

2013

## Domestic Violence in Indian Country: Improving the Federal Government's Response to This Grave Epidemic Note

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# CONNECTICUT LAW REVIEW

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VOLUME 45

JULY 2013

NUMBER 5

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## Note

### DOMESTIC VIOLENCE IN INDIAN COUNTRY: IMPROVING THE FEDERAL GOVERNMENT'S RESPONSE TO THIS GRAVE EPIDEMIC

JEANA PETILLO

*The pervasiveness of domestic violence against Native American women in Indian country is alarming. Pursuant to the doctrine of trust responsibility, the federal government has recently responded to the epidemic of domestic violence in Indian country by passing three pieces of legislation—18 U.S.C. § 117, the Tribal Law and Order Act of 2010, and the Violence Against Women Reauthorization Act of 2013. This Note discusses the shortcomings of these pieces of legislation and proposes two courses of action by which the federal government may improve its response to domestic violence in Indian country. First, this Note suggests that the federal government research and promote domestic violence response programs that have been effective among the general population. Second, the federal government should acknowledge and address the many infrastructural problems that prevent Native American victims from having meaningful access to domestic violence resources. If implemented, these recommendations will likely provide the federal government and tribal governments with the practical tools necessary to decrease domestic violence in Indian country. Ultimately, the purpose of this Note is to raise awareness about Native American women who have suffered and continue to suffer from domestic violence and to inspire discussions about the best possible solutions.*

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# DOMESTIC VIOLENCE IN INDIAN COUNTRY: IMPROVING THE FEDERAL GOVERNMENT'S RESPONSE TO THIS GRAVE EPIDEMIC

JEANA PETILLO\*

## I. INTRODUCTION

Standing Rock Sioux Reservation is one of approximately three hundred Indian reservations in the United States.<sup>1</sup> In the fall of 2009, eleven officers from the Bureau of Indian Affairs were responsible for the nine thousand residents on the Standing Rock Sioux Reservation.<sup>2</sup> Only one officer was available to respond to a call from a woman who had been raped by her husband in their home.<sup>3</sup> The officer did not have time to document evidence from the scene, including evidence of the blood and feces that covered the room where the rape occurred.<sup>4</sup> Two advocates from a local women's shelter arrived at the scene and took photographs of the room; however, the photographs would have likely been more valuable as evidence if they had been taken by a police officer.<sup>5</sup> Nevertheless, this woman fared better than most Native American<sup>6</sup> victims of domestic violence, who either do not report incidents of domestic violence or do not get an adequate response from law enforcement when they do make a report.<sup>7</sup>

The complex scheme of criminal jurisdiction in Indian country, created by the federal government, significantly impedes law enforcement's ability to respond to domestic violence. Whether a tribe, a state, or the federal government has the authority to respond to a crime in Indian country

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<sup>1</sup> NATIONAL PARK SERVICE, U.S. DEP'T OF THE INTERIOR, INDIAN RESERVATIONS IN THE CONTINENTAL UNITED STATES, <http://www.nps.gov/nagpra/DOCUMENTS/ResMapIndex.htm> (last visited Mar. 14, 2013).

<sup>2</sup> Kathy Dobie, *Tiny Little Laws: A Plague of Sexual Violence in Indian Country*, HARPER'S MAG., Feb. 2011, at 59.

<sup>3</sup> *Id.*

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

<sup>5</sup> *Id.*

<sup>6</sup> This Note uses the terms "Indian" and "Native American" interchangeably. The decision to do so was based on the interchangeable use of these terms in the literature and the statutes.

<sup>7</sup> AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 6 (2007).

depends on who committed the crime and where it occurred.<sup>8</sup> When a victim calls the police, the police immediately ask two questions: “Was it in our jurisdiction? Was the perpetrator Native American?”<sup>9</sup> Thus, as soon as a Native woman calls the police for help, her ability to protect herself and obtain justice is impaired by the jurisdictional scheme.

Unfortunately, the federal government’s response to domestic violence in Indian country has not adequately addressed the staggering rates of domestic violence against Native American women. For example, 18.2 per 1,000 Native American women are subject to domestic violence annually compared to 2.6 per 1,000 women overall.<sup>10</sup> This Note makes recommendations to improve the federal government’s response to domestic violence in Indian country based on an examination of three pieces of recent federal legislation: the Domestic Assault by an Habitual Offender statute, codified as 18 U.S.C. § 117; the Tribal Law and Order Act, codified as 25 U.S.C. § 2802; and the Violence Against Women Act Reauthorization of 2013, to be codified in scattered sections of 18 and 42 U.S.C.

Pursuant to 18 U.S.C. § 117, enacted in 2006, if a Native American has two prior tribal court convictions for domestic violence, and commits a third domestic violence offense, the federal government can prosecute that individual as an habitual domestic violence offender in federal court.<sup>11</sup> Federal prosecutors are actively pursuing convictions under 18 U.S.C. § 117;<sup>12</sup> however, this legislation falls short in four significant respects. First, 18 U.S.C. § 117 only responds to the most egregious domestic violence incidents and therefore does not address day-to-day incidents of domestic violence. Second, this legislation has only been used to prosecute Indian domestic violence offenders because prior to February 28,

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<sup>8</sup> JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 158 (2d ed. 2010).

<sup>9</sup> AMNESTY INT’L, *supra* note 7, at 8 (internal quotation marks omitted).

<sup>10</sup> Sarah Deer, *Domestic Violence in Indian Country*, INDIAN COUNTRY TODAY (Jan. 19, 2007), <http://indiancountrytodaymedianetwork.com/ictarchives/2007/01/19/deer-domestic-violence-in-indian-country-90234> (citing BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE DECLINED BETWEEN 1993 AND 2004 (2006), available at <http://www.bjs.gov/content/pub/press/ipvpr.cfm>).

<sup>11</sup> 18 U.S.C. § 117 (2006).

<sup>12</sup> For example, in *United States v. Cavanaugh*, the federal government prosecuted Roman Cavanaugh, Jr. under 18 U.S.C. § 117 after an incident where he repeatedly slammed his common-law wife’s head against the dashboard of their car and threatened to kill her before she jumped out of the car and hid in a field. 643 F.3d 592, 594 (8th Cir. 2011). Prior to this incident, Cavanaugh had been convicted of domestic assault in tribal court on three separate occasions. *Id.* Furthermore, the purpose of this Note is not to discredit the work that federal prosecutors are doing pursuant to 18 U.S.C. § 117. Federal prosecutors have tremendously helped Native American victims of domestic violence by prosecuting habitual Indian offenders. The purpose of this Note is to discuss some of the challenges associated with federal prosecutions of Native Americans and to recommend ways that the federal government can improve its response to domestic violence in Indian country in order to better protect and assist Native American victims of domestic violence.

2013, Congress did not recognize tribes' inherent authority to prosecute non-Indian domestic violence offenders.<sup>13</sup> Third, when the federal government prosecutes Indian country domestic violence cases, many victims and other tribal members cannot fully participate in the federal judicial process because of language barriers and the inordinate distances between reservations and federal courts.<sup>14</sup> Fourth, 18 U.S.C. § 117 only responds to abominable cases of domestic violence and does nothing to prevent domestic violence or rehabilitate domestic violence offenders.

In addition, the Tribal Law and Order Act ("TLOA"), enacted in 2010, focuses on improving the collaborative efforts of tribal, federal, and state governments in order to decrease violence against Native American women.<sup>15</sup> While the TLOA has the potential to improve the response to domestic violence in Indian country by empowering "tribal governments with the authority, resources, and information necessary to safely and effectively provide public safety in Indian country,"<sup>16</sup> Congress has failed to adequately fund the TLOA.<sup>17</sup> Consequently, many of the initiatives of the TLOA have yet to be enacted.<sup>18</sup>

Lastly, in February 2013, Congress passed a reauthorization of the Violence Against Women Act ("VAWA").<sup>19</sup> Initially, in January 2013, the House of Representatives failed to pass the Senate-approved VAWA Reauthorization of 2011.<sup>20</sup> However, the House of Representatives ultimately passed the Senate-approved VAWA Reauthorization of 2013, which substantially enhances tribes' ability to address domestic violence in Indian country.<sup>21</sup> In particular, the VAWA Reauthorization of 2013

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<sup>13</sup> See Ashley Parker, *House Renews Violence Against Women Measure*, N.Y. TIMES, Mar. 1, 2013, at A13 (reporting that the House voted in favor of the Senate-approved Violence Against Women Act, which permits tribes to exercise their criminal jurisdiction over non-Indian domestic violence offenders).

<sup>14</sup> Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 710–11 (2006).

<sup>15</sup> Tribal Law and Order Act of 2010, H.R. 725, 111th Congress § 202 (codified as amended at 25 U.S.C. § 2801 (Supp. 2010)).

<sup>16</sup> *Id.* § 202(b)(3).

<sup>17</sup> Rob Capriccioso, *Do Congress and Obama Really Support the Tribal Law and Order Act?*, INDIAN COUNTRY TODAY (Dec. 19, 2011), <http://indiancountrytodaymedianetwork.com/article/do-congress-and-obama-really-support-the-tribal-law-and-order-act%3F-68002>.

<sup>18</sup> *Id.*; see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-658R, TRIBAL LAW AND ORDER ACT 3–4 (2011) (reporting that none of the surveyed tribes have exercised their increased sentencing authority under the TLOA primarily due to difficulties implementing other pre-requisites under the TLOA).

<sup>19</sup> Parker, *supra* note 13.

<sup>20</sup> S. 1925, 112th Cong. § 904 (2011); Jamil Smith, *Congress Lets Violence Against Women Act Wither Away*, MSNBC.COM (Jan. 2, 2013, 7:18 PM), <http://tv.msnbc.com/2013/01/02/congress-lets-violence-against-women-act-wither-away/>.

<sup>21</sup> S. 47, 113th Cong. § 904 (2013); AM. BAR ASS'N, [http://www.americanbar.org/advocacy/governmental\\_legislative\\_work/priorities\\_policy/access\\_to\\_legal\\_services/vawa\\_home.html](http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/access_to_legal_services/vawa_home.html) (last updated Mar. 5, 2013).

recognizes the inherent authority of tribal governments to prosecute non-Indians who commit domestic violence against Indians in Indian country.<sup>22</sup> Considering the fact that non-Indians commit 85% of all violent crimes against Native women,<sup>23</sup> Congress's recognition of tribes' inherent authority to exercise criminal jurisdiction over non-Indian domestic violence offenders is an enormous step in improving tribes' ability to address domestic violence in Indian country.

Nevertheless, the epidemic of domestic violence in Indian country continues to be pervasive. In order for the federal government to effectively address domestic violence in Indian country, this Note asserts that the federal government must do two things. First, the federal government's response must concentrate on promoting programs that have been proven to prevent and deter domestic violence generally. Second, the federal government's response must address the infrastructural problems, including access to police, medicine, and transportation, which impede Native American victims from seeking domestic violence resources on a daily basis.

Before delving into the substance of this Note, however, it is important to acknowledge that the federal government has an obligation to assist Indian tribes pursuant to the doctrine of trust responsibility. The trust relationship originated between the federal government and the Indian tribes in the late 1700s and 1800s when the federal government entered into various treaties with the Indian tribes.<sup>24</sup> The treaties provided that the Indian tribes would relinquish significant amounts of their land to the federal government, and in return, the federal government would respect the tribes' independence, protect the tribes, and provide supplies and services to the tribes.<sup>25</sup> Thus, pursuant to the promises that the federal government made to Indian tribes long ago, the federal government has a continuing duty to address domestic violence in Indian country.<sup>26</sup>

Part II of this Note discusses the historical development of domestic violence among Native Americans. This discussion primarily focuses on the effect of the European colonization of the United States on domestic violence in Indian country. Additionally, Part II explores the

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<sup>22</sup> S. 47, 113th Cong. § 904 (2013); see also Matthew L.M. Fletcher, *Biden and Obama Remarks at VAWA Signing Ceremony*, TURTLE TALK (Mar. 8, 2013, 11:03 AM), <http://turtletalk.wordpress.com/2013/03/08/biden-and-obama-remarks-at-vawa-signing-ceremony/> (quoting President Obama at the signing ceremony: "Tribal governments have an inherent right to protect their people, and all women deserve the right to live free from fear").

<sup>23</sup> Rebecca A. Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CALIF. L. REV. 185, 189 (2008).

<sup>24</sup> STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 29–30 (4th ed. 2012).

<sup>25</sup> *Id.* at 30.

<sup>26</sup> See *id.* at 31 ("This principle—that the federal government has a duty to fulfill its promises—is known as the doctrine of trust responsibility." (emphasis omitted)).

contemporary crisis of domestic violence in Indian country.

Part III outlines federal, state, and tribal jurisdictions and provides a comprehensive overview of the complex scheme of criminal jurisdiction as well as a brief review of civil jurisdiction in Indian country. This Part also exposes the difficulties that the jurisdictional schemes pose for tribes when responding to domestic violence.

Part IV reviews the federal government's current response to domestic violence in Indian country under 18 U.S.C. § 117, the TLOA, and the VAWA Reauthorization of 2013. Thereafter, Part IV analyzes the fundamental problems with the federal prosecution of Indian country crimes and explains how these fundamental problems contribute to the shortcomings of the federal government's response to domestic violence in Indian country.

Finally, Part V of this Note asserts that in order for the federal government to effectively address the epidemic of domestic violence in Indian country, its responses must: (1) concentrate on promoting programs that have been proven to prevent and deter domestic violence generally; and (2) address the infrastructural problems, including access to police, medicine, and transportation, which preclude Native American victims from accessing crucial domestic violence resources.

## II. DOMESTIC VIOLENCE IN INDIAN COUNTRY: THE PAST AND THE PRESENT

I was five months pregnant and unusually big! I didn't want to be intimate with him. He became extremely angry about the rejection and dragged me into his bedroom, beating me severely, stripping my clothes, and raping me. I was concerned about my unborn child, because he punched me in the stomach repeatedly. I was so badly bruised that I was unable to move. After raping me, he hid my clothes at his mother's house . . . . He locked me in his room for several days. . . . A few times a day he would escort me to the bathroom. . . . I realized that he was waiting for the visible bruises to disappear before he finally let me go. His final remark as he handed me my clothes was the threat, "Don't forget, we're still married! You are still my wife and have to behave like one!"<sup>27</sup>

Many experts believe that violence against Native American women

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<sup>27</sup> ANONYMOUS, *From a Woman Who Experienced Violence*, in SHARING OUR STORIES OF SURVIVAL: NATIVE WOMEN SURVIVING VIOLENCE 105, 107–08 (Sarah Deer et al. eds., 2008).

became an issue during the colonization period.<sup>28</sup> Prior to colonization, violence against Native American women was uncommon and was not tolerated.<sup>29</sup> Moreover, tribes viewed women as sacred, and honored and respected them for their ability to create life.<sup>30</sup> However, throughout the European colonization of Native American territories, the role and status of Native American women changed and domestic violence became more common.<sup>31</sup>

As European settlers claimed Native American territories, they insisted on dealing with Native American men,<sup>32</sup> and they raped and killed Native American women in order to seize land and force assimilation.<sup>33</sup> During the Trail of Tears and the Long Walk, settlers committed violent acts against women, acts described as “an integral part of conquest and colonization.”<sup>34</sup> The repeated exposure that Native Americans had to the settlers’ values led to the belief of some Native men that they have “a right to certain entitlements in their relationships with women that allow them to enforce their viewpoints and control a woman’s behavior.”<sup>35</sup>

Subsequently, the United States government sought to compel Native Americans to assimilate into non-Indigenous society.<sup>36</sup> In the late 1800s, the federal government removed Native American children from their families and required them to attend boarding schools run by the Bureau of Indian Affairs.<sup>37</sup> Native American children were subjected to physical and sexual violence at the boarding schools and hundreds of Native American children died because of inadequate food and medical care.<sup>38</sup> As recently as the 1970s, the Indian Health Services sterilized thousands of Native American women<sup>39</sup> without their free and informed consent.<sup>40</sup> These assimilation efforts resulted in the loss of traditional cultural values and the internalization of oppression<sup>41</sup> and, thus, likely contributed to the

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<sup>28</sup> VICTORIA YBANEZ, *Domestic Violence: An Introduction to the Social and Legal Issues for Native Women*, in SHARING OUR STORIES OF SURVIVAL: NATIVE WOMEN SURVIVING VIOLENCE 49, 50 (Sarah Deer et al. eds., 2008).

<sup>29</sup> *Id.*; see also AMNESTY INT’L, *supra* note 7, at 16 (stating that historically, violence against Native women was rare and severely punished when it did occur).

<sup>30</sup> JENNY GILBERG ET AL., ADDRESSING DOMESTIC VIOLENCE IN INDIAN COUNTRY: INTRODUCTORY MANUAL 3 (2003); see also AMNESTY INT’L, *supra* note 7, at 16 (noting that “prior to colonization women often held esteemed positions in society”).

<sup>31</sup> AMNESTY INT’L, *supra* note 7, at 16; GILBERG, *supra* note 30, at 3–4.

<sup>32</sup> AMNESTY INT’L, *supra* note 7, at 16.

<sup>33</sup> GILBERG, *supra* note 30, at 5.

<sup>34</sup> AMNESTY INT’L, *supra* note 7, at 16.

<sup>35</sup> GILBERG, *supra* note 30, at 5.

<sup>36</sup> AMNESTY INT’L, *supra* note 7, at 16.

<sup>37</sup> *Id.*

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

<sup>39</sup> GILBERG, *supra* note 30, at 7. Approximately 42% of Native women were sterilized. *Id.*

<sup>40</sup> AMNESTY INT’L, *supra* note 7, at 17.

<sup>41</sup> GILBERG, *supra* note 30, at 6.

contemporary domestic violence crisis in Indian country.

Today, domestic violence is a major criminal justice and public health issue throughout the United States.<sup>42</sup> As an illustration, 22.1% of women and 7.4% of men in a national survey reported that they had been physically assaulted by a spouse or partner.<sup>43</sup> While the national rates of domestic violence are dismaying, domestic violence in Indian country is even more pervasive than in non-Indian country.<sup>44</sup> In fact, Native American women are seven times more likely than all other women to be victims of domestic violence.<sup>45</sup>

According to an Assistant Attorney General of the United States, “[v]iolence against Native women has reached epidemic rates.”<sup>46</sup> This is evidenced by the National Institute of Justice’s findings that three out of five Native women have been assaulted by their spouses or intimate partners, one-third of Native women will be raped during their lifetimes, and on some reservations, Native American women are murdered at a rate ten times higher than the national average.<sup>47</sup> In addition, Congress has found that Native women experience the violent crime of battering at a rate of 23 per 1,000, compared with 8 per 1,000 among Caucasian women, and between 1979 and 1992, 75% of Native women homicides were committed by family members or acquaintances.<sup>48</sup> Moreover, tribal leaders and authorities report a cycle of escalating violence, including incidents of physical beatings that lead to severe physical injury or death, violence that is simply not being adequately addressed.<sup>49</sup>

While colonization and the federal government’s assimilation efforts certainly contributed to the outgrowth of domestic violence in Indian country, the staggering rates of domestic violence against Native American women today are attributable, at least in part, to the lack of infrastructure on many reservations and the complex scheme of criminal jurisdiction. Due to the lack of infrastructure in many parts of Indian country, many incidents of domestic violence are likely unreported or undocumented because, for example, victims are unable to obtain assistance from the

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<sup>42</sup> PATRICIA TJADEN & NANCY THOENNES, NAT’L INST. OF JUSTICE & CTRS. FOR DISEASE CONTROL & PREVENTION, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN v (2000).

<sup>43</sup> *Id.* at 26.

<sup>44</sup> Deer, *supra* note 10.

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

<sup>46</sup> Letter from Ronald Weich, Assistant Attorney General, to Joseph R. Biden, Jr., President United States Senate (July 21, 2011) [hereinafter Letter from Weich].

<sup>47</sup> *Id.*

<sup>48</sup> Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109–162, § 901, 119 Stat. 2960 (2006).

<sup>49</sup> *Id.*

police<sup>50</sup> or are unable to get to a medical provider.<sup>51</sup> As a result, numerous perpetrators are never held accountable. Further, the scheme of criminal jurisdiction has caused significant confusion about who should respond to crimes.<sup>52</sup> Although the VAWA Reauthorization of 2013 recognizes tribes' inherent authority to exercise criminal jurisdiction over all domestic violence offenders within Indian country,<sup>53</sup> this major change in criminal jurisdiction still needs to be implemented and coordinated with federal and state governments.

### III. MAKING SENSE OF TRIBAL, STATE, AND FEDERAL JURISDICTIONS WITHIN INDIAN COUNTRY

*"If it's a parcel of property in a rural area, it may take weeks or months to determine if it's Indian land or not; investigators usually cannot determine this, they need attorneys to do it by going through court and title records to make a determination."*<sup>54</sup>

When the tribes were independent nations, they had inherent sovereign power to govern their people and their territory.<sup>55</sup> However, since the time of colonization, federal statutes, treaties, and Supreme Court decisions have limited tribal sovereignty and thus restricted tribes' power to govern Indians and Indian country.<sup>56</sup> Pursuant to a series of federal laws, the federal government, a state, or a tribe may have exclusive or concurrent jurisdiction over a particular criminal defendant.<sup>57</sup> Accordingly, whether

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<sup>50</sup> See Dobie, *supra* note 2, at 61 (describing an incident where a sexual assault was reported to the police and the officer drove past the house without stopping to provide assistance, and then claimed that no one was at the residence).

<sup>51</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-29, INDIAN HEALTH SERVICE: CONTINUED EFFORTS NEEDED TO HELP STRENGTHEN RESPONSE TO SEXUAL ASSAULTS AND DOMESTIC VIOLENCE I (2011) (stating that it can take people in rural areas hours or sometimes days to get to a medical provider).

<sup>52</sup> See *infra* Part III.D (discussing the confusion that can arise when it is unclear as to whether the federal government or tribe has jurisdiction over an issue).

<sup>53</sup> S. 47, 113th Cong. § 904 (2013). Prior to the restoration and recognition of tribes' inherent authority to exercise criminal jurisdiction over non-Indian domestic violence offenders, many legal scholars argued that unless changes were made to the jurisdictional scheme, domestic violence in Indian country would not be effectively addressed. See Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL'Y 121, 122 (2004) (stating that the federal and state legal systems cannot adequately address sexual violence against Native women because of the need for culturally relevant consequences, including local accountability and community awareness); Marie Quasius, Note, *Native American Rape Victims: Desperately Seeking an Oliphant-Fix*, 93 MINN. L. REV. 1902, 1907, 1923–24 (2009) (arguing that the jurisdictional confusion under the then-current legal structure resulted in federal, state, and tribal failure to prosecute); Letter from Weich, *supra* note 46 (discussing the lack of federal resources available to address violence against Native women).

<sup>54</sup> AMNESTY INT'L, *supra* note 7, at 34 (quoting an Assistant United States Attorney).

<sup>55</sup> COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 204 (Nell Jessup Newton ed., 2005).

<sup>56</sup> *Id.* at 206–07.

<sup>57</sup> 18 U.S.C. §§ 1152, 1153, 1162 (2006).

the federal government, a state, or a tribe has the power to prosecute a crime in Indian country depends on who committed the crime (Indian or non-Indian) and where the crime was committed (Indian country, a state that has adopted Public Law 280, or a state that has not adopted Public Law 280).<sup>58</sup>

#### A. Federal Jurisdiction

The General Crimes Act<sup>59</sup> and the Major Crimes Act<sup>60</sup> define the federal government's jurisdiction over crimes committed in Indian country. In 1834, Congress passed the General Crimes Act, which extended federal criminal laws to "'interracial' crimes"<sup>61</sup> committed within Indian country. The term "interracial crimes" in this context refers to "crimes committed by an Indian against a non-Indian, and by a non-Indian against an Indian."<sup>62</sup> However, if an Indian defendant is punished under the tribe's legal system, then the federal government no longer has authority to punish the Indian defendant under the General Crimes Act.<sup>63</sup> Additionally, the General Crimes Act did not give the federal government jurisdiction over crimes committed between Indians.<sup>64</sup>

Thus, until the passage of the Major Crimes Act in 1885, tribes retained exclusive criminal jurisdiction over crimes committed between Indians.<sup>65</sup> Congress passed the Major Crimes Act in order to extend the federal government's authority to certain designated offenses that occur between Indians within Indian country.<sup>66</sup> Accordingly, tribes have concurrent jurisdiction with the federal government over offenses that occur between Indians and are designated in the Major Crimes Act.<sup>67</sup> The designated offenses include "murder, manslaughter, kidnapping, . . . assault with a dangerous weapon, [and] assault resulting in serious bodily injury."<sup>68</sup> Since the Major Crimes Act only covers felonies, tribes have retained exclusive jurisdiction over non-felony crimes that occur between Indians.

Despite the concurrent jurisdiction that tribes have with the federal government under the Major Crimes Act, many tribes do not prosecute offenses under the Act either because they mistakenly believe that they do

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<sup>58</sup> RICHLAND & DEER, *supra* note 8, at 158.

<sup>59</sup> 18 U.S.C. § 1152 (2006).

<sup>60</sup> *Id.* § 1153.

<sup>61</sup> PEVAR, *supra* note 24, at 129.

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

<sup>63</sup> 18 U.S.C. § 1152 (2006).

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

<sup>65</sup> PEVAR, *supra* note 24, at 129.

<sup>66</sup> 18 U.S.C. § 1153 (2006).

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

<sup>68</sup> *Id.*

not have the authority or because they believe that the federal government will handle the offenses.<sup>69</sup> Moreover, many tribes do not prosecute offenses covered by the Major Crimes Act because the Indian Civil Rights Act does not permit tribes to impose a prison sentence greater than three years for any one offense,<sup>70</sup> which often makes prosecuting offenses under the Major Crimes Act impractical.<sup>71</sup>

### B. *State Jurisdiction*

States do not have jurisdiction over crimes that are committed by Indians or against Indians within Indian country unless Congress specifically grants states jurisdiction over such crimes.<sup>72</sup> In 1953, Congress passed Public Law 280,<sup>73</sup> which transferred federal jurisdiction over crimes occurring in Indian country to certain named states.<sup>74</sup> Public Law 280 mandated that California, Minnesota, Nebraska, Oregon, and Wisconsin assume the federal government's jurisdiction over the tribes in their respective states.<sup>75</sup> Subsequently, when Alaska became a state, it was also required to assume the federal government's jurisdiction over tribes.<sup>76</sup> In addition, Public Law 280 gave all other states the option to assume full or partial jurisdiction over tribes in their respective states.<sup>77</sup> In mandatory Public Law 280 states, it is the state and not the federal government that has jurisdiction to prosecute crimes committed by non-Indians in Indian country and crimes committed by Indians in Indian country that fall under the Major Crimes Act.<sup>78</sup>

While the purpose of Public Law 280 may have been to improve law enforcement within Indian country,<sup>79</sup> its primary effect has been to further complicate tribal criminal jurisdiction. Many of the states that were required to assume the federal government's jurisdiction over tribes were

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<sup>69</sup> CARRIE E. GARROW & SARAH DEER, 2 TRIBAL CRIMINAL LAW AND PROCEDURE 87 (Jerry Gardner ed., 2004).

<sup>70</sup> See Protection of Indian Arts and Crafts Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 (amending language of 25 U.S.C. § 1302(7) to allow tribal courts to impose sentences of three years or less for certain offenses). Prior to the Tribal Law and Order Act of 2010, which amended the Indian Civil Rights Act, 25 U.S.C. § 1302(7) (2006), tribal courts only had authority to impose sentences of one year of imprisonment and fines not greater than \$5,000.

<sup>71</sup> GARROW & DEER, *supra* note 68, at 87.

<sup>72</sup> COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 55, at 501, 537.

<sup>73</sup> Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified at 18 U.S.C. § 1162 and 28 U.S.C. § 1360).

<sup>74</sup> 18 U.S.C. § 1162 (2006).

<sup>75</sup> COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 55, at 544 n.305.

<sup>76</sup> *Id.* at 544 n.306; see also Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 700 (2006).

<sup>77</sup> Goldberg & Champagne, *supra* note 76, at 699-701.

<sup>78</sup> 18 U.S.C. § 1162 (2006); see also COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 55, at 566.

<sup>79</sup> COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 55, at 561.

frustrated by the mandate in the absence of federal funding.<sup>80</sup> Not only did Public Law 280 states lack federal funding, they did not have the federal resources that non-Public Law 280 states had, including the Federal Bureau of Investigation, the Bureau of Indian Affairs, and the United States Attorney's Office.<sup>81</sup> In 1974, according to the President of the National Congress of American Indians, Wendell Chino, "[o]n those reservations where states have assumed jurisdiction under the provisions of Public Law 280, lawlessness and crimes have substantially increased and [the reservations] have become known as no man's land."<sup>82</sup>

### C. Tribal Jurisdiction

In general, as quasi-sovereign bodies, tribes only have criminal jurisdiction over Indians,<sup>83</sup> and cannot try or punish non-Indians who commit crimes against Indians in Indian country.<sup>84</sup> However, pursuant to the VAWA Reauthorization of 2013, tribes can exercise criminal jurisdiction over non-Indians who commit domestic violence offenses against Indians within Indian country.<sup>85</sup> Prior to the passage of the VAWA Reauthorization of 2013, tribes could not exercise criminal jurisdiction over non-Indian domestic violence offenders in Indian country because the Supreme Court, in *Oliphant v. Suquamish Indian Tribe*,<sup>86</sup> limited tribal criminal jurisdiction to Indians.<sup>87</sup> Yet in *Oliphant*, the Court explained that Congress has the authority to restore tribal criminal jurisdiction over non-Indians.<sup>88</sup> Thus, although Congress has currently only restored tribal criminal jurisdiction over non-Indians for domestic violence offenses, Congress does have the authority to further restore tribal jurisdiction over other crimes.

With respect to tribal criminal jurisdiction over domestic violence offenses, the VAWA Reauthorization of 2013 amended the Indian Civil

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<sup>80</sup> See Ada Pecos Melton & Jerry Gardner, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, AM. INDIAN DEV. ASS'N. (2004), <http://aidainc.net/Publications/pl280.htm> (discussing the "lawlessness" that has resulted from attempts to implement Public Law 280 despite insufficient financial resources).

<sup>81</sup> See *id.* (noting that the delegation of jurisdiction was accompanied by neither appropriate funding nor resources on par with that of the federal government and its agencies).

<sup>82</sup> Goldberg & Champagne, *supra* note 75, at 699 (quoting 1 NAT'L AM. INDIAN COURT JUDGES ASS'N, JUSTICE AND THE AMERICAN INDIAN 28 (1974)).

<sup>83</sup> COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 55, at 226.

<sup>84</sup> *Id.* (quoting *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (holding that "Indian tribes do not have inherent jurisdiction to try and to punish non-Indians")).

<sup>85</sup> S. 47, 113th Cong. § 904 (2013).

<sup>86</sup> 435 U.S. 191 (1978).

<sup>87</sup> *Id.* at 195.

<sup>88</sup> See *id.* at 212 (emphasizing that the "prevalence of non-Indian crime on today's reservations . . . are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians")

Rights Act of 1968 to permit tribes to exercise “special domestic violence criminal jurisdiction over all persons.”<sup>89</sup> Accordingly, tribes will be able to prosecute non-Indians who commit domestic violence against Indians. Congress’s recognition of tribes’ inherent authority to protect Indians from domestic violence was imperative in improving the response to domestic violence in Indian country because non-Indians commit at least 85% of all violent crimes against Native women.<sup>90</sup> Moreover, the recognition of tribal jurisdiction over non-Indian domestic violence offenders was necessary because, as of 2010, 46% of people living on reservations were non-Indians and 59% of Indian women were married to non-Indian men.<sup>91</sup> Under the new law, if a non-Indian commits a crime in Indian country, the tribe and the federal government, or the state in Public Law 280 states, will have concurrent jurisdiction.<sup>92</sup>

In addition to the general limits on tribal criminal jurisdiction, the Supreme Court has also imposed limits on tribal civil jurisdiction over nonmembers in Indian country.<sup>93</sup> For example, in *Strate v. A-1 Contractors*,<sup>94</sup> the Court asserted, “[o]ur case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances.”<sup>95</sup> More recently, in *Nevada v. Hicks*,<sup>96</sup> the Court concluded that a tribe did not have civil jurisdiction over the conduct of a nonmember that occurred on a tribal member’s land within Indian country.<sup>97</sup>

Regarding tribal civil jurisdiction over domestic violence in Indian country specifically, Congress has recognized that tribes have civil

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<sup>89</sup> S. 47, 113th Cong. § 904 (2013).

<sup>90</sup> See Hart & Lowther, *supra* note 23, at 189 (“Over 85% of perpetrators in rape and sexual assault against Native American women are described by their victims as being non-Indian.”).

<sup>91</sup> Matthew L.M. Fletcher, *NCAI Press Release on VAWA Reauthorization Passage*, TURTLE TALK (Feb. 28, 2013, 1:26 PM), <http://turtletalk.wordpress.com/2013/02/28/ncai-press-release-on-vawa-reauthorization-passage/> (citing U.S. Census Bureau, Census 2010).

<sup>92</sup> S. 47, 113th Cong. § 904(b)(2) (2013). Prior to the passage of the VAWA Reauthorization of 2013, neither the federal government nor Public Law 280 states were required to respond to domestic violence incidents committed by a non-Indian in Indian country. See Hart & Lowther, *supra* note 23, at 203 (explaining that there was a jurisdictional gap that may result in a tribe not having jurisdiction over a non-Indian and the federal government having jurisdiction but choosing not to prosecute). Despite the fact that the federal government and Public Law 280 states were not required to respond, in 2005 Congress stated that “Indian tribes require additional criminal justice and victim services resources to respond to violent assaults against women; and . . . the unique legal relationship of the United States to Indian tribes creates a Federal trust responsibility to assist tribal governments in safeguarding the lives of Indian women.” Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 901, 119 Stat. 3078.

<sup>93</sup> COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 55, at 232.

<sup>94</sup> 520 U.S. 438 (1997).

<sup>95</sup> *Id.* at 445.

<sup>96</sup> 533 U.S. 353 (2001).

<sup>97</sup> *Id.* at 364.

jurisdiction over protection orders.<sup>98</sup> In particular, full faith and credit is required for a protection order that is issued by a state or Indian tribe.<sup>99</sup> But in *Martinez v. Martinez*,<sup>100</sup> the District Court for the Western District of Washington held that the full faith and credit statute did not authorize protective orders against nonmembers.<sup>101</sup> However, pursuant to the VAWA Reauthorization of 2013, tribal courts can enforce protection orders against non-Indians, regardless of whether the order originated in Indian country or outside of Indian country.<sup>102</sup> Nevertheless, the extent to which tribal civil jurisdiction will be used to address domestic violence in Indian country is not yet known.

#### D. *Jurisdictional Impediments to Tribal Responses to Domestic Violence*

Prior to the VAWA Reauthorization of 2013, tribes had criminal jurisdiction over Indians, but not non-Indians, who committed domestic violence offenses within Indian country.<sup>103</sup> Thus, if a non-Indian committed a crime of violence against an Indian, including domestic assault, only the federal government (or Public Law 280 states) had jurisdiction over the non-Indian perpetrator.<sup>104</sup> However, pursuant to the new scheme of criminal jurisdiction, tribal authorities can exercise criminal jurisdiction over non-Indian domestic violence offenders.<sup>105</sup> Still, this major change in tribal criminal jurisdiction needs to be successfully implemented and coordinated with federal and state governments, which could take a substantial amount of time and resources.

Under the former scheme of criminal jurisdiction, where tribes did not have jurisdiction over non-Indian domestic violence offenders, there was often confusion and uncertainty surrounding which government was responsible for responding to the crime because jurisdiction depended on who committed the crime, the type of crime, and where the crime was

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<sup>98</sup> MATTHEW L.M. FLETCHER, AM. CONST. SOC'Y FOR LAW & POL'Y, ADDRESSING THE EPIDEMIC OF DOMESTIC VIOLENCE IN INDIAN COUNTRY BY RESTORING TRIBAL SOVEREIGNTY 3 (2009).

<sup>99</sup> 18 U.S.C. § 2265(a) (2006).

<sup>100</sup> *Martinez v. Martinez*, No. C08-5503 FDB, 2008 WL 5262793 (W.D. Wash. Dec. 16, 2008).

<sup>101</sup> *Id.* at \*4; see also FLETCHER, *supra* note 97, at 3 n.16 (explaining that the court in *Martinez* rejected the tribal court's attempt to issue and enforce a protection order against a nonmember).

<sup>102</sup> S. 47, 113th Cong. § 905 (2013); Press Release, U.S. Dep't of the Interior, Salazar, Washburn Commend Passage of Violence Against Women Act (Feb. 28, 2013), available at <http://www.doi.gov/news/pressreleases/salazar-washburn-commend-passage-of-violence-against-women-act.cfm>.

<sup>103</sup> See *supra* Part III.C.

<sup>104</sup> See *Oliphant v. Suquamish*, 435 U.S. 191, 212 (1978) (holding that tribes do not have criminal jurisdiction over non-Indians).

<sup>105</sup> S. 47, 113th Cong. § 904 (2013).

committed.<sup>106</sup> Sometimes the confusion was so great that no government would respond, which deprived victims of legal protection and allowed offenders, especially non-Indian offenders, to get away with crimes of domestic violence.<sup>107</sup> As a sexual assault support worker in Oklahoma explained, “[w]hen an emergency call comes in, the sheriff will say ‘but this is Indian land.’ Tribal police will show up and say the reverse. Then, they just bicker and don’t do the job.”<sup>108</sup> Similarly, a state prosecutor in South Dakota acknowledged that the complex jurisdiction “means that some crimes just ‘fall through the cracks.’”<sup>109</sup>

In cases where both a tribe and the federal government have jurisdiction, such as cases involving Indian habitual domestic assault offenders, various obstacles prevent tribes from pursuing adequate investigations. Some tribal police officers are hesitant to preserve evidence at crime scenes because federal authorities have chosen not to pursue cases where the tribal police had already started an investigation.<sup>110</sup> Moreover, when federal prosecutors decide not to prosecute a case, they rarely hand the evidence over to tribal authorities.<sup>111</sup> Thus, tribal authorities are unable to pursue the case. In some cases, the federal authorities do not inform tribes that they have decided not to prosecute a case until after the tribe’s statute of limitations has run out.<sup>112</sup> In other cases, the federal authorities never tell the tribe that they have declined to prosecute a case.<sup>113</sup> Tribes have become so frustrated by the federal government’s lack of communication, failure to prosecute cases, and poor police work, that some tribal members have sued the federal government.<sup>114</sup>

In the past, jurisdictional problems have commonly arisen in cases

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<sup>106</sup> AMNESTY INT’L, *supra* note 7, at 27. For example, although a tribe has exclusive criminal jurisdiction over a domestic assault that occurs between two Indians, the tribe and the federal government have concurrent jurisdiction over domestic assault that occurs between two Indians if the domestic assault also falls within a designated offense under the Major Crimes Act, such as assault with the intent to commit murder, assault with a dangerous weapon, or assault resulting in serious bodily injury. 18 U.S.C. § 1153 (2006).

<sup>107</sup> AMNESTY INT’L, *supra* note 7, at 27–28.

<sup>108</sup> *Id.* at 33.

<sup>109</sup> *Id.* at 62.

<sup>110</sup> *Id.* at 42.

<sup>111</sup> Timothy Williams, *High Crime but Fewer Prosecutions on Indian Land*, N.Y. TIMES, Feb. 21, 2012, at A14; *see also* Dobie, *supra* note 2, at 64 (quoting a public defender who said, “[the federal government] will not prosecute, yet they won’t send the information down so the tribe can prosecute. We never, ever see the results of a rape kit”).

<sup>112</sup> Williams, *supra* note 111.

<sup>113</sup> AMNESTY INT’L, *supra* note 7, at 71 (“One [Native American] woman I work with told me that she reported her sexual assault two years ago and that she didn’t know if the case had been investigated or prosecuted. I researched the case and discovered it had been declined, but no one had told the woman.”).

<sup>114</sup> Williams, *supra* note 111.

where it was clear that the federal government had exclusive jurisdiction, namely when a non-Indian committed a crime against an Indian, because tribes were unable to ensure that the federal government acted. Despite the fact that only the federal government could prosecute non-Indian offenders, United States Attorneys' Offices declined to prosecute 50% of the 9,000 cases that tribes filed between 2005 and 2009.<sup>115</sup> Thus, in approximately 4,500 cases, the alleged perpetrators, including non-Indians and Indians, did not face any consequences and remained free to commit crimes in the future.<sup>116</sup> Consequently, in the cases that the federal government declined to prosecute involving non-Indian alleged perpetrators, the Native American victims did not have any criminal recourse.<sup>117</sup> Although tribes can now exercise criminal jurisdiction over non-Indian domestic violence offenders, tribes and the federal government have concurrent jurisdiction over such matters<sup>118</sup> and, therefore, they must work together to ensure that non-Indian domestic violence offenders are no longer immune from prosecution.<sup>119</sup>

#### IV. THE FEDERAL GOVERNMENT'S RESPONSE TO DOMESTIC VIOLENCE IN INDIAN COUNTRY

*"[A] lot of our people on Standing Rock are grieving . . . . Grieving because of being sexually abused, physically abused. The people think there's no justice. They feel hopeless. They're in pain, and you can't tell the bigwigs that."*<sup>120</sup>

##### A. 18 U.S.C. § 117, Tribal Law and Order Act, and Violence Against Women Act Reauthorization of 2013

Since 2006, Congress has enacted three pieces of legislation—the Domestic Assault by an Habitual Offender statute, codified as 18 U.S.C. § 117; the Tribal Law and Order Act, codified as 25 U.S.C. § 2802; and the

<sup>115</sup> Juana Majel-Dixon, *A Critical Time to Protect Native Women and Advance Tribal Jurisdiction*, 16 RESTORATION OF NATIVE SOVEREIGNTY & SAFETY FOR NATIVE WOMEN, Summer 2011, at 4. The 9,000 cases that were filed include crimes committed by non-Indians and Indians. Felicia Fonseca & Sudhin Thanawala, *AP IMPACT: US Declines to Try Half Native Crimes*, BOSTON.COM (May 31, 2011), [http://www.boston.com/news/nation/articles/2011/05/31/ap\\_impact\\_us\\_declines\\_to\\_try\\_half\\_native\\_crimes/?page=full](http://www.boston.com/news/nation/articles/2011/05/31/ap_impact_us_declines_to_try_half_native_crimes/?page=full).

<sup>116</sup> Majel-Dixon, *supra* note 115, at 4. The statistics do not specify how many of the 4,500 unprosecuted cases were allegedly committed by non-Indians as opposed to Indians.

<sup>117</sup> *Tribal Priorities for the Reauthorization of the Violence Against Women Act*, 16 RESTORATION OF NATIVE SOVEREIGNTY & SAFETY FOR NATIVE WOMEN, Summer 2011, at 6.

<sup>118</sup> S. 47, 113th Cong. § 904 (2013).

<sup>119</sup> Fletcher, *supra* note 22 ("Indian Country has some of the highest rates of domestic abuse in America. And one of the reasons is that when Native American women are abused on tribal lands by an attacker who is not Native American, the attacker is immune from prosecution by tribal courts." (quoting President Obama) (internal quotation marks omitted)).

<sup>120</sup> Dobie, *supra* note 2, at 64.

Violence Against Women Reauthorization Act of 2013, to be codified in scattered sections of 18 and 42 U.S.C.—in its efforts to address domestic violence in Indian country. Beginning in 2006, Congress passed the Violence Against Women and Department of Justice Reauthorization Act of 2005, which contained 18 U.S.C. § 117, known as the Domestic Violence by an Habitual Offender legislation.<sup>121</sup> Pursuant to 18 U.S.C. § 117, a person who commits a domestic assault within the territorial jurisdiction of the United States or Indian country, and who has two prior convictions for domestic assault, is guilty of domestic assault by an habitual offender and can be prosecuted by the federal government.<sup>122</sup> Significantly, the federal government has only used 18 U.S.C. § 117 to prosecute habitual Indian offenders because prior to March 2013, non-Indian domestic violence offenders could not be prosecuted in tribal courts. The legislative history reveals that this statute was enacted to protect Native American women in Indian country from domestic violence.<sup>123</sup> Specifically, Congress intended to allow uncounseled tribal court convictions to count as predicate offenses for the purposes of a federal prosecution because the Major Crimes Act does not permit the federal government to prosecute domestic violence cases unless they involve serious bodily injury or death.<sup>124</sup>

The constitutionality of 18 U.S.C. § 117 was challenged in two recent cases.<sup>125</sup> In both cases, the courts held that the statute was constitutional.<sup>126</sup> In the first case, *United States v. Cavanaugh*,<sup>127</sup> Roman Cavanaugh Jr., a member of the Spirit Lake Sioux Tribe, had been convicted of misdemeanor domestic abuse offenses on three different occasions in the Spirit Lake Tribal Court.<sup>128</sup> On all three occasions, Cavanaugh was advised of his right to retain counsel at his own expense but he chose to not to do so.<sup>129</sup> The federal case arose when Cavanaugh and his common law wife, Amanda Luedtke, were together in a car and Cavanaugh, who was driving, “grabbed [her] head, jerked it back and forth, and slammed it into

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<sup>121</sup> Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 909, 119 Stat. 2960.

<sup>122</sup> 18 U.S.C. § 117(a) (2006).

<sup>123</sup> *United States v. Cavanaugh*, 680 F. Supp. 2d 1062, 1076 (D.N.D. 2009) (citing 151 CONG. REC. S4873-74 (May 10, 2005)), *rev'd* 643 F.3d 592 (8th Cir. 2011). The statute had the effect of only applying to Native Americans because prior to the statute the federal government could use previous state and federal domestic violence convictions when prosecuting non-Indians.

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

<sup>125</sup> *United States v. Cavanaugh*, 643 F.3d 592, 594 (8th Cir. 2011); *United States v. Shavanaux*, 647 F.3d 993 (10th Cir. 2011).

<sup>126</sup> *Cavanaugh*, 643 F.3d at 592; *Shavanaux*, 647 F.3d at 993.

<sup>127</sup> 643 F.3d 592 (8th Cir. 2011).

<sup>128</sup> *Id.* at 594.

<sup>129</sup> *Id.*

the dashboard.”<sup>130</sup> Cavanaugh threatened to kill Luedtke but she escaped by jumping out of the car and hiding in a field.<sup>131</sup> As a result, Cavanaugh was arrested and charged under 18 U.S.C. § 117.<sup>132</sup>

Cavanaugh challenged the constitutionality of the federal government’s use of his prior uncounseled tribal convictions as predicate convictions to establish the elements of 18 U.S.C. § 117.<sup>133</sup> The court held that the use of Cavanaugh’s prior uncounseled tribal convictions was constitutional provided there were not any allegations of irregularity in the tribal court proceeding other than the absence of counsel and there were not any claims of actual innocence of the prior convictions.<sup>134</sup>

Similarly, in *United States v. Shavanaux*,<sup>135</sup> Adam Shavanaux, a member of the Ute Indian Tribe, had been convicted of domestic assault on two prior occasions in Ute Tribal Court.<sup>136</sup> On both occasions, Shavanaux exercised his right under Ute criminal procedures to be represented by a lay advocate at his own expense; however, he was not represented by counsel on either occasion.<sup>137</sup> As in *Cavanaugh*, the court held that the use of Shavanaux’s uncounseled tribal court convictions to establish the elements of 18 U.S.C. § 117 did not violate the Fifth or Sixth Amendments of the United States Constitution.<sup>138</sup> Accordingly, courts have thus far permitted the federal government to use uncounseled tribal convictions to prosecute Indians in federal court as repeat domestic violence offenders.

After the enactment of 18 U.S.C. § 117, Congress continued its effort

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

<sup>131</sup> *Id.*

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

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 605. The court rested its conclusion on the fact that the Indian Civil Rights Act did not extend the Sixth Amendment right to appointed counsel to all indigent criminal defendants in tribes. *Id.* at 596. The Indian Civil Rights Act only requires the appointment of counsel in tribal court prosecutions that result in a term of incarceration that is greater than one year. 25 U.S.C. § 1302(7) (2006). The court dismissed the equal protection claim on the ground that “distinctions based upon tribal affiliation were not invidious race-based distinctions” but instead “distinctions based upon ‘the quasi-sovereign status of [Indian tribes] under federal law.’” *Cavanaugh*, 643 F.3d at 605 (quoting *United States v. Antelope*, 430 U.S. 641, 646 (1977)).

<sup>135</sup> 647 F.3d 993 (10th Cir. 2011).

<sup>136</sup> *Id.* at 995.

<sup>137</sup> *Id.* at 996.

<sup>138</sup> *Id.* at 998, 1001. The court held that the use of the uncounseled tribal convictions did not violate the Sixth Amendment because the Bill of Rights does not apply to Indian tribes. *Id.* at 998. The Indian Civil Rights Act extended many of the rights under the Bill of Rights Act to Indian tribes but it did not extend the right to counsel for indigent criminal defendants. 25 U.S.C. § 1302 (2006). The court also held that the use of the uncounseled tribal convictions did not violate the Due Process Clause of the Fifth Amendment because even though the Ute tribal court procedures did not comply with the Constitution, they did not violate the Constitution. *Shavanaux*, 647 F.3d at 998, 1001. For the purposes of due process, federal courts have analogized Indian tribes to foreign states and, therefore, under the principles of comity, tribal judgments have been recognized by the federal government, provided the procedures of the “foreign jurisdiction” are not incompatible with due process of law and the court had jurisdiction. *Id.*

to address the epidemic of domestic violence in Indian country by enacting the Tribal Law and Order Act of 2010 (“TLOA”). The TLOA proposes to decrease violence against Native American women by clarifying the responsibilities of tribal, federal, and state governments when crimes occur in Indian country, and by improving communication and resource sharing between tribal, federal, and state law enforcement officials.<sup>139</sup> Thus, the TLOA addresses two significant deficits in the current response to domestic violence in Indian country: the confusion and lack of communication between tribal, federal, and state officials about their role in domestic violence cases and law enforcement’s often incomplete response to incidents of domestic violence.

First, the TLOA focuses on facilitating communication between federal, state, and tribal law enforcement.<sup>140</sup> In particular, the TLOA requires both federal law enforcement officers to coordinate criminal investigations with tribal authorities and federal prosecutors to coordinate criminal prosecutions with tribal authorities.<sup>141</sup> Moreover, the TLOA requires the Federal Bureau of Investigation to compile data about the types of crimes investigated in Indian country and the status of investigated cases.<sup>142</sup> Additionally, at least one Assistant United States Attorney is supposed to be appointed as a tribal liaison for each district that includes Indian country.<sup>143</sup>

Second, the TLOA provides for law enforcement training on appropriate responses to domestic violence incidents, including how to properly interview a victim of domestic violence or sexual assault, and training on the collection, preservation, and presentation of evidence to federal and tribal prosecutors in order to secure convictions of domestic violence offenders.<sup>144</sup> Further, the TLOA gives law enforcement employees within the Bureau of Indian Affairs (“BIA”) greater authority to make arrests in domestic violence cases.<sup>145</sup> Specifically, a BIA officer may make an arrest without a warrant if “the offense is a misdemeanor crime of domestic violence, dating violence, stalking, or violation of a protection order and has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon,” and is committed by a domestic partner or relative within Indian country.<sup>146</sup> The federal government hopes that “[a]s the numbers of convictions grow, more women may be willing to

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<sup>139</sup> Tribal Law and Order Act of 2010 § 202, 25 U.S.C. § 2801 (Supp. 2010).

<sup>140</sup> 25 U.S.C. § 2809 (Supp. 2010).

<sup>141</sup> *Id.* §§ 2809(1), (3).

<sup>142</sup> *Id.* § 2809(2).

<sup>143</sup> *Id.* § 2810.

<sup>144</sup> *Id.* § 2802(c)(9).

<sup>145</sup> *Id.* § 2803(3)(c).

<sup>146</sup> *Id.*

report the abuses against them so that their abusers may be prosecuted.”<sup>147</sup>

Most recently, Congress passed the VAWA Reauthorization of 2013, which recognizes tribes’ inherent authority to exercise “special domestic violence criminal jurisdiction over all persons.”<sup>148</sup> The Senate viewed this legislation as necessary because even after the enactment of the TLOA, tribal governments still did not have jurisdiction over non-Indians who commit domestic violence offenses within Indian country. Initially, the Senate proposed the same provisions in the VAWA Reauthorization of 2011, but the House of Representatives passed a different version of the Reauthorization of 2011, H.R. 4970, which would not have permitted tribes to exercise special domestic violence criminal jurisdiction over non-Indians.<sup>149</sup> Additionally, in contrast to the Senate’s bill, H.R. 4970 did not include clarification about tribal civil jurisdiction over protections orders against non-Indians.<sup>150</sup> The Obama Administration urged the House of Representatives to work with the Senate-approved VAWA Reauthorization of 2011, and to pass legislation that provides for more victim protection.<sup>151</sup> Despite the urging of President Obama and numerous VAWA advocates, the House of Representatives failed to pass the Senate’s version of the VAWA Reauthorization of 2011.<sup>152</sup>

However, in January 2013, the Senate introduced the VAWA Reauthorization of 2013, which contained the same special domestic violence criminal jurisdiction provisions.<sup>153</sup> Thereafter, in February 2013, the House of Representatives passed the Senate-approved VAWA Reauthorization of 2013.<sup>154</sup> Accordingly, tribal governments can finally exercise their authority to prosecute non-Indians who commit domestic violence offenses against Indians. As discussed in Part III.C, Congress’s recognition of tribes’ authority over domestic violence offenses committed by non-Indians was imperative because 85% of Native American victims of rape and sexual assault reported that their assailant was non-Indian<sup>155</sup>

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<sup>147</sup> Lynn Rosenthal, *The Tribal Law and Order Act of 2010: A Step Forward for Native Women*, COUNCIL ON WOMEN & GIRLS (July 29, 2010, 5:13 PM), <http://www.whitehouse.gov/blog/2010/07/29/tribal-law-and-order-act-2010-a-step-forward-native-women>.

<sup>148</sup> S. 47, 113th Cong. § 904 (2013).

<sup>149</sup> Library of Congress Online, *Bill Summary & Status H.R. 4970*, (last visited Mar. 15, 2013) available at <http://thomas.loc.gov/cgi-bin/thomas>; OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY, H.R. 4970 VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2012 (May 15, 2012).

<sup>150</sup> OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, *supra* note 149.

<sup>151</sup> *Id.* According to the Executive Office of the President, the President’s senior advisors stated that they would advise the President to veto H.R. 4970 if it had been presented to him. *Id.*

<sup>152</sup> Smith, *supra* note 20.

<sup>153</sup> S. 47, 113th Cong. § 904 (2013).

<sup>154</sup> Parker, *supra* note 13.

<sup>155</sup> Hart & Lowther, *supra* note 23, at 189.

and, as of 2010, 46% of people living on reservations were non-Indians and 49% of Indian women were married to non-Indian men.<sup>156</sup> Accordingly, the absence of authority to prosecute non-Indian domestic violence offenders in Indian country is no longer a major obstacle to tribal government's ability to comprehensively address domestic violence.

Of these three pieces of legislation, 18 U.S.C. §117 is the primary tool that the federal government has used to address domestic violence in Indian country. Despite the passage of the TLOA, Congress has failed to adequately fund the TLOA<sup>157</sup> and, consequently, many of the initiatives of the TLOA have yet to be implemented.<sup>158</sup> Similarly, due to the very recent passage of the VAWA Reauthorization Act of 2013, much remains to be seen regarding the implementation of tribal jurisdiction over non-Indian domestic violence offenses. Accordingly, because 18 U.S.C. § 117 is the primary avenue through which the federal government is currently addressing domestic violence in Indian country, the next section focuses on some of the fundamental problems with the federal prosecution of crimes that occur in Indian country.

#### B. *Fundamental Problems with the Federal Prosecution of Indian Country Crimes*

Three factors weigh against the federal prosecution of crimes in Indian country, including federal prosecution of domestic assaults by habitual offenders. First, the federal government's history with Native Americans has resulted in tribal distrust of the federal government, which inhibits federal prosecution of cases involving Native American defendants.<sup>159</sup> Second, the United States' public policy of tribal self-determination is thwarted by the current jurisdictional framework, which limits tribes' ability to prosecute cases and interferes with their sovereignty.<sup>160</sup> Third, there are numerous practical obstacles to the federal prosecution of tribal cases, such as language barriers and distance between reservations and federal courts.<sup>161</sup>

First, the tortuous history between Native Americans and the federal government, discussed in Part II, has led to tribal distrust of the federal government. Specifically, Dean Kevin Washburn, the Assistant Secretary for Indian Affairs at the Department of the Interior and a former federal

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<sup>156</sup> Fletcher, *supra* note 90.

<sup>157</sup> Capriccioso, *supra* note 17.

<sup>158</sup> *Id.*; see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-658R, *supra* note 18, at 3–4 (reporting that none of the surveyed tribes have exercised their increased sentencing authority under the TLOA primarily due to difficulties implementing other pre-requisites under the TLOA).

<sup>159</sup> See *infra* text accompanying notes 161–67.

<sup>160</sup> See *infra* text accompanying notes 168–79.

<sup>161</sup> See *infra* text accompanying notes 180–86.

prosecutor, has explained that because of the United States' history with Native Americans, many tribes still view the federal government as an enemy.<sup>162</sup> When a federal prosecutor becomes involved in a case, it is common for a victim's family to side with the defendant and against the victim in order to avoid taking the side of the federal government over the tribal member.<sup>163</sup> Similarly, tribal officials may be unwilling to assist a federal prosecutor because they do not want to be seen as helping the enemy.<sup>164</sup>

Further, Washburn asserts that tribal distrust of federal law enforcement results in a high number of crimes that are never reported.<sup>165</sup> In particular, Native American victims do not trust that the federal authorities will protect them from retaliation.<sup>166</sup> Federal law enforcement and prosecutors "swoop in occasionally to prosecute a perpetrator, but they do not maintain a constant presence."<sup>167</sup> Consequently, tribes are left to deal with the aftermath of a crime and to try to restore their communities.<sup>168</sup>

When the federal government "swoop[s] in" to prosecute an habitual domestic violence offender, the victims and the community are likely left with many unanswered questions.<sup>169</sup> The lack of communication between federal authorities and tribal communities suggests that many victims probably do not know when the offender will be released from federal prison. In addition, victims are left to find support services in their communities to deal with the emotional and physical harm caused by the offender.

Second, federal prosecution of Indian country crimes is contrary to the United States' policy of tribal self-determination and respect for tribal sovereignty. Since the 1970s, the United States has followed a public policy of tribal self-determination.<sup>170</sup> Under this policy, tribal governments make and enforce their own laws and tribes have their own law

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<sup>162</sup> Washburn, *supra* note 14, at 736. "Many Indians distrust the legal and social authorities that could be most helpful to them because of past experiences of unjust treatment." *Id.* at 736 n.122.

<sup>163</sup> *Id.* at 736.

<sup>164</sup> *Id.* at 739.

<sup>165</sup> *Id.* at 737–38.

<sup>166</sup> *Id.* at 738.

<sup>167</sup> *Id.* Washburn explains that a tribal prosecutor is a viable alternative to a federal prosecutor for three reasons. First, a tribal prosecutor "could represent the community and the community would feel less of a need to attempt to protect the defendant against external authority." *Id.* Second, a tribal prosecutor would likely live in the community, which would show that the prosecutor was interested in the community and enable the prosecutor to address collateral issues. *Id.* Third, a tribal prosecutor would likely act in a manner that was "more compatible with community norms." *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> AMNESTY INT'L, *supra* note 7, at 28.

enforcement and court systems.<sup>171</sup> Despite this policy, tribal governments have been unable to fully protect their members because of the former jurisdictional framework.<sup>172</sup> While testifying before the Committee on Senate Indian Affairs in 2007, the Assistant Attorney General acknowledged that “just determining who the responding law enforcement agency should be in a violent situation can often be problematic and hinder appropriate response.”<sup>173</sup>

In addition, tribal governments have been unable to fully protect their members because federal agencies control the funds for tribal services and the federal government has not provided adequate funding for tribal justice systems to respond to crimes.<sup>174</sup> As a tribal judge explained, “[n]o other governmental entity has a greater stake in reducing reservation crime than the tribal governments themselves. What the tribal courts need to be successful is [a] sufficient level of reliable support—in terms of training, technical, assistance, and funding.”<sup>175</sup> Due to the perpetual lack of funding, most recently seen with the TLOA, tribes are more dependent on the federal government to prosecute crimes than they would be otherwise.

The jurisdictional issues and lack of funding takes away tribes’ ability to prosecute local crimes. Thus, the tribal criminal justice system stands in stark contrast to the general criminal justice system in the United States where “criminal justice is an inherently local activity as a matter of constitutional design”<sup>176</sup> and where “criminal justice systems are carefully designed to empower local communities to solve internal problems and to restore peace and harmony to the community.”<sup>177</sup> By preventing tribes from addressing some crimes in Indian country through tribal law enforcement and the tribal court system, the federal government “robs the tribal community of leadership in one of the most important areas of

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Law Enforcement in Indian Country: Hearing Before the Committee on Senate Indian Affairs*, 110th Cong. 1 (2007) (statement of Regina B. Schofield, Assistant Attorney General, Office of Justice Programs, Dep’t of Justice), available at [http://web.lexis-nexis.com.ezproxy.law.uconn.edu:8080/congcomp/document?\\_m=b5ffb5bdc7c590e09584b8026287fb47&\\_docnum=2&wchp=dGLzVzB-zSkSA&\\_md5=d90d313c8d748816b5bfc921b0e11c06](http://web.lexis-nexis.com.ezproxy.law.uconn.edu:8080/congcomp/document?_m=b5ffb5bdc7c590e09584b8026287fb47&_docnum=2&wchp=dGLzVzB-zSkSA&_md5=d90d313c8d748816b5bfc921b0e11c06).

<sup>174</sup> AMNESTY INT’L, *supra* note 7, at 8. According to a statement by the United States Commission on Civil Rights in 2003, “tribal courts have been underfunded for decades.” *Id.* at 63. Inadequate funding affects tribal courts’ ability to proceed with prosecutions and to recruit victim witness coordinators. *Id.*; see also *supra* Part I (explaining the federal government’s duty to assist tribes pursuant to the doctrine of trust responsibility).

<sup>175</sup> *Tribal Courts: Hearing Before the Committee on Senate Indian Affairs*, 110th Cong. 2 (2008) (statement of Honorable Theresa M. Pouley Judge, Tulalip Tribal Court President, Northwest Tribal Court Judges Ass’n), available at [http://web.lexis-nexis.com.ezproxy.law.uconn.edu:8080/congcomp/document?\\_m=45b488fcc9aafb1bc015c29abe31c55&\\_docnum=2&wchp=dGLzVzB-zSkSA&\\_md5=cf914fff75fe60565502ba8442eb88](http://web.lexis-nexis.com.ezproxy.law.uconn.edu:8080/congcomp/document?_m=45b488fcc9aafb1bc015c29abe31c55&_docnum=2&wchp=dGLzVzB-zSkSA&_md5=cf914fff75fe60565502ba8442eb88).

<sup>176</sup> Washburn, *supra* note 14, at 713.

<sup>177</sup> *Id.*

governance: maintenance of public safety and criminal justice.”<sup>178</sup>

Consequently, the policy of self-determination is not being practiced<sup>179</sup> and tribes continue to be deprived of their sovereignty. The federal government should follow its policy on tribal self-determination and support tribal efforts to respond to crimes in a “culturally appropriate and efficient manner.”<sup>180</sup> In fact, the federal government has recently recognized that “the most effective solutions to the problems facing tribes come from the tribes themselves, and that [the federal government’s] role is to help them develop and implement their own law enforcement and criminal justice strategies.”<sup>181</sup> As the research on effective responses to domestic violence discussed in Part V.A indicates, if tribal communities are empowered to respond to local crimes of domestic violence, their community programs are more likely to include thorough response procedures that help the victims and offenders rather than merely imposing jail sentences on the offenders.

Third, the lack of infrastructure in large areas of Indian country prevents Native Americans from being a part of the federal criminal justice process. This issue was brought to Congress’s attention in 2007 when the Assistant Attorney General testified before the Committee on Senate Indian Affairs and explained that domestic violence victims in Indian country “often lack the basic resources necessary to access services, such as phones and transportation.”<sup>182</sup> Similarly, Amnesty International’s Director of Government Relations stated that improvements in law enforcement coverage are particularly needed in rural areas lacking transportation and communications infrastructure.<sup>183</sup>

Additionally, Washburn has described how the distances between reservations and federal courts and language barriers between tribes and the federal government are particularly problematic. When the federal government prosecutes a case, victims and witnesses are generally required to travel vast distances to get to the federal court.<sup>184</sup> Washburn cites the Red Lake Band of Ojibwe in northern Minnesota as an example of a tribe in which a member would have to travel 250 miles or more to get to the

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<sup>178</sup> *Id.* at 738.

<sup>179</sup> *Id.* at 740.

<sup>180</sup> FLETCHER, *supra* note 97, at 4.

<sup>181</sup> *Law Enforcement in Indian Country*, *supra* note 171.

<sup>182</sup> *Id.*

<sup>183</sup> *Violence Against Women: Hearing Before the Committee on Senate Indian Affairs*, 110th Cong. 1 (2007) (statement of Alexandra Arriaga, Director Government Relations, Amnesty International, USA), available at [http://web.lexis-nexis.com.ezproxy.law.uconn.edu:8080/congcomp/document?\\_m=a1ce942baf822ca9ddca93f7f60456cf&\\_docnum=2&wchp=dGLbVzB-zSkSA&\\_md5=3134ed26591235704192d42b8b1ad2f0](http://web.lexis-nexis.com.ezproxy.law.uconn.edu:8080/congcomp/document?_m=a1ce942baf822ca9ddca93f7f60456cf&_docnum=2&wchp=dGLbVzB-zSkSA&_md5=3134ed26591235704192d42b8b1ad2f0).

<sup>184</sup> Washburn, *supra* note 14, at 711.

federal court in St. Paul or Minneapolis.<sup>185</sup> Reaching a federal court is further complicated by the fact that many Native Americans live below the poverty level and do not have reliable means of transportation.<sup>186</sup>

Even if a victim or a witness is able to get to the federal court, it is unlikely that any of the court personnel, including the judge and the court reporter, speak the tribal member's native language.<sup>187</sup> Thus, as Washburn described:

[A] witness in an Indian country case may be facing a five-hour or longer drive in an untrustworthy vehicle in a northern winter with nothing to look forward to but being forced to speak in public in front of a large group of non-Indian strangers, or being forced to endure a painful cross-examination in which her motives and perhaps her character will be questioned.<sup>188</sup>

Accordingly, two major considerations in developing a meaningful response to domestic violence in Indian country are ensuring that tribal members can physically access the criminal justice system and that tribal members can understand the language in which the proceedings are being conducted.

In addition to these three factors—distrust in the federal government, ineffective tribal self-determination, and practical obstacles—the federal government's reliance on the federal prosecution of domestic violence is problematic because the federal government's response to violence against Native American women falls below international law standards.<sup>189</sup> Specifically, the United States has not acted with due diligence “to prevent, investigate and punish sexual violence against Native American and Alaska Native women.”<sup>190</sup> Further “the erosion of tribal governmental authority and resources to protect Indigenous women from crimes of sexual violence is inconsistent with international human rights standards.”<sup>191</sup>

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<sup>185</sup> *Id.*; see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-29, *supra* note 51, at 27 (explaining that in Alaska, some victims of domestic violence must travel hundreds of miles by airplane or snow machine to hospitals just to get the proper medical attention).

<sup>186</sup> Washburn, *supra* note 14, at 711–12. “In 1999, the average unemployment rate for Indians on or near reservations was 43 percent, and reached as high as 85 percent on the poorest reservations.” ROBERT T. ANDERSON ET AL., *AMERICAN INDIAN LAW* 12 (2d ed. 2010).

<sup>187</sup> Washburn, *supra* note 14, at 710–11.

<sup>188</sup> *Id.* at 712.

<sup>189</sup> AMNESTY INT'L, *supra* note 7, at 10.

<sup>190</sup> *Id.* Under international law, the duty of due diligence requires “that states must take reasonable steps to prevent human rights violations and, when they occur, use the means at their disposal to carry out effective investigations, identify and bring to justice those responsible, and ensure that the victim receives adequate reparation.” *Id.*

<sup>191</sup> *Id.* at 19.

The United Nations Declaration on the Rights of Indigenous Peoples provides “minimum standards” for protecting the rights of Indigenous people around that world.<sup>192</sup> Article 4 of the Declaration provides that “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”<sup>193</sup> As discussed above, the United States does not practice its policy of tribal self-determination and does not provide adequate funding to tribes or have a system for tribes to secure adequate funding. Although the United States has not fully complied with Article 4 of the Declaration, in 2010, President Obama announced that the United States now supports the Declaration.<sup>194</sup>

Thus, having identified some of the fundamental problems with the federal prosecution of Indian country crimes, and particularly domestic violence offenses, the next section of this Note makes two recommendations for improving the federal government’s response to the epidemic of domestic violence in Indian country.

#### V. DEVELOPING AN EFFECTIVE RESPONSE TO DOMESTIC VIOLENCE IN INDIAN COUNTRY

*“Our women are tired . . . . They’re tired of getting raped, they’re tired of getting beaten. They’re tired of getting their hopes stepped on any time they try to do something about it.”*<sup>195</sup>

Both the facts and the Native American women’s stories that this Note has discussed demonstrate that the federal government’s current response to domestic violence in Indian country is flawed. Particularly, even though the constitutionality of 18 U.S.C. § 117 has been upheld, the statute falls short in its effort to protect Native American women from domestic violence in four distinct ways. First, as exemplified by *Cavanaugh*, this statute does not provide relief to Native American victims of domestic violence unless they have been severely assaulted by an habitual offender and therefore does not address day-to-day incidents of domestic violence. Second, the federal government has only prosecuted habitual Indian domestic violence offenders under this statute because prior to March 2013, tribal governments did not have jurisdiction over non-Indian

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<sup>192</sup> *Id.* at 21.

<sup>193</sup> *Id.*

<sup>194</sup> Presidential Proclamation, *National Native American Heritage Month, 2012* (Nov. 12, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/11/01/presidential-proclamation-national-native-american-heritage-month-2012>.

<sup>195</sup> Dobie, *supra* note 2, at 57 (quoting Tinnekkia Williams, a women’s advocate, expressing her hope that the Tribal Law and Order Act of 2010 will be properly funded and enforced).

domestic violence offenders. Third, practical problems with the federal prosecution of Indian country cases, discussed in Part IV.B, demonstrate that many victims and other tribal members cannot participate in the federal judicial process because of language barriers and the inordinate distances between reservations and federal courts.<sup>196</sup> Lastly, most of the women who will have recourse under the statute are women who have already been victims of domestic violence on multiple occasions,<sup>197</sup> illustrating that the statute is merely reactive and does nothing to prevent domestic violence.

In order for the federal government to effectively address the epidemic of domestic violence in Indian country, this Note asserts that the federal government must do two things. First, the federal government's response must concentrate on promoting programs that have been proven to prevent and deter domestic violence generally. Second, the federal government's response must address the infrastructural problems, including access to police, medicine, and transportation, all of which prevent Native American victims from seeking domestic violence resources on a daily basis.

#### A. *Effective Responses to Domestic Violence Generally*

The federal government should concentrate on researching and promoting domestic violence programs in Indian country that have been proven to be effective among the general population. By promoting programs that have been proven to be effective, the federal government will have a greater chance of successfully reducing the astonishing rates of domestic violence in Indian country. Importantly, a review of current studies regarding the effectiveness of domestic violence programs in general indicates that the federal government's current approach of imposing lengthy prison sentences under 18 U.S.C. § 117 may not be as effective at addressing domestic violence as community oriented programs that serve both the victim and the offender. Moreover, the federal government's current approach under 18 U.S.C. § 117 does not include a preventative component even though preventative programs have been proven to be effective at reducing rates of domestic violence.<sup>198</sup>

One contemporary study on batterer intervention programs revealed

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<sup>196</sup> Washburn, *supra* note 14, at 710–11.

<sup>197</sup> See, e.g., Press Release, U.S. Attorney's Office for the District of Montana, Aldin Ray Two Moons, Sr. Sentenced in U.S. District Court (Aug. 10, 2011) (on file with the Federal Bureau of Investigation, Salt Lake City Division), available at <http://www.fbi.gov/saltlakecity/press-releases/2011/aldin-ray-two-moons-sr.-sentenced-in-u.s.-district-court> (stating that the United States Attorney's Office in the District of Montana prosecuted Aldin Ray Two Moons, Sr. under 18 U.S.C. § 117 after an incident where he punched his common law wife in the face several times, and noting that he had ten prior tribal arrests and four convictions for domestic assault).

<sup>198</sup> See *infra* Part V.C.

the importance of including domestic violence victims in the treatment process.<sup>199</sup> In contrast to other punishments, such as imprisonment, batterer intervention programs treat domestic violence offenders in a group setting.<sup>200</sup> According to this particular study, victim involvement in the batterer intervention treatment process serves three functions. Victim involvement keeps victims informed of what is happening throughout the treatment process and thereby relieves victim anxiety and apprehension.<sup>201</sup> It also exposes victims to community resources, such as victim and family counseling.<sup>202</sup> Lastly, communicating with victims throughout the treatment process can empower domestic violence victims to transition away from an abusive relationship.<sup>203</sup> Overall, domestic violence victims who participate in batterer intervention programs report that the experience “provided them with an enhanced sense of well-being, validated the authenticity of their traumatic experiences, and raised their awareness of the various aspects of domestic violence.”<sup>204</sup>

In addition to helping victims deal with the aftermath of a domestic violence incident, batterer intervention programs reduce the rate of future domestic violence incidents. Specifically, 78% of participants in one batterer intervention program reported that the program reduced the frequency of domestic violence incidents and 70% of participants reported that the severity of the violence decreased.<sup>205</sup> Also, 55% of participants reported that domestic violence incidents ceased entirely after completion of the program.<sup>206</sup> Therefore, domestic violence response programs that incorporate components of batterer intervention programs, such as group treatment and communication with victims, will likely successfully reduce future incidents of domestic violence and help victims work through the aftermath of a domestic assault.

In a different study, researchers examined factors that are correlated with post-treatment recidivism.<sup>207</sup> According to this study, historical and

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<sup>199</sup> Carol Gregory & Edna Erez, *The Effects of Batterer Intervention Programs: The Battered Women's Perspectives*, 8 VIOLENCE AGAINST WOMEN 206, 229 (2002).

<sup>200</sup> *Id.* at 208.

<sup>201</sup> *Id.* at 229.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 210.

<sup>205</sup> *Id.* at 215.

<sup>206</sup> *Id.*

<sup>207</sup> Robert M. Sartin, David J. Hansen & Matthew T. Huss, *Domestic Violence Treatment Response and Recidivism: A Review and Implications for the Study of Family Violence*, 11 AGGRESSION & VIOLENT BEHAVIOR 425, 431 (2006). The data is from studies that looked at domestic violence in the general population and does not specifically pertain to Native Americans. *Id.* at 430–31. Given that the effectiveness of legal interventions is inconclusive, the fact that tribes cannot impose a sentence greater than three years for any one offense under the Indian Civil Rights Act does not present a meaningful counterargument. *Id.* at 432.

familial factors about an offender are linked to the post-treatment recidivism rate of domestic violence offenders.<sup>208</sup> For example, children who experience abuse or witness parental abuse are more likely to suffer from antisocial personality disorder, which is related to post-treatment recidivism.<sup>209</sup> Thus, this study indicates that domestic violence programs may be more effective if they take a broader approach to treatment and examine historical and familial factors that may impact treatment.

However, much of the data on the effectiveness of judicial interventions in deterring domestic violence among the general population is largely inconclusive.<sup>210</sup> One study found that offenders who attended court-ordered domestic violence counseling were 56% less likely to have a domestic violence offense during the 12 to 18 month follow-up period than individuals who did not attend a court ordered domestic violence counseling program.<sup>211</sup> This study also found that increased levels of legal consequences, such as only a guilty verdict versus a guilty verdict, probation, a court order for treatment, and successful completion of treatment, correlated with a decreased rate of recidivism.<sup>212</sup> By contrast, other studies have not found any effect of legal intervention on domestic violence recidivism rates.<sup>213</sup> In one study, the type of sentence—including advisement, suspended sentence, and jail sentence—did not affect the recidivism rate over an 18 to 24 month follow-up period.<sup>214</sup> Significantly, there is no evidence that incarceration or probation leads to lower recidivism rates than treatment.<sup>215</sup>

Although more research about the effectiveness of different responses to domestic violence is needed, the current research raises an important consideration about the federal government's approach to domestic violence under 18 U.S.C. § 117. In particular, the research suggests that the lengthy sentences that can be imposed upon Indian domestic violence offenders under 18 U.S.C. § 117 may not reduce recidivism rates among habitual domestic violence offenders. Thus, although 18 U.S.C. § 117 is one possible resource that can be used to address the epidemic of domestic violence in Indian country, other responses not based on the imposition of prison sentences must be further developed.

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<sup>208</sup> *Id.* at 431.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 432.

<sup>211</sup> *Id.* (citing study by Murphy et al. 1998).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> See JEFFREY FAGAN, NAT'L INST. OF JUSTICE, THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS 20 (1996) (describing the difficulties of drawing empirical conclusions about the relative effects that legal intervention and treatment have on domestic violence).

### B. *Infrastructural Impediments to Tribal Responses to Domestic Violence*

In order to protect Native women from domestic violence, the women must have meaningful access to law enforcement, medicine, transportation, and judicial proceedings. As illustrated by the police presence in the Standing Rock Sioux Reservation, where eleven officers from the Bureau of Indian Affairs were responsible for the 9,000 residents in 2009,<sup>216</sup> the police forces that are responsible for reservations are severely understaffed and underfunded.<sup>217</sup> Tribes have continually requested additional resources for law enforcement on reservations, and have emphasized that the lack of law enforcement resources is a direct threat to the safety of Native American citizens, but the federal government has not responded.<sup>218</sup>

Aside from the challenges that tribal police departments face from the disproportionately low level of resources that they have compared to non-Indian police departments,<sup>219</sup> tribal police departments are likely less effective than they would be if they had greater independence from the federal government. As a result of the federal government's policies, tribes have been unable to design and control their police forces.<sup>220</sup> Tribes' lack of control over their police forces is problematic because research has shown that a "community policing strategy, which involves embedding community priorities and values in the overall function of the police enterprise, enhances the capacity of police to assist communities."<sup>221</sup>

In addition to having adequate police forces in place to respond to incidents of domestic violence, Native women need to have support services and medical services available in times of crisis. Fortunately, Native women and tribal communities have actively developed support services for women. For example, in 2007, the Pretty Bird Woman House, a women's shelter in the Standing Rock Sioux Reservation in South Dakota, answered 397 crisis calls, provided emergency shelter to 188 women, and provided court advocacy support for 28 women.<sup>222</sup> However,

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<sup>216</sup> Dobie, *supra* note 2, at 59.

<sup>217</sup> See AMNESTY INT'L, *supra* note 7, at 8 ("[U]nderstaffing and lack of appropriate training in the relevant police forces are also undermining survivors' right to justice.").

<sup>218</sup> NAT'L CONG. OF AM. INDIANS, FISCAL YEAR 2013 INDIAN COUNTRY BUDGET REQUEST: EXECUTIVE SUMMARY 3 (2012), available at <http://www.ncai.org/resources/ncai-publications/indian-country-budget-request>. Oddly, "[e]ven the 2010 passage of the Tribal Law & Order Act . . . has not prompted Congress to invest more money in public safety on reservations." *Id.*

<sup>219</sup> Tribal police departments have between 55% and 75% of the resources of non-Indian police departments, even though the rate of violent crimes is between two and three times higher in Indian country. STEWART WAKELING ET AL., NAT'L INST. OF JUSTICE, POLICING ON AMERICAN INDIAN RESERVATIONS, at vii (2001).

<sup>220</sup> *Id.* at 4.

<sup>221</sup> *Id.*

<sup>222</sup> *Pretty Bird Woman House Rises from the Ashes!*, DAILY KOS (Nov. 12, 2007, 3:06 PM), <http://www.dailykos.com/story/2007/11/12/409455/-Pretty-Bird-Woman-House-Rises-From-The-Ashes#>.

in comparison to support services, tribal communities have had greater difficulty establishing medical services that victims of domestic violence often require. The per capita federal spending on health services for Native communities is far below its spending on health services for all other groups.<sup>223</sup> While it is unlikely that the federal government will even come close to fulfilling the National Congress of American Indians' funding request for health services for 2013,<sup>224</sup> the federal government should make a good faith effort to continue funding certain programs of the Indian Health Services that have been proven to be effective.<sup>225</sup>

Access to reliable transportation is another infrastructural problem that needs to be addressed. Many victims and community members are unable to travel the vast distances between their reservations and the federal courts. Due to the benefits that victims, community members, and offenders experience from being a part of the criminal justice process, all should have access to the court proceedings. According to Washburn, tribal communities should be present during the legal process because they are the "affected community" and therefore have an interest in the outcome of the proceeding.<sup>226</sup> If tribal communities are not present, it is unlikely that they will understand what happened and they will not get any of the "community therapeutic" benefits thought to be served by public trials.<sup>227</sup> Moreover, if the tribal community is not present at the proceeding, the defendant is less likely to "feel the weight of moral judgment of his own community"<sup>228</sup> and therefore "he may not be confronted with his own actions in a way that would cause him to regret the actions that gave rise to his criminal offense."<sup>229</sup> Thus, in many instances, tribal courts may be able to prosecute cases faster than the federal government since tribal court caseloads are smaller than federal court caseloads<sup>230</sup> and tribal court prosecutions would likely have a greater impact on the victim, the offender, and the community.

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<sup>223</sup> U.S. COMM'N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 13 (2003).

<sup>224</sup> The National Congress of American Indians requested a \$367.6 million budget increase to Indian Health Service to maintain current services and a \$634 million increase for program services in its 2013 budget request. NAT'L CONG. OF AM. INDIANS, *supra* note 216, at 6. Due to the limited financial resources of the federal government in terms of providing medical resources to tribes, the federal government should coordinate medical services with Native women's shelters and other clinics that are already in place.

<sup>225</sup> *Infra* Part V.C.

<sup>226</sup> Washburn, *supra* note 14, at 770.

<sup>227</sup> *Id.* at 771.

<sup>228</sup> *Id.* at 772.

<sup>229</sup> *Id.* In sum, "[t]his harms both the defendant and the community and frustrates both the rehabilitative and retributive purposes of criminal law." *Id.*

<sup>230</sup> FLETCHER, *supra* note 97, at 3.

### C. *Lessons from the Past While Planning for the Future*

This Note has asserted that in order for the federal government to improve its response to domestic violence in Indian country, it must promote programs that have been proven to effectively respond to domestic violence and must address the infrastructural problems that impede domestic violence victims from necessary resources. In addition to these two specific recommendations, the federal government's future efforts should be generally informed by past programs that have been successful at addressing domestic violence in Indian country and overarching tribal values and traditions.

Two past programs serve as exemplars for future program designs. First, the STOP Violence Against Indian Women Grant Program ("STOP"), established in the late 1990s, has been particularly successful. By working on a government-to-government basis with Indian tribes, STOP encouraged the development of the "tribal justice system's response, including law enforcement, prosecution, victim services, and courts, to violence against Indian women and . . . improve[d] services to victims of domestic violence."<sup>231</sup> The STOP grant program resulted in an increased number of domestic violence programs, coordinated community responses, and changes to tribal codes.<sup>232</sup> Additionally, in working to end violence against women, some tribes reclaimed their traditional values.<sup>233</sup> Second, the Indian Health Service and the Administration for Children and Families have implemented proactive programs that teach tribal communities about domestic violence.<sup>234</sup> One component of the program is educational and aims to break the cycle of domestic violence by enlisting men to mentor boys about relationship violence and respecting women.<sup>235</sup>

Finally, the federal government should embrace tribal values and tribal culture and use tribal traditions to inform its responses to domestic violence in Indian country. Throughout history and today, protecting Native women has been culturally important because it "maintains continuity with customary values, and it meets the duties of a government to promote the well-being of all members."<sup>236</sup> In fact, tribal domestic violence codes are generally based on the "traditional willingness of tribes to respect women in complementary roles which promote tribal well-

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<sup>231</sup> GILBERG ET AL., *supra* note 30, at 9 (internal parenthesis omitted).

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> ANNA MARJAVI & VICKI YBANEZ, FAMILY VIOLENCE PREVENTION FUND, BUILDING DOMESTIC VIOLENCE HEALTH CARE RESPONSES IN INDIAN COUNTRY: A PROMISING PRACTICES REPORT 35 (2010).

<sup>235</sup> *Id.* at 38.

<sup>236</sup> Hart & Lowther, *supra* note 23, at 216.

being.<sup>237</sup> Moreover, the Navajo Nation's domestic violence code is more protective than numerous state domestic violence laws.<sup>238</sup> Accordingly, the federal government would benefit from examining and utilizing tribal traditions in its efforts to address domestic violence in Indian country.

## VI. CONCLUSION

The federal government's response to the epidemic of domestic violence in Indian country has fallen short. This Note discussed three pieces of federal legislation—18 U.S.C. § 117, the TLOA, and the VAWA Reauthorization of 2013—and demonstrated that the federal government primarily relies on federal prosecutions pursuant to 18 U.S.C. § 117 to address domestic violence in Indian country. However, due to the fundamental problems with federal prosecutions of crimes in Indian country, and the ongoing pervasiveness of domestic violence, this Note recommended that the federal government improve its response by doing two things. First, this Note explained the benefits of researching and promoting domestic violence response programs that have been proven to be effective among the general population. Second, this Note raised infrastructural problems that need to be acknowledged and addressed in order for Native American victims to have meaningful access to domestic violence resources. While these two recommendations may not be the ultimate solution, they provide a logical starting point in tribal, state, and federal efforts to eradicate domestic violence in Indian country. At the very least, this Note and these recommendations should raise awareness about the stories and experiences of Native American victims of domestic violence.

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<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 217. The Navajo Nation is one of the largest tribes in the United States. *Id.*