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# Criminal Justice in Indian Country

Sarah Deer

*Mitchell Hamline School of Law, [sarah.deer@mitchellhamline.edu](mailto:sarah.deer@mitchellhamline.edu)*

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# Criminal Justice in Indian Country

## **Abstract**

On March 7, 2013, President Obama signed the 2013 Violence Against Women Act Re-authorization ("VAWA 2013"). Contained within that legislation is a partial re-authorization of tribal criminal jurisdiction over non-Indians, which is a topic covered in this short article. VAWA 2013 recognizes that the inherent right of tribal nations includes criminal jurisdiction over non-Indian defendants accused of domestic violence. The topics discussed in this article—statistical evidence, interdiction of violence, and protecting Native women—will likely become even more important as tribal leaders and jurists consider the future of tribal self-determination and seek to realize the full potential of the changes created by VAWA 2013.

## **Keywords**

Violence Against Women Act 2013, Indian Law, Native women, tribal jurisdiction, non-Indian jurisdiction, victimization surveys, Oliphant decision, sex crimes data, violence against women

## **Disciplines**

Criminal Law | Indian and Aboriginal Law

**CONFERENCE TRANSCRIPT: HEEDING FRICKEY’S CALL:  
DOING JUSTICE IN INDIAN COUNTRY\***

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\* These materials were presented at the University of California at Berkeley Law School on Sept. 27-28, 2012.

This victory is an example of a successful collaborative approach that required carefully negotiating with California through administrative channels, instead of through litigation or legislation. It was all about building a solution whereby we could achieve dual protections for the environment and the tribes' traditional subsistence uses. All of the uses allowed by California before these new regulations go into effect will remain in place for the tribes that are listed for these MPAs. But the public will not be allowed the same extractive uses in those MPAs.

For the first time, north coast tribes have received formal recognition by California of their marine use rights through a new and distinct category of use that stands separate from the recreational and commercial categories. We view this as a huge victory for California tribes. The MLPA process has been far from perfect, and not everyone was happy with the outcome; but in the southern bio-region of the north coast (from the mouth of the Mattole River to Point Arena) seventeen federally recognized tribes in Mendocino and Lake Counties were included in this area's six new SMCAs, and one federally recognized tribe in Humboldt County was included in one of those SMCAs. Four federally recognized tribes in Humboldt and Del Norte Counties were included in four new SMCAs and one new state marine recreational management area in the north coast's northern bio-region (from the Oregon border to the mouth of the Mattole River).<sup>86</sup>

Tribal engagement in the MLPA process demonstrates that when people pull together and work towards something good, both environmental protection and social justice can be achieved. And, we can change the way the government views tribal sovereignty and aboriginal rights.

#### CRIMINAL JUSTICE IN INDIAN COUNTRY

*Sarah Deer, Assistant Professor of Law, William Mitchell College of Law*<sup>87</sup>

Author's preface: *These remarks were originally delivered in September of 2012. On March 7, 2013, President Obama signed the 2013 Violence Against Women Act Reauthorization ("VAWA 2013"). Contained within that legislation is a partial reauthorization of tribal criminal jurisdiction*

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86. *Northern California Marine Protected Areas*, CAL. DEP'T OF FISH & WILDLIFE, [http://www.dfg.ca.gov/mlpa/ncmpas\\_list.asp](http://www.dfg.ca.gov/mlpa/ncmpas_list.asp) (last visited Mar. 27, 2013) (final approved regulation, including maps and details regarding tribal take).

87. Citizen of the Muscogee (Creek) Nation of Oklahoma. *Mvto* (thank you) to the many Native women survivors and advocates who have informed my work on this issue. I am grateful to Anna R. Light, who provided invaluable research assistance in finalizing these remarks for publication.

*over non-Indians, which is a topic covered in this short essay. VAWA 2013 recognizes that the inherent right of tribal nations includes criminal jurisdiction over non-Indian defendants accused of domestic violence. The topics discussed in this essay — statistical evidence, interdiction of violence, and protecting Native women — will likely become even more important as tribal leaders and jurists consider the future of tribal self-determination and seek to realize the full potential of the changes created by VAWA 2013.*

Thank you very much for this opportunity. This is my first visit to Berkeley and I am grateful that I have been invited to share some information about my work.

At the outset, I would like to lay some foundation for my perspective on Indian law. My introduction to law was based on my experience in victim advocacy. Prior to going to law school (and during law school), I worked at a rape crisis center in Lawrence, Kansas as an advocate for six years. Many of the women I worked with were Native students at Haskell Indian Nations University in Lawrence who had either been assaulted prior to coming to Haskell or had been assaulted on campus. Through that work I began to see a possible path of working in the legal system to help those women. My plan was originally to work as a sex crimes prosecutor.

I ended up straying from that particular career path, but most of my work continues to be informed by the experience of working directly with victims of violent crime. Since law school, I have spoken to literally hundreds of native women who have survived sexual assault or domestic violence (often both) throughout Indian Country and in urban areas. Most of my scholarship has focused on the needs and rights of those survivors.<sup>88</sup>

The statistics regarding violence against Native women are almost a mantra now for many of us who work in this area. One in three Native women will be sexually assaulted in her lifetime, and three out of five will be victims of domestic violence.<sup>89</sup> Major news media outlets have called the problem "an epidemic."<sup>90</sup>

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88. See, e.g., Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL'Y 121 (2004); Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 SUFFOLK U. L. REV. 455 (2005); Sarah Deer, *Decolonizing Rape Law: A Native Feminist Synthesis of Safety and Sovereignty*, 24 WICAZO SA REV. 149 (2009); Sarah Deer, *Relocation Revisited: Sex Trafficking of Native Women in the United States*, 36 WM. MITCHELL L. REV. 621 (2010).

89. See Hilary N. Weaver, *The Colonial Context of Violence: Reflections on Violence in the Lives of Native American Women*, 24 J. INTERPERSONAL VIOLENCE 1552, 1557 (2009); Stephanie Wahab & Lenora Olson, *Intimate Partner Violence and Sexual Assault in Native American Communities*, 5 TRAUMA, VIOLENCE & ABUSE 353 (2004); *Policy Insights Brief:*

It is important to understand the origin of those statistics in order to learn from this data, as opposed to it being a phrase we simply repeat. Many advocates in tribal communities have told me that those statistics don't reflect the reality they encounter. When I talk to advocates on the reservations and in Alaska Native villages about the "one in three" Native women, they have expressed skepticism. The skepticism is based on experience, that the problem is much more significant because the existing data grossly understates the problem. Charon Asetoyer and other women from reservations have explained the severity of domestic violence this way: Native women "talk to their daughters about what to do when they are sexually assaulted, not *if* they are sexually assaulted, but *when*."<sup>91</sup> In 2011, Juana Majel Dixon, First Vice President of the National Congress of American Indians and member of the Pauma-Yuima Band of Luiseno Indians explained, "Young women on the reservation live their lives in anticipation of being raped. They talk about 'how I will survive my rape' as opposed to not even thinking about it. We shouldn't have to live our lives that way."<sup>92</sup> Sexual assault has been normalized in many of our communities.

In 1999, the Bureau of Justice Statistics issued a report called "American Indians and Crime," which was really the first national exposure of Native victimization in the United States.<sup>93</sup> It showed a highly disproportionate

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*Statistics on Violence Against Native Women*, NCAI POL'Y RES. CTR. (Feb. 2013), [http://files.ncai.org/broadcasts/2013/February/Policy%20Insights%20Brief\\_VAWA\\_020613.pdf](http://files.ncai.org/broadcasts/2013/February/Policy%20Insights%20Brief_VAWA_020613.pdf).

90. Suzy Khimm, *The Violence Against Women Act Is on Life Support*, WASH. POST (Jan. 25, 2013, 3:37 PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/25/the-violence-against-women-act-is-on-life-support> (citing the "epidemic of domestic violence among Native Americans"); Rebecca Solnit, *A Rape a Minute, a Thousand Corpses a Year*, HUFFINGTON POST (Jan. 24, 2013, 10:25 AM), [http://www.huffingtonpost.com/rebecca-solnit/violence-against-women\\_b\\_2541940.html](http://www.huffingtonpost.com/rebecca-solnit/violence-against-women_b_2541940.html) ("Speaking of epidemics, one of three Native American women will be raped.").

91. NATIVE AM. WOMEN'S HEALTH EDUC. RES. CTR., INDIGENOUS WOMEN'S DIALOGUE: ROUNDTABLE REPORT ON THE ACCESSIBILITY OF PLAN B AS AN OVER THE COUNTER (OTC) WITHIN INDIAN HEALTH SERVICE 10 (Feb. 2012), available at <http://www.naho.ca/wp-content/uploads/2012/03/Plan-B-Report.pdf> (emphasis added).

92. Kirsten M. Carlson, *UN Special Rapporteur Investigates Epidemic of Violence Against Indian Women in the United States*, TURTLE TALK (Jan. 29, 2011, 12:24 PM), <http://turtletalk.wordpress.com/2011/01/29/un-special-rapporteur-investigates-epidemic-of-violence-against-indian-women-in-the-united-states/>.

93. LAWRENCE A. GREENFELD & STEVEN K. SMITH, BUREAU OF JUSTICE STATISTICS, AMERICAN INDIANS AND CRIME (1999), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=387>. For an updated version, see STEVEN W. PERRY, BUREAU OF JUSTICE

level of victimization in the lives of Native people, including data that Native people have experienced rates of violence at two and one half to three times higher than the mainstream population. Since 1999, those statistics have been affirmed, verified, and replicated by a number of different sources including state and tribal entities.<sup>94</sup> Amnesty International investigated the high rates of sexual violence, which resulted in intense media attention to the problem.<sup>95</sup> What I wanted to speak specifically about is the data – the one in three data and the three out of five data – and talk about the challenges with relying on that data.

The first problem we have to confront is that a lot of this data is national in scope. Using this data to describe problems in all tribal nations is problematic because each community is different. Tribal governments have struggled for over a century with the "one size fits all" federal approach to problem solving in tribal communities. Our tribal communities are often lumped into a single category (e.g., "Indian Country" or "Native people"), which does not account for the wide disparity in specific problems faced by individual sovereign nations.

Most of the time, we don't have specific data about individual tribal communities, and of course the crime rates are not the same in every single community. When the national data does not reflect the reality in a particular community, there tends to be some skepticism about that data. The other problem with the national data is that it often does not distinguish between on-reservation crime and off-reservation crime.

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STATISTICS, AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE, 1992-2002 (2004), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=386>.

94. University of Delaware criminologist Ronet Bachman is the leading statistician on violence against Native women in the United States. See Ronet Bachman et al., *Estimating the Magnitude of Rape and Sexual Assault Against American Indian and Alaska Native (AIAN) Women*, 43 AUSTL. & N.Z. J. CRIMINOLOGY 199 (2010). Other studies which support these findings include Shira Rutman et al., *Reproductive Health and Sexual Violence Among Urban American Indian and Alaskan Native Young Women: Select Findings from the National Survey of Family Growth (2002)*, 16 MATERNAL & CHILD HEALTH J. S347 (2012); DANETTE BUSKOVICK & ELIZABETH A. PETERSON, U.S. DEP'T OF JUSTICE, DOMESTIC VIOLENCE: RESULTS FROM THE 2008 MINNESOTA CRIME VICTIM SURVEY (2009), available at [https://www.unitedwaytwincities.org/\\_asset/fphxh5/2009\\_Domestic\\_Violence\\_Report.pdf](https://www.unitedwaytwincities.org/_asset/fphxh5/2009_Domestic_Violence_Report.pdf); PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN (2000), available at <https://www.ncjrs.gov/pdffiles1/nij/183781.pdf>.

95. AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2007), available at <http://www.amnestyusa.org/pdfs/MazeOfInjustice.pdf>.

In order to understand how to use this information, it is important to understand how this data is collected and how the numbers are crunched. I should preface my remarks on data by clarifying that I do not have training in statistics. However, I think lawyers should have a basic understanding of how data is collected and published. I apologize for the very cursory overview that is based on my understanding of how this process works.

Much of this data is collected by the federal government through victimization surveys.<sup>96</sup> Prior to victimization survey development, the only way to "count" crime was to consider the number of police reports that were filed. Those of you who are victims or work with victims know that most of these crimes are never reported to police.<sup>97</sup> So relying on law enforcement report data or prosecution data does not yield accurate results.

The "victim survey" method was developed to contact random samples of the population (via telephone in most cases) and ask them a series of questions regarding their experience with crime.<sup>98</sup> If a survey respondent indicates that she has been a victim of crime, she is asked a series of questions about the type of crime, the race of the perpetrator, and so on. Victimization surveys are the true origin of much of our knowledge because most victims don't officially report crime — especially sexual assault crimes. Prior to the development of victimization surveys, there was no way to account for crimes never reported.

Fortunately, the sample sizes in many of these studies have become large enough that American Indian and Alaska Native data has become "statistically significant." If the data is not a "statistically significant sample," then it is simply pooled with other groups of people who do not constitute a statistically significant sample and categorized as "other." This

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96. See, e.g., Jennifer L. Truman & Michael Planty, *Criminal Victimization, 2011*, BUREAU OF JUST. STAT. BULL., Oct. 2012, at 1, available at <http://bjs.gov/content/pub/pdf/cv11.pdf>; LYNN LANGTON ET AL., BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006-2010 (Aug. 2012), available at <http://bjs.gov/content/pub/pdf/vnrp0610.pdf>; JANET L. LAURITSEN ET AL., BUREAU OF JUSTICE STATISTICS, METHODS FOR COUNTING HIGH-FREQUENCY REPEAT VICTIMIZATIONS IN THE NATIONAL CRIME VICTIMIZATION SURVEY (2012), available at <http://bjs.gov/content/pub/pdf/mchfrv.pdf>.

97. See Weaver, *supra* note 89, at 1556; *Victimization Surveys*, U. OF ARIZ. RAPE & SEXUAL ASSAULT SURVEILLANCE PROJECT, <http://www.u.arizona.edu/~sexasslt/victimization.html> (last visited Feb. 7, 2013).

98. See *Survey Methodology for Criminal Victimization in the United States*, BUREAU OF JUST. STAT., [http://bjs.ojp.usdoj.gov/content/pub/pdf/ncvs\\_methodology.pdf](http://bjs.ojp.usdoj.gov/content/pub/pdf/ncvs_methodology.pdf) (last visited Apr. 2, 2013).



is commonly seen in criminology studies that classify Americans as "White, Black, and Other."

But it is still important to remember that this data is based on anonymous surveys using random sample methodology. In at least one series of major studies, the U.S. Census Bureau is a central player, and statisticians design these survey projects to ensure scientific validity.<sup>99</sup> Since 1999, the data has been consistent in terms of the very high rate of crimes, particularly in tribal communities. I am not aware of a single study (federal, state, or tribal) containing a statistically significant group of American Indians/Alaska Natives where the data *doesn't* suggest that Native people suffer the highest rates of victimization in the United States.

However, one major problem with the data from a federal Indian law perspective is that the National Crime Victimization Survey ("NCVS") and National Violence Against Women Survey ("NVAWS") studies don't ask the survey respondent to identify whether a crime occurred on or off reservation land.<sup>100</sup> That piece of information is crucial when trying to resolve jurisdictional questions and develop solutions to these high rates of crime.

Another potential weakness of victimization surveys is the likelihood that a survey respondent may not wish to disclose a crime like sexual assault, especially if she lives with her abuser. A Native woman may decline to disclose that she has been victimized because the survey is sponsored by the federal government, especially if she doesn't trust the results will be anonymous. Again, these victimization surveys are a vast improvement over the older way of collecting crime data through reports, but I think it is fair to say that the numbers may not reflect the true gravity of the situation.

I'd like to return to my second point — the problem with not knowing whether these crimes tend to occur in Indian Country.<sup>101</sup> Again, the data simply doesn't tell us. The issue of the race of the perpetrator comes up in this context because these victimization surveys are telling us that most perpetrators of violence against Native women are non-Native. Clearly, *Oliphant* immediately becomes an issue when you start talking about

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99. *Data Collection: National Crime Victimization Survey*, BUREAU OF JUST. STAT., <http://bjs.ojp.usdoj.gov/index.cfm?ty=dcdetail&iid=245> (last visited Apr. 2, 2013).

100. *Id.*; TJADEN & THOENNES, *supra* note 94, at 23.

101. Indian Country is defined at 18 U.S.C. § 1151 (2006), and includes reservations, dependent Indian communities, and allotments. Tribes only have criminal jurisdiction over crimes perpetrated by Indians within Indian country. When a crime occurs off-reservation, even if a tribal member is a defendant, the tribe lacks criminal jurisdiction.

that.<sup>102</sup> One thing is clear: *Native women report in these victimization surveys that most of their perpetrators are non-Native.*<sup>103</sup> This is an anomaly in American criminology. Most violent crime in America is intra-racial.<sup>104</sup> In other words, if you are a white victim, your perpetrator is more likely than not to be white; if you are a black victim, your perpetrator is more likely than not to be black. The only exception to that general pattern is that Native women report their attackers and abusers to be non-Native as opposed to Native. This is scientifically valid data.

There is skepticism and cynicism in some circles about the interracial statistics.<sup>105</sup> Some of that skepticism might be based on the fact that most violent crime in the United States *is* intra-racial. Why would the experience of Native women be different? And are we letting Native men "off the hook" by only talking about the non-Native perpetrators?

Frankly, I think the debate is a bit of a distraction, but we have to confront it because it is driving much of the discussion about an *Oliphant* fix, including provisions in the VAWA 2013. From my perspective, even if only one non-Native man rapes one Native woman on one reservation, that tribe should be able to assert criminal jurisdiction over that case. So from that perspective, I don't see the need to *prove* that most perpetrators on reservations are non-Native. *Oliphant* should be fixed because it was the wrong decision and is inconsistent with tribal sovereignty.<sup>106</sup> For example, suppose the data showed that only a minority of Native women reported their attacker/abuser was non-Native. Under those facts, I still think the

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102. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (holding that tribes cannot prosecute non-Indians for crimes committed in Indian country).

103. See GREENFELD & SMITH, *supra* note 93, at 7.

104. See RONET BACHMAN ET AL., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN 38 (2008), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf> [hereinafter WHAT IS KNOWN].

105. See Scott Seaborne, *Crime Data Misrepresented to Serve Hidden Tribal Agenda*, INDIAN COUNTRY TODAY (June 14, 2012), <http://indiancountrytodaymedianetwork.com/opinion/crime-data-misrepresented-to-serve-hidden-tribal-agenda-118360>. But see Carole Goldberg & Kevin Washburn, *Goldberg and Washburn: Lies, Damn Lies, and Crime Statistics*, INDIAN COUNTRY TODAY (July 25, 2008), <http://indiancountrytodaymedia.network.com/node/93310>.

106. Many legal scholars and practitioners have explained the flaws in the *Oliphant* decision and called for its reversal by Congress. See, e.g., L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996); John P. LaVelle, *Petitioner's Brief — Reargument of Oliphant v. Suquamish Indian Tribe*, 13 KAN. J.L. & PUB. POL'Y 69 (2003); Frank Pommersheim, *Lara: A Constitutional Crisis in Indian Law?*, 28 AM. INDIAN L. REV. 299, 303 (2003-2004).

*Oliphant* fix is justified because tribal nations should have authority over all crimes that happen on their lands. However, studies showing that most perpetrators of violence against Native women are non-Native are certainly a compelling reason to fix *Oliphant*.

In addition to a general skepticism about the percentages of non-Native perpetrators, there is the community-specific concern. A minority of tribal nations is so remote or closed that non-Native people are largely absent. Tribal members in such communities may not see many non-Native people in their community. So when the data suggests most perpetrators are white, those tribal members may be understandably skeptical of the data's accuracy. If the data doesn't reflect the reality in a particular community, then the data is met with skepticism by members of that community.

And then, of course, we have the urban issue. Some of the critique I have heard about the racial component of these victimization surveys is that they actually reflect "urban stats." The argument here is along the lines of, "these aren't numbers that are happening on reservations; they are happening off the reservation," so tribal jurisdiction is not relevant. Tribal jurisdiction is irrelevant for off-reservation crime, so if the numbers are more reflective of urban settings, critics say we don't need to adjust tribal criminal jurisdiction.

So we really can't say for certain whether most Native women who experience crime on tribal lands are more likely the victims of Native people or non-Native people. However, whether the rate is 20% non-Native or 80% non-Native, Congress should correct *Oliphant*. Future studies in this area should include this critical data point so we can address skepticism about the data.<sup>107</sup>

Here's another interesting facet of the interracial statistic debate. When someone critiques the data by suggesting that the numbers reflect the reality in urban settings but not reservation settings, we are still left with a really problematic situation. If the data *is* more accurate in the urban settings, shouldn't we be concerned that most Native women in *urban* settings are reporting this high rate of inter-racial crime? Again, remember that most

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107. The National Institute of Justice ("NIJ") is authorized "to conduct research on violence against American Indian and Alaska Native women in Indian Country" pursuant to the Reauthorization of the Violence Against Women Act of 2005, Title IX, Section 904(a)(1)(2). *Violence Against American Indian and Alaska Native Women: Program of Research*, NAT'L INST. OF JUST., <http://www.nij.gov/nij/topics/tribal-justice/vaw-research/welcome.htm> (last visited Apr. 2, 2013). The work at NIJ is being informed by experts and federal stakeholders, although no date has been announced for publishing a report. *Id.*

crime in the United States is intra-racial. Since we know that Native women are reporting this high rate of inter-racial crime, this suggests there is a significant problem regardless of tribal jurisdiction.

What factors make it more likely that a Native victim in an *urban* setting is more likely than not to be attacked by a non-Native? If Native women are being targeted for sexual assault, there may very well be a hate-crime component to some of these crimes. There is a sense that there is a "rapeability" factor that comes from a product of the United States' long history of anti-Indian and anti-woman policies, which have become part of the fabric of our society.<sup>108</sup> I think that many advocates would agree with me that in some predator circles, Native women are perceived as less than human and therefore they don't deserve protection from the legal system. This perception becomes enhanced for drug addicted or prostituted women, and predators may target Native women and girls precisely because they are marginalized and fall outside the protection of the law.

As lawyers and policy makers, we need a plan of action to fully address the problem of sexual assault against Native women. In my opinion, there are three categories of action needed. Some of these efforts are underway, but much more needs to be done.

The first category is the reform of federal law. Control over violent crime on reservations should be placed back in the hands of tribal governments. The Tribal Law and Order Act<sup>109</sup> and the VAWA 2013<sup>110</sup> are a good start toward returning and restoring jurisdiction where it belongs — with tribal governments.

The second category of action is to strengthen the internal capacity of tribal courts to adjudicate crimes like rape and child sexual abuse. There are tribes that have been prosecuting these crimes for a long time, but they are few and far between. As more resources become available and jurisdiction is restored, more tribal governments will be able to take on these kinds of crimes. However, one of the problems I have found in my research is that there are many problematic sex crime laws on some tribal books. There are sexual assault ordinances at the tribal level that replicate state law from the 1940s or 1950s, when we had really bad rape laws across America.

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108. See ANDREA SMITH, CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE (2005) (providing a full discussion of how this dynamic has developed in the United States).

109. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258.

110. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54.

Many of these problematic tribal rape laws were adopted in the time of "boilerplate" or "model tribal codes" — where a law was simply adopted by a tribal council without modification.<sup>111</sup> The Bureau of Indian Affairs developed a "Model Code for the Administration of Justice by Courts of Indian Offenses" in the 1970s, which was "nothing more than a redraft of the old Bureau regulations."<sup>112</sup> These problematic tribal codes are usually not reflective of traditional tribal values and can make it difficult for a tribal prosecutor to charge and prosecute crimes against women and children.

For example, I have reviewed tribal sexual assault laws that include things like spousal exemption, which prevents a tribal prosecutor from charging a man who rapes his wife. That is an out-dated Anglo-American law, but still a part of some tribal laws.<sup>113</sup> Another example is the problem of defining sexual assault as requiring physical force instead of a lack of consent. In some tribal codes, there remains a requirement that the tribal prosecutor show physical force in order to secure conviction.<sup>114</sup> Physical force is uncommon in cases of sexual assault. Perpetrators generally use other kinds of force, like coercion and threats.

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111. See, e.g., PAWNEE TRIBE OF INDIANS CODE § 234 ("It shall be unlawful to intentionally, wrongfully, and without consent subject another, not his/her spouse, to any sexual contact."); CHEYENNE RIVER SIOUX TRIBE LAW & ORDER CODE § 3-4-18(4) ("[T]he jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private, when such are not otherwise corroborated."); SAULT STE. MARIE CODE § 71.1801(4) ("No prosecution may be instituted or maintained for rape, deviate sexual contact, or sexual assault unless the alleged offense was brought . . . within thirty (30) days after its occurrence."); LAWS OF THE CONFEDERATED SALISH & KOOTENAI TRIBES § 2-1-601 (requiring "force" or incapacitation).

112. Russel Lawrence Barsh & J. Youngblood Henderson, *Tribal Courts, the Model Code, and the Police Idea in American Indian Policy*, 40 LAW & CONTEMP. PROBS. 25, 26 (1976).

113. See, e.g., MARICOPA AK-CHIN INDIAN COMMUNITY OF ARIZ. CODE § 4.20 ("A person who commits, or attempts to commit, an act of sexual intercourse with another not his spouse . . ."); CHEYENNE RIVER SIOUX TRIBE LAW & ORDER CODE § 3-4-18(1) ("code relating to sexual offenses shall not apply to conduct between married persons"); CONFEDERATED TRIBES OF UMATILLA INDIANS CODE § 85(B) ("'Female' means a female person who is not married to the actor.") *Disclaimer: These tribal codes are provided as examples and are not intended to blame or embarrass any particular tribal communities.*

114. See, e.g., TULALIP TRIBES OF WASH. CODES & REGULATIONS § 3.6.1; FORT PECK COMPREHENSIVE CODE OF JUSTICE § 220 (1986); CHEYENNE RIVER SIOUX TRIBE LAW AND ORDER CODE § 3-4-16; CONFEDERATED TRIBES OF UMATILLA INDIANS CODE § 85(C); CONFEDERATED TRIBES OF THE COLVILLE RESERVATION CODE § 3-1-10.

Most states have reformed rape law such that lack of consent is sufficient to prove sexual assault. So tribal laws that include a physical force requirement are really replicating very antiquated old Anglo-American rape law. While we are reforming federal law we also have to reform tribal law so that we can put the control back into the hands of the tribal governments in a very practical way. If jurisdiction is restored to tribal governments, tribes must be able to effectively prosecute those crimes, or very little changes for the lives of victims.

The third category is to pay attention to services for our Native women living outside the reservation — often in urban areas. For example, most of the money from the VAWA 2013 is earmarked for tribal governments and reservation-based advocacy programs. I understand there is not enough money to go around and all advocacy programs struggle with a lack of resources. The advocacy programs in tribal communities are absolutely critical to help secure justice for survivors. However, that money is not largely available to urban community centers and Native-based advocacy programs off reservation. Since most Native women don't live on reservations,<sup>115</sup> we are not fully addressing the problem of violence against Native women if we don't secure funding and support for off-reservation programs. In federal Indian law, we are obviously focusing on tribal jurisdiction (for good reason); but in practice, we are missing a huge portion of our survivors who don't live on reservations.

So those are my three recommendations for moving forward to address violence against Native women: First, continue to reform federal law and advocate for restoration of tribal authority; second, ensure that tribal governments have the law and the training in place so that they can take action in cases of sexual violence; and third, make sure that urban women are not forgotten. Practitioners and scholars in Indian law should be cautious when relying on data. We must be cognizant of how the data is collected and how we use it. Research is a powerful tool for federal Indian law reform. *Mvto* (Thank you).

*M. Alexander Pearl, NALSA Alum; Assistant Professor, Florida International University College of Law*

It is an honor to be invited to this conference to say a few words about Indian law, Professor Frickey, and “grounded scholarship.” We are here today to honor Professor Frickey and remember his call to make legal

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115. WHAT IS KNOWN, *supra* note 104, at 17; TINA NORRIS ET AL., U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, at 12-13 (2012).