What about the Children? Extending Tribal Criminal Jurisdiction to Crimes Against Children

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Introduction

Billie Jo Rich, a member of the Eastern Band of Cherokees, recounts a run-in with her estranged, non-Indian husband:

> [He] suddenly lunged in again and snatched my car keys . . . . I jumped out of the car and began struggling with him to get the car keys . . . [H]e kicked me, and when I fell across the ground he kicked me again . . . My younger daughter . . . [was] standing beside my car . . . I pulled her into my arms to comfort her . . . He grabbed her arms and pulled her so hard that even though he was not touching me directly, I was dragged across the ground.[1]

Tribal courts generally do not have criminal jurisdiction over non-Indians.[2] Although federal prosecutors typically do have jurisdiction, they often fail to

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[1] Billie Jo Rich, *Letter to Council Woman Terri Henry*, Sliver of a Full Moon (Feb. 14, 2013), http://sliverofafullmoon.org/wp-content/uploads/2013/09/ Billie.Jo_.Rich_.Strong.Heart_.Story_.pdf, *archived at* https://perma.cc/ZC9K-GEQD (quoting Billie Jo Rich, a member of the Eastern Band of Cherokee Indians, who lives in North Carolina).

[2] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 204 (1978).

prosecute crimes that non-Indians commit against Indians in Indian country.[3] And while Congress has permitted some states to exercise jurisdiction over these crimes, the state prosecution rate is also woeful.[4] Consequently, Native individuals are left without legal recourse. Congress created a limited exception to the prohibition on tribal criminal jurisdiction over non-Indians in its 2013 reauthorization of the Violence Against Women Act ("VAWA").[5] Tribes who opt into the VAWA provision are able to exercise special criminal jurisdiction over non-Indians who commit crimes of domestic violence in Indian country.[6] Since Ms. Rich is an adult, her tribe can now protect her when her non-Indian husband attacks her.[7] But her children remain outside of tribal protection, vulnerable to attacks by non-Indian perpetrators, including their own father.[8]

While the Attorney General's Advisory Committee and the American Bar Association ("ABA") have recommended that tribal jurisdiction over non-Indians be extended to crimes against children,[9] thus far, there is a dearth of legal scholarship on the issue. This Note fills that gap. Enabling Indian Tribes to enforce the legal rights of their children would advance the civil rights of a historically marginalized population.

Part I explores how overlapping tribal, federal, and state criminal jurisdiction in Indian country creates a "crazy quilt"[10] of jurisdiction. Part II explains how VAWA fixed part of the criminal jurisdiction gap by giving

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[3] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-167R, DECLINATIONS OF INDIAN COUNTRY MATTERS 3 (2010), http://www.gao.gov/new.items/d11167r.pdf, *archived at* https://perma.cc/9W32-EDLQ [hereinafter DECLINATIONS OF INDIAN COUNTRY MATTERS].

[4] *See* Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country,* 44 UCLA L. REV. 1405, 1441 (1997); Carol Goldberg, *State Jurisdiction Overlooked Problem in Criminal Justice Debate*, INDIAN COUNTRY TODAY (Jul. 13, 2007), http://indiancountrytodaymedianetwork.com/2007/07/13/goldberg-state-jurisdiction-overlooked-problem-criminal-justice-debate-91100, *archived at* https://perma.cc/4DSE-XRN5.

[5] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–4, §§ 904, 908, 127 Stat. 54, 120–23, 125–26 (2013) (codified at 25 U.S.C. § 1304).

[6] 25 U.S.C. § 1304(a)–(b).

[7] *See* 25 U.S.C. § 1304(c).

[8] *See id.*; U.S. DEP'T OF STATE, ATTORNEY GENERAL'S ADVISORY COMMITTEE ON AMERICAN INDIAN/ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE: ENDING VIOLENCE SO CHILDREN CAN THRIVE 47–50 (2014), http://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2014/11/18/finalaianreport.pdf, *archived at* https://perma.cc/2RNC-TK2X [hereinafter ATTORNEY GENERAL'S ADVISORY COMMITTEE ON NATIVE CHILDREN].

[9] *See* ATTORNEY GENERAL'S ADVISORY COMMITTEE ON NATIVE CHILDREN, *supra* note 8 at 47; Rhonda McMillion, *Congress Should Bolster Jurisdiction of Tribal Courts Over Violence Against Children, ABA Urges*, A.B.A. J. (Nov. 1, 2015, 12:40 AM), http://www.abajournal.com/magazine/article/congress_should_bolster_jurisdiction_of_tribal_courts_over_violence_against, *archived at* https://perma.cc/PA4J-ZVBD; Senator Byron L. Dorgan, Joanne Shenandoah, *Ending Violence So American Indian Alaska Native Children Can Thrive*, HUM. RTS. Mag., May 2015, at 10, 12; Lorelei Laird, *Indian Tribes Are Retaking Jurisdiction Over Domestic Violence on Their Own Land*, A.B.A. J. (April 1, 2015, 6:02 AM), http://www.abajournal.com/magazine/article/indian_tribes_are_retaking_jurisdiction_over_domestic_violence_on_their_own, *archived at* https://perma.cc/D9WR-KCJ8.

[10] Tim Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 U. KAN. L. REV. 387, 387 (1974) (calling law enforcement in Indian Country a "jurisdictional crazy-quilt").

tribes special criminal jurisdiction over non-Indians who commit domestic violence and have close ties to a tribe. It also examines the empirical evidence regarding tribal prosecutions and convictions under VAWA.

Part III asserts that empirical evidence gathered from VAWA cases demonstrates a remaining jurisdictional gap for crimes against children. It goes on to argue that Congress should fill this gap by extending tribal criminal jurisdiction to crimes that non-Indians commit against Indian children in Indian country. This Part situates the need for tribal jurisdiction in the long history of extreme federal and state intervention into American Indian families, which has been followed by the re-establishment of privacy for American Indian families resulting in heightened privacy for non-Indians who commit crimes against Indian children.

As explained in Part IV, if Congress extends tribal criminal jurisdiction to non-Indian crimes against children, challenges to this legislation are unlikely to succeed as long as Congress explicitly enacts such jurisdiction through inherent tribal sovereignty.[11] Non-Indian defendants' United States Constitutional rights will be somewhat diminished in tribal courts. However, extending tribal criminal jurisdiction is still justified because criminal defendants' rights always vary according to the sovereign state in which the crime is committed.[12] Furthermore, Part IV demonstrates how tribal criminal jurisdiction can be analogized to court-martial,[13] another arena in which the accused is not entitled to full constitutional protections. Just as court-martial is limited to members of the military who have commited crimes, tribal jurisdiction would be limited to non-Indians who have close ties to a tribe and have commited crimes in Indian country.

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[11] Inherent tribal sovereignty includes tribal sovereign powers that have not been removed through a treaty or statute. United States v. Wheeler, 435 U.S. 313, 323 (1978) ("[Inherent tribal sovereignty] exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.") (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)).

[12] *See* Amos N. Guiora, *Where Are Terrorists to Be Tried: A Comparative Analysis of Rights Granted to Suspected Terrorists*, 56 Cath. U. L. Rev. 805, 833–36 (2007); Nina Morrison, *Curing "Constitutional Amnesia": Criminal Procedure Under State Constitutions*, 73 N.Y.U. L. Rev. 880, 881–84 (1998).

[13] Court-martial refers to military criminal trials. Congress exercised its Art. 1 § 8 constitutional powers over the military to author the Uniform Code of Military Justice ("UCMJ"), which has criminal laws for military members and establishes the court-martial system whereby members of the military are tried by the military courts rather than civil courts. *See What's a Court-Martial?*, Lawyers.com, http://military-law.lawyers.com/military-law-basics/whats-a-court-martial.html, *archived at* https://perma.cc/CXW3-9LCG (last visited June 27, 2016).

I. Jurisdictional Gaps in Indian Country

As domestic dependent nations, American Indian Tribes have an exceptional status in the United States.[14] Tribes retain some of their inherent sovereignty as separate nations in relation to the states, but are still subject to federal law.[15] This unique positioning of tribes vis-a-vis state and federal governments has resulted in a confusing net of overlapping tribal, federal, and state criminal jurisdiction in Indian country.[16] Criminal jurisdiction in Indian country varies based on the parties involved, the severity of the crime, and whether Congress has delegated federal jurisdiction to states.[17] Making matters worse, tribes are not permitted to exercise criminal jurisdiction over non-Indians,[18] and state and federal law enforcement authorities frequently fail to prosecute such defendants.[19]

A. Tribes occupy a unique position in United States law as domestic dependent nations.

Indian tribes have always occupied a unique status in the U.S. legal landscape. Three cases that Chief Justice Marshall authored, often termed the "Marshall trilogy," are the starting point for understanding the unusual relationship between the U.S. and tribes.[20] In *Johnson v. M'Intosh*,[21] the Court asserted that tribes were no longer independent foreign nations: when they fell under U.S. control, their external sovereignty ceased.[22] *Cherokee Nation v. State of Georgia*[23] involved the Cherokee Nation's attempt to obtain an injunction to restrain Georgia from executing state laws that would have removed the Cherokee political structure and seized Cherokee land.[24] In *Cherokee Nation*, the Supreme Court determined that it had no original jurisdiction because the Cherokees were not a foreign nation. It also coined the paternalistic term "domestic dependent nation," comparing the relationship between tribes and the U.S. to that of a "ward to his guardian."[25] Fi-

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[14] *See* Worcester v. Georgia, 31 U.S. 515, 593–94 (1832).
[15] *See id.*
[16] *See* David Harper, *Justice Department Prosecuting More Indian Country Crimes*, Tulsa World (Nov. 4, 2013), http://www.tulsaworld.com/news/local/justice-department-prosecuting-more-indian-country-crimes/article_f66f7c27-48a9-5051-8bb8-54fc69302411.html, *archived at* https://perma.cc/MS96-VQJV.
[17] *See infra* Section I.B.
[18] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208, 210 (1978).
[19] *See* Declinations of Indian Country Matters, *supra* note 3; Goldberg-Ambrose *supra* note 4.
[20] *See, e.g.,* Ryan Fortson, *Advancing Tribal Court Criminal Jurisdiction in Alaska*, 32 Alaska L. Rev. 93, 105 (2015).
[21] 21 U.S. 543, 568 (1823).
[22] *See id.* at 568.
[23] 30 U.S. 1 (1831).
[24] *See id.* at 1, 7–8.
[25] *Id.* at 17, 39.

nally, *Worcester v. Georgia*[26] established that Georgia laws did not apply on Cherokee land as tribes retained limited sovereignty.[27] However, the Court went on to hold that tribal sovereignty only has force against state governments and that tribes are subject to federal laws.[28] Tribes' unique position as domestic dependent nations has contributed to a complicated patchwork of criminal jurisdiction in Indian country.

B. Overlapping tribal, federal, and state criminal jurisdiction in Indian country has created a jurisdictional "crazy quilt" with devastating gaps.

Tribes' status as domestic dependent nations has led to confusing layers of tribal, federal, and state criminal jurisdiction in Indian country. As one federal prosecutor describes it, figuring out who has jurisdiction over a crime that occurs in Indian country is only slightly less confusing than "solving a Rubik's cube while blindfolded and underwater."[29] There are several questions that must be resolved to determine who has criminal jurisdiction: What qualifies as Indian country? Are the parties involved Indian or non-Indian? How severe is the crime? Lastly, did the federal government delegate criminal jurisdiction to the state in which the Indian country is located?

i. What qualifies as Indian country?

For Tribes to assert criminal jurisdiction, the crime must have occurred in Indian country. Federal statute defines Indian country as (a) Indian reservations, (b) dependent Indian communities, and (c) Indian allotments.[30] First, reservations are public lands that the federal government holds in trust for tribes.[31] Even if a non-Indian holds the title to an individual parcel of land, as long as that land is within the bounds of a reservation, it is still considered Indian country.[32] Second, as initially recognized in *United States v. Sandoval*,[33] dependent Indian communities include tribally held fee simple land that is still considered Indian country because of the many ongoing interactions between the tribe and federal government and the tribal need for federal protection.[34] The Court further elaborated on the requirements for

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[26] 31 U.S. 515 (1832).

[27] *See id.* at 593–94.

[28] *See id.*

[29] Harper, *supra* note 16 (quoting Assistant U.S. Attorney Trent Shores).

[30] 18 U.S.C. § 1151 (2015). Although 18 U.S.C. § 1151 deals with criminal jurisdiction, the Court has found that the definition of Indian Country also applies to civil cases. *See* Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 527 (1998).

[31] *See* Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351, 356–57 (1962); *see also* Donnelly v. United States, 228 U.S. 243, 269 (1913).

[32] *See Seymour*, 368 U.S. 351, 356–57 (1962).

[33] 231 U.S. 28 (1913).

[34] *See id.* at 46–47.

dependent Indian communities in *Alaska v. Native Village of Venetie Tribal Government*[35] by establishing a two prong test: "first, they must have been set aside by the federal government for the use of the Indians as Indian land; second, they must be under federal superintendence."[36] Finally, the General Allotment Act of 1887 broke up some Indian Reservations into allotments, which were then given to individual Indians in fee simple; this allotted land also qualifies as Indian country.[37] As a general rule, Indian tribes and the federal government, not states, have jurisdiction in Indian country.[38]

ii. Parties Involved

The Supreme Court has long found that state, not federal, courts have jurisdiction over crimes only involving non-Indians that occur in Indian country.[39] Early case law recognized that tribal courts retained criminal jurisdiction over crimes involving both Indians and non-Indians in Indian country.[40] But in *Oliphant v. Suquamish Indian Tribe*,[41] the Court reversed course, holding that even if a crime occurs in Indian country, tribal courts do not have criminal jurisdiction over non-Indian defendants unless Congress has affirmatively granted such jurisdiction.[42] The Court deemed tribal jurisdiction over non-Indian defendants inappropriate because it would subject defendants to laws enacted by a foreign people with a foreign culture.[43]

Oliphant has had especially dire consequences because, as explained below, with the exception of Public Law 280 states,[44] states also lack jurisdiction over crimes with non-Indian perpetrators and Indian victims in Indian country.[45] Consequently, in non-Public Law 280 states, only the federal government can assert jurisdiction over crimes that non-Indians commit against Indians in Indian country. This is problematic because federal prosecutors are often poorly situated to prosecute crimes committed in Indian

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[35] 522 U.S. 520, 527 (1998).

[36] *Id.* at 527.

[37] *See* General Allotment Act, ch. 119, 24 Stat. 388 (1887); Mattz v. Arnett, 412 U.S. 481, 496 (1973).

[38] *See* Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 527 (1998) (citing South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998)).

[39] *See, e.g.,* United States v. McBratney, 104 U.S. 621, 624 (1881).

[40] *See* United States v. Mazurie, 419 U.S. 544, 553 (1975); Williams v. Lee, 358 U.S. 217, 222 (1959).

[41] 435 U.S. 191 (1978).

[42] *See Oliphant*, 435 U.S. at 208, 210.

[43] *See id.* at 210–211.

[44] *See infra*, Section II.B.iv.

[45] *See* Williams v. United States, 327 U.S. 711, 714 (1946) ("[On a reservation] the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed there, as in this case, by one who is not an Indian against one who is an Indian."); Worcester v. State of Ga., 31 U.S. 515, 561 (1832) (holding that the states do not have jurisdiction in Indian territory); Fort Belknap Indian Cmty. of the Fort Belknap Indian Reservation v. Mazurek, 43 F.3d 428, 434 (9th Cir. 1994) (recognizing a narrow exception to the lack of state jurisdiction in Indian country: states have concurrent criminal jurisdiction to bring prosecutions for violations of state liquor laws that occur on reservations).

country. The distance between reservations and U.S. Attorneys' Offices and the lack of federal expertise and interest in prosecuting misdemeanors and low-level felonies results in under-enforcement of serious crimes, such as domestic violence, in Indian country.[46]

The Supreme Court further limited tribal criminal jurisdiction in *Duro v. Reina*,[47] which extended *Oliphant* by determining that tribes could not exercise criminal jurisdiction over Indians who were members of another tribe.[48] The Court again voiced concerns about permitting tribal criminal jurisdiction over non-members who could not participate in the tribal political process and who were perhaps unaccustomed to tribal culture and traditions.[49] However, Congress responded with the "*Duro*-fix,"[50] reinstating tribal criminal jurisdiction over any person who identifies as Indian, regardless of her tribal membership. The Court then upheld the *Duro*-fix in *U.S. v. Lara,*[51] recognizing that Congress has the power to overturn the Court's stance and holding that Congress intended to recognize inherent tribal sovereignty with the *Duro*-fix.[52] Yet, even with the *Duro*-fix, the *Oliphant* limitation remains, rendering tribes unable to try non-Indians for crimes that occur in Indian country.

iii. Severity of the Crime

Adding to the ongoing confusion about criminal jurisdiction in Indian country, jurisdiction also varies by the severity of the crime. The root of this jurisdictional difference is the 1817 Indian County Crimes Act, commonly referred to as the General Crimes Act. The General Crimes Act extended federal jurisdiction to Indian country with three exceptions:[53] tribes retained jurisdiction for (1) Indian-on-Indian crime, (2) crimes for which a treaty specifies tribal jurisdiction, and (3) crimes involving an Indian defendant already punished pursuant to tribal law.[54]

In 1883, the Supreme Court granted a habeas petition in *Ex Parte Kan-gi-shun-ca*[55] (*Ex Parte Crow Dog* in English) because federal courts lacked jurisdiction due to the General Crimes Act exception for Indian-on-Indian

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[46] *See infra* Section III.B.

[47] Duro v. Reina, 495 U.S. 676 (1990), superseded by statute, 25 U.S.C. § 1301(2) (2012), as recognized in United States v. Lara, 541 U.S. 193 (2004).

[48] *See id.* at 688.

[49] *See id.* at 693.

[50] 25 U.S.C. § 1301.

[51] 541 U.S. 193 (2004).

[52] *See id.* at 199–200.

[53] *See* Act of Mar. 3, 1817, ch. 92, §§ 1–2, 3 Stat. 383 (codified as General Crimes Act, 18 U.S.C. § 1152 (2006)).

[54] 18 U.S.C. § 1152. The Assimilative Crimes Act extended federal jurisdiction over tribes to more crimes by permitting federal courts to try state crimes committed on reservations.

[55] 109 U.S. 556, 557 (1883).

crime. In response, Congress enacted the Indian Major Crimes Act,[56] creating an exception to the Indian-on-Indian exception in the General Crimes Act and permitting federal jurisdiction over specified felonies that occur between two Indians in Indian country, including murder, manslaughter, kidnaping, and felony child abuse.[57] Thus, the federal government now has jurisdiction over all crimes involving non-Indians[58] and major crimes[59] involving only Indians in Indian Country.[60] But since the General Crime Act exceptions survive,[61] tribes retain sole jurisdiction over Indian-on-Indian crime not covered by the Major Crimes Act, and have concurrent jurisdiction with the federal government over major crimes.

iv. Congress' Public Law 280 Delegation of Criminal Jurisdiction to some States

The final wrinkle in criminal jurisdiction in Indian country is Public Law 280 ("PL 280").[62] Congress enacted PL 280 in 1953 amidst a slew of other assimilationist policies.[63] Under PL 280, Congress delegated all federal criminal power in Indian country to mandatory PL 280 states; Congress also partially delegated such power to optional PL 280 states.[64] While PL 280 transfers the federal criminal jurisdiction in Indian country to some states, it does not affect inherent tribal sovereignty or the remaining tribal jurisdiction. Tribes still have sole jurisdiction over Indian-on-Indian crime not covered by the Major Crimes Act and concurrent jurisdiction over major crimes.[65] Accordingly, courts have recognized that tribes can exercise concurrent criminal jurisdiction in PL 280 states.[66]

Congress established six mandatory PL 280 states: Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. These mandatory states have exclusive jurisdiction under the General Crimes Act and Major Crimes Act;

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[56] Ch. 341 § 9, 23 Stat. 362, 385 (1887) (codified as amended at 18 U.S.C. § 1153 (2012)). Felonies covered by the Indian Major Crimes Act include "murder, manslaughter, kidnapping, maiming . . . , incest, . . . felony assault . . . , an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery . . . ." *Id.* at § 1153(a).

[57] *See id.*

[58] *See* 18 U.S.C. § 1152.

[59] *See supra* note 56.

[60] *See id.* at § 1153(a).

[61] 18 U.S.C. § 1152.

[62] Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified at 18 U.S.C. §§ 1162, 1360).

[63] *Id.*; see also ROBERT T. ANDERSON, ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 150 (2d ed., 2010).

[64] 18 U.S.C. § 1162.

[65] *See supra* notes 58–61.

[66] *See* Native Vill. of Venetie I.R.A. Council v. State of Alaska, 944 F.2d 548, 561 (9th Cir. 1991) (citing California v. Cabazon Band of Mission Indians, 480 U.S. 202, 222 (1987); Bryan v. Itasca County, Minnesota, 426 U.S. 373, 388 (1976)); Booth v. State, 903 P.2d 1079, 1085 (Alaska Ct. App. 1995)).

federal prosecutors no longer have jurisdiction.[67] Congress also allowed other states to choose to opt into PL 280.[68] There are nine states that opted in, choosing to exercise partial criminal or civil jurisdiction in Indian country: Arizona, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington.[69] In optional PL 280 states, there is concurrent federal and state jurisdiction under the General and Major Crimes Acts.[70]

Further complicating the jurisdiction in PL 280 states, some of the mandatory PL 280 states have retroceded jurisdiction over select Indian lands back to the tribes.[71] Moreover, some optional states that never implemented their PL 280 jurisdiction have retroceded jurisdiction back to the federal government, or had their jurisdiction successfully challenged in court.[72] The numerous outcomes in PL 280 states make the jurisdictional muddle all the more confusing.

The delegation of criminal jurisdiction to states might seem like an easy fix to the complex jurisdictional issues in Indian country. However, instead of easing jurisdictional issues, PL 280 seems to have worsened them by "engender[ing] deep-seated hostility" between states and tribes.[73] States have viewed the extension of their criminal jurisdiction to Indian country without an accompanying increase in federal funding as adding to the workload of already over-burdened state law enforcement offices.[74] On the other hand, tribes have viewed the extension of state jurisdiction without tribal consent as an affront to tribal sovereignty.[75] As Goldberg and Single-

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[67] M. Brent Leonhard, *Returning Washington P.L. 280 Jurisdiction to Its Original Consent-Based Grounds*, 47 GONZ. L. REV. 663, 689 (2011). The Tribal Law and Order Act also allows tribes to petition for concurrent federal jurisdiction. Robert Anderson, *Negotiating Jurisdiction: Retroceding State Authority Over Indian Country Granted by Public Law 280,* 87 WASH. L. R. 915, 930–31, n.87 (2012).

[68] *See* Leonhard, *supra* note 67.

[69] *See* Ada Pecos Melton & Jerry Gardner, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, AMERICAN INDIAN DEVELOPMENT ASSOCIATES, LLC (2013), http://www.aidainc.net/Publications/pl280.htm, *archived at* https://perma.cc/3WUG-3HJD.

[70] *See* Leonhard, *supra* note 67, at 690.

[71] *See id.* at 691.

[72] *See id.* at 702.

[73] Rebecca A. Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CAL. L. REV. 185, 208–09 (2008).

[74] *See* Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country,* 44 UCLA L. REV. 1405, 1441 (1997); Carol Goldberg, *State Jurisdiction Overlooked Problem in Criminal Justice Debate*, INDIAN COUNTRY TODAY (Jul. 13, 2007), http://indiancountrytodaymedianetwork.com/2007/07/13/goldberg-state-jurisdiction-overlooked-problem-criminal-justice-debate-91100, *archived at* https://perma.cc/Y4X2-H6JV (The lack of funding in Public Law 280 states has resulted in "far fewer tribal police departments and court systems on reservations subject to state jurisdiction. This lack of local control has meant less cooperation with law enforcement efforts, less attention to tribal priorities for community safety (typically drug enforcement and domestic violence concerns), and less accessible police and courts.").

[75] *See* Goldberg-Ambrose, *supra* note 74.

ton reported after surveying 19 California tribes about their experience with PL 280:

> [T]hemes of confusion, inadequate or untimely service, and insensitive or discriminatory treatment appear in the [survey] responses. All but two of the nineteen tribes, for example, complained of serious gaps in protection from county law enforcement. Problems with drugs and violent crimes received frequent mention.[76]

Consequently, PL 280 has both soured relationships between states and tribes and resulted in less effective law enforcement in Indian country.

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In sum, tribes' status as domestic dependent nations has led to reduced tribal criminal jurisdiction and complicated overlapping state and federal criminal jurisdiction in Indian country. Whether the tribal, state, or federal government can exercise criminal jurisdiction in Indian country depends on the individuals involved, the severity of the crime, and whether PL 280 applies. One thing is clear: under *Oliphant*, tribes are unable to exercise criminal jurisdiction over non-Indians for crimes committed on Indian country unless Congress specifically permits such jurisdiction.

II. The Criminal Jurisdiction Gap in Indian Country and the VAWA Fix

The lack of tribal criminal jurisdiction over non-Indian defendants combines with the failure of state and federal prosecutors' offices to prosecute such individuals to create an environment that engenders crime in Indian country.[77] Congress has filled a small part of this jurisdictional gap with its 2013 Reauthorization of VAWA.[78] VAWA permits tribes to exercise special domestic violence criminal jurisdiction over non-Indians.[79] The empirical data from tribes exercising this jurisdiction bears out the need for increased tribal criminal jurisdiction over non-Indian defendants.[80]

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[76] Carole Goldberg & Heather Valdez Singleton, *Research Priorities: Law Enforcement In Public Law 280 States*, Nat'l Criminal Justice Reform Ctr. 9 (1998), http://www.ncjrs.gov/pdffiles1/nij/grants/209926.pdf, *archived at* https://perma.cc/5VRU-ZRXN.

[77] *See* N. Bryce Duthu, *Justice in Indian Country*, N.Y. Times (Aug. 10, 2008), http://www.nytimes.com/2008/08/11/opinion/11duthu.html?_r=0, *archived at* https://perma.cc/2UZR-NM9S; Louisa Erdich, *Rape on the Reservation*, N.Y. Times (Feb. 26, 2013), http://www.nytimes.com/2013/02/27/opinion/native-americans-and-the-violence-against-women-act.html?_r=0, *archived at* https://perma.cc/9F3R-4LPF.

[78] *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–4, §§ 904, 908, 127 Stat. 54, 120–23, 125–26 (2013) (codified at 25 U.S.C. § 1304).

[79] *See id.*

[80] *See Tribal Implementation of VAWA: Resource Center for Implementing Trivbal Provisions of the Violence Against Women Act (VAWA)*, National Congress of American Indians, http://www.ncai.org/tribal-vawa/pilot-project-itwg/pilot-project, *archived at* https://perma.cc/3W5H-M96S (last visited Jan. 20, 2016); Report by Alfred Urbina & Melissa Tatum, On-

A. *The restrictions on tribal criminal jurisdiction leave a jurisdictional gap in Indian country, resulting in rampant crime.*

The patchwork of criminal jurisdiction in Indian country creates an environment ripe for lawlessness.[81] An FBI Enforcement Bulletin has termed the extreme crime rates in Indian country an "epidemic."[82] American Indians and Native Alaskans are two and a half times more likely to experience violent crimes than other individuals in the U.S.[83] Approximately 39% of Native women experience domestic violence,[84] and one in three is raped.[85] In 2011, 11.4 of every 1,000 American Indian or Alaska Native children were victims of maltreatment; in comparison, only 7.9 per 1,000 white children were victims.[86] Moreover, American Indians experience interracial violence at a far greater rate than other racial groups: 70% of the violence Indians experience is from individuals of a different race.[87] In contrast, only 19% of violence with African American victims is interracial and only 31% of the violence with white victims is interracial.[88] Since tribes are unable to prosecute non-Indian perpetrators, even if the crime occurs in Indian coun-

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the-Ground VAWA Implementation: Lessons from the Pascua Yaqui Tribe (Jan. 20, 2016) (on file with author).

[81] *See* Duthu, *supra* note 77*;* Erdich, *supra* note 77 ("[T]his gap in the law has attracted non-Indian habitual sexual predators to tribal areas. Alexandra Pierce, author of a 2009 report on sexual violence against Indian women in Minnesota, has found that rapes on upstate reservations increase during hunting season. A non-Indian can drive up from the cities and be home in five hours. The tribal police can't arrest him."); Janine Robben, *Life in Indian Country: How the Knot of Criminal Jurisdiction is Strangling Community Safety*, OREGON STATE BAR (Jan. 2012), https://www.osbar.org/publications/bulletin/12jan/indiancountry.html, *archived at* https://perma.cc/V8M8-3VVB ("What you have [in Indian country] is a crazy quilt of Jurisdiction that allows the government to ignore things.") (quoting Robert James Miller, a professor of Indian Law at Lewis and Clark Law School); Timothy Williams, *Higher Crime, Fewer Charges on Indian Land*, N.Y. TIMES (Feb. 20, 2012), http://www.nytimes.com/2012/02/21/us/on-indian-reservations-higher-crime-and-fewer-prosecutions.html, *archived at* https://perma.cc/7TVR-GNYM.

[82] Michael J. Bulzomi, *FBI Law Enforcement Bulletin: Indian Country and the Tribal Law and Order Act of 2010*, FBI (May 2012), https://leb.fbi.gov/2012/may/indian-country-and-the-tribal-law-and-order-act-of-2010, *archived at* https://perma.cc/L7Z2-8QH5.

[83] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-252, INDIAN COUNTRY CRIMINAL JUSTICE 1 (2011), http://www.gao.gov/assets/320/315698.pdf, *archived at* https://perma.cc/96EQ-P6G7 [hereinafter Indian Country Criminal Justice].

[84] *See id.*

[85] *See* Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA, AMNESTY INT'L 2 (2007), http://www.amnestyusa.org/pdfs/MazeOfInjustice.pdf, *archived at* https://perma.cc/AC76-Y3YT.

[86] *See* Children's Bureau, *Child Maltreatment 2011*, THE ADMIN. ON CHILDREN, YOUTH, AND FAMILIES 43 (2011), http://www.acf.hhs.gov/sites/default/files/cb/cm11.pdf, *archived at* https://perma.cc/9AP8-ENU6.

[87] *See* Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence, *Ending Violence so Children Can Thrive*, U.S. DEP'T OF JUSTICE 50 (Nov. 2014), http://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2014/11/18/finalaianreport.pdf, *archived at* https://perma.cc/M2XW-JYNS.

[88] *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, AMERICAN INDIANS AND CRIME 9 (2004), http://www.bjs.gov/content/pub/pdf/aic02.pdf, *archived at* https://perma.cc/2QJD-KZ6F.

try, they rely on federal United States Attorney's Offices ("USAOs") or state prosecutor's offices to do so.[89]

However, reports on federal and state prosecutions in Indian country paint a stark picture. The Department of Justice ("DOJ") acknowledges that it can be extremely difficult for federal law enforcement officers, sometimes located hundreds of miles away from tribal communities, to effectively manage local misdemeanors and minor felonies in Indian country.[90] The U.S. Government Accountability Office reports that between 2005 and 2009, tribes referred over 10,000 cases to USAOs; approximately 77% of those cases involved violent crimes.[91] Yet USAOs declined to prosecute 50% of the referred cases.[92] PL 280 states are no better off: the lack of federal resources in PL 280 states combines with inadequate state resources to facilitate a culture of lawlessness.[93]

B. The 2013 Reauthorization of VAWA enabled tribes to exercise special domestic violence criminal jurisdiction over non-Indians.

In an attempt to address the horrifically high rate of violence experienced by Native women, Congress granted tribes special domestic violence criminal jurisdiction ("SDVCJ") over certain non-Indians in its 2013 reauthorization of VAWA.[94] VAWA marks the first legislation allowing tribal criminal jurisdiction over non-Indians since *Oliphant* was decided in 1973.[95] Section 904 of VAWA "recognize[s] and affirm[s]" inherent tribal power

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[89] Indian Country Criminal Justice, *supra* note 83, at 14.

[90] *See* Stephen Fee, *Tribal Justice: Prosecuting Non-Indians for Sexual Assault on Reservations*, PBS NewsHour (Sept. 5, 2015, 1:08 PM), http://www.pbs.org/newshour/bb/tribal-justice-prosecuting-non-natives-sexual-assault-indian-reservations, *archived at* https://perma.cc/MR4G-839F (quoting Michelle Demmert, the lead attorney of the Tulalip Tribe: "In just three recent cases, we had children involved, and we're not able to charge on the crimes that were committed against those children including endangerment, criminal endangerment, possibly assault, other attendant or collateral crimes").

[91] *See* Declinations of Indian Country Matters, *supra* note 3.

[92] *See id.* at 5. The DOJ reports that the number of declinations decreased to 37% in 2011 and 31% in 2012 while acknowledging that "'[declination statistics] likely reflect difficulties caused by the justice system in place' including the 'lack of police on the ground in Indian country' and 'shortfalls for training, forensics equipment, [and] personnel.'" U.S. Dep't of Justice, Indian Country Investigations and Prosecutions 2011-2012 5, http://www.justice.gov/sites/default/files/tribal/legacy/2013/05/31/tloa-report-cy-2011-2012.pdf, *archived at* https://perma.cc/7EDT-HU68 (citing 2009 Senate Report Accompanying the Tribal Law and Order Act).

[93] *See* Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. Rev. 1405, 1441 (1997).

[94] *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–4, §§ 904, 908, 127 Stat. 54, 120–23, 125–26 (2013) (codified at 25 U.S.C. § 1304).

[95] *See Indian Law — Tribal Courts — Congress Recognizes and Affirms Tribal Courts' Special Domestic Violence Jurisdiction over Non-Indian Defendants. - the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4*, 127 Harv. L. Rev. 1509, 1509–10 (2014).

to "exercise special domestic violence criminal jurisdiction over all persons" in Indian country.[96]

Perhaps in an attempt to safeguard against possible challenges,[97] VAWA tightly constrains tribal jurisdiction. The jurisdiction is limited to protective order violations, dating violence (defined as violence committed by an individual in a "romantic or intimate" relationship with the victim), and domestic violence (defined as violence committed by a spouse, intimate partner, co-habitant, or person who shares a child with the victim).[98] Tribes cannot exercise jurisdiction if the incident occurs in Indian country, and both the victim and perpetrator are non-Indian.[99] Furthermore, tribal jurisdiction is only permitted when the non-Indian defendant has substantial ties to the tribe: he or she must live or work in the prosecuting tribe's Indian country or be in a relationship with either a member of the tribe or a non-member Indian who lives on the tribe's land.[100]

Finally, tribes must grant non-Indian defendants numerous constitutional protections in order to exercise the SDVCJ. As tribes were not involved in the drafting of the United States Constitution, tribal courts are not bound by it.[101] However, though it does not require all constitutional protections, the Indian Civil Rights Act ("ICRA") of 1968 mandates many comparable rights in Indian country.[102] Defendants prosecuted under VAWA are entitled to standard ICRA rights, including protection against unreasonable searches and seizures, double jeopardy, self-incrimination, and cruel and unusual punishment as well as the right to a speedy trial and confrontation.[103] If a VAWA defendant may be sentenced to prison time, the tribe is also required to provide the more rigorous rights required by ICRA under 25 U.S.C. § 1302(c),[104] including the right to a licensed defense attorney if a defendant could be subjected to imprisonment for over one year, a judge who is trained to practice law, publically accessible criminal laws for notice purposes, and a recording of the proceeding.[105] Additionally, VAWA requires an impartial jury that does not exclude non-Indians from the jury pool and that defendants be informed of their right to petition for habeas in fed-

[96] 25 U.S.C. § 1304 (b)(1). For the purposes of the SDVCJ, Indian country has the same definition as it does in the Major Crimes Act. *Id.* at § 1304(a)(3)

[97] *See supra* note 95, at 1516.

[98] *See* 25 U.S.C. § 1304(a)(1)–(2); (c)(1)–(2) (2013).

[99] *See id.* at § 1304(b)(4)(a).

[100] *See id.* at § 1304(b)(4)(b).

[101] Talton v. Mayes, 163 U.S. 376, 384 (1896); *accord* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

[102] 25 U.S.C. § 1302 (2010). Note that the Bill of Rights also does not apply to Indian Tribes. *See Talton*, 163 U.S. at 382–84.

[103] 25 U.S.C. §1302(a) (2010).

[104] *Id.* at § 1304(d)(2).

[105] *Id.* at § 1302(c).

eral courts.[106] VAWA also has a catchall, mandating that defendants receive "any other rights whose protection is necessary under the Constitution."[107]

Although most commentators see VAWA as a positive move for tribal sovereignty[108] and view its numerous safeguards for defendants as an attempt to protect VAWA from being overturned by the Supreme Court,[109] some have criticized it for forcing United States constitutional values on tribal courts.[110] Other commentators have called for even broader tribal criminal jurisdiction over non-Indians who commit crimes in Indian country, arguing in favor of tribal jurisdiction even if the perpetrator does not have close ties with the community[111] and an increase in tribal sentencing power.[112]

C. The empirical data from tribes exercising VAWA jurisdiction over non-Indian defendants bears out the need for increased tribal criminal jurisdiction.

The DOJ approved five tribes for participation in the VAWA pilot project, allowing three tribes to start exercising SDVCJ in February 2014 and two more tribes to start exercising the jurisdiction in March 2015.[113] After the conclusion of the pilot project, the DOJ granted three other tribes permis-

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[106] *See id.* at § 1302(d)(3), (e). There is no direct appeal from tribal court to federal court, so defendants tried in tribal courts must use habeas petitions to get federal review. Paul J. Larkin, Jr. & Joseph Luppino-Esposito, *The Violence Against Women Act, Federal Criminal Jurisdiction, and Indian Tribal Courts*, 27 BYU J. PUB. L. 1, 10 n.39 (2012).

[107] 25 U.S.C. § 1304 (d)(4) (2010).

[108] *See*, *e.g.*, *Indian Law—Tribal Courts*, *supra* note 95, at 1518. *See also* Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness:* Indian Courts and the Future *Revisited*, 84 U. COLO. L. REV. 59, 62 (2013); Jessica Greer Griffith, *Too Many Gaps, Too Many Fallen Victims: Protecting American Indian Women from Violence on Tribal Lands*, 36 U. PA. J. INT'L L. 785, 789 (2015); J. Matthew Martin, *Slaying the Minotaur*, 53 JUDGES' J., 14, 17 (2014).

[109] *See Indian Law—Tribal Courts*, *supra* note 95.

[110] *See* Zanita Fenton (moderator), et. al., *Panel on Colonization, Culture, and Resistance (Transcript), University of Miami School of Law*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 325, 330–31 (2015); Fletcher, *supra* note 108, at 81–82.

[111] *See* Ed Hermes, *Law & Order Tribal Edition: How the Tribal Law and Order Act Has Failed to Increase Tribal Court Sentencing Authority*, 45 ARIZ. ST. L.J. 675, 697 (2013); Gabrielle Mandeville, *Sex Trafficking on Indian Reservations*, 51 TULSA L. REV. 181, 190 (2015); Laird, *supra* note 9, at 49–50.

[112] Hermes, *supra* note 111, at 698.

[113] *VAWA 2013 Pilot Project*, U.S. DEPT. OF JUSTICE (Mar. 13, 2015), http://www.justice.gov/tribal/vawa-2013-pilot-project, *archived at* https://perma.cc/APC6-5XKR. The Confederated Tribes of the Umatilla Indian Reservation in Oregon ("CTUIR"), the Pascua Yaqui Tribe of Arizona, and the Tulalip Tribe of Washington received DOJ approval to begin exercising SDVCJ on February 20, 2014; the Assiniboine and Sioux Tribes of the Fort Peck Reservation in Montana and Sisseton Wahpeton Oyate Tribe of the Lake Traverse Reservation in South Dakota received DOJ approval to begin exercising SDVCJ on March 6, 2015. *Id. See also Tribal Implementation of VAWA: Resource Center for Implementing Tribal Provisions of the Violence Against Women Act (VAWA)*, NATIONAL CONGRESS OF AMERICAN INDIANS, http://www.ncai.org/tribal-vawa/pilot-project-itwg/pilot-project, *archived at* https://perma.cc/XYM9-6HPL (last visited Jan. 20, 2016).

sion to exercise SCDVJ later in 2015.[114] Now any tribe that wishes to exercise VAWA jurisdiction and meets the statutory procedural requirements may do so.[115]

Thus far, VAWA jurisdictional changes seem to have had little effect for four of the five tribal courts that received SCDVJ in 2015. As of September 2015, the Assiniboine and Sioux Tribe, Little Traverse Bay Bands, and Seminole Tribe of Oklahoma have yet to arrest anyone under VAWA.[116] The Sisseton Wahpeton Oyate Tribe had only arrested one individual.[117] However, as people become more aware of the new SDVCJ as an available tribal resource, these numbers will probably rise. Accustomed to a lack of tribal jurisdiction over non-Indians, as many as 80% of Indians have previously stated that they did not report non-Indian partner violence because they knew that the tribe was powerless to help.[118] As the SCDVJ becomes the norm, arrests and convictions in these four tribes will likely increase.

For the other four tribes exercising the SDVCJ — the CTUIR, the Eastern Band of Cherokee, the Pascua Yaqui, and the Tulalip — there have been a total of 41 arrests and 19 convictions under VAWA as of September 2015.[119] Data collected by these tribes highlights the importance of the new jurisdiction. The CTUIR report that in 2012, 60% of the Umatilla Victims Services Program cases involved non-Indians.[120] For the Pascua Yaqui Tribe, during the first year of the pilot project, non-Indians accounted for 25% of domestic violence cases on the reservation.[121] The Pascua Yaqui data also shows that the 19 non-Indian defendants the tribe has prosecuted under VAWA have over 90 documented contacts with the tribal law enforcement (including incidents both before and after VAWA implementation).[122] Most of these defendants have "lengthy state criminal histories involving convictions for drugs, weapons, and assaultive behavior."[123] Despite the many concerns that non-Indians would challenge their VAWA prosecutions in tri-

[114] *See Tribal Implementation of VAWA*, *supra* note 113 (stating that the Little Traverse Bay Bands of Odawa Indians in Michigan, the Eastern Band of Cherokee in North Carolina, and the Seminole Nation of Oklahoma are authorized to exercise the special domestic violence criminal jurisdiction).

[115] *Violence Against Women Act (VAWA) Reauthorization 2013*, U.S. DEP'T OF JUSTICE (Mar. 26, 2015), https://www.justice.gov/tribal/violence-against-women-act-vawa-reauthorization-2013-0, *archived at* https://perma.cc/SW24-7FW8.

[116] *See Tribal Implementation of VAWA*, *supra* note 113.

[117] *Id.*

[118] *See* Laird, *supra* note 9, at 49 (citing interviews of domestic violence victims of the Confederated Tribes of the Umatilla Indian Reservation that occurred as part of a Family Violence Program from 2011–2012).

[119] *See Tribal Implementation of VAWA*, *supra* note 113 (collecting data with respect to arrests and convictions as of September 2015); *see also* Urbina & Tatum, *supra* note 80, at 3 (updating information about arrests and convictions by the Pascua Yaqui Tribe).

[120] *See Tribal Implementation of VAWA*, *supra* note 113.

[121] Urbina & Tatum, *supra* note 80, at 3.

[122] *Id.* at 3.

[123] *Id.* at 3–4.

bal courts as unconstitutional, thus far, no non-Indian has done so.[124] However, concerns that VAWA did not go far enough in giving tribes jurisdiction over non-Indians have been validated.

III. Congress Should Extend Special Domestic Violence Criminal Jurisdiction to Crimes that Non-Indians Commit Against American Indian Children

The Eastern Band of Cherokees,[125] Pascua Yaqui,[126] and Tulalip[127] Tribes have all called for extending VAWA's special criminal jurisdiction to non-Indian crimes against Native children in Indian country. Likewise, the Attorney General's Advisory Committee and the ABA have argued that Congress should authorize tribes to exercise such jurisdiction.[128] Yet thus far no scholarship comprehensively addresses the arguments in favor of extending special tribal criminal jurisdiction to crimes against children and the corresponding counter arguments. This Note tackles that task.

The high rates of victimization among Native children, the strong connection between domestic violence and child abuse, and the unusually high rate of interracial violence experienced by American Indians all demonstrate that Congress should extend tribal criminal jurisdiction to non-Indian crimes against children. Data collected as tribes enforce VAWA underscores the need for tribal jurisdiction over non-Indian crimes against children. Despite the greater attention Indian country crime has garnered with the passage of VAWA, state and federal prosecutions in Indian country are still inadequate. Moreover, while Congress and the Court have generally become more willing to invade familial privacy due to concerns about child abuse and neglect

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[124] *See* Fee, *supra* note 90 ("Here's the evidence that it's working: under the pilot project, more than two dozen non-Indians have been charged with domestic violence and dating violence crimes. They all have the right to go straight to federal court and ask to be released if their rights are being violated. And how many have done so? Zero.") (quoting Sam Hirsch from the Department of Justice); *see also* Laird, *supra* note 9, at 51–52; M. Brent Leonhard, *Implementing VAWA 2013*, 40 Hum. Rts. Mag. (2014), http://www.americanbar.org/publications/human_rights_magazine_home/2014_vol_40/vol—40—no—1—tribal-sovereignty/implementing-vawa-201.html, *archived at* https://perma.cc/QWF7-DQ75 (last visited Jan. 20, 2016).

[125] *See* Holly Kays, *Cherokee Court Hands Out First-Ever Sentence to Non-Indian*, Smokey Mountain News (Aug. 12, 2015), http://www.smokymountainnews.com/news/item/16180-cherokee-court-hands-out-first-ever-sentence-to-non-indian, *archived at* https://perma.cc/F4H8-7NXH.

[126] *See Pascua Yaqui Tribe VAWA Implementation*, Nat'l Cong. of Am. Indians 5, http://www.ncai.org/tribal-vawa/pilot-project-itwg/Pascua_Yaqui_VAWA_Pilot_Project_Summary_2015.pdf, *archived at* https://perma.cc/33V8-Q9HH (last visited Jan. 20, 2016).

[127] *See VAWA 2013 and the Tulalip Tribes Jurisdiction over Crimes of Domestic Violence*, Tulalip Tribes (Oct. 2015), http://www.tulaliptribes-nsn.gov/Portals/0/pdf/departments/tribal_court/18380_VAWA_2013-v3_Minus_Story.pdf, *archived at* https://perma.cc/WP5E-AG7L.

[128] Attorney General's Advisory Committee on Native Children, *supra* note 8, at 9. The co-chairs of the advisory committee also argue that jurisdiction should be extended to crimes against children in *the Human Rights Journal*. *See generally* Byron L. Dorgan & Joanne Shenandoah, *Ending Violence So American Indian Alaska Native Children Can Thrive*, 40 Hum. Rts. Mag. (2014); Laird, *supra* note 9; McMillion, *supra* note 9.

during the twentieth century, the reorientation of American Indian law towards self-determination has created the opposite result — increased privacy — for American Indians families. Non-Indians who commit crimes against Native children are even further insulated from government intervention because of the powerlessness of tribes to prosecute them, creating a heightened privacy for non-Indians who commit crimes against Indian children. Finally, on a practical level, Congress has demonstrated it is willing to enact legislation to protect Indian children.

A. *Native children experience heightened levels of criminal victimization, and evidence from VAWA bears out the need for extending tribal jurisdiction to crimes non-Indians commit against Indian children.*

By any account, Native children live in grim circumstances. Although current policies towards tribes are typically centered on self-determination, the history of colonization, removal, and assimilation still haunts tribes in the form of poverty, low educational attainment, and family separation.[129] Approximately 25% of Native children live in poverty, compared with 13% of children in other U.S. populations.[130] Native children are more likely to have substance abuse issues and less likely to graduate high school than other children.[131] American Indians and Native Alaskans experience violent crimes at a rate 2.5 times the national average.[132] There are almost twice as many substantiated reports of abuse and neglect per capita for Native children as there are for other children of other races,[133] and Native children are two times as likely to die before they turn 24 than other children.[134] Furthermore, the abuse and neglect of Native children often goes unreported, meaning that this data does not fully reflect the circumstances Native children

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[129] Dolores Subia BigFoot & Susan R. Schmidt, *Honoring Children, Mending the Circle: Cultural Adaptation of Trauma-Focused Cognitive-Behavioral Therapy for American Indian and Native Alaskan Children*, J. CLINICAL PSYCHOL. 847, 848 (2010), http://www.itcmi.org/wp-content/uploads/2013/04/TBCAC-cultural-adaptation-article2010.pdf, *archived at* https://perma.cc/HSH8-9Z9Z.

[130] *See* Sari Horwitz, *The Hard Lives — and High Suicide Rate — of Native American Children on Reservations,* WASH. POST (Mar. 9, 2014), https://www.washingtonpost.com/world/national-security/the-hard-lives—and-high-suicide-rate—of-native-american-children/2014/03/09/6e0ad9b2-9f03-11e3-b8d8-94577ff66b28_story.html, *archived at* https://perma.cc/DUN4-DHMK; *see also* Tara Culp-Pressler, *The Shocking Rates of Violence and Abuse Facing Native American Kids*, THINK PROGRESS (Nov. 18, 2014, 9:12 AM), http://thinkprogress.org/health/2014/11/18/3593300/violence-native-american-kids/, *archived at* https://perma.cc/3VG5-8DCN.

[131] *See* Horwitz, *supra* note 130.

[132] *See* BigFoot & Schmidt, *supra* note 129, at 848.

[133] *See* Lawrence A. Greenfield & Steven K. Smith, *American Indians and Crime*, BUREAU OF JUSTICE STATISTICS 15 (Feb. 1999), http://www.bjs.gov/content/pub/pdf/aic.pdf, *archived at* https://perma.cc/MHQ3-M5R3.

[134] *See* Horwitz, *supra* note 130.

face.[135] Crucially, "[a]t least 70% of the violent victimizations experienced by American Indians are committed by persons not of the same race — a substantially higher rate of interracial violence than experienced by white or black victims."[136]

Additionally, research reveals a strong connection between domestic violence and the risk of child abuse. About 39% of Native women are victims of domestic violence.[137] Studies show that between 49% and 70% of men who commit domestic violence abuse their children,[138] and that 28% to 59% of child abuse cases involve documented violence against mothers.[139] Data from state courts indicate children are present in over a third of domestic violence occurrences that make it to court,[140] suggesting that children are present for many more incidents of unreported domestic violence. Batterers are about 700% more likely to assault children in the home than non-batterers and are four times as likely to sexually abuse children in the home.[141] Living with a perpetrator of domestic violence is one of the strongest risk factors for a child becoming a victim of incest.[142] Domestic violence may also be the largest predictor of fatalities resulting from child abuse and neglect.[143] Pertinent to tribal jurisdiction over domestic violence commited by non-Indians, but not child abuse commited by such perpetrators, separating a victim and batterer can actually increase the risk of child abuse from a batterer, as the batterer may try to hurt the child to compensate for the decreased opportunity to directly abuse the mother.[144]

While tribal data demonstrates that the new VAWA jurisdiction fills an important domestic violence gap, the empirical evidence also shows a remaining jurisdictional gap that must be filled. The Pascua Yaqui Tribe re-

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[135] *See* Kathleen A. Earle, *Child Abuse and Neglect: An Examination of American Indian Data*, Casey Family Programs 8 (Dec., 2000), http://www.nicwa.org/research/02.Child_Abuse.pdf, *archived at* https://perma.cc/L7WE-QZK4.

[136] Greenfield & Smith, *supra* note 133, at vi.

[137] NCAI Policy Research Center, *Policy Insight: Brief Statistics on Violence Against Native Women,* Nat'l Cong. Of Am. Indians 3 (February 2013), http://www.ncai.org/attachments/PolicyPaper_tWAjznFslemhAffZgNGzHUqIWMRPkCDjpFtxeKEUVKjubxfpGYK_Policy%20Insights%20Brief_VAWA_020613.pdf, *archived at* https://perma.cc/YUH4-9D6H.

[138] *See* Attorney General's Advisory Committee on Native Children, *supra* note 8, at 50.

[139] *See Responses to the Co-Occurrence of Child Maltreatment and Domestic Violence in Indian Country: Repairing the Harm and Protecting Children and Mothers*, Tribal Law and Pol'y Institute 10 (Dec. 2011), http://www.tribal-institute.org/download/OVWGreenbookReportHVS_TD_7-18.pdf, *archived at* https://perma.cc/ZB5N-4LL6.

[140] *See* Shannan Catalano, et al., *Selected Findings: Female Victims of Violence*, Bureau of Justice Statistics 4 (Sept. 2009), http://www.bjs.gov/content/pub/pdf/fvv.pdf, *archived at* https://perma.cc/8QHH-WYCQ.

[141] *See* Lundy Bancroft, *The Parenting of Men Who Batter*, 39 Court Rev. 44, 45 (2002), http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1149&context=ajacourtreview, *archived at* https://perma.cc/7VXX-W44J.

[142] *See id.* at 45–46.

[143] *See* Janet Carter, *Domestic Violence, Child Abuse, and Youth Violence: Strategies for Prevention and Early Intervention*, Minnesota Ctr. Against Violence and Abuse 2 (Nov. 2, 2012), http://www.mincava.umn.edu/link/documents/fvpf2/fvpf2.shtml, *archived at* https://perma.cc/XD4D-WUS7.

[144] *See* Bancroft, *supra* note 141, at 46.

ported that 13 of its SDVCJ cases involved 18 children who were "exposed to violence, were victims, or reported the crime while it was in progress."[145] All of the children were under 11 years of age.[146] According to Alfred Urbina, the Pascua Yaqui Attorney General, the tribe was unable to prosecute any of the crimes involving children because VAWA jurisdiction is restricted to crimes of dating violence and domestic violence.[147] Michelle Demmert, the lead attorney for the Tulalip Tribe, reported that six of the tribe's 11 VAWA cases involved chargeable crimes against children,[148] at least three of which included assault and criminal endangerment,[149] but the tribe remains unable to charge non-Indians with those crimes. Jason Smith, a Tribal Prosecutor for the Eastern Band of Cherokees similarly stated that in cases involving children, "[the tribe is] forced to push for prosecution in federal or state courts or [is] left without recourse where those gaps still exist."[150] Native children are indisputably frequent victims of non-Indian crime, yet, state and federal prosecutors are failing to exercise their criminal jurisdiction and prosecute non-Indians for the crimes they commit against Native children.

B. State and federal prosecutors are failing to fill the jurisdictional gap when it comes to crimes against Native children.

With the exception of VAWA cases, tribes cannot pursue criminal charges against non-Indians because of *Oliphant.* State and federal prosecutors are failing to adequately enforce the law when it comes to crimes non-Indians commit against children. And this failure spans the continuum of jurisdictional set ups; it occurs in mandatory PL 280 Indian country, Indian country where federal prosecutors and tribes rather than states have jurisdiction, and optional PL 280 states.

As noted above, in the PL 280 states that have criminal jurisdiction over crimes that non-Indians commit against Indians in Indian country, the lack of increased funding for state law enforcement has combined with poor tribal-state relationships to create widespread lawlessness in Indian country.[151] Since federal prosecutors no longer have jurisdiction in mandatory PL 280 states, they cannot fill in gaps left by ineffective state law enforcement.[152]

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[145] *See* Urbina & Tatum, *supra* note 80, at 55.
[146] *See id.*
[147] *Id.*
[148] *See* Email from Michelle Demmert, Tulalip Reservation Attorney, to author (Jan. 21, 2016, 11:31 EST) (on file with author).
[149] *See* Fee, *supra* note 90.
[150] *See* Kays, *supra* note 125.
[151] *See supra*, section II.B.iv.
[152] *See* Leonhard, *supra* note 68.

In non-PL 280 states, states lack jurisdiction over crimes committed by non-Indians against Indians in Indian country.[153] In theory, federal jurisdiction fills that gap under the General and Major Crimes Acts.[154] Yet while massive levels of federal declinations to prosecute in Indian country seem to be at least somewhat decreasing,[155] federal prosecutors still lack incentives to prosecute crimes that occur in Indian country. Deficient resources and the distance between federal prosecutors' offices and Indian communities — sometimes hundreds of miles — make federal prosecution of non-Indian crime in Indian country difficult.[156] Additionally, since both states and tribes lack jurisdiction when non-Indians commit crimes against Indian victims in Indian country, USAOs are the only bodies that can charge non-Indians at all, regardless of the severity of the crime. This creates a situation in which federal prosecutors' offices are needed to pursue even misdemeanors or low-level felonies. However, since federal courts are not courts of general jurisdiction, federal prosecutors are typically not responsible for pursuing charges for all levels of criminal behavior. This lack of federal expertise snowballs with statutory issues with charging the broad range of Indian country crimes for which federal prosecutors bear responsibility and a lack of interest in charging low-level crimes.

Statutory issues often arise when it comes to charging the vast array of crimes that occur in Indian country. While the Assimilative Crimes Act,[157] which fills gaps in federal law with state criminal law, applies in Indian country,[158] if there is a federal statute addressing the criminal conduct in question, prosecutors are required to follow the federal statute even if it has a narrower scope than the applicable state law.[159] This can result in cases in which a federal prosecutor wants to charge a non-Indian defendant, but the defendant's behavior does not rise to the level of severity under the federal statute. As Professor Gavin Clarkson reports:

> [There are] a number of U.S. Attorneys, however, who want to prosecute domestic violence cases [with non-Indian perpetrators and Indian victims in Indian country], but the federal statutory hurdle is so high that a broken nose is insufficient grounds for a felony assault charge. That requires 'serious bodily injury,' defined as a substantial risk of death, extreme physical pain, protracted and

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[153] *See supra* note 45.

[154] *See* 18 U.S.C. §§ 1152–3.

[155] *See* DECLINATIONS OF INDIAN COUNTRY MATTERS, *supra* note 3; *see also* Indian Country Investigations and Prosecutions 2011-2012, *supra* note 92.

[156] *See* DECLINATIONS OF INDIAN COUNTRY MATTERS, *supra* note 3.

[157] 18 U.S.C. § 13 (2012).

[158] *See* Williams v. United States, 327 U.S. 711, 713–14 (1946); *see also* Arvo Q. Mikkanen, *Indian Country Criminal Jurisdictional Chart 2*, U.S. DEP'T OF JUSTICE (Dec. 2010), http://www.justice.gov/sites/default/files/usao-wdok/legacy/2014/03/25/Indian%20Country%20Criminal%20Jurisdiction%20ChartColor2010.pdf, *archived at* https://perma.cc/F2S6-6P2L.

[159] *See Williams*, 327 U.S. at 717–18.

> obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty.[160]

Even when there is no conflicting federal statute and the federal prosecutor could apply the state statute, the federal prosecutor may not have enough proficiency with the state code to quickly and effectively charge a non-Indian defendant.

Furthermore, federal prosecutors may simply be uninterested in charging misdemeanors and less serious felonies that non-Indians commit in Indian country. As Margaret Chiara, the former U.S. Attorney for Western Michigan, a district that covers several reservations, explains:

> I've had (assistant U.S. Attorneys) look right at me and say, 'I did not sign up for this'. . . . They want to do big drug cases, white-collar crime and conspiracy. And I'll tell you, the vast majority of the judges feel the same way. They will look at these Indian country cases and say, 'What is this doing here? I could have stayed in state court if I wanted this stuff' . . . . It's a terrible indifference, which is dangerous because lives are involved.[161]

The lack of federal prosecution of non-Indians for crimes committed against Indians in Indian country has encouraged many non-Indian defendants to exploit tribes' inability to prosecute them.[162]

In optional PL 280 states, where both state and federal prosecutors have jurisdiction,[163] the outcome is still abysmal. Data collected by the Tulalip Tribe, which is located in the partial PL 280 state of Washington, bears out the failure of federal and state prosecutors to effectively prosecute non-Indian crimes committed against Native children. Six of the VAWA cases that the Tulalip Tribe has prosecuted involved chargeable crimes against children.[164] One of the six cases was so severe that it was transferred to federal court (a transfer that would be unavailable in a mandatory PL 280 state).[165] The federal government has not taken action in the other five cases. The tribe has documented the failure of Washington State to take any action to protect at least four of the child victims.[166] Demonstrating the lack of communication between state and tribal prosecutors, the Tulalip Tribal Prosecutor is unsure whether the state prosecuted anyone in the sixth case, as the

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[160] Gavin Clarkson, *Reservations Beyond the Law*, L.A. Times (Aug. 3, 2007), http://www.latimes.com/la-oe-clarkson3aug03-story.html, *archived at* https://perma.cc/P4ZE-GCBJ.

[161] Michael Riley, *Promises, Justice Broken*, Denv. Post (Nov. 11, 2007), http://www.denverpost.com/2007/11/10/promises-justice-broken/, *archived at* https://perma.cc/82AR-LFSJ.

[162] *See* Erdich, *supra* note 81.

[163] *See* M. Brent Leonhard, *Returning Washington P.L. 280 Jurisdiction to Its Original Consent-Based Grounds*, 47 Gonz. L. Rev. 663, 693 (2011).

[164] *See* email from Michelle Demmert, *supra* note 148.

[165] *See id.*; *see also* Leonhard, *supra* note 124.

[166] *See VAWA 2013 and the Tulalip Tribes Jurisdiction over Crimes of Domestic Violence*, *supra* note 127.

tribe is not informed about state decisions to pursue charges related to crimes in Indian country.[167] The confusion engendered by overlapping concurrent jurisdiction seems to result in both state and federal prosecutors declining to pursue charges when it comes to crimes against children.

The data demonstrates that non-Indian crimes against children are common on reservations and often arise when tribes exercise VAWA special criminal jurisdiction over non-Indians. Tribes remain unable to prosecute such crimes under *Oliphant.* The many problems with state and federal law enforcement in Indian country have created an environment in which non-Indians frequently get away with crimes committed in Indian country, including crimes against children.

C. The current focus on tribal self-determination has flipped government over-intervention in Indian homes to under-intervention, which combines with the lack of tribal jurisdiction to create a heightened privacy for non-Indians who commit crimes against Indian family members.

Traditionally, familial privacy has been considered sacrosanct in U.S. law. Early law recognized "white male property owners as those individuals uniquely entitled to full citizenship and its attendant rights," including control over their wives and children.[168] At common law, as long as they provided for and protected their children,[169] fathers determined who had custody of their children, were entitled to their children's labor, and were able to corporally punish them.[170] Throughout the nineteenth century, U.S. courts continued to strongly protect parents' rights to custody of and control over their children and were reluctant to intervene in the home.[171] As the women's rights movement took off in the early twentieth century, this patriarchal privacy shifted to parental privacy: the Court recognized parents' ability to "direct the upbringing and education of children under their control."[172] However, the second half of the twentieth century brought about a shift in familial privacy. State legislatures began passing child abuse and neglect laws aimed at preventing abusive parenting.[173] Justifying their involvement

[167] *See* email from Michelle Demmert, Tulalip Reservation Attorney, to author (Feb. 20, 2016, 12:33 EST) (on file with author).

[168] *See* Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 61 (2006).

[169] *See* 1 William Blackstone, COMMENTARIES *434–41.

[170] *See id.*

[171] *See* Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 311–13 (2002).

[172] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); *see also* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[173] *See* Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 64 (2006).

under the best interest of the child standard, states now broadly exercise jurisdiction in custody and adoption cases.[174]

While the mainstream arc of U.S. family law has transitioned from an absolute respect for a father's authority in his own home to a greater willingness to intervene, American Indian family law has taken a different path. With a few exceptions, Indians were not granted citizenship until 1924 and thus not privileged to the rights traditionally granted to white males, including familial privacy.[175] Beginning in the seventeenth century, American Indians experienced repeated attempts to remove Indian children from their families and assimilate them into white, westernized culture. Before the Revolutionary War, Indian children were apprenticed into English homes in an effort to acculturate them to English life,[176] and the first boarding school for Native children was established in 1754 in an attempt to separate children from their tribes, convert them to Christianity, and "civilize" them.[177] Though early attempts to assimilate American Indian children were mostly unsuccessful,[178] they set the scene for the heavy-handed assimilationist policies that the federal government later adopted. In 1860, the Bureau of Indian Affairs ("BIA") founded the first federal boarding school for American Indian children; in 1880 there were 60 such boarding schools.[179] Federal policies supported these boarding schools in their attempts to fully integrate Native children into white, westernized culture by promoting the English language, Protestantism, a system of private property, and agricultural training until the 1950s.[180] Henry Pratt, the founder of the notorious Carlisle boarding school, asserted that the education would "kill the Indian, save the man."[181]

The boarding schools were followed by concerted effort to redistribute Indian children to non-Indian homes during the tribal Termination Era.[182] From the 1950s through the 1970s, the BIA and the Child Welfare League of America facilitated the removal of Indian children from their homes and placed them with non-Indian families.[183] Studies conducted in 1969 and

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[174] *See id.*

[175] *See* Anderson et al., *supra* note 63, at 127-129; Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (1988)).

[176] *See* Neal Salisbury, *Red Puritans: The "Praying Indians" of Massachusetts Bay and John Eliot,* 31 The William and Mary Quarterly, 27, 46 (Jan. 1974).

[177] Lorie M. Graham, *"The Past Never Vanishes": A Contextual Critique of the Existing Indian Family Doctrine*, 23 Am. Indian L. Rev. 1, 12 (1998).

[178] *See id.* at 13.

[179] *See History and Culture: Boarding Schools*, Northern Plains Reservation Aid, http://www.nrcprograms.org/site/PageServer?pagename=airc_hist_boardingschools, *archived at* https://perma.cc/GK5Q-MLEX (last visited Feb. 24, 2016).

[180] *See* Kelley Halverson, et al., *Cultural Loss: American Indian Family Disruption, Urbanization, and the Indian Child Welfare Act,* 81 Child Welfare 319, 323 (2002); *see also History and Culture: Boarding Schools*, *supra* note 179.

[181] *History and Culture: Boarding Schools*, *supra* note 179.

[182] *See* Alverson et al., *supra* note 180, at 323; *see also* Anderson et al., *supra* note 63, at 142.

[183] *See* Alverson et al., *supra* note 180, at 323.

1974 demonstrated that approximately 25–35% of Indian children were being taken from their families and fostered or adopted by non-Indian families.[184] Indian children were removed from homes at far greater rates than non-Indian children. For instance, Indian children were five times more likely to be put in foster care or adopted than their non-Indian counterparts in Minnesota, and 1600% more likely to be separated from their parents in Wisconsin than non-Indian children.[185]

In the 1960s, Congressional tribal policies shifted towards self-determination rather than termination.[186] The Indian Child Welfare Act ("ICWA"),[187] which is meant to protect Native families and grant tribes control over child custody, exemplifies this shift in American Indian family law.[188] ICWA gives tribes exclusive jurisdiction over custody proceedings for Indian children domiciled on a reservation.[189] Even if an Indian child is not domiciled on a reservation, if there is a possibility that parental rights will be terminated or the child will be put in foster care, the state must transfer the case to a tribal court.[190] ICWA also mandates a preference order for child placement to ensure that the child will be raised in tribal culture: first, a child will be placed with an extended family member; second, with an unrelated tribal member; or third, with another Indian family.[191]

The federal government's over-intervention into Indian homes and removal of Indian children was appalling, and ICWA was sorely needed. However, the gap in tribal criminal jurisdiction over non-Indians has combined with ICWA to inadvertently create a heightened privacy for non-Indians who commit crimes against Indian children in Indian country. As evidenced by ICWA, federal policies now center on preventing state and federal intervention in families with Indian children. Since tribes do not have jurisdiction over crimes non-Indians commit against children, and state and federal prosecutors often fail to pursue charges for such crimes, non-Indians are granted an additional layer of familial privacy — a heightened privacy — for the crimes they commit against Native children.[192] Consequently, Indian children with one Indian parent and one non-Indian parent who live in Indian country are especially susceptible to abuse and neglect, an

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[184] *See* William Byler, *The Role of the Federal Government: A Congressional View*, *in* The Destruction of American Indian Families 1, 1 (Steven Unger ed., 1977).

[185] *See id.*

[186] *See* Anderson et al., *supra* note 63, at 152.

[187] 25 U.S.C. § 1911(a).

[188] Andrew Cohen, *Indian Affairs, Adoption, and Race: The Baby Veronica Case Comes to Washington*, The Atlantic (April 12, 2013), http://www.theatlantic.com/national/archive/2013/04/indian-affairs-adoption-and-race-the-baby-veronica-case-comes-to-washington/274758/, *archived at* https://perma.cc/S7RL-QS7L.

[189] *See* 25 U.S.C. § 1911(a) (2012).

[190] *See id.* § 1911(b).

[191] *See id.* § 1915(a).

[192] *See infra* section IV.A.

unintended consequence of the lack of state and federal government intervention in Indian families.

D. *On a practical level, Congress has shown that it is open to enacting legislation that protects American Indian children.*

Congress' enactment rate for legislation related to Indians was much higher than its enactment rate for other legislation from 1975 to 2013, suggesting that Congress is willing to pass statutes favorable to tribes.[193] Congress has also demonstrated that it is especially willing to enact legislation that protects Native children. Responding to calls to end discrimination against American Indian families and stop the removal of their children,[194] Congress has repeatedly recognized "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[195] Congress has also declared "that it is the policy of this Nation to protect the best interest of Indian children and to promote the stability and security of Indian tribes and families."[196] Congress' willingness to protect Native children is evident in both ICWA[197] and the Indian Child Protection and Family Violence Prevention Act ("ICPA").[198]

As addressed above, Congress enacted ICWA to help remedy the centuries of attempted assimilation of American Indians.[199] ICPA provides additional federal protection for Native children. Congress passed ICPA in response to a sex abuse scandal involving a federally employed teacher at a tribal school who molested over one hundred Indian children.[200] In an attempt to protect Indian children, ICPA established mandatory reporting of Native child abuse and neglect for law enforcement and child protective services agencies,[201] instituted compulsory background checks for federal employees who interact with Native children,[202] and ordered that a central registry of sex offenders be established.[203] While ICPA's success has been

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[193] *See* Kirsten Matoy Carlson, *Congress and Indians*, 86 U. Colo. L. Rev. 77, 109–110 (2015).

[194] *See, e.g.*, James Abourezk, *The Role of the Federal Government: A Congressional View*, *in* The Destruction of American Indian Families 12, 12–13 (Steven Unger ed., 1977); William Byler, *supra* note 184, at 9–10.

[195] 25 U.S.C. § 1901; *see also* 25 U.S.C. § 3201.

[196] 25 U.S.C. § 1092.

[197] 25 U.S.C. § 1901.

[198] 25 U.S.C. § 3201.

[199] *See* Anderson et al., *supra* note 63, at 494-96 (citing House Report No. 95-1386 (July 24, 1978)); *see also* Cohen, *supra* note 188.

[200] *See* Peter West, *U.S. Agrees to Pay $13 Million to Settle 8 Abuse Suits Brought by Hopi Indians*, Educ. Week (May 2, 1990), http://www.edweek.org/ew/articles/1990/05/02/09380025.h09.html, *archived at* https://perma.cc/ST2R-HYE8; *see also* Virginia Davis & Kevin Washburn, *Sex Offender Registration in Indian Country*, 6 Ohio St. J. Crim. L. 3, 7–8 (2008).

[201] *See* 25 U.S.C. § 3203 (2000).

[202] *See id.* § 3207.

[203] *See id.* § 3204.

limited as the central registry has yet to be established,[204] it is another example of Congress' recognition of the importance of protecting American Indian children.

Although ICWA and ICPA take place in different contexts — keeping Indian children with their families in custody hearings and protecting them from sexual abuse, especially at the hands of federal employees — both statutes indicate that when there is indisputable evidence that Indian children are being harmed, Congress is willing to act. Such evidence exists for crimes committed against Indian children by non-Indians. There is no question that there is a gross injustice in continuing to allow non-Indian defendants to walk away from documented crimes against children without any consequences.[205] Furthermore, the public awareness of and media focus on the plight of American Indian children seems to have triggered both ICWA and ICPA.[206] Given the wave of public awareness and media coverage of violence on reservations, which led to the enactment of the 2013 VAWA Reauthorization and has continued since VAWA,[207] the time is ripe for Congress to enact legislation extending special tribal criminal jurisdiction to non-Indian crimes against children. Perhaps one of the reasons Congress has yet to do so involves concerns about the constitutional rights of non-Indian defendants in tribal courts.[208] However, as addressed below, the rights of non-Indian defendants in tribal courts would be adequately protected if Congress increased tribal jurisdiction with the appropriate safeguards.

IV. Challenges to an Extension of Tribal Criminal Jurisdiction to Non-Indian Crimes Against Children Are Unlikely to Succeed

An extension of tribal criminal jurisdiction to crimes non-Indians commit against Indian children could be challenged on two grounds that are also often invoked in arguments against VAWA extension of jurisdiction. First, the extension could be challenged on the grounds that Congress has gone

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[204] *See* Davis & Washburn, *supra* note 200, at 8.

[205] *See Tribal Implementation of VAWA: Resource Center for Implementing Tribal Provisions of the Violence Against Women Act (VAWA)*, Nat'l Congress of American Indians, http://www.ncai.org/tribal-vawa/pilot-project-itwg/pilot-project (last visited Jan. 20, 2016), *archived at* https://perma.cc/9P9V-ZP4G; *see also* email from Michelle Demmert, *supra* note 148.

[206] *See* Cohen, *supra* note 188; Davis & Washburn, *supra* note 200, at 7–8.

[207] *See, e.g.,* Erdich, *supra* note 77; Horwitz, *supra* note 130.

[208] *See* Thomas F. Gede, *Criminal Jurisdiction of Indian Tribes: Should Non-Indians Be Subject to Tribal Criminal Authority Under VAWA?*, 13 Engage 40, 41 (2012), http://www.fed-soc.org/publications/detail/criminal-jurisdiction-of-indian-tribes-should-non-indians-be-sub ject-to-tribal-criminal-authority-under-vawa, *archived at* https://perma.cc/Y3B9-4JGS.

beyond its constitutional powers in delegating jurisdiction to the tribes.[209] Another frequently deployed argument against extending tribal criminal jurisdiction is that the constitutional rights of non-Indian defendants will be violated if they are criminally prosecuted in tribal courts.[210] Former Oklahoma Senator Tom Coburn asserted that "[The SDVCJ] provision will eventually be thrown out, be challenged, and on appeal they'll lose, because you cannot guarantee American citizens their Constitutional rights if they're non-tribal members in a tribal court."[211] Yet these challenges are unlikely to succeed as long as Congress expands tribal jurisdiction based on inherent tribal sovereignty and adopts defendant protections for the new jurisdiction that are similar to those in VAWA.

A. Challenges based on a lack of Congressional power to extend tribal jurisdiction are unlikely to succeed if Congress explicitly invokes inherent tribal sovereignty.

An extension of tribal criminal jurisdiction to non-Indian crimes against Native children could be challenged on the ground that Congress acted beyond its constitutional power in extending tribal criminal jurisdiction to non-Indians.[212] How the Court responds to such a challenge will likely turn on whether Congress expanded tribal criminal jurisdiction by delegating its power to Indian tribes[213] or by lifting congressional restraints on inherent tribal sovereign power in enacting the jurisdiction.[214] Under a delegated authority theory, Congress took over tribal criminal power to prosecute non-Indians when tribes became domestic dependent nations.[215] If Congress expands tribal jurisdiction over non-Indian crimes against children through the delegation of Congressional power, then tribal jurisdiction would be subject to Constitutional restraints.[216] On the other hand, under an inherent tribal sovereignty theory, Congress could extend tribal jurisdiction over non-Indian crimes against children by lifting former Congressional restraints on

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[209] *See* Shefali Singh, *Closing the Gap of Justice: Providing Protection for Native American Women Through the Special Domestic Violence Criminal Jurisdiction Provision of Vawa*, 28 COLUM. J. GENDER & L. 197, 213 (2014).

[210] *See* Gede, *supra* note 208; *see also* Adam Serwer, *Republicans are Blocking the Violence Against Women Act*, MOTHERJONES (Mar. 20, 2012, 5:00 AM), http://www.motherjones.com/politics/2012/03/republicans-violence-against-women-act, *archived at* https://perma.cc/4XS6-C6QG; Erdich, *supra* note 77; Singh, *supra* note 209, at 213.

[211] *See* Fee, *supra* note 90.

[212] *See* Singh, *supra* note 209, at 213.

[213] United States v. Lara, 541 U.S. 193, 227 (2004) (Souter, J., Dissenting) (asserting that, as the Court held in *Duro* that tribes no longer held inherent criminal jurisdiction over non-member Indians, any exercise of criminal jurisdiction over non-members must be based on a congressional delegation of federal power).

[214] *Id.* at 200 (determining that Congress had the power to restore inherent tribal power by removing political branch restrictions on tribal jurisdiction over non-members).

[215] Singh, *supra* note 209, at 213–14.

[216] *Id.*

tribal power.[217] If Congress extends tribal jurisdiction through inherent tribal sovereignty, then tribal jurisdiction would be subject only to statutory restrictions, such as those in ICRA, rather than the Constitution.[218]

As long as Congress uses language explicitly recognizing that it is expanding tribal jurisdiction based on inherent tribal sovereignty, a challenge arguing that Congress lacks power to expand tribal criminal jurisdiction is unlikely to prevail. Congress has explicitly affirmed inherent tribal power in three separate legislative acts: ICWA,[219] which recognized inherent tribal power to deal with Indian child custody issues; the *Duro*-fix, which recognized inherent tribal power to exercise criminal jurisdiction over non-member Indians;[220] and VAWA, which recognized inherent tribal power to exercise SDVCJ over non-Indians who commit domestic violence in Indian country.[221] The Supreme Court has repeatedly treated ICWA as a valid exercise of Congressional power.[222] Likewise, in *U.S. v. Lara*, the Supreme Court upheld the *Duro*-fix on the grounds that Congress intended the statute to recognize inherent tribal sovereignty.[223] Although a challenge to tribal jurisdiction under VAWA has yet to arise, the Court is likely to uphold VAWA, given Congress' explicit statement in VAWA that, ". . . the inherent power of that tribe . . . is hereby recognized and affirmed[ ] to exercise special domestic violence criminal jurisdiction over all persons."[224] If the Court upholds the VAWA expansion of tribal special criminal jurisdiction, it is likely to do the same for a similar expansion of tribal jurisdiction over

[217] *Id.* at 214.

[218] *Id.*

[219] 25 U.S.C. § 1911 (1978).

[220] 25 U.S.C. § 1301(2).

[221] 25 U.S.C. § 1304(b)(1) (2013).

[222] *See generally* Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013); Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).

[223] *Id.* at 197–99.

[224] 25 U.S.C. § 1304(b)(1) (2013). Many commentators suggest that Congress has done everything in its power to try to ensure that VAWA survives a challenge on the grounds that Congress lacked power to enact the statute. *See Indian Law — Tribal Courts*, *supra* note 95, at 1516 ("[T]he language used in this '*Oliphant* fix' to confer special domestic violence criminal jurisdiction is almost identical to the text of the '*Duro* fix.' Adopting this familiar construction of recognition and affirmation of inherent tribal power . . . signals clear intent to override *Oliphant* as § 1301(2) overrode *Duro* — and likely demonstrates Congress's hope that the new fix will similarly survive scrutiny . . . .") (footnotes omitted); Laura C. Sayler, *Back to Basics: Special Domestic Violence Jurisdiction in the Violence Against Women Reactivation Act of 2013 and the Expansion of Inherent Tribal Sovereignty*, CARDOZO L. REV. DE NOVO 1, 34 (2014) ("[T]he Court should carefully delineate that the VAWA Reactivation Act of 2013 does not represent an exercise of the plenary power that has typically characterized much of federal Indian jurisprudence in the twentieth century, but rather falls into a more limited view of Congress's power consistent with its fiduciary responsibilities in Indian country."). *But see* Margaret H. Zhang, *Special Domestic Violence Criminal Jurisdiction for Indian Tribes: Inherent Tribal Sovereignty Versus Defendants' Complete Constitutional Rights*, 164 U. PA. L. REV. 243, 279 (2015) ("Depending on a given court's preferred justifications — history, congressional power, voluntary political membership, etc. — it can reasonably rule either for or against inherent tribal authority to exercise special domestic violence criminal jurisdiction.").

non-Indian crimes against children if the statute also uses language recognizing inherent tribal sovereign power.

B. Challenges on the grounds that non-Indian defendants are not entitled to full constitutional rights in tribal courts are unlikely to succeed.

It is also likely that defendants will challenge tribal jurisdiction over non-Indian crimes against children on the grounds that the non-Indian defendants are not entitled to full Constitutional protections in tribal courts. Since tribes did not participate in the writing of the Constitution, tribal courts are not bound by the Constitution absent Congressional action.[225] ICRA mandated that many parts of the Bill of Rights apply in tribal courts, including the rights to due process and equal protection of the law and protection against double jeopardy and self-incrimination.[226] But indigent defendants' right to appointed counsel in tribal courts is limited to crimes that could result in a prison sentence of over one year, whereas the Sixth Amendment right to appointed counsel applies if defendants face any prison time at all.[227] ICRA also contains no reference at all to grand jury indictments and no guarantee of an *impartial* jury (though defendants can request a six person jury).[228]

Although a challenge to VAWA on the grounds that tribal courts insufficiently protect defendants' rights has yet to occur, Congress has included safeguards in the VAWA above and beyond the ICRA requirements, which will help it withstand such challenges. Congress strengthened the right to an impartial jury by requiring tribes who exercise VAWA jurisdiction to select a jury from a pool that does not exclude non-Indians.[229] VAWA also mandates that tribes inform non-Indian defendants of their rights to petition for habeas in federal court.[230] If a non-Indian defendant could be sentenced to a period of imprisonment exceeding one year VAWA further requires that tribes provide licensed counsel, a judge with legal training, publically accessible statutes, and a recording of the trial.[231] VAWA further includes a constitutional catchall, instructing tribes to provide defendants with "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe."[232] Although VAWA has been criticized for forcing a westernized,

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[225] *See* Talton v. Mayes, 163 U.S. 376, 384 (1896); *accord* Santa Clara Pueblo v. Martinez, 436 U.S. 47, 56 (1978).
[226] 25 U.S.C. § 1302(a) (2010).
[227] *Id.; see also* United States v. Bryant, No. 15-420, slip. op. at *2 (June 13, 2016).
[228] *Id.*
[229] 25 U.S.C. § 1304(d)(3) (2013).
[230] 25 U.S.C § 1304(e) (2013).
[231] 25 U.S.C. § 1302(c) (2010).
[232] 25 U.S.C. § 1304(d)(4) (2013).

U.S. version of due process onto tribes,[233] Congress' extremely cautious approach has lessened the possible success of constitutional challenges to the extension of tribal criminal jurisdiction.[234] If Congress includes similar constitutional protections for defendants when extending jurisdiction to crimes against children, it will protect challenges to this jurisdiction as well.

Moreover, lesser rights for defendants in tribal courts are in accord with both the inherent sovereignty of tribes and other contexts where the court has permitted defendant rights to fall below constitutional requirements. First, a criminal defendant subject to inherent tribal sovereignty is like a defendant subject to the criminal law of a foreign jurisdiction where U.S. constitutional rights do not apply.[235] Once a U.S. citizen commits a crime in another country, she is subject to that country's criminal laws and entitled to only the protections for defendants that country provides.[236] Similarly, once a U.S. citizen commits a crime in Indian country, she should be subject only to whatever protections tribal courts provide to defendants. Although the international analogy is most apt, as tribes are domestic dependent nations rather than states, criminal defendants are also subject to different rights based on state constitutions, depending on the state where the crime is committed.[237] Thus whether analogizing to foreign countries or different states, it is the norm rather than the exception for defendants' rights to vary based on the forum.

Second, if in extending tribal SDVCJ to crimes against children, Congress continues to require that non-Indians who are prosecuted have close ties to the tribe — perhaps adding a category for non-Indian defendants who live in a household or regularly interact with Indian children in addition to the current VAWA categories — then the tribal criminal jurisdiction will mimic another arena in which claims are permitted to proceed against individuals not entitled to full constitutional protections: the court-martial process used in the military.

Military commanders can pursue charges against service members through three different types of courts-martial: summary court-martial, spe-

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[233] *See* Zanita Fenton (moderator) et. al., *Panel on Colonization, Culture, and Resistance (Transcript), University of Miami School of Law*, 5 U. Miami Race & Soc. Just. L. Rev. 325, 332–33 (2015); *see also* Matthew L. M. Fletcher, *Indian Courts and Fundamental Fairness:* Indian Courts and the Future *Revisited*, 84 U. Colo. L. Rev. 59, 95 (2013) ("ICRA is a creature of Congress. While Congress may have intended that tribal justice systems be the primary interpreter of 'due process' and 'equal protection' in accordance with tribal customs and traditions, those concepts remain American concepts, not tribal concepts.").

[234] *See* Singh, *supra* note 209, at 227; *see also Indian Law—Tribal Courts*, *supra* note 95, at 1517–18.

[235] Anderson et al., *supra* note 63, at 135–36 (citing Felix S. Cohen, Cohen's Handbook of Federal Indian Law (2005 ed.)).

[236] *See* Anupriya Krishna, *Innocents (and the Guilty) Abroad*, American Bar Ass'n (May/June 2013), http://www.americanbar.org/publications/gp_solo/2013/may_june/innocents_and_guilty_abroad.html, *archived at* https://perma.cc/32RD-TM4A.

[237] *See* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions As Guardians of Individual Rights,* 61 N.Y.U. L. Rev. 535, 548 (1986).

cial court-martial, and general court-martial.[238] Summary court-martial is limited to non-capital offenses and involves a procedure in which one officer represents both the government and the accused and also finds the facts and the law. It can result in punishments such as being restricted to a geographic location for two months, confinement with hard labor, and garnishment of up to two-thirds of one month's pay.[239] Summary court-martial is not considered a criminal proceeding as the accused can refuse to be tried by this method.[240] The other two military procedures, general and special courts-martial, are considered criminal procedures. Special court-martial is comparable to a misdemeanor trial and generally involves a military judge and a three member panel that determines the verdict.[241] In a special court-martial, the panel may sentence the accused to any applicable non-capital punishment except dishonorable discharge, imprisonment for over a year, hard labor for over three months, and fines exceeding more than two-thirds of a service member's monthly salary.[242] General court-martial is comparable to a felony trial: the panel can sentence a service member to any applicable punishment, including death.[243] General court-martial typically has a military judge and five deciding panel members.[244]

Two key differences between courts-martial and civilian trials involve the charging process and the jury. In the military, the decision to pursue court-martial against a service member lies within the commanding officer's discretion.[245] Although this discretion is somewhat cabined for general court-martial — the commanding officer must order an investigation and have the charges approved by a legal advisor before convening the court-martial — the process lacks the grand jury finding of probable cause and true bill of indictment required for civilian indictments.[246] Additionally, in contrast to civilian jury trials, court-martial panel members are not the peers of the accused or a cross-section of the community; rather, they are selected based on their rank and record.[247]

The court-martial process has many parallels to tribal courts. In both situations, various forms of process have been enacted to ensure that accused individuals are still protected. Moreover, each of these situations involves a suspect who has affirmatively chosen to be a part of a specific jurisdiction and is on notice that a proceeding may occur against her in which she is not entitled to the full Bill of Rights. Just as individuals volunteer to serve in the

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[238] 10 U.S.C. § 816.

[239] Keith M. Harrison, *Be All You Can Be (Without the Protection of the Constitution),* 8 Harv. BlackLetter J. 221, 239 (1991).

[240] *Id.*

[241] *Id.*

[242] 10 U.S.C. § 819.

[243] 10 U.S.C. § 818.

[244] 10 U.S.C. § 816.

[245] Harrison, *supra* note 239, at 241–43.

[246] *Id.*

[247] *Id.* at 241.

military, non-Indians who would be covered by an extension of tribal jurisdiction would be those who have opted in by choosing to have close ties to a tribal community and committing a crime in Indian country. Accordingly, just as the Court has allowed military courts-martial to use proceedings that do not offer defendants the full protection of the Bill of Rights, it should do the same for tribal courts exercising jurisdiction over non-Indians who have committed crimes against children in Indian country.

Even beyond Congress adopting VAWA safeguards to protect defendants' rights and the parallels between court-martial and tribal jurisdiction over non-Indians, tribes have strong incentives to safeguard tribal jurisdiction over non-Indians by carefully protecting non-Indian defendants' rights. Although some tribes have been exercising the SDVCJ for over two years, at this point no non-Indian defendant has challenged VAWA jurisdiction.[248] Perhaps this is because, as Louise Erdich put it,

> Tribal judges know they must make impeccable decisions. They know that they are being watched closely and must defend their hard-won jurisdiction. Our courts and lawyers cherish every tool given by Congress. Nobody wants to blow it by convicting a non-Indian without overwhelming, unshakable evidence.[249]

The Umatilla tribes even went so far as encouraging a defendant to challenge VAWA, offering to waive exhaustion requirements so that the defendant could immediately challenge his conviction in federal court. But the defendant declined to challenge the tribal jurisdiction.[250] Although a constitutional challenge may be inescapable at some point, the lack of challenge to date suggests that VAWA adequately protects defendant rights and so would an extension of VAWA to include jurisdiction over crimes against children.

Conclusion

The gap in criminal jurisdiction in Indian country has created the perfect environment for non-Indians to commit crimes against American Indians with impunity. Tribal members were in desperate need of VAWA legislation, which allows tribes to exercise SDVCJ over non-Indians with close ties to the tribe. However, a serious jurisdictional gap remains: Native children are frequently victims of violence and often involved in domestic violence cases, yet tribes remain unable to hold non-Indian defendants accountable for their crimes against children. Although either the state or federal government always has jurisdiction over these crimes, state and federal prosecutors have failed to adequately protect Native children. Exacerbating the problem, the policy shift towards protecting the privacy of American

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[248] *See* Fee, *supra* note 90; Leonhard, *supra* note 124.
[249] *See* Erdich, *supra* note 77.
[250] *See* Laird, *supra* note 9, at 52.

Indian families through ICWA has combined with the inability of tribes to prosecute non-Indians who commit crimes against children to grant these perpetrators a heightened privacy that protects them from criminal liability. To close this gap, Congress should extend tribal criminal jurisdiction to include non-Indian crimes committed against Native children in Indian country. If in extending tribal jurisdiction, Congress invokes tribal sovereign power, includes safeguards for defendants' rights, and requires defendants to have close ties to the tribe, the broadened tribal jurisdiction should be protected against challenges in Court.

It is too late to protect Billie Jo Rich's daughter from her father's outburst of violence. But it is not too late to protect the numerous other Native children, children who are extremely likely to experience violence. Congress should quickly act to do so.