, stemming from cultural differences, further inhibiting them from filing reports with state law enforcement. *See* KING, *supra* note 15, at 14-18.

<sup>75</sup> Sarah Deer, et al., *Final Report: Focus Group on Public Law 280 and the Sexual Assault of Native Women 8* (Tribal Law and Policy Institute 2007) *available at* <http://www.ovw.usdoj.gov/280-fg-finalreport.pdf>

<sup>76</sup> University of Alaska Anchorage Justice Center, *Mandatory Arrest in Domestic Violence Cases*, 25(3) ALASKA JUSTICE FORUM 9 (2008) *available at* [http://justice.uaa.alaska.edu/forum/25/3fall2008/b\\_dvarrests.html](http://justice.uaa.alaska.edu/forum/25/3fall2008/b_dvarrests.html).

<sup>77</sup> ALASKA STAT. § 18.65.530 (West. 2009).

<sup>78</sup> POMMERSHEIM, *supra* note 57.

<sup>79</sup> *Id.*

<sup>80</sup> As of 2008, the BIA funded fifty-nine detention facilities on tribal lands in the United States, operated forty-seven tribal law enforcement programs and funded an additional one hundred and fifty four tribal law enforcement programs. DAVIS & WASHBURN, *supra* note 18, at 19.

<sup>81</sup> Alaska State Troopers Village Public Safety Officer Program, <http://www.dps.state.ak.us/AST/vpso/about.aspx> (Aug. 22, 2012 6:02PM). *See also* Otwin Marenin, *Conflicting Perspectives on the Role of the Village Public Safety Officer in Native Villages in Alaska*, 18(3) AMERICAN INDIAN QUARTERLY 297 (1994) (examining how Native Alaska villagers view the Village Public Safety Officer, the “main formal agent of law enforcement and order maintenance found in Native villages.”)

<sup>82</sup> Private Officer News Network, <http://privateofficernews.wordpress.com/2009/10/16/alaska-public-safety-officers-unique-breed-www-privateofficer-com/> (Aug. 22, 2012 4:11PM).

<sup>83</sup> *Id.*

<sup>84</sup> ALASKA STAT. § 12.25.030 (2009).

<sup>85</sup> Private Officer News Network, *supra* note 84.

<sup>86</sup> *Id.*

<sup>87</sup> Amnesty International, *supra* note 8, at 46. The Amnesty International Report notes that this discrepancy has resulted in the VPSO program being criticized as a separate, unequal and insufficient form of law enforcement. VPSOs and VPOs are often the first to respond to reports of crimes in Alaska Native villages, but “cannot serve arrest warrants or investigate serious crimes such as rape without the approval of State Troopers.” *Id.*

<sup>88</sup> Davis & Washburn, *supra* note 18, at 3.

<sup>89</sup> Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006) [hereinafter VAWA].

<sup>90</sup> *See infra* Conclusion.

<sup>91</sup> VAWA, *supra* note 88.

<sup>92</sup> POMMERSHEIM, *supra* note 57.

<sup>93</sup> *Id.*

<sup>94</sup> University of Alaska Anchorage Justice Center, *supra* 76.

<sup>95</sup> *Id.*

<sup>96</sup> *See* MELISSA L. TATUM, *A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts*, 90 KY. L. J. 123, 172-175 (2001-

2002) (pointing out that while they clearly have no criminal jurisdiction over non-Indians who violate foreign protective orders in Indian country, tribes nonetheless possess criminal jurisdiction over Indians who violate protective orders). Tatum argues further that a tribe may want to establish civil penalties that can be applied to both Indian and non-Indian violators who violate protective orders. *id.* Tatum also addresses the role of tribal versus state law enforcement in the enforcement of protective orders:

Tribes will particularly want to determine whether their police officers have the authority to investigate and to detain all persons for any potential violation of tribal law, as well as to examine the contours of the arrest authority provided to their police officers. Specifically, do tribal police have the authority to perform warrantless arrests for violations of protection orders? Many states classify violations of protection orders as misdemeanors, and common law generally provides that police officers may make a warrantless arrest for a misdemeanor only if it was committed in their presence. Thus, state police officers may not possess authority to make warrantless arrests of all those who violate protection orders, absent specific statutory authorization.

*Id.* at 173.

<sup>97</sup> *Supra* note 56.

<sup>98</sup> Strommer & Osborne, *supra* note 21, at 1, citing a 2004 Alaska Department of Public Safety report that indicated that of 197 rural Alaska villages, 48 had a VSPO but no State Trooper presence and 68 had no state law enforcement presence at all. *Alaska Dep't of Pub. Safety, Law Enforcement in Rural Alaska Villages* (2004).

According to a survey by the Alaska Federation of Natives, the rate of sexual violence in rural villages is as much as 12 times the national rate. *See* Timothy Williams, *For Native American Women, Scourge of Rape, Rare Justice*, N.Y. TIMES, May 22, 2012, at A1.

<sup>99</sup> *Case, supra* note 28, at 154.

<sup>100</sup> This paper is not arguing against full sovereignty being awarded to Alaska tribes, but such an argument does not need to be made for the purposes of this discussion. Alaska Native victims of domestic violence would receive better assistance and protection if

Alaska tribal courts exercised concurrent criminal jurisdiction over domestic violence crimes, as well as if Alaska tribal courts were encouraged to develop their regulatory jurisdiction to protect victims from domestic violence. Truly addressing the divestiture debate is beyond the scope of this paper; however, this paper takes the position that Public Law 280 did not divest Alaska Native villages of criminal jurisdiction. Further, this paper argues that tribal courts in Alaska should exercise concurrent, though limited, criminal jurisdiction with the state, regardless of whether Public Law 280 applies; that is, regardless of whether the crime took place in Indian country.

<sup>101</sup> John v. Baker, 982 P.2d 738 (Alaska 1999).

<sup>102</sup> *Id.* at 743.

<sup>103</sup> *Id.* at 748.

<sup>104</sup> *Id.* at 748-749.

<sup>105</sup> *Supra* note 55.

<sup>106</sup> Case, *supra* note 28, at 154.

<sup>107</sup> 25 U.S.C. § 1302 (West 2009).

<sup>108</sup> John v. Baker, 982 P.2d 738, 760 (Alaska 1999).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> For Justice Scalia's distinction between judicial comity and legislative comity in the international context, see Anne-Marie Slaughter, *Government networks, the heart of the liberal democratic order*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* at 208-209 (Gregory H. Fox & Brad R. Roth, eds., Cambridge University Press, 2000).

<sup>113</sup> See, e.g., Deer, *supra* note 69, at 122 (arguing that "Native women need community awareness and accountability for sexual violence at the local level, preferably framed in a culturally-relevant way", and that "the role of tribal leaders and tribal justice systems in responding to rape is central to resolving the issue" and providing the needed responses) and King, *supra* note 15 (examining cultural mores within the Alaska Native community that clash with the institutional expectations of the adversarial system).

<sup>114</sup> Notably, as of the completion of this paper, Congress is considering a bill to amend the Indian Law Enforcement Reform Act, the Indian Tribal Justice Act, the Indian Tribal Justice Technical and Legal Assistance Act of 2000, and the Omnibus Crime Control and Safe Streets Act of 1968 to improve the prosecution of, and response to, crimes

in Indian country, and for other purposes. This bill, among other things, proposes increasing the criminal sentences tribal courts may impose. S.797 Tribal Law and Order Act of 2009. See memo See also Jenny Gold, *Bill Bolsters Tribal Power to Prosecute Rape Cases* (NPR radio broadcast Jul. 23, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=92833011>.

<sup>115</sup> Amnesty International, *End injustice — Effective prosecutions*, <http://www.amnesty.org/en/library/asset/AMR51/058/2007/en/96944ef6-d3a1-11dd-a329-2f46302a8cc6/amr510582007en.html> (last visited Sept. 11, 2012).

(Aug. 22, 2012 5:06PM) (summarizing findings from *Maze of Injustice*, *supra* note 3, at 64).

<sup>116</sup> Strommer & Osborne, *supra* note 21, at 15.

<sup>117</sup> *Id.*, citing Native Village of Perryville v. Tague, No. 3AN-00-12245 (Alaska Super. Ct. Nov. 19, 2003).

<sup>118</sup> Sarah Deer, *Expanding the Network of Safety: Tribal Protection Orders for Survivors of Sexual Assault*, *TRIBAL LAW JOURNAL* (2003), available at [http://tlj.unm.edu/tribal-law-journal/articles/volume\\_4/expanding\\_the\\_network\\_of\\_safety\\_tribal\\_protection\\_orders\\_for\\_survivors\\_of\\_sexual\\_assault/index.php](http://tlj.unm.edu/tribal-law-journal/articles/volume_4/expanding_the_network_of_safety_tribal_protection_orders_for_survivors_of_sexual_assault/index.php).

<sup>119</sup> A similar situation exists for American Indian and Alaska Native sexual assault victims, where many tribal codes include criminal laws on rape and sexual assault, but very few tribal nations actively prosecute sexual assault cases. Deer, *supra* note 71, at 128-129.

<sup>120</sup> Di Pietro, *supra* note 34, at 353.

<sup>121</sup> *Id.*

<sup>122</sup> Deer, *supra* note 118.

<sup>123</sup> Case, *supra* note 28, at 154, citing Montana v. United States, 450 U.S. 544, 557 (1981) and Nevada v. Hicks, 533 U.S. 353, 359 (2001).

<sup>124</sup> POMMERSHEIM, *supra* note 57.

<sup>125</sup> Amnesty International, *supra* note 8, at 44.

<sup>126</sup> POMMERSHEIM, *supra* note 57.

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

<sup>128</sup> Deer, *supra* note 69, at 128.

<sup>129</sup> Bachman et al., *supra* note 8, at 38.

<sup>130</sup> Official Site of the Ninilchik Traditional Council, <http://www.ninilchiktribe-nsn.gov/domestic.html> (Aug. 22, 2012 5:44PM).

<sup>131</sup> NINILCHIK VILLAGE ORDINANCE No. 99-01 (1999) (emphasis added).

<sup>132</sup> *Id.*

<sup>133</sup> This paper is focused on providing assistance and protection to Alaska Native victims of domestic violence, and therefore utilizes the premise that the abuser should be forced to cease contact with the victim, either through criminal sentencing or through a protective order. Obviously relationships, especially where children are involved, are never that simple, and the author of this paper recognizes the hope that in some (albeit rare) cases, abusers may be able to be rehabilitated and resolution may be found through other means such as alternate dispute resolution. For a detailed assessment of alternate dispute resolution in Alaska Native communities,

see Joan F. Connors, et al., *Resolving Disputes Locally: Alternatives for Rural Alaska* (Alaska Judicial Council 1992) available at <https://www.ncjrs.gov/pdffiles1/Digitization/139534NCJRS.pdf>

<sup>134</sup> *Supra* note 52.

<sup>135</sup> Matthew L. M. Fletcher, *Addressing the Epidemic of Domestic Violence in Indian Country by Restoring Tribal Sovereignty*, J. AMERICAN CONSTITUTION SOCIETY ISSUE GROUPS 1 (2009), available at <http://www.acslaw.org/files/Fletcher%20Issue%20Brief.pdf>

<sup>136</sup> *Id.* at 8.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 9.