THE VIOLENCE AGAINST WOMEN ACT: A DOUBLE-EDGED SWORD FOR NATIVE AMERICANS, THEIR RIGHTS, AND THEIR HOPES OF REGAINING CULTURAL INDEPENDENCE

INTRODUCTION

Diane Millich could not escape. Millich, a Native American and member of the Southern Ute tribe of Colorado, had found herself married to a physically and emotionally abusive husband.[1] One day, her husband even appeared at her work carrying a gun, promising to kill her.[2] Living on the Southern Ute reservation, Millich reached out to tribal law enforcement officers, hoping they could detain her husband and end the hitting, beating, and life-threatening statements.[3] However, because her husband was a non-native,[4] the tribal law enforcement officers could not detain him.[5] Additionally, because the abuse occurred on tribal land, the local Colorado sheriff's department did not have jurisdiction over the land, so, like the tribal officers, the sheriff's department left Millich without any solutions. Millich was trapped.

For victims like Millich, residing on a reservation and having a non-native partner often made it nearly impossible to escape a domestic violence situation. However, in 2013, the United States Congress changed the lives of victims like Millich. In passing the reauthorization of the Violence Against Women Act ("VAWA"), Native Americans were granted jurisdiction over non-natives in

1. Lorelei Laird, *Indian Tribes are Retaking jurisdiction over domestic violence on their own land*, A.B.A. J. (Apr. 1, 2015, 6:02 AM), http://www.abajournal.com/magazine/article/indian_tribes_are_retaking_jurisdiction_over_domestic_violence_on_their_own [http://perma.cc/Y59U-RMKJ].

2. *Id.*

3. *Id.*

4. For purposes of this article, "non-native" describes someone who was not born part of an Alaskan or American Indian tribe ("Native American" tribe). A non-native can be married to a Native American and can have children who are part Native American.

5. Laird, *supra* note 1.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

domestic violence situations.[6] These new VAWA provisions came into full effect on March 7, 2015.[7]

This Comment discusses the implications of VAWA for the Native American community and for non-native defendants. Unlike scholars before me, I discuss VAWA's success since it became law in March 2015. I argue that, while VAWA grants Native Americans more power over non-native perpetrators, it does so with the expectation that tribal courts will conform to Anglo-American criminal procedure, creating further assimilation of tribal courts and robbing Native Americans of their cultural uniqueness. Part I discusses the social and legal history of Native Americans' interactions with the United States government. Through this background information, it becomes evident that VAWA re-grants Native Americans jurisdictional power that had been slowly taken from Native Americans for hundreds of years. Part I also addresses how federal and state government officials often refuse to prosecute crimes in Indian Country.[8] Next, Part II explains the provisions within VAWA that grant Native Americans jurisdiction over non-natives in tribal court. Part II also presents a hypothetical that compares the federal and state court systems to the tribal court system. Additionally, Part II addresses the critiques that VAWA has received and questions whether VAWA Title IX is constitutional. Finally, Part II briefly discusses the implications of a new United States Supreme Court case that challenged tribal courts' civil jurisdiction over non-native respondents. Part III offers that VAWA is an imperfect solution for Native Americans and compares tribal courts' implementation of VAWA to the experiences of Palestinians in the West Bank and Gaza Strip.

6. While "VAWA" refers to the Violence Against Women Act as a whole, this paper will use "VAWA" as a reference to the provisions within the Violence Against Women Act which address Native American tribal court jurisdiction, specifically the provisions within Title IX Safety for Indian Women.

7. Samuel Gottstein, *An Era of Continued Neglect: Assessing the Impact of Congressional Exemptions for Alaska Natives*, 55 B.C. L. REV. 1253, 1272 (2014).

8. "Indian Country" describes all territories and reservations where American Indians reside. "Native Americans" encompasses both American Indian tribes and Alaskan natives. I recognize that individual tribes and Alaska Native peoples have distinct cultural practices and ideals. However, the term "Indian Country" used within VAWA still excludes about 200 Alaska Native Tribes because the legal term "Indian Country" does not apply to their lands. *See* Mary Hudetz, *New Federal Laws Help, But Still Don't Fully Protect Native American Women From Violence*, WASH. POST (June 13, 2014), https://www.washingtonpost.com/blogs/she-the-people/wp/2014/06/13/new-federal-laws-help-but-still-dont-fully-protect-native-american-women-from-violence/ [http://perma.cc/7J94-VZXH].

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

I. BACKGROUND

A. Domestic Violence in Indian Country

Contrary to much of the Western world, not all Native American tribes are predominately patriarchal societies. Several Native American tribes hold women to high esteem and reserve special roles for women within their communities.[9] For example, Cherokee women were traditionally homeowners, and a Cherokee Women's Council decides which men can hold positions of authority within Cherokee tribes.[10] The Iroquois, like the Cherokee, also have a historically matriarchal society. Traditionally, Iroquois women were "keepers of the faith" and aided in the selection of spiritual leaders.[11] Today, many Iroquois tribes ceremoniously honor women for providing food and children.[12] Iroquois mothers, not fathers, arrange marriages for their children.[13] Additionally, many Iroquois tribes recognize "matrons" who control the food supply,[14] manage the wealth, and nominate chiefs.[15] Thus, historically, Native American tribes have valued women within their societies, and the victimization of women through domestic abuse is often contrary to tribal cultures and traditions.

Despite the history of respecting women within Native American culture, today many Native American women face the harsh reality of domestic violence and abuse. Native American elders claim that this domestic violence, or "wife-beating," was only brought into Indian Country through Native Americans' interactions with non-natives.[16] Elders allege that once Native Americans were introduced to Anglo-American culture, domestic violence between Native Americans themselves and between Native Americans and non-natives escalated.[17] Although this escalation of domestic violence is difficult to measure due to its sensitivity that prevents it from being reported,

9. For a more expansive analysis of women within Native American culture, see generally NANCY SHOEMAKER, NEGOTIATORS OF CHANGE: HISTORICAL PERSPECTIVES ON NATIVE AMERICAN WOMEN, (Routledge 1st ed. 1995).

10. *Restoring Native American Families*, PBS (Sept. 2008), http://www.pbs.org/indiancountry/challenges/families2.html [http://perma.cc/FL9Z-GGD4].

11. Judith K. Brown, *Economic Organization and the Position of Women Among the Iroquois*, 17 ETHNOHISTORY 151, 155 (1970).

12. *Id.*

13. *Id.*

14. *Id.* at 162.

15. *Id.* at 154, 163.

16. *Restoring Native American Families*, *supra* note 10; *see also* Rebecca Nagle, *An Interview With Shawn Partridge on Violence Against Native Women*, HUFFINGTON POST (May 31, 2015), http://www.huffingtonpost.com/rebecca-nagle/an-interview-with-shawn-p_b_6979694.html [http://perma.cc/XK3X-SZD4] ("Our Elders tell us these kinds of victimization were not the kind of behavior that was tolerated or really practiced much among our people.").

17. *Restoring Native American Families*, *supra* note 10.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

statistics demonstrate that Native American women are among the most targeted group of individuals for domestic abuse.[18] According to the Indian Law & Order Commission, Native American women have a ten times higher risk of being murdered than other women within the United States.[19] Additionally, Native American women are 2.5 times more likely to be raped or sexually assaulted than other United States women.[20] Indeed, over one third of Native American women will be a victim of rape in her lifetime, and thirty-nine percent of Native American women will experience some form of domestic violence.[21] Even more astounding, eighty-eight percent of the perpetrators who rape and abuse these women are non-natives.[22] Thus, the pattern of violence is not simply contained within Native American communities. While Native Americans living on reservations are primarily the victims, non-natives who live or work on reservations are often responsible for the victimization of Native American women.[23] Traditionally, these non-natives could not be prosecuted in Indian Country, but, with the new provisions in VAWA, Native American communities finally have jurisdiction over these non-native perpetrators.

B. Historical and Legal Background

To understand the significance of the new jurisdictional powers that were granted to Native Americans through VAWA, a brief historical background of the relationship between Native Americans and the United States government is necessary. Before Europeans began colonizing the Americas, Native American tribes lived amongst one another in organized societies with their own unique forms of government.[24] Although it is difficult to categorize every

18. Gideon M. Hart, *A Crisis in Indian Country: An Analysis of the Tribal Law and Order Act of 2010*, 23 REGENT U. L. REV. 139, 147–49 (2011).

19. INDIAN LAW & ORDER COMMISSION, *A Roadmap for Making Native America Safer*, 6 (May 2015), http://www.aisc.ucla.edu/iloc/report/files/Roadmap%20For%20Making%20Native%20America%20Safer%20-%20Washington%20DC%20May%202015.pdf [http://perma.cc/BH9T-EMAD].

20. AMNESTY INT'L, *Maze of Injustice: The Failure to Protect Indigenous Women From Sexual Violence in the USA*, 2 (2007), https://www.amnestyusa.org/pdfs/mazeofinjustice.pdf [http://perma.cc/6DYS-6LZB].

21. ATTORNEY GENERAL'S ADVISORY COMM. ON AM. INDIAN AND ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE, ENDING VIOLENCE SO CHILDREN CAN THRIVE 38 (2014).

22. *Violence Against Native Women Gaining Global Attention*, INDIAN LAW RESOURCE CTR., http://indianlaw.org/safewomen/violence-against-native-women-gaining-global-attention [http://perma.cc/Z44S-E9F3].

23. *Id.*

24. NAT'L CONGRESS OF AM. INDIANS, *An Introduction to Indian Nations in the United States*, 3, http://www.ncai.org/about-tribes/indians_101.pdf [http://perma.cc/8WWK-Y4TA] (The National Congress of American Indians (NCAI) advocates for more than 250 distinct tribal

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

tribal government due to the vast number of tribes, most tribes utilized tribal councils to resolve disputes among their members.[25] Often, tribal councils had a chief or mediator that acted as a decision-maker rather than a judge.[26] Tribal councils also sought to address crime through restitution and compensation rather than retribution, an Anglo-American ideal.[27] Thus, rather than emphasizing punishment for the wrongdoer, tribal councils focused on rehabilitating victims and compensating victims' families after crimes.[28] Through these acts of restitution and compensation, tribal councils hoped to bring about forgiveness and restore harmony within their communities.[29] These tribal governments maintained much of this traditional structure during the first three centuries of colonization.[30]

From 1492 to 1828, Europeans began colonizing the Americas and acquired Native American lands through treaties and the doctrine of discovery, which permitted Europeans to claim land that they "discovered."[31] Europeans acted peacefully towards Native Americans, constructing over six hundred treaties and agreements with Native Americans in exchange for Native American land.[32] Indeed, the relations between Europeans and Native Americans were often so peaceful that many European fur traders married Native American women in a marriage *à la façon du pays*, that symbolized both individualized treaties and committed relationships.[33] However, as Europeans continued moving West, the relations between Native Americans and Europeans increasingly became more difficult for the federal government to oversee, and conflicts between the settlers and Native Americans often occurred.[34]

From 1828 to 1887, the United States further destroyed Native Americans and their culture through removal and relocation.[35] With a growing population and strong military, the United States launched military campaigns and conquered tribes and their lands, killing thousands of Native Americans and

governments within the U.S. It seeks to promote a better understanding of Native American cultures, governments, and rights.).

25. VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 111 (Univ. of Tex. Press, 1st ed. 1983).

26. *Id.* at 112.

27. *Id.* at 111–12.

28. *Id.*

29. *Id.*

30. DELORIA, *supra* note 25, at 113–14.

31. *Id.* at 3. Note that Europeans never truly discovered the land because Native Americans had lived on the land for thousands of years before them.

32. *Id.* at 3–4.

33. A. Gottfred, *Art. III Femmes du Pays: Women of the Fur Trade, 1775-1821*, NORTHWEST J., http://www.northwestjournal.ca/XIII2.htm [http://perma.cc/HB7U-SVM8].

34. DELORIA, *supra* note 25, at 5.

35. *Id.* at 6.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

forcing tribes to relocate on reservations out West.[36] Although reservations were designated specifically for Native Americans, many reservations were dependent on federal government funding and overwhelmed by the presence of European missionaries seeking to assimilate Native Americans into Anglo-American culture.[37] In 1887, the period of allotment and assimilation began. The 1887 Dawes Act converted communal tribal land into individual land allotments, granting two-thirds of reservation land to European western settlers.[38] Often, Native Americans were not compensated for this reservation land.[39] The Dawes Act was designed to increase assimilation by requiring Native Americans to have private property rather than traditional tribal communal property.[40] Additionally, this allotment policy increased the development of Courts of Indian Offenses, that were established by the federal government in order to address legal issues that the federal government believed traditional tribal councils were incapable of addressing.[41] Thus, traditional tribal councils began to disappear as the period of allotment and assimilation continued.[42]

In 1934, Native Americans were finally granted more control over their own governments and court systems through the Indian Reorganization Act ("IRA").[43] The IRA enabled Native Americans to draft constitutions for their communities, write by-laws for their governments, and, most importantly, construct their own tribal court systems.[44] The IRA allowed Native Americans to begin establishing tribal courts, and tribes created their own unique tribal court systems under the direction of the federal government.[45] Today, through the IRA, a typical tribal court often consists of three associate judges and one Chief Judge who are all elected by two-thirds vote of the tribal council.[46] Some tribal courts even include a "special judge" who is a United States licensed attorney.[47] When deciding disputes, a tribal judge frequently grants an order that "benefits the whole Indian community" and does not "chastise [the] individual offender," restoring the traditional notion of prioritizing tribal

36. NAT'L CONGRESS OF AM. INDIANS, *supra* note 24, at 3.

37. DELORIA, *supra* note 25, at 7.

38. NAT'L CONGRESS OF AM. INDIANS, *supra* note 24, at 3.

39. *Id.*

40. DELORIA, *supra* note 25, at 9.

41. *Id.* at 114.

42. NAT'L CONGRESS OF AM. INDIANS, *supra* note 24, at 3.

43. DELORIA, *supra* note 25, at 116.

44. *Id.*

45. Today, the federal government recognizes 562 "tribes, bands, nations, pueblos, rancherias, communities and Native villages in the United States. Approximately 229 of these are located in Alaska; the rest are located in 33 other states. Tribes are ethnically, culturally and linguistically diverse." NAT'L CONGRESS OF AM. INDIANS, *supra* note 24, at 4.

46. DELORIA, *supra* note 25, at 117.

47. *Id.*

harmony over individual punishment.[48] Therefore, the IRA allowed Native Americans to establish the tribal court systems that they maintain today.

Other than the IRA, another significant act, the Indian Civil Rights Act, further instructed Native Americans about how to manage their court systems. In 1968, the Indian Civil Rights Act was signed into law and granted Native American parties in tribal courts many of the rights that United States citizens have in United States courts.[49] Within this legislation, tribal courts, that were already funded and organized by the federal government,[50] were suddenly required to exercise the Fifth and Sixth Amendment rights of double jeopardy, self-incrimination, trial by jury, right to counsel, right to a speedy and public trial, and right to confrontation and cross-examination.[51] Thus, the federal government gained more control over the procedures of tribal courts and prevented tribal judges from exercising Native American traditions within tribal courts. Specifically, tribal judges were restricted from sentencing defendants to more than one year jail time.[52] By placing this strict limit on tribal court systems, the Indian Civil Rights Act prevented tribal courts from prosecuting defendants for more serious crimes and, in turn, stripped power away from tribal courts. Throughout the remaining 20th Century, the United States only continued to restrict and contain tribal courts' powers.

Outside of legislation, the Supreme Court of the United States has limited tribal courts' power through its decisions. One decision in particular, *Oliphant v. Suquamish Indian Tribe*, has largely impacted the rights and jurisdictional limitations of tribal courts.[53] In *Oliphant*, two non-native residents were arrested on the Suquamish reservation by tribal police.[54] Non-native Oliphant was arrested for assaulting a police officer and resisting arrest, and non-native Belgarde was arrested for reckless endangerment of another person and tribal property damage after he drove his car into a tribal police car.[55] During this time, the Suquamish tribal council had issued a law that granted Suquamish courts criminal jurisdiction over non-natives.[56] Thus, the tribal council

48. *Id.* at 120.

49. *Id.* at 128.

50. *Id.* at 126.

51. DELORIA, *supra* note 25, at 129.

52. Originally, this was limited to six months, but, over time, tribal judges were able to sentence defendants to one year. This limit is imposed for both Native and non-native defendants. Seth Fortin, *The Two-Tiered Program of the Tribal Law and Order Act*, 61 UCLA L. REV. DISC. 88, 90, 90 n.1 (2013).

53. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

54. *Id.* at 194.

55. *Id.*

56. SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 207 (Univ. of Oklahoma Press, 1st ed. 1989).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

prosecuted Oliphant and Belgarde.[57] In federal court, Oliphant and Belgarde claimed that the Suquamish tribe did not have criminal jurisdiction over non-natives in tribal courts.[58] The Court agreed, holding that tribal courts do not have criminal jurisdiction over non-natives who violate tribal law on tribal lands.[59] Thus, *Oliphant* placed greater restrictions on tribal courts, causing them to seek alternative solutions such as civil fines in order to seek justice against non-native defendants.[60]

Following *Oliphant*, another Supreme Court decision, *Duro v. Reina*, greater restricted tribal courts' jurisdictional power.[61] In *Duro*, a nonmember Native American was staying on the Salt River Reservation for the Pima-Maricopa tribe.[62] While on the reservation, the nonmember murdered a boy from another tribe.[63] As a result, the Pima-Maricopa officers placed the nonmember into custody and charged him with the illegal firing of a weapon, the maximum charge a tribal court could issue due to the Indian Civil Rights Act.[64] The nonmember argued that the Pima-Marcopa tribal court lacked jurisdiction.[65] The Supreme Court agreed, holding that tribal courts do not have authority to prosecute Native Americans who are not members of their respectful tribe.[66] Thus, *Duro* placed a larger restraint on tribal court authority.

In 2004, the Court revised *Oliphant* and *Duro* through its decision in *United States v. Lara*.[67] In *Lara*, Billy Jo Lara, a member of the Turtle Mountain Band of Chippewa Indians, lived on the Spirit Lake Reservation with his wife and children who were members of the Spirit Lake Sioux Tribe.[68] After repeated incidents of misconduct, Spirit Lake banned Lara from the Spirit Lake Reservation.[69] Lara refused to abide by the Spirit Lake order and, after being stopped from entering onto the reservation by federal officers, Lara assaulted one of the officers.[70] As a result, Spirit Lake charged Lara with "violence to a policeman," and Lara pleaded guilty.[71] However, after this conviction, the federal government also charged Lara with assaulting a federal

57. *Id.*
58. *Id.* at 208.
59. *Oliphant*, 435 U.S. at 195.
60. O'BRIEN, *supra* note 56, at 208.
61. Duro v. Reina, 495 U.S. 676, 679 (1990).
62. *Id.* at 679.
63. *Id.*
64. *Id.* at 681.
65. *Id.*
66. *Duro*, 495 U.S. at 679.
67. United States v. Lara, 541 U.S. 193, 205–07 (2004).
68. *Id.* at 196.
69. *Id.*
70. *Id.*
71. *Id.*

officer.[72] In his federal court case, Lara argued that that the federal government violated the Double Jeopardy Clause, and the Court was left to address whether the prosecution of "nonmember Indian offenders" was inherent tribal sovereignty or federal authority.[73] The Court found that Congress may "relax the restrictions imposed by the political branches on the tribes' inherent prosecutorial authority."[74] Ultimately, the Court found that Congress may allow tribes to prosecute non-members as long as those non-members are Native Americans themselves.[75] Thus, *Lara* clarified *Oliphant* and overturned *Duro* in regards to tribal courts' jurisdictional powers. However, *Lara* did not grant Native Americans the power to prosecute non-natives in tribal courts.

After *Lara*, Congress revised tribal courts' autonomy yet again. In 2010, Congress passed the Tribal Law and Order Act ("TLOA"), amending the Indian Civil Rights Act and aiming to grant tribal courts greater power in prosecuting criminals in Indian Country.[76] Specifically, TLOA expands tribal courts' sentencing authority from one year to three years' imprisonment.[77] It also allows for potential concurrent tribal and federal jurisdiction in specific states.[78] However, TLOA does not grant tribal courts jurisdiction over most criminal offenses. Instead, it seeks to increase the communication between tribal courts and federal courts.[79] TLOA encourages dialogue between tribal leaders and federal law enforcement through providing tribal law enforcement officers training and access to the National Criminal Information Center database.[80] Additionally, TLOA requires federal prosecutors to contact tribal officers when a federal prosecution of a crime in Indian Country is dismissed.[81] Thus, Native Americans can then prosecute the once-dismissed federal case in tribal court.[82] TLOA also promotes better communication between the federal and tribal court systems through requiring "the appointment of a tribal liaison in each United States Attorney's Office that includes Indian Country within its borders to help coordinate prosecutions and develop working relationships with local tribal law enforcement."[83] These liaisons train tribal justice officials in evidence-gathering so that tribal law

72. *Lara*, 541 U.S. at 197.
73. *Id.* at 199.
74. *Id.* at 205.
75. *Id.* at 200.
76. Hart, *supra* note 18, at 140–41.
77. *Id.* at 141.
78. *Id.* at 156–57.
79. *Id.* at 166.
80. *Id.*
81. Hart, *supra* note 18, at 167.
82. *Id.* at 167.
83. *Id.* at 168.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

enforcement can better support federal prosecutions.[84] Therefore, instead of isolating tribal court systems and treating them as less qualified systems of government, TLOA seeks to restore the importance of tribal courts in prosecuting crimes within Indian Country.

Despite TLOA's ability to strengthen communication between federal and tribal courts, TLOA fails to grant tribal courts enough power to make noticeable change. As previously mentioned, TLOA only allows tribal courts to have sentencing authority up to three years.[85] Thus, only misdemeanors and some minor crimes that occur in Indian Country may be prosecuted in tribal courts. Additionally, TLOA fails to address the prosecution of crimes by non-natives in tribal courts.[86] So, while TLOA suffices as a starting point, it ultimately does not restore a great amount of authority to tribal courts.

C. The Problems of Prosecution in Indian Country

With the addition of TLOA, the federal government hoped to decrease crime in Indian Country that is often caused by one large reason: federal prosecutors' high declination rates of Indian Country crimes.[87] First, federal prosecutors often do not prosecute crimes that occur in Indian Country.[88] According to the Department and the Transactional Records Access Clearinghouse at Syracuse University, 5900 assaults in Indian Country were reported in 2006, and only 558 of these assaults were reported to federal prosecutors, who declined approximately 320 of them.[89] These prosecuted crimes only reflect those crimes that are reported.[90] Often, Native Americans choose not to file reports, believing that the crime has very little chance of being prosecuted.[91] Indeed, with a myriad of cases stacked on their desks and limited resources to efficiently work on cases, many federal prosecutors do not have the time, money, or skills to prosecute Indian Country crimes.[92] Often, a crime in Indian Country implies hundreds of miles of traveling as well as cultural or language barriers.[93] In fact, even among the Native Americans who attend law school, most of these Native Americans tend not to become involved with Native American law, unremedying the language and cultural

84. *Id.*

85. *Id.* at 179.

86. Hart, *supra* note 18, at 178.

87. Ed Hermes, *Law & Order Tribal Edition: How the Tribal Law and Order Act Has Failed to Increase Tribal Court Sentencing Authority*, 45 ARIZ. ST. L.J. 675, 680–81 (2013).

88. *Id.* at 679–80.

89. *Id.* at 679.

90. *Id.*

91. Elise Helgesen, *Allotment of Justice: How U.S. Policy in Indian Country Perpetuates the Victimization of American Indians*, 22 U. FLA. J.L. & PUB. POL'Y 441, 456–57 (2011).

92. Hermes, *supra* note 87, at 680.

93. *Id.*

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

barriers between attorneys and Native Americans.[94] Thus, the barriers between federal prosecutors and Indian Country often cause prosecutors to decline prosecuting crimes of Indian Country.

Other than these barriers, federal prosecutors and investigators also may decline Indian Country crimes because federal officers are not the first responders when crimes occur in Indian Country.[95] Typically, tribal law enforcement officers are the first to respond when a crime is reported.[96] As a result, these tribal officers are the first to observe evidence and interview initial witnesses.[97] Because tribal officers have different practices and training from federal officers, federal prosecutors often do not uphold the evidence and interviews gathered by tribal officers as reliable.[98] Thus, federal investigators and prosecutors collect their own separate evidence and interviews, and this distance in time prevents accuracy in the evidence.[99] Additionally, it prevents federal officers from finding witnesses who are willing to speak and are able to accurately recall the criminal events.[100] With these problems, federal prosecutors often determine that Indian Country crimes are nearly impossible to properly prosecute. As a result, many domestic violence crimes go unprosecuted by federal prosecutors. With the reauthorization of VAWA, Native Americans can prosecute these crimes that were often overlooked by federal prosecutors.

II. VIOLENCE AGAINST WOMEN ACT AND ITS IMPACT

A. Violence Against Women Act, Title IX

In 1994, Congress enacted then-Senator Joe Biden's Violence Against Women Act.[101] VAWA requires a community response to domestic violence, provides comprehensive preventative education, and creates harsher penalties for repeat offenders.[102] Since 1994, VAWA has been reauthorized in 2000,

94. DELORIA, *supra* note 25, at 145.

95. Hermes, *supra* note 87, at 680.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 680–81.

100. Hermes, *supra* note 87, at 681.

101. Upon the reauthorization of VAWA in 2013, Vice President Biden called the members of Congress who opposed the reauthorization part of a "Neanderthal crowd," demonstrating how strongly VAWA supporters felt about the reauthorization. Jennifer Epstein, *Biden: 'Neanderthal Crowd' Slowed VAWA Renewal*, POLITICO (Sept. 12, 2013, 10:05 PM), http://www.politico.com/blogs/politico44/2013/09/biden-neanderthal-crowd-slowed-vawa-renewal-172549 [http://perma.cc/4H75-7STF].

102. U.S. DEPT. OF JUSTICE OFFICE OF VIOLENCE AGAINST WOMEN, THE HISTORY OF THE VIOLENCE AGAINST WOMEN ACT 3, http://www.ncdsv.org/images/OVW_HistoryVAWA.pdf [http://perma.cc/C2KQ-UEQJ].

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

2006, and 2013.[103] In its most recent reauthorization, VAWA Title IX included provisions to address the problem of domestic violence for Native American women. Section 904 "Tribal Jurisdiction Over Crimes of Domestic Violence" and Section 905 "Tribal Protection Orders" allow "participating tribes"[104] to have concurrent jurisdiction with the United States federal government over domestic violence, dating violence, and violations of protection orders.[105] Specifically, Section 904 allows tribal courts to have jurisdiction over non-natives who have ties to the tribe.[106]

To determine if a non-native can be tried in tribal court, Section 904 contains specific guidelines. A non-native must reside on tribal land, be employed on tribal land, or be a spouse or partner of a Native American.[107] Thus, this allows tribes to have jurisdiction over United States citizens, granting Native Americans power that has been reduced since Europeans first colonized the Americas. However, tribal jurisdiction does have its limits. A tribe may not have jurisdiction over a non-native if neither the victim nor defendant are Native American.[108] Additionally, tribes are required to provide native and non-native defendants the right to a trial by an impartial jury that reflects a "cross section" of the tribal community and does not purposefully exclude non-natives residing on tribal land.[109] However, even with these limits, VAWA still allows Native Americans the ability to have control over non-natives who have ties to their tribes.

In order to implement VAWA into Native American communities, Section 908(b)(2) establishes a Pilot Project. Section 908(b)(2)(A) states that "[a]t any time during the 2-year period beginning on the date of the enactment of this Act, an Indian tribe may ask the Attorney General to designate the tribe as a participating tribe. . . ."[110] Once a tribe is designated, the tribe "may commence exercising special domestic violence criminal jurisdiction."[111] From 2013 to August 2015, eight tribal communities became Pilot Projects.[112] These

103. *Id*.

104. "The term 'participating tribe' means an Indian tribe that elects to exercise special domestic violence criminal jurisdiction over the Indian country of that Indian tribe." Violence Against Women Reauthorization Act of 2013 (VAWA), Pub. L. No. 113-4, sec. 904, § 204(a)(4), 127 Stat. 54, 121 (2013).

105. VAWA, § 904.

106. § 904(b)(4).

107. § 904. Thus, the non-native must be someone whom the victim "knows, such as a husband, boyfriend or domestic partner." *See also* Hudetz, *supra* note 8 (discussing how this prevents tribes from prosecuting violence against women committed by a non-native stranger).

108. § 904.

109. § 904(d).

110. § 908(b)(2)(A).

111. § 908(b)(2)(C).

112. *Tribal Implementation of VAWA*, NCAI http://www.ncai.org/tribal-vawa/pilot-project-itwg/pilot-project [http://perma.cc/U4KS-9KTD].

communities included the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Confederated Tribes of the Umatilla Indian Reservation, Eastern Band of Cherokee, Little Traverse Bay Bands of Odawa Indians, Pascua Yaqui Tribe, Seminole Nation of Oklahoma, Sisseton Wahpeton Oyate of the Lake Traverse Reservation, and the Tulalip Tribes.[113] Since the time of implementation to September 2015, these Pilot Projects collectively performed twenty-one arrests and thirteen convictions of non-natives.[114] Thus, the Pilot Program demonstrates that Title IX provides immediate change to Native American communities.

Through Title IX, Native Americans are finally able to prosecute the non-natives who are responsible for eighty-eight percent of the domestic abuse experienced by Native American women.[115] However, Title IX is not a perfect solution. Instead of allowing Native Americans to reestablish their traditional tribal court system based on restitution rather than retribution, VAWA requires Native Americans to prosecute non-native offenders in a court system similar to federal and state court systems. Section 904(d)(4) instructs that all participating tribes must provide the non-native defendant "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant."[116] Thus, through this provision, while non-natives are protected by having their constitutional rights met, Native Americans are required to yet again implement United States law and policy into their own governments. By requiring tribal courts to uphold United States constitutional norms, Congress infuses tribal courts with "American values," robbing tribal courts from reestablishing their traditional Native American tribal court systems.[117] So, although VAWA provides Native American domestic abuse victims with protection under tribal law, it does so by assimilating tribal courts and requiring tribal courts to ignore their traditional Native American identities.[118]

113. *Id.*

114. *Id.*

115. *Violence Against Native Women Gaining Global Attention*, *supra* note 22.

116. *Indian Law - Tribal Courts - Congress Recognizes and Affirms Tribal Courts' Special Domestic Violence Jurisdiction Over Non-Indian Defendants. - The Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, TIT. IX, 127 STAT. 54, 118-26 (To Be Codified in Scattered Sections of the U.S. Code)*, 127 HARV. L. REV. 1509, 1516 (2014).

117. *Id.* at 1516–17.

118. However, Native American tribes still support VAWA, believing that "no cost is greater than the harm and shame that was being borne by our women and children" through domestic abuse. Additionally, Native Americans find that VAWA still holds their Native American ideals at its core, "namely protecting [Native American] people and providing fairness to the accused." PASCUA YAQUI TRIBE VAWA IMPLEMENTATION, PASCUA YAQUI TRIBE ARIZONA 4,

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

B. Pre-Title IX vs. Post-Title IX Hypothetical

In order to better understand the advantages and disadvantages of prosecuting a non-native within a tribal court, a comparison between the tribal court system and United States federal and state court system is necessary. For this hypothetical comparison, suppose that the domestic violence incident took place on the federally recognized Pascua Yaqui Reservation.[119] The Pascua Yaqui Reservation is located sixty miles north of the United States-Mexico border, just outside Tucson, Arizona.[120] Approximately 5000 tribal members live on the reservation, and approximately 800 non-natives work for the tribe, tribal businesses, or attend school on the reservation.[121] Thus, non-native and Native American relationships are common. Imagine that a Pascua Yaqui native woman, "Jane," was exposed to a year of domestic abuse by "John," her roommate and non-native boyfriend. One night after a horrible beating, Jane finally gains the courage to leave the home she shares with John and seek help.[122] Jane escapes from their home and immediately telephones the tribal police. The tribal police soon arrive to interview Jane.

First, imagine that this year of domestic violence took place in 2000, years before the changes to VAWA were created and implemented. First, the tribal police would interview Jane and discover that John is not a Native American. Thus, they would be unable to arrest John for any charges, and the police would discourage Jane from reporting the incident, knowing that Jane's chances of seeking help are slim.[123] However, suppose Jane courageously chooses to still report the incident to the FBI. After waiting a month for the FBI to respond, investigators finally arrive to re-interview Jane. By this time, Jane has already forgotten details about the main beating incident and can only vaguely recall what happened during the other domestic abuse incidents. Additionally, Jane's wounds have all healed, and she does not have any photo evidence from the night of the incident. Thus, Jane is less credible than she

http://www.ncai.org/tribal-vawa/pilot-project-itwg/Pascua_Yaqui_VAWA_Pilot_Project_Summary_ 2015.pdf [http://perma.cc/88H5-YGAT].

119. The Pascua Yaqui tribe was the first tribe to prosecute a non-native under VAWA and was part of the Pilot Program. Sari Horwitz, *Arizona Tribe Set to Prosecute First Non-Indian under a New Law*, WASH. POST (Apr. 18, 2014), https://www.washingtonpost.com/national/arizona-tribe-set-to-prosecute-first-non-indian-under-a-new-law/2014/04/18/127a202a-bf20-11e3-bcec-b71ee10e9bc3_story.html [http://perma.cc/XGV2-FP62].

120. PASCUA YAQUI TRIBE VAWA IMPLEMENTATION, *supra* note 118, at 2.

121. Horwitz, *supra* note 119.

122. This factual scenario is based off the domestic abuse Diane Millich of the Southern Ute tribe experienced. Anya Montiel, *Sliver of a Full Moon*, AMERICAN INDIAN, http://www.americanindianmagazine.org/story/sliver-full-moon?page=show [http://perma.cc/42QQ-R82N].

123. *See* Timothy Williams, *For Native American Women, Scourge of Rape, Rare Justice*, N.Y. TIMES (May 22, 2012), http://www.nytimes.com/2012/05/23/us/native-americans-struggle-with-high-rate-of-rape.html [http://perma.cc/42QQ-R82N].

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

was when she first talked to the tribal police. When the federal prosecutor obtains the investigator's report, the federal prosecutor is unsure whether or not there is enough evidence to prosecute. If the federal prosecutor decides that there is enough evidence, John will be prosecuted in front of a jury consisting primarily of non-natives in federal court because Native Americans who live on the reservation would not be subjected to jury duty. Thus, the non-native jurors may sympathize with John, and racial stereotypes might cause the jury to disbelieve Jane, a Native American outsider. However, in the more likely scenario that the federal prosecutor chooses not to prosecute John, Jane will never be told by the federal prosecutor why the government refused to press charges.[124] Instead, Jane will be left helpless and on her own.

However, imagine Jane's domestic abuse occurred in April 2015, after the passing and implementation of VAWA Title IX. In this scenario, Jane could telephone the tribal officers, and they could immediately arrest John. Pascua Yaqui could then press charges against John. If John decides not to plea, John would then be tried in Pascua Yaqui court. As he awaits trial, John would be transported to a Bureau of Indian Affairs contracted detention facility in San Luis, Arizona that is close to the reservation.[125] Here, the tribe employs detention officers to specifically address tribal detainee needs.[126] When it is time for his trial, John would then go back to the reservation to be tried.

When John would arrive for trial, he would be in the Pascua Yaqui courthouse. The Pascua Yaqui courthouse itself is an impressive $21 million structure designated for the justice system as well as Pascua Yaqui police.[127] The justice system consists of Victim Services, Probation, and Pre-Trial Services Departments.[128] Additionally, courtrooms contain video and audio recording devices, and "each juror has a small television screen to view forensic evidence."[129] Non-native and Native American defendants are also provided with the same rights and resources that are available in state and municipal courts. If John meets the economic requirements, John would be assigned a public defender from the Public Defender's Office that consists of "four licensed defense attorneys and funds four private contracted defense attorneys for conflict situations."[130] At trial, the jury would consist of a "cross section" of the community, consisting of Native Americans and non-natives who reside on the reservation as well as non-natives who work at tribal

124. *Id.*
125. PASCUA YAQUI TRIBE VAWA IMPLEMENTATION, *supra* note 118, at 4.
126. *Id.*
127. Horwitz, *supra* note 119.
128. PASCUA YAQUI TRIBE VAWA IMPLEMENTATION, *supra* note 118, at 3.
129. Horwitz, *supra* note 119.
130. PASCUA YAQUI TRIBE VAWA IMPLEMENTATION, *supra* note 118, at 3.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

businesses and in the tribal government.[131] The jury would then decide, under the direction of the judge, whether or not John was guilty. Unlike some tribal courts, Pascua Yaqui requires judges to have a law degree.[132] Thus, John would be tried in a court system quite similar to the United States court system through his impartial juror, public defender representation, and educated judge.

Based on these hypotheticals, Jane has a much greater chance of being protected from John's abuse through the Pascua Yaqui court system. Unlike the federal system, where charges against John would most likely be dropped, Pascua Yaqui could immediately arrest and charge John, keeping him detained and away from Jane. Under the federal system, Jane is offered little, if any, protection from John. Contrastingly, the tribal court offers Jane and other domestic abuse victims protection from John and other abusers. Additionally, under the Pascua Yaqui court system, John's rights as a defendant are well protected. He is allotted representation of a qualified attorney in the Public Defender System. He also is tried in front of an impartial jury, made up of both Native Americans and non-natives, decreasing the possibility of juror bias based on his non-native status.

C. Response to Title IX Critiques

However, despite Jane's better chance of protection in the tribal court, some scholars argue that Title IX violates non-natives' constitutional rights. Specifically, scholars are concerned that tribal courts will not provide an impartial jury for non-native defendants, fearing that the jury will be composed of mostly Native American jurors.[133] However, none of the Sixth Amendment challenges brought by non-native defendants have been successful.[134] Critics also argue that Double Jeopardy problems may arise with Title IX because it allows tribes to try cases that are also subject to federal jurisdiction.[135] However, the federal government views tribes as separate sovereigns, so the Double Jeopardy clause is not violated by VAWA.[136] Thus, only the fear of a impartial jury still seems problematic.

Yet, despite concerns regarding an impartial jury, VAWA guarantees that both Native American and non-native defendants should have an impartial jury consisting of "a fair cross section of the community" and one that does "not

131. Horwitz, *supra* note 119.

132. *Id.*

133. Cynthia Castillo, *Tribal Courts, Non-Indians, and the Right to an Impartial Jury After the 2013 Reauthorization of VAWA*, 39 AM. INDIAN L. REV. 311, 322 (2015).

134. *Id.*

135. Shefali Singh, *Closing the Gap of Justice: Providing Protection for Native American Women Through the Special Domestic Violence Criminal Jurisdiction Provision of VAWA*, 28 COLUM. J. GENDER & L. 197, 221 (2014).

136. United States v. Lara, 541 U.S. 193, 210 (2003).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

systematically exclude any distinctive group in the community, including non-Indians."[137] The demographics on every reservation differ. Some reservations consist of primarily Native Americans, whereas others consist of mostly non-natives.[138] However, of the 4.6 million people who live in Indian Country, only 1.1 million people identify as Native American.[139] Based on this statistic, many tribes should be able to summon non-native residents to jury duty and have a jury consisting of both non-natives and Native Americans when a non-native is being tried. However, even if a jury consists primarily of Native Americans, this does not automatically result in finding of guilt for a non-native defendant. For example, in one Pascua Yaqui case, a non-native defendant was adjudicated by a jury with a Native American majority and Native American foreperson.[140] At trial, the jury was presented all the facts, including photographs of the Pascua Yaqui victim's injuries.[141] Yet, despite the majority Native American jury, the non-native was not convicted, proving that tribal court juries may be able to overcome juror bias.[142] While this is just one example, it shows that tribal juries are capable of analyzing the facts in an unbiased matter. Although many scholars and Congresspersons still argue that VAWA causes non-natives to risk of their constitutional rights, this example proves that bias can be overcome.[143]

In addition to arguments of the lack of an impartial jury, Title IX critics contend that trial court judges are not qualified. Unlike the Pascua Yaqui hypothetical, not all tribal judges are required to have a law degree.[144] However, despite their lack of law degree, many tribal judges are often natural leaders within their tribe and are typically required to be literate in English.[145] According to the Tribal Court Bench Book produced by the Northwest Tribal

137. VAWA § 904(d)(3) (2013).

138. Castillo, *supra* note 133, at 325–26.

139. *Id.* The United State Census Bureau found that 1.1 million Native Americans living in Indian areas identified themselves as "American Indian or Alaska Native," referring to "having origins in any of the original peoples of North and South American (including Central America)" and maintaining "tribal affiliation or community attachment." TINA NORRIS ET AL., U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010 13, http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf [http://perma.cc/L9CU-MA76].

140. Lorelei Laird, *Reclaiming Sovereignty*, 101 A.B.A. J., 46, 51 (2015).

141. *Id.*

142. *Id.*

143. Tom Gede, *Criminal Jurisdiction of Indian Tribes: Should Non-Indians Be Subject to Tribal Criminal Authority Under VAWA?*, ENGAGE, July 2012, at 40.

144. DELORIA, *supra* note 25, at 117. Note that not all U.S. federal and state judges are required to have law degrees.

145. *Id.* at 117, 124.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

Judges Association ("NTJA"), tribal judges should have a gatekeeper role.[146] They should prevent violence between intimate partners and prevent violence against children.[147] However, tribal judges should not "shoulder the responsibility" of protecting victims of domestic violence.[148] Instead, the NTJA explains that the community—not the judge—is responsible for preventing domestic abuse. By emphasizing the community, the NTJA returns to traditional Native American beliefs that concentrate on bringing about harmony within the community rather than penalizing the perpetrator of the crime.[149] Thus, in restoring traditional Native American beliefs, tribal judges act as a liaison between the Anglo-American court system and traditional tribal court system. While they may not all have law degrees, they are still leaders within their communities and are thus "qualified" as respected community leaders.

Other than differing in the qualifications for judges, constitutional problems may also arise because tribal courts differ in their funding. Not all tribal courts are as well-funded as the Pascua Yaqui and cannot afford $21 million dollar courthouses. When compared to federal and state courts, tribal courts have significantly less funding and resources, and this could cause defendants to have ineffective assistance of counsel.[150] VAWA authorizes Attorney Generals to exercise the option of awarding grants to Indian tribes to "strengthen tribal criminal justice systems to assist Indian tribes in exercising special domestic violence criminal jurisdiction."[151] These grants help fund law enforcement, prosecution, trial and appellate courts, probation systems, detention and correctional facilities, alternative rehabilitation centers, and family service systems.[152] Ultimately, however, VAWA insists that if Attorney Generals choose to award grants, the grants should be used to "provide indigent criminal defendants with the effective assistance of licensed defense counsel, at no cost to the defendant, in criminal proceedings in which a participating tribe prosecutes a crime of domestic violence or dating violence

146. THE NORTHWEST TRIBAL COURT JUDGES ASSOCIATION, TRIBAL COURT BENCH BOOK FOR DOMESTIC VIOLENCE CASES 19 (1999), http://www.tribal-institute.org/download/VAWA+Bench+Book.pdf [http://perma.cc/CR5A-NWZM].

147. *Id.*

148. *Id.* at 20.

149. DELORIA, *supra* note 25, at 111–12.

150. In 1993, Congress enacted the Indian Tribal Justice Act (ITJA) that recognized tribal courts and tribal justice programs as "essential" to Native American culture and identity. ITJA also acknowledged that tribal justice systems are underfunded, so ITJA established the Office of Tribal Justice Support within the Bureau of Indian Affairs in order to increase the funding of tribal justice systems. Samuel E. Ennis & Caroline P. Mayhew, *Federal Indian Law and Tribal Criminal Justice in the Self-Determination Era*, 38 AM. INDIAN L. REV. 421, 441 (2014).

151. VAWA § 904(f)(1) (2013).

152. *Id.*

or a criminal violation of a protection order."[153] Thus, VAWA permits Attorneys General to fund public-defender-like systems for defendants like Pascua Yaqui's Public Defender System and requires effective assistance of counsel.

Even with the requirements of effective assistance of counsel and an impartial jury, tribal courts are not without their shortcomings. Indeed, due to the lack of funding and resources within tribal courts, problems may arise when trying cases under Title IX. For example, in *Moses v. Fleek*, the weaknesses of tribal courts prevented Monique Moses from seeking justice against her ex-husband and former abuser, Matthew Fleek.[154] Moses, a member of the Tulalip tribe, met Fleek, a non-native, while serving in the Marine Corps.[155] In 2008, Moses and Fleek were married and later had a child.[156] In 2013, the couple divorced and established a parenting plan.[157] The following year, Moses filed for an Order of Protection against Fleek, and the trial level tribal court granted the order.[158] During the Order of Protection hearing, no live testimony was taken from Moses or Fleek.[159] In addition, the parties were not subjected to cross examination.[160] On appeal, the appellate level tribal court vacated the Order of Protection because the trial court failed to expose both Moses and Fleek to direct and cross examination.[161] This vacated order demonstrates that tribal courts may uphold the legal procedures established by Anglo-Americans at the expense of Native American women's safety. Thus, while VAWA allows Native Americans to try non-natives in tribal court, it does so only under Anglo-American procedures, expecting tribal courts to have enough funding to have criminal procedures similar to Anglo-American criminal procedures.

D. Impact of Recent Civil Case

On June 25, 2016, the United States Supreme Court issued its long-awaited decision for *Dollar General Corporation v. Mississippi Band of Choctaw*.[162] In a single page per curium opinion, the United States Court of Appeals for the

153. § 904(f)(2).

154. *See* Moses v. Fleek, 13 NICS App. 25 (2015).

155. *Id*. at 25; Jean Reid Norman, *Marines Band Together to Help Couple*, LAS VEGAS SUN (Aug. 22, 2008, 12:00 AM), http://lasvegassun.com/news/2008/aug/22/marines-band-together-help-couple/.

156. Norman, *supra* note 155; *see also Moses*, 13 NICS App. at 25 (discussing marriage and child).

157. *Moses*, 13 NICS at 26.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. Dollar General Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159 (2016).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

Fifth Circuit's judgment was affirmed by an equally divided Court.[163] In *Dollar General*, John Doe, a member of the Mississippi Band of Choctaw Indians, alleged that he was sexually molested by Dale Townsend, a non-native, at a Dollar General located on the Choctaw's reservation.[164] As a result, Doe and the Mississippi Band of Choctaw brought a civil suit against Dollar General in tribal court alleging sexual assault and battery.[165] Dollar General challenged the tribal court's jurisdictional power in federal court. The Fifth Circuit held that the tribal court had jurisdiction over Dollar General because Doe had a consensual working relationship with Dollar General.[166]

In its appeal to the Supreme Court, Dollar General argued that the tribal court should not have jurisdiction over Dollar General and Townsend, a non-native.[167] Dollar General claimed that tribal courts should not have civil jurisdiction over non-natives because tribal courts lack resources and qualified judges.[168] Indeed, Dollar General argued that the lack of extensive codified tribal laws presents a challenge for non-native defendants because "the content of tribal law is often knowable only to a few tribe members."[169] Thus, a non-native defendant would be ill-prepared and ill-represented, even if the non-native is represented by an attorney.[170] Additionally, Dollar General argued that Congress, not the Court, has the power to decide the extent of tribal jurisdiction.[171] Indeed, Dollar General referenced VAWA within its brief, stating, "Congress may also decide to grant jurisdiction over particular kinds of cases or issues, as it did in the Violence Against Women Reauthorization Act in the criminal context."[172] By directly mentioning VAWA, Dollar General admitted that their case was similar jurisdictionally and substantively to whether a non-native perpetrator can be criminally tried in tribal court for abusing a Native American.

163. Ed Gehres, *Opinion Analysis:* Dollar General*, the Court's Longest Pending Case of the 2015 Term is a Four-Four Per Curium Opinion*, SCOTUSBLOG, (June 25, 2016, 9:28 AM), http://www.scotusblog.com/2016/06/opinion-analysis-dollar-general-the-courts-longest-pending-case-of-the-2015-term-is-a-four-four-per-curiam-opinion/ [http://perma.cc/8UNX-PQ2M].

164. Brief for Respondents at 10, *Dollar General*, 136 S. Ct. (No. 13-1496), http://www.scotusblog.com/wp-content/uploads/2015/10/13-1496bs.pdf [http://perma.cc/TUN8-TAFQ].

165. *Id.* at 11.

166. Dolgencorp v. Miss. Band of Choctaw Indians, 746 F.3d 167, 172 (5th Cir. 2014).

167. Brief for the Petitioners at 3, *Dollar General*, 136 S. Ct. (No. 13-1496), http://www.scotusblog.com/wp-content/uploads/2015/09/13-1496-ts1.pdf [http://perma.cc/7HFW-G87K].

168. *Id.* at 3–4.

169. *Id.* at 7; *see* Brief Amicus Curiae of the States of Okla., Wyo., Utah, Mich., Ariz., and Ala. in Support of Petitioners at 3, *Dollar General*, 136 S. Ct. 2159 (No. 13-1496), http://www.scotusblog.com/wp-content/uploads/2015/09/amicus_oklahoma.pdf [http://perma.cc/8CYZ-B9P2].

170. Brief Amicus Curiae of the States of Okla., Wyo., Utah, Mich., Ariz., and Ala. at 3.

171. Brief for Petitioners, *supra* note 167, at 41.

172. *Id.* at 42.

In response to Dollar General's arguments, the Mississippi Band of Choctaw argued that Native Americans should have civil jurisdiction over non-natives in tribal court. Specifically, the Choctaw alleged that its court system "guarantees equal protection and due process for 'any person within its jurisdiction.'"[173] The Choctaw explained that tribal courts often rely upon federal and state case law when assessing legal issues that are underdeveloped within the tribal court system.[174] Additionally, the amicus briefs claimed that Dollar General was given fair notice of being subject to tribal jurisdiction.[175]

With the Supreme Court issuing a split decision, tribal courts have civil jurisdiction over non-natives in tort actions. However, this decision only applies to the Fifth Circuit, so a similar case could have a different outcome if it is brought in another Circuit. In utilizing the Fifth Circuit's decision, Native American domestic abuse victims could be permitted to bring civil suits against non-native abusers in tribal court. Thus, the Fifth Circuit decision opens the door for Native Americans to recover against their non-native perpetrators.

III. AN IMPERFECT SOLUTION

Although Title IX has restored power to tribal courts, it is still imperfect. It only addresses domestic abuse for Native American women, ignoring victims who are children and men.[176] It only permits tribal courts to prosecute non-natives who do not live or work on tribal land if they are husbands, partners, or boyfriends of Native American women, prohibiting random acts of rape and sexual assault from being prosecuted in tribal courts.[177] Finally, Title IX requires tribal courts to meet federal standards, forcing tribal courts to further assimilate to the Anglo-American system.[178] Yet, without Title IX and without choosing to assimilate their court systems, Native American women continue to be unprotected from non-native abusers. Thus, Title IX is a double-edged sword.

I recognize that I am not a Native American woman, nor do I have any experience living or working amongst Native Americans. Thus, I am not in any way qualified to speak for Native Americans regarding whether they should

173. Brief for Respondents, *supra* note 164, at 3.

174. *Id.* at 7.

175. Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Mississippi In Support of Respondents at 2, Dollar General Corp. v. Miss. Band of Choctaw Indians, No. 13-1496 (U.S., 2015), http://www.scotusblog.com/wp-content/uploads/2015/10/13-1496-bsac-The-American-Civil-Liberties-Union.pdf [http://perma.cc/DY37-JTP9].

176. ATTORNEY GENERAL'S ADVISORY COMM. ON AM. INDIAN AND ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE, *supra* note 21, at 9.

177. VAWA § 904(b)(4)(B)(iii) (2013); Mary Hudetz, *supra* note 8. Tribal courts can still prosecute non-natives who live or are employed on tribal land for these acts of violence.

178. § 904(d)(4).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

support Title IX. However, by comparing Native Americans' adaptation of VAWA and United States federal law to the predicament that Israeli courts face in trying Palestinian residents of the West Bank and Gaza Strip, a better understanding of the favorableness and unfavorableness of VAWA can be gained.

Since 1967, Israel has maintained control over the West Bank and Gaza Strip, where many Palestinians live.[179] Although Israel has never formally asserted sovereignty over the West Bank and Gaza Strip, Israeli military governments have continuously occupied the territories ("Occupied Territories"), resulting in years of conflict between Israel and Palestine.[180] Palestinians wish to end Israeli occupation and establish independence within the Occupied Territories.[181] Because thousands of Palestinians are residents of the Occupied Territories, thousands of Palestinians have been tried in Israeli military courts within the Occupied Territories.[182] Thus, Israeli and Palestinian lawyers represent Palestinian defendants in Israeli courts where Palestinians are forced to adhere to Israeli laws and court structure.[183]

George E. Bisharat[184] questions whether lawyers who represent Palestinian defendants assist in Palestinian interests or simply legitimize the Israeli occupation and militarization over the Occupied Territories.[185] On one side, lawyers not only aid Palestinian defendants in representation but also "function as links between defendants and the outside world."[186] Often, lawyers provide defendants food, clothing, and information from their family members.[187] Thus, lawyers not only improve Palestinian defendants' legal positions but also their daily lives. Contrastingly, by permitting lawyering within Israeli courts, Palestinians submit to Israeli rule. By participating in the Israeli court system, lawyers legitimize Israeli occupation and induce "Palestinian *compliance* with military administration."[188] However, Bisharat concludes that, while submission to the Israeli court system delays Palestinians the ultimate goal of independence, the benefits experienced by Palestinians and Palestinian

179. George E. Bisharat, *Courting Justice? Legitimation in Lawyering Under Israeli Occupation*, 20 LAW & SOC. INQUIRY 349, 349 (1995).

180. *Id.* at 349, 352. I call this the Occupied Territories to be consistent with Bisharat's terminology.

181. *Id.* at 351.

182. *Id.* at 353.

183. *Id.* at 354.

184. George E. Bisharat is an anthropology, Middle East, and legal scholar. *George Bisharat*, INST. FOR PALESTINIAN STUDIES, http://www.palestine-studies.org/institute/fellows/george-bisharat [http://perma.cc/G3BC-PZKZ].

185. Bisharat, *supra* note 179, at 358–59.

186. *Id.* at 371.

187. *Id.* at 371–72.

188. *Id.* at 387.

defendants outweigh the legitimization of Israeli occupation.[189] Thus, while lawyering in Israeli courts is an imperfect solution for Palestinians, it is one that Palestinians should settle for in order to achieve legal representation under Israeli occupation.

Like Bisharat's example of the Occupied Territories, in implementing Title IX, Native Americans obtain greater legal power but also must submit to federal court procedures. Just as Palestinians must choose whether to submit to Israeli military courts, allowing lawyers to represent them but also detract them from their goal of gaining independence, Native Americans must choose whether to implement Title IX, allowing Native Americans to be protected from non-native abusers but also lose their traditional court system and further assimilate to Anglo-American culture. Like Palestinians, Native Americans are faced with an imperfect solution. However, seeing that Native Americans are eager to protect women from domestic violence, implementation of VAWA allows Native Americans to achieve this goal.[190] Thus, benefits of implementing VAWA, like the benefits of submitting to Israeli military courts, outweigh the greater assimilation of the Anglo-American court system and culture.

CONCLUSION

Although VAWA grants tribal courts autonomy over non-natives, VAWA forces Native Americans to further assimilate into Anglo-American culture by implementing United States criminal procedure. Before the reauthorization of VAWA, the power of tribal courts slowly depleted over time, allowing tribal courts to only have jurisdiction over Native Americans and only issue up to three year sentences. Due to this lack of jurisdictional power, many Native American women who were abused by non-native male partners were deprived from protection. Thus, Title IX finally grants these domestic violence victims efficient access to protection through allowing tribal courts jurisdiction over non-native male partners. Although critics argue that Title IX disadvantages non-natives and violates their constitutional rights, success stories prove that tribal courts carefully protect non-native defendants through public defender systems and an impartial jury consisting of both non-natives and Native Americans. In doing so, tribal courts assimilate the Anglo-American criminal justice system. Based on the experience of Palestinians living in the Occupied Territories, this assimilation might be a worthy imperfect solution because

189. *Id.* 350–51.

190. Nagle, *supra* note 16.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

Native Americans can now protect domestic violence victims. Thus, in sacrificing cultural assimilation, tribal courts who implement VAWA actively protect victims from non-native perpetrators.

MARY K. MULLEN*

* J.D. Candidate, 2017, Saint Louis University School of Law. Thank you to Professor Monica Eppinger for her guidance and encouragement throughout the production of this Comment. Thank you also to my unwavering support system—Mom, Dad, Mark, Jimmy, Phil, and Jeremy.