DOMESTIC VIOLENCE REPORT™

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Use of Tribal Convictions in Federal Court

by Leslie A. Hagen

In 2005, Congress recognized what many in tribal communities had known for years, that American Indian and Alaska Native (AI/AN) women experience crimes of domestic and sexual assault at much higher rates than do other population groups in the United States. With the passage of the Violence Against Women Reauthorization Act of 2005 (VAWA), Congress created Title IX Safety for Indian Women. Section 901 of VAWA lists findings by Congress of the level of violence experienced by women in AI/AN communities:

1. One out of every three Indian (including Alaska Native) women are raped in their lifetimes;
2. Indian women experience 7 sexual assaults per 1,000, compared with 4 per 1,000 among Black Americans, 3 per 1,000 among Caucasians, 2 per 1,000 among Hispanic women, and 1 per 1,000 among Asian women;
3. Indian women experience the violent crime of battering at a rate of 23.2 per 1,000, compared with 8 per 1,000 among Caucasian women;
4. During the period 1979 through 1992, homicide was the third leading cause of death of Indian females aged 15 to 34, and 75% were killed by family members or acquaintances;
5. Indian tribes require additional criminal justice and victim

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VAWA 2018: The Time Has Come for a Full *Oliphant* Fix

by Brent Leonhard

Indian country criminal jurisdiction is a dangerous mess, and the product of a long history of bad decisions from all branches of the United States Government.[1] In 1978 the Supreme Court significantly endangered Native women victims of non-Indian violence when it decided **Oliphant v. Suquamish Indian Tribe**, 435 U.S. 191 (1978). That case involved two non-Indian residents of the tribe. One defendant, Oliphant, assaulted a tribal police officer and resisted arrest at Suquamish's annual celebration, Chief Seattle Days, while the other defendant, Belgarde, led police on a high-speed chase that ended with him slamming into a tribal police vehicle. In Belgarde's case, tribal officers called Kitsap County Sheriffs out to the scene but when the Sheriffs arrived, they refused to take any action.[2] Understandably, the Suquamish tribe prosecuted Oliphant and Belgarde for their crimes in the Suquamish court; otherwise they would have gone unpunished. The defendants challenged the tribe's jurisdiction all the way to the United States Supreme Court. Ultimately, Justice Rehnquist, writing for the majority, held that tribes were implicitly divested of the power to prosecute non-Indians "except in a manner acceptable to Congress."[3] This created a serious hole for public safety in Indian country.

Former Associate Attorney General Tom Perrelli highlighted the danger implicit in Indian country criminal jurisdiction rather well when testifying before the Senate Committee on Indian Affairs on November 10, 2011. He said:

> Tribal governments—police, prosecutors and courts—should be essential parts of the response to

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In This Issue . . .

This is the second of two issues of *DVR* devoted to tribal law. Articles in this issue feature the tribal law provisions in the Violence Against Women Act, a landmark case prosecuted under the new federal strangulation law, a recent U.S. Supreme Court case on the use of tribal court convictions in subsequent prosecutions in federal court, and the role of protection orders in tribal courts.

D. Kelly Weisberg, Editor, *Domestic Violence Report*

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these crimes. But under current law, they lack the authority to address many of these crimes . . . [T]ribal courts have no authority at all to prosecute a non-Indian, even if he lives on the reservation and is married to a tribal member. Tribal police officers who respond to a domestic violence call, only to discover that the accused is non-Indian and therefore outside the tribe's criminal jurisdiction, often mistakenly believe they cannot even make an arrest. Not surprisingly, abusers who are not arrested are more likely to repeat, and escalate their attacks. Research shows that law enforcement's failure to arrest and prosecute abusers both emboldens attackers and deters victims from reporting future incidents. In short, the jurisdictional framework has left many serious acts of domestic violence and dating violence unprosecuted and unpunished."[4]

In addition to the real world confusion Mr. Perrelli highlights, the safety gap was exacerbated by the historic fact that federal prosecutors more often than not declined to prosecute Indian country crimes. Between October 2002 and September 2003, 58.8% of cases referred by the Bureau of Indian Affairs for federal prosecution were declined.[5] Between October 2003 and September 2004, the rate dropped to 47.9%, an improvement but significantly higher than the national average of 21.5% for the same time period.[6] While historical statistics are not available concerning the declination rates of non-Indian crimes, one can reasonably assume they were at least as high as the average for all other crimes. However, since passage of the Tribal Law and Order Act of 2010 and a sea change in the way United States Attorneys interact with tribal nations, declination rates have significantly improved with an overall rate of 34% for 2013. But that rate jumped back up to 44% in 2015.[7] Unfortunately, we still do not know what the declination rate is for crimes committed by non-Indians against Indians because it has not yet been accurately tracked.[8]

The danger implicit in the jurisdictional mess has been borne by Indian women, who face an epidemic level of violence in the United States.[9] Indian women are 2.5 times more likely to be sexually assaulted than other women.[10] More than one in three—34.1%—of Indian women will be raped in their lifetime.[11] While national murder rates of Indian

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Tribal Courts and the Power to Protect

by Honorable Kelly Gaines Stoner & Shandi S. Campbell*

"American Indian and Alaska Native (AI/AN) communities and lands are frequently less safe—and sometimes dramatically more dangerous—than most other places in our country. Ironically, the U.S. government, which has a trust responsibility for Indian Tribes, is fundamentally at fault for this public safety gap. Federal government policies have displaced and diminished the very institutions that are best positioned to provide trusted, accountable, accessible, and cost-effective justice in Tribal communities."[1]

A key responsibility of any sovereign is to keep its citizens[2] safe. Tribes are no different in that regard, but tribes face many additional hurdles to exercising that sovereign responsibility, including an ever-increasing threat of violence towards Native women. Barriers created by complex civil and criminal jurisdictional rules, a lack of consistent enforcement of tribal protection orders in state jurisdictions, and federal restrictions placed on tribal criminal sentencing authority, require tribes to work harder than state sovereigns when issuing an enforceable protection order. Former Tulalip Tribal Judge Theresa Pouley encapsulated the present situation in Indian country: "The combination of the silence that comes from victims who live in fear and a lack of accountability by outside jurisdictions to prosecute that crime, you've created if you will, the perfect storm for domestic violence and sexual assault, which is exactly what all of the statistics would bear out."[3] This article examines the complexities surrounding issuing tribal court protective orders, full faith and credit of tribal protection orders, and offender accountability for violating protection orders in Indian Country.[4]

Since time immemorial, tribes have possessed an inherent sovereign power to make laws and be governed by those laws. Prior to federal restrictions, a tribe's sovereignty stretched to all people and lands found within a tribe's jurisdiction. Colonization and Anglo-settlers' perceived notion of superiority however, quickly put a stranglehold on tribal sovereignty and attempted to quash the rights of tribal governments to rule its people and those that interacted with the tribe or its members. The forced metamorphosis of pure tribal sovereignty into its almost unrecognizable current state has left a lasting impact in Indian Country.

Though often told as tales of old, the historical trauma of colonization, assimilation, and jurisdictional annihilation are still causing jolts of pain and re-opening the wounds of AI/AN people. Nowhere is this more apparent than when examining the rates of violence against women. AI/AN women suffer domestic violence and physical assaults at rates higher than any other ethnicity.[5] A staggering 56.1% of AI/AN women have experienced sexual violence; 66.4% have experienced psychological aggression by an intimate partner; and 55.5 % have experienced physical violence by an intimate partner.[6] This violence is being perpetrated against AI/AN women both in state and tribal jurisdictions, but only the tribal jurisdictions are impacted by imposed jurisdictional limitations, greatly restricting a tribe's ability to account for victim safety.

At the core of domestic violence, is the perpetrator's manipulation tactics to maintain power and control over the victim.[7] Protection orders are often used to disperse some of the power and control a perpetrator is exerting over the victim and provides a unique legal remedy that is civil in nature but carries both civil and criminal penalties for violations of any provision of the order. Tribal sovereignty in the form of exercising tribal court jurisdiction is critically important to victims of domestic violence residing within Indian country[8] and civil tribal court protection orders are a necessary tool that tribal courts use to address issues victim safety and offender accountability. However, a tribal court's civil authority to offer protection to tribal citizens seeking protection in tribal courts has been greatly restricted by Congress and federal case law. While it is generally held that a tribal court has civil jurisdiction to issue a civil protection order between members of that tribe for causes of action arising in Indian country,[9] the issue of whether a tribal court had the civil authority to issue a civil protection order in matters involving non-members, including non-member Indians, is murky.

The Violence Against Women Act 2013[10] (VAWA 2013) helped to clear some of the murk and specifically focused on the power of a tribal court order to issue civil protection orders over all persons and expressed the following:

> (e) Tribal Court Jurisdiction.–For purposes of this section, a court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe".[11]

Though this language clarified some of the tribal civil jurisdictional questions regarding a tribe's authority to issue protection orders involving non-members, this is far from the only hurdle that tribal courts must overcome when seeking to protect tribal citizens.

A protection order is only as strong as the enforceability of the order. Victims believe that protection orders will be enforced across all jurisdictional boundaries and that the safety measures put forth by one judicial forum will be recognized by all other judicial forums. However, that is not always the case. When victims seek to enforce

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tribal court protection orders outside of the jurisdictional boundaries of the issuing tribal court, issues related to full faith and credit will impact victim safety despite a powerful federal law that targets the seamless enforcement of all protection orders across jurisdictional lines.

VAWA 2013 directly focused on the issue of full faith and credit of all protection orders issued in compliance with VAWA 2013. VAWA 2013 notes:

> Any protection order issued that is consistent with subsection (b) by the court of a state, Indian tribe or territory shall be accorded full faith and credit by the court of another state, tribe or territory and enforced by the court and law enforcement of the other state, Indian tribe or territory as if it were the order of the enforcing jurisdiction.[12]

To be "consistent with subsection (b)" a tribal court protective order must, on the face of the document itself, have findings that include (1) that the tribal court has subject matter jurisdiction, (2) why the tribal court has personal jurisdiction, and (3) that due process has been satisfied according to tribal law. Though the analysis seems simple, anecdotal evidence reveals victims are still experiencing difficulties with enforcement of tribal court protection orders in jurisdictions outside of the issuing tribe's Indian country. VAWA's subsection (b) requires the tribal protection order to have findings that include that tribal law provides: (1) subject matter jurisdiction, (2) personal jurisdiction, and (3) that due process has been satisfied.[13] Indeed, "[m]any Tribal governments have been active in seeking ways to make do with the current jurisdictional structure. However, working around the current jurisdictional maze will continue to deliver suboptimal justice because of holes in the patchwork system and these "work-arounds" still do not provide Tribal governments with full authority over all crime and all persons on their lands."[14]

When enforcement of a protection order is sought (no matter the jurisdiction) there are essentially two mechanisms of enforcement: civil enforcement and criminal enforcement. The enforcing court will apply its jurisdiction's civil and/or criminal laws to any enforcement of a foreign protection order. In terms of a tribe's civil enforcement for violations of a protection order occurring in Indian Country, VAWA 2013 specifically addresses some possible civil remedies: (1) tribal court enforcement for violations of protection orders through civil contempt, or (2) by excluding the violator from tribal lands.[15] VAWA also recognized that tribes may have "other appropriate mechanisms" potentially available to enforce violations of protection orders in tribal courts such as monetary penalties, community service, restitution, forfeiture, and posting of a Peace Bond.[16]

Criminal enforcement of a tribal court protective order often brings with it quaking quagmires of jurisdictional interpretations and limitations. Today, three sovereigns vie for civil and/or criminal jurisdiction in Indian country: tribal governments, state governments, and the federal government. In determining which sovereign (tribal, federal or state) may exercise criminal jurisdiction in Indian country, the following examination must be made: (1) where did the crime occur; (2) who is the suspect; (3) who is the victim; and (4) the crime that was committed. An accurate and clearly delineated analysis, complete with

Table 1: Criminal Jurisdiction on Reservations Not Affected by PL 280/State Jurisdiction[23]

Indian Status	***Type of Crime*** ***Major Crime*** *(as defined by Major Crimes Act (MCA))*	***All Other Crimes***
Indian perpetrator, Indian victim*	Federal (under MCA) and tribal jurisdiction	Tribal jurisdiction
Indian perpetrator, non-Indian victim**	Federal (under MCA) and tribal jurisdiction	Federal (under General Crimes Act) and tribal jurisdiction
Non-Indian perpetrator, Indian victim	Federal jurisdiction (under General Crimes Act)***	Federal (under General Crimes Act) jurisdiction***
Non-Indian perpetrator, non-Indian victim	State jurisdiction	State jurisdiction

*If the offense is listed in the Major Crimes Act (MCA), there is federal jurisdiction, exclusive of the state, but not the tribe. If the listed offense is not otherwise defined and punished by federal law applicable in the special maritime and territorial jurisdiction of the United States, state law is used in federal courts. See section 1153(b). If not listed in MCA, the tribal jurisdiction is exclusive.

**If listed in the Major Crimes Act (MCA), there is federal jurisdiction, exclusive of the state, but probably not of the tribe. If the listed offense is not otherwise defined and punished by federal law applicable in the special maritime and territorial jurisdiction of the United States, state law is used in federal courts. If not listed in MCA, there is federal jurisdiction, exclusive of the state, but not of the tribe, under the General Crimes Act. If the offense is not defined and punished by a statute applicable within the special maritime and territorial jurisdiction of the United States, state law is used in federal courts under 18 U.S.C. § 13. The United States can prosecute an Indian for a non-MCA crime, provided the tribe has not prosecuted.

***Tribal jurisdiction for crimes under VAWA 2013 Title IX, when the tribe has opted in to Special Domestic Violence Criminal Jurisdiction (SDVCJ).

Note: There is federal jurisdiction in Indian country for crimes of general applicability.

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Prosecuting a Landmark Non-Fatal Strangulation Case in Federal Court

by Leslie A. Hagen*

In the early morning hours of August 19, 2013, Zackeria Crawford strangled his girlfriend until she lost consciousness and became incontinent. The assault occurred within the exterior boundaries of the Blackfeet Indian Reservation in Montana. The defendant is an enrolled member of the tribe.

The victim told the FBI Special Agent that she was asleep in the home that she shared with defendant Crawford, her boyfriend of three years. Crawford woke her up, began to threaten her, and accused her of cheating. The defendant then forced the victim into the crawlspace located in a closet leading under the residence. While in the crawlspace, Crawford beat the victim with his hands and feet. He then placed his hands on the victim's throat and began strangling her. The victim told law enforcement that he said words to the effect of, "I really hate to do this to you, but I'm going to kill you."

The victim told investigators that she twice lost consciousness and that the assault lasted for approximately 20 minutes. When the defendant went to another room in the house, the victim escaped the crawl space and ran out of the house to her car and attempted to drive away. The defendant jumped on to the hood of the vehicle and hung on for several blocks. Crawford eventually rolled off of the vehicle and the victim drove directly to the Browning Correctional Center and reported the assault.

Law enforcement obtained photographs of the injuries, and the victim obtained medical treatment. The treating physician documented that there was a substantial risk of death. The defendant confessed to the FBI and ultimately pled guilty to one count of assault by strangulation under 18 U.S.C. § 113(a)(8). The case was prosecuted by Assistant U.S. Attorney (AUSA) Ryan Weldon, and it represents one of the first cases in the country to be prosecuted under the new federal strangulation and suffocation statute. The defendant was sentenced to 30 months imprisonment and three years of supervised release at his March 2014 sentencing hearing.[1]

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Severity of the Problem

Police and prosecutors are learning what survivors of non-fatal strangulation have known for years: "Many domestic violence offenders and rapists do not strangle their partners to kill them; they strangle them to let them know they can kill them—any time they wish."[2] There are clear reasons why strangulation assaults—particularly in an intimate partner relationship—should be a separate felony offense and taken seriously at sentencing.

- "Strangulation is more common than professionals have realized. Recent studies have now shown that 34 percent of abused pregnant women reported being 'choked;' 47 percent of female domestic violence victims reported being 'choked.'"[3]
- "Victims of multiple [non-fatal strangulation] 'who had experienced more than one strangulation attack, on separate occasions, by the same abuser, reported neck and throat injuries, neurologic disorders and psychological disorders with increased frequency.'"[4]
- "Almost half of all domestic violence homicide victims had experienced at least one episode of non-fatal strangulation prior to a lethal [or near-lethal] violent incident. [Victims of one episode of strangulation are 700 percent more likely to be a victim of attempted homicide by the same partner.] Victims of prior non-fatal strangulation are 800 percent more likely of later becoming a homicide victim [at the hands of the same partner]."[5]
- Even given the lethal and predictive nature of these assaults, the largest non-fatal strangulation case study ever conducted to date (the San Diego Study), found that most cases lacked physical evidence or visible injury of strangulation.[6] Only 15% of the victims had a photograph of sufficient quality to be used in court as physical evidence of strangulation, and no symptoms were documented or reported in 67% of the cases.[7] The San Diego Study found major signs and symptoms of strangulation that corroborated the assaults, but little visible injury.[8]
- "Strangulation is more serious than professionals have realized. Loss of consciousness can occur within 5 to 10 seconds . . . and death within 4 to 5 minutes. The seriousness of the internal injuries [even with no external injuries] may take a few hours to be appreciated and delayed death can occur days later."[9]
- "Because most strangulation victims do not have visible [external] injuries, strangulation cases may be minimized or trivialized by law enforcement, medical and mental health professionals [and even courts]."[10]
- Even in fatal strangulation cases, there is often no evident external injury (confirming the findings regarding the seriousness of non-fatal, no-visible-injury strangulation assaults).[11]
- Non-fatal strangulation assaults may not fit the elements of other serious assaults due to the lack of visible injury. Studies are confirming that an offender can strangle someone nearly to death with no visible injury, resulting in professionals viewing such an offense as a minor misdemeanor or no provable crime at all.[12]
- Experts across the medical profession now agree that manual or ligature strangulation is "lethal force" and is one of the best predictors of a future homicide in domestic violence cases.[13]

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Ten percent of violent deaths in the United States are from strangulation, with six female victims to every male victim.[14] However, the percentage of women who survive strangulation is far greater. Numerous studies show that 23% to 68% of women who are victims of intimate partner violence have experienced strangulation assault by a male partner in their lifetime. Another study conducted at a battered women's shelter, found that on average, each woman with a history of strangulation had been strangled 5.3 times in her intimate relationships.[15] Furthermore, a strong correlation exists between strangulation and other types of domestic abuse. In a study of 300 strangulation cases, a history of domestic violence existed in 89% of the cases, and children were present during at least 50% of the incidents.[16]

This correlation is disturbing, especially in the context of Indian Country, where violent crime rates can far exceed those of other American communities. Some tribes have experienced rates of violent crime over 10 times the national average.[17] Reservation-based and clinical research show very high rates of intimate partner violence against American Indians and Alaska Native women.

Police, prosecutors, and medical providers across the country have begun to appreciate the inherent lethality risks for strangulation and suffocation crimes. The overwhelming majority of states and some Indian tribes have enacted strangulation-specific laws that range from misdemeanor offenses to felonies. Because domestic violence and sexual assault remains primarily a matter of state, local, and tribal jurisdiction, the federal government historically lacked jurisdiction over some intimate partner violence crimes. The Violence Against Women Reauthorization Act of 2013 (VAWA 2013) changed that by providing the federal government with additional statutory tools to prosecute intimate partner violence. With the passage of VAWA 2013, Congress recognized the gravity of strangulation and suffocation crimes and, accordingly, amended the federal assault statute, 18 U.S.C. § 113, to include a specific charge of assault or attempted assault by strangulation or suffocation. This important change in the law became effective March 7, 2013.

Numerous studies show that 23% to 68% of women who are victims of intimate partner violence have experienced strangulation assault by a male partner in their lifetime. Another study conducted at a battered women's shelter, found that on average, each woman with a history of strangulation had been strangled 5.3 times in her intimate relationships.

Federal Criminal Jurisdiction

Currently, there are 573 federally recognized tribes in the United States.[18] According to the Bureau of Indian Affairs, "[a]pproximately 56.2 million acres are held in trust by the United States for various Indian tribes and individuals."[19] In addition, the Bureau states the following:

> There are approximately 326 Indian land areas in the U.S. administered as federal Indian reservations (i.e., reservations, pueblos, rancherias, missions, villages, communities, etc.). The largest [such land area] is the 16 million-acre Navajo Nation Reservation located in Arizona, New Mexico, and Utah. The smallest is a 1.32-acre parcel in California where the Pit River Tribe's cemetery is located. Many of the smaller reservations are less than 1,000 acres.[20]

Approximately, 5.2 million people in the United States identify as Native American, "either alone or in combination with one or more other races," per the 2010 Census.[21] And of this group, 2.9 million, or 0.9 % of the total U.S. population, identify as only Native American.[22] In 2010, more than 1.1 million Native Americans resided on tribal land.[23]

The two main federal statutes governing federal criminal jurisdiction in Indian country are 18 U.S.C. § 1152 and § 1153.[24] Section 1153, known as the Major Crimes Act, gives the federal government jurisdiction to prosecute certain enumerated offenses, such as murder, manslaughter, rape, aggravated assault, and child sexual abuse, when they are committed by Indians in Indian country.[25] Section 1152, known as the General Crimes Act, gives the federal government exclusive jurisdiction to prosecute all crimes committed by non-Indians against Indian victims in Indian country.[26] Section 1152 also grants the federal government jurisdiction to prosecute minor crimes by Indians against non-Indians, although that jurisdiction is shared with tribes and provides that the federal government may not prosecute an Indian who has been punished by the local tribe.[27]

To protect tribal self-government, Section 1152 specifically excludes minor crimes involving Indians, when the crimes fall under exclusive tribal jurisdiction.[28] The federal government also has jurisdiction to prosecute federal crimes of general application, such as drug and financial crimes, when they occur in Indian country, unless a specific treaty or statutory provision provides otherwise.[29] On a limited number of reservations, the federal criminal responsibilities under Sections 1152 and 1153 have been ceded to the States under "Public Law 280" or other federal laws.

The United States Constitution, treaties, federal statutes, executive orders, and court decisions establish and define the unique legal and political relationship that exists between the United States and Indian tribes. The FBI and the USAOs are two of many federal law enforcement agencies with responsibility for investigating and prosecuting

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Indian Child Welfare Act in Custody Cases Involving Domestic Violence: Case Summaries

by Anne L. Perry

Introduction

The Indian Child Welfare Act (ICWA) provides special protections in child welfare proceedings for children who are members of—or eligible for membership in—an Indian Tribe. 25 U.S.C. §§ 1901-1963 (2012). Congress passed the ICWA in 1978 in response to the routine removal of Indian children from their families and kinship networks and placement in foster or adoptive homes with non-Indian families. Hearings leading up to the passage of the statute identified rising concern "over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large number of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." **Mississippi Band of Choctaw Indians v. Holyfield**, 490 U.S. 30 (1989). Evidence presented at these hearings showed that 25% to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions. Approximately 90% of the Indian placements were in non-Indian homes. **Id.** In its landmark case on the tribal jurisdictional provisions under the ICWA, the Supreme Court reasoned that the ICWA provisions were "a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves." **Id.** ICWA seeks to protect the best interests of Indian children by providing services to prevent removal and to preserve and reunify Indian families.

To achieve these ends, ICWA establishes "minimum Federal standards for the removal of Indian children from their families and [for] the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture." 25 U.S.C. § 1902. The statute establishes exclusive jurisdiction in the tribal courts for proceedings concerning an Indian child who "resides or is domiciled within the reservation of such tribe," and creates a dual or concurrent jurisdictional scheme in the case of children not domiciled on the reservation. The various provisions of ICWA create procedural and substantive safeguards, including notice and appointment of counsel and parental and tribal rights of intervention. State court custody proceedings are to be transferred to the tribal court on the petition of either parent or tribe. Under ICWA, "No foster care placement may be ordered . . . in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses," that a parent's continued custody of the child "is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(e). Further, this finding must be made beyond a reasonable doubt to order the termination of parental rights. Adoptive placements are also governed by ICWA, and must be made preferentially with members of the child's extended family, other members of the same tribe, or other Indian families. These provisions control child custody determinations concerning Indian children where domestic violence in the household creates an unsafe or unstable home.

Oklahoma: Father Entitled to His Own Hearing in Child Welfare Adjudication

The Facts. Father, Tylor Clark, and Mother had a child together, J.C. Father and Mother were married when J.C. was born but later divorced. Mother also had two younger children, J.C.'s half-siblings, with Joshua Driever. The three children were taken into protective custody after Mother and Driever were arrested for alleged possession and being under the influence of methamphetamines and for child endangerment. The State filed a petition to adjudicate all three children as deprived, listing Father as a defendant, along with Mother and Driever. The allegations specifically pertaining to Father were that he was diagnosed with Bipolar Disorder but not currently taking any medications, that Father and Mother had a "domestically violent relationship," that Father had a criminal history for domestic assault and battery, and that Father had failed to protect J.C. from the "deprivations" in the petition. As to Mother and Driever, the State additionally listed the conditions of possession of illegal substances, substance abuse, and threat of harm as grounds for removal. At the adjudication hearing, Mother stipulated to the allegations in the petition and to J.C's deprived status. Father, however, objected to the adjudication and requested a non-jury trial on the question of whether J.C. should be adjudicated deprived. The court denied Father's request, finding that because Mother had stipulated to J.C.'s deprived status, there was no need for a trial on the allegations against Father.

Cherokee Nation Intervenes Pursuant to ICWA. Shortly thereafter, the Cherokee Nation filed a notice to intervene pursuant to ICWA, stating that the children were "Indian Children" and the Nation intended to be involved with the case. The court entered a written order that ICWA applied, but memorialized the adjudication of all three children as deprived. The order further recited that the court had rejected Father's request for a non-jury trial and had overruled Father's objection to the adjudication of J.C. as deprived. All three children were declared wards of the State and placed in foster care. Father appealed, arguing that the trial court denied his constitutional right of due process by refusing his request for a non-jury trial on the issue of whether J.C. was deprived.

Civil Court Case. The Court of Civil Appeals of Oklahoma noted that the ICWA (and its Oklahoma State counterpart) provided that a court shall "[a]ccept a stipulation by the child's parent, guardian, or other legal custodian that the facts alleged in the petition are true and correct." However, Father claimed that the acceptance of

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Table 2: Criminal Jurisdiction for States and Reservations Where PL 280 Applies[24]

Indian Status	***Type of Crime*** ***Major Crime*** *(as defined by Major Crimes Act (MCA))*	***All Other Crimes***
Indian perpetrator, Indian victim*	State and tribal jurisdiction	State and tribal jurisdiction
Indian perpetrator, non-Indian victim*	State and tribal jurisdiction	State and tribal jurisdiction
Non-Indian perpetrator, Indian victim*	State jurisdiction**	State jurisdiction**
Non-Indian perpetrator, non-Indian victim	State jurisdiction	State jurisdiction

*Under TLOA, a tribal government may request federal concurrent over crimes in PL 280 states, subject to approval of the U.S. Attorney General.
**Tribal jurisdiction for crimes under VAWA Title IX, when a tribe has opted in to Special Domestic Violence Criminal Jurisdiction (SDVCJ).
Note: There is federal jurisdiction in Indian country for crimes of general applicability.

comprehensive findings of facts and law must occur each time tribal courts seek to exercise criminal jurisdiction in Indian Country. Federal restrictions on a tribe's criminal authority over non-Indians may be terrifying for victims as a recent study found that 90% of the Native Americans reported being victimized by a non-Indian.[17]

Though Tribe's have criminal jurisdiction over crimes committed in Indian Country by Indians against Indians, the barriers impeding criminal-enforcement of tribal court protection order violations by a *non-Indian in Indian Country* are complex. Tribe's jurisdictional limits are a direct result of federal restrictions placed upon a tribal court in the criminal justice realm. Historically, the U.S. Supreme Court held that tribes did not possess criminal authority to prosecute crimes between non-Indians that were committed in Indian country.[18] Additionally, the U.S. Supreme Court restricted a tribe's inherent sovereign powers to criminally charge a non-Indian with violating tribal laws in Indian country.[19]

Criminal enforcement of tribal protective order violations that occur outside of the issuing tribe's jurisdiction multiplies the victim's barriers to enforcement. Despite the commands of full faith and credit found in VAWA 2013 as discussed above, seeking enforcement of a tribal protection order in a state court forum can be difficult. Enforcement by the foreign jurisdiction in wholly dependent upon (1) the willingness of the enforcing jurisdiction to recognize the tribal court order as valid and (2) the willingness of the enforcing jurisdiction to address the often-overlooked need for accountability for perpetrators of violence against AI/AN women.

Despite the restrictions the federal government has placed on tribal sovereignty, in 2013, Congress relaxed restrictions on a tribe's inherent criminal jurisdiction over crimes committed by non-Indians in Indian country for tribes that could meet minimum federal mandates.[20] VAWA 2013, recognized tribes' inherent power to exercise "special domestic violence criminal jurisdiction" (SDVCJ)[21] over certain defendants, regardless of their Indian or non-Indian status, who commit acts of domestic violence or dating violence or violate certain protection orders in Indian country. As stated by the Senate Committee on Indian Affairs:

> Criminals tend to see Indian reservations and Alaska Native villages as places they have free reign, where they can hide behind the current ineffectiveness of the judicial system. Without the authority to prosecute crimes of violence against women, a cycle of violence is perpetuated that allows, and even encourages, criminals to act with impunity in Tribal communities and denies Native women equality under the law by treating them differently than other women in the United States.[22]

The charts in Table 1 (p. 4) and Table 2 (p. 8) demonstrate the complex analysis connected to tribal court criminal jurisdiction.

Beyond a tribe's criminal jurisdiction limitations, Congress has also severely diminished tribal courts' sentencing authority. The Indian Civil Rights Act, among other things, restricted a tribal court's criminal sentencing authority to a $5,000 fine and one year imprisonment or both.[25] For those tribes that can meet certain federal mandates the tribe's maximum sentencing authority can be increased to a $15,000 fine and/or three years of imprisonment.[26] While Congress has relaxed previous restrictions placed upon a tribe's criminal sentencing authority, not all tribes meet the federal mandates to exercise this enhanced authority.

Though enforcement of tribal protection orders across all jurisdictional boundaries is mandated by federal law, this is not the reality of victims attempting to have a tribal protection order enforced and any hesitation of enforcement jeopardizes victim safety. AI/AN women deserve to be as safe as other women in the United States. Congress must continue to relax restrictions place on tribal sovereignty in both the civil and criminal realm to allow tribes to stand on equal footing with states to issue and enforce protection orders. Until tribal sovereignty is once again recognized in its purest form, Tribal governments will continue, as always, to work exhaustively in the face of enormous barriers to keep tribal citizens safe.

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crimes that occur in Indian country. FBI jurisdiction for the investigation of federal violations in Indian country is statutorily derived from 28 U.S.C. § 533, pursuant to which the FBI was given investigative authority by the Attorney General.[30] In addition to the FBI, the Department of the Interior's Bureau of Indian Affairs (BIA) plays a significant role in enforcing federal law, including the investigation and presentation for prosecution of cases involving violations of 18 U.S.C. §§ 1152 and 1153.

VAWA 2013

Under 18 U.S.C. § 113, it is now possible to prosecute perpetrators in Indian County for the specific offenses of strangulation and suffocation. Section 113(a)(8) provides that:

> [W]hoever, within the special maritime and territorial jurisdiction of the United States, is guilty of . . . an assault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate, [shall be punished] by a fine under this title, imprisonment for not more than 10 years, or both.[31]

In this section, the term "strangling" means "intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim[.]" 18 U.S.C. §113(b)(4). The definitions of spouse, intimate partner, and dating partner are found in 18 U.S.C. §2266.[32]

Prior to the passing of VAWA 2013, strangulation cases were typically prosecuted as an Assault Resulting in Serious Bodily Injury (ARSBI), pursuant to 18 U.S.C. § 113(a)(6). ARSBI is punishable by a fine, imprisonment for not more than 10 years, or both. Serious bodily injury is defined in 18 U.S.C. § 1365(h) as:

A. a substantial risk of death;
B. extreme physical pain;
C. protracted and obvious disfigurement; or
D. protracted loss or impairment of the function of a bodily member, organ, or mental faculty[.][33]

Most federal prosecutors charging a defendant with ARSBI following an allegation of strangulation argue that the crime presented a "substantial risk of death" to the victim. AUSAs may need to enlist expert medical testimony to explain just how easy it is to strangle someone to death and yet leave no visible external injuries. Only 11 pounds of pressure placed on the carotid arteries (arteries that supply oxygenated blood to the head and neck) for 10 seconds is necessary to cause unconsciousness.[34] Brain death will occur in four to five minutes if strangulation continues.

The crime of ARSBI was infrequently used to charge strangulation cases occurring in the context of intimate partner violence. And, if other assaults occurred during the violent episode, charges were more likely to address those violent acts as opposed to the strangling.[35]

The neck is so easy to grab, so vulnerable, so vital to all life, connecting breathing and heart to mind. . . . Nothing comes close to strangulation and suffocation in sheer terror.

It is important to note that § 113(a)(8) only addresses situations where the victim is the spouse, intimate partner, or dating partner of the defendant. Consequently, a defendant who commits a strangulation offense outside this context will not be charged in federal court as a violation of § 113(a)(8). The prosecutor will instead look to the crimes of ARSBI, attempted murder, or murder, depending on the facts.

This new charging tool is now five years old, and it is frequently used by federal prosecutors to combat violent crime in Indian country. However, there are very few appellate decisions interpreting the statute. The most significant reported opinion to date is the case of **United States v. Jordan Lamott**.[36] Lamott and his victim, both Native Americans, were living on the Blackfeet Indian Reservation in Montana at the time of the offense.[37] The couple had been out drinking with friends, and Lamott became jealous of the attention one of the victim's friends paid to her at the party.[38] When the couple returned to Lamott's house, he strangled the victim multiple times, including one episode that left her unconscious.[39] The prosecutor charged Lamott with one count of assault by strangulation (18 U.S.C. § 113(a)(8)) and one count of ARSBI (18 U.S.C. § 113(a)(6)).[40] After a two-day jury trial, Lamott was convicted on the charge of assault by strangulation. The jury hung on the ARSBI and it was dismissed. Defendant was sentenced to 32 months imprisonment and timely appealed his conviction.[41]

Lamott argued that the trial court erred when it instructed the jury to disregard evidence of his voluntary intoxication. Defendant argued this was reversible error because the crime of assault by strangulation is a specific intent crime.[42] Accordingly, the court had to determine if the crime of assault by strangulation is a specific or general intent crime. The appellate court first looked to the text of the statute and found that the statute does not specify a *mens rea* requirement.[43] The court also noted that only the first three crimes in the federal assault statute include the words "with intent to" and that the strangulation part of the statute does not include this language. In addition, the federal statute provides that the crime of strangulation can be done knowingly or recklessly and because the definition explicitly disclaims the requirement of "any intent to kill or protractedly injure," it is unlikely that Congress intended the federal assault statute to require specific intent.[44] Moreover, an examination of the legislative history indicates that Congress intended that general and not specific intent is required.[45] Accordingly, the appellate court found that assault by strangulation is a general intent crime

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and that Lamott's voluntary intoxication was not relevant. The trial court did not err by instructing the jury to disregard it.[46]

Lamott's second argument on appeal was that the trial court's instruction to the jury that it find the defendant "wounded" the victim rather than instructing it they must determine if Lamott "assaulted" the victim.[47] The prosecutor asked that the jury be instructed that in order to convict, it must find "the defendant assault[ed the victim] by intentionally striking or wounding her. . . . [and] the defendant did so by strangling" the victim. Lamott did not object to this proposed instruction.[48] Defendant argued on appeal that the court should have instructed the jury to determine whether "the defendant intentionally assaulted [the victim] by strangling her."[49] The appellate court agreed that use of the word assaulted instead of wounded would have more closely tracked the statute and the indictment.[50] But, the court disagreed that the instruction used changed the outcome of the trial.[51] The appellate court stated that "the district court's inclusion of the word 'wounded' may have been superfluous, but if anything, the inclusion of 'wounded' in the instruction required that the government meet a higher burden than was necessary because section (a)(8) does not require proof of a wound or injury."[52] Defendant's conviction was affirmed.[53]

Sentencing Guidelines

Once an AUSA secures a conviction for a violation of § 113(a)(8), it becomes necessary to properly calculate an appropriate sentencing guidelines range. On April 30, 2014, the U.S. Sentencing Commission (USSC) published amendments to the Sentencing Guidelines. After reviewing the legislative history, public comment, hearing testimony, and relevant data of VAWA 2013, "the Commission determined that strangulation and suffocation of a spouse, intimate partner, or dating partner represents [sic] a significant harm not addressed by the existing guidelines and specific offense characteristics."

Accordingly, the USSC issued the following amendments to the Sentencing Guidelines:

> [T]he amendment amends Appendix A to reference section 113(a)(8) to § 2A2.2 (Aggravated Assault) and amends the Commentary to § 2A2.2 to provide that the term "aggravated assault" includes an assault involving strangulation, suffocation, or an attempt to strangle or suffocate. The amendment amends § 2A2.2 to provide a 3-level enhancement at § 2A2.2(b)(4) for strangling, suffocating, or attempting to strangle or suffocate a spouse, intimate partner, or dating partner. The amendment also provides that the cumulative impact of the enhancement for use of a weapon at § 2A2.2(b)(2), bodily injury at § 2A2.2(b)(3), and strangulation or suffocation at § 2A2.2(b)(4) is capped at 12 levels. The Commission determined that the cap would assure that these three specific offense characteristics, which data suggests co-occur frequently, will enhance the ultimate sentence without leading to an excessively severe result.
>
> Although the amendment refers section 113(a)(8) offenses to § 2A2.2, it also amends § 2A6.2 (Stalking or Domestic Violence) to address cases involving strangulation, suffocation, or attempting to strangle or suffocate, as a conforming change. The amendment adds strangulation and suffocation as a new aggravating factor at § 2A6.2(b)(1), which results in a 2-level enhancement, or in a 4-level enhancement if it applies in conjunction with another aggravating factor such as bodily injury or the use of a weapon.[54]

These amendments became effective November 1, 2014. Official text of the amendments can be found at *www.ussc.gov*.

Conclusion

Strangulation is a serious crime that affects too many women in vulnerable positions. It has a devastating impact on victims. A strangulation survivor from Illinois described the effects of this crime. In her written testimony before the U.S. Sentencing Commission in February 2014 as the Commission contemplated appropriate sentencing guidelines for the amended federal assault statute, she succinctly and profoundly described the devastating fear of the crime of strangulation:

> After two years of marriage filled with verbal abuse, shoving, and other physical abuse, one night my husband threw me down on the bed and began strangling me. Unlike any other way that he had attacked me in the past, this horror instantly sent me to a level of terror and trauma I had never known in my whole life. I knew I was seconds away from dying. This was a fear unlike anything I had ever known. Everything was suddenly different in my whole consciousness. I was going to die. The unthinking rage in his eyes made that clear.
>
> He had even pulled a gun on me once, slapped me black and blue, but nothing felt as scary as this. There was that first part of the attack that so utterly terrified me as I anticipated my imminent death, panicking with what I could do. The fighting for freedom, the pain of his hands around my neck. Then as I began to suffocate, I could feel myself dying. Gasping for breath, desperate for air. Feeling myself slipping away, so fully conscious and hyper aware. And watching him—how personal the rage was. How he was using his bare hands to kill me—it was so intimate, he was so close to me. His skin on my skin. Like drowning, trapped in the water beneath the ice, the panic, the desperation to breathe, yet not being able to.
>
> He felt me going limp and thankfully let go. I coughed myself back to life. What I learned in the days and the weeks after was the on-going and constant re-traumatization of the aftermath of the strangulation. For weeks, every time I moved my head, I was grabbed with pain. I couldn't sleep, I couldn't eat or drink well. Every move was a painful reminder. I had to take time off work without pay to cover up the

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> worst of it, then I had to lie to deal with answering questions about the bruises, etc., at my teaching job. The aftermath was a constant reminder of what had happened. [Twenty] years later it is as vivid to me as any moment of my life.
>
> The neck is so easy to grab, so vulnerable, so vital to all life, connecting breathing and heart to mind. The viciousness and harm of this terroristic act is far different than mere broken bone or a physical injury. I have suffered the range of these injuries and nothing comes close to strangulation and suffocation in sheer terror.[55]

With the new provisions of the federal assault statute in § 113(a)(8), more victims of intimate partner violence in Indian Country will now find protection under the law from their abusers.

End Notes

1. A copy of the sentencing press release can be found online at *https://www.justice.gov/usao-mt/pr/crawford-sentenced-district-montana-one-first-strangulation-convictions-country.*

2. Casey Gwinn (2013). Strangulation and the law. In The Training Inst. on Strangulation Prevention & the Cal. Dist. Attorneys Ass'n (Eds.), *The investigation and prosecution of strangulation cases,* Chapter 2. Available at *https://www.strangulationtraininginstitute.com/wp-content/uploads/2015/07/California-Strangulation-Manual_web3.pdf.*

3. Press Release, Office of Public Affairs, Department of Justice (February 4, 2013). Justice Department holds first national Indian country training on investigation and prosecution of non-fatal suffocation offenses. Available at *http://www.justice.gov/opa/pr/2013/February/13-opa-148.html.*

4. *Id.* citing Donald J. Smith, Jr., et al.(2001). Frequency and relationship of reported symptomology in victims of intimate partner violence: The effect of multiple strangulation attacks, *J. Emergency Med., 21(3),* 323, 325-26.

5. **Id.** (internal citations omitted) (citing Nancy Glass, et al. (2008*).* Non-fatal strangulation is an important risk factor for homicide of women, *J. Emergency Med. 35(3),* 329.

6. Gael B. Strack, George E. McClane & Dean A.Hawley (2001). A review of 300 attempted strangulation cases Part I: Criminal legal issues, *J. Emergency Med., 21(3),* 303, 305-6.

7. **Id.**

8. **Id.**

9. Press Release, supra n. 4, citing Casey Gwinn and Dean A. Hawley (2012), Forensic medical findings in fata and non-fatal intimate partner strangulation assaults. Available at *http://www.strangulationtraininginstitute.com/index.php/library/viewcategory/843-scholarly-works-and-reports.html2013).*

10. **Id.**

11. **Id.**

12. **Id.**

13. **Id.** *citing* Nancy Glass et al., supra, n. 5.

14. Allison Turkel (2008). "And Then He Choked Me": Understanding, investigating, and prosecuting strangulation cases, *The Voice 2(1),* 1. Available at *http://www.ndaa.org/pdf/the_voice_vol_2_no_1_08.pdf.*

15. Lee Wilbur, et al. (2001). Survey results of women who have been strangled while in an abusive relationship. J. Emergency Med., *21(3),* 297-302.

16. Gael B. Strack & George McClane (David C. James ed., 1998) (updated January 2003, September 2007). How to improve your investigation and prosecution of strangulation cases. Available at *https://www.google.com/url?bvm=bv.66917471%2Cd.cWc&cd=2&ei=kxB6U5CZAa2ysATu-IHICQ&q=%22how%20to%20improve%20your%20investigation%20and%20prosecution%20of%20strangulation%20cases%22&rct=j&sa=t&source=web&url=https%3A//fvpf.confex.com/recording/nchdv/2009/pdf/free/4db77adf5df9fff0d3caf5cafe28f496/session1326_2.pdf&usg=AFQjCNEcLDtiDz7gz_NOu0JRm1ZFGHxcRw&ved=0CDEQFjAB.*

17. Ronet Bachman, Heather Zaykowshi, Rachel Kallmyer, Margarita Poteyeva & Christina Lanier (2008). Violence against American Indian and Alaska Native women and the criminal justice response: What is known. Washington, D.C.: National Institute of Justice, Office of Justice Programs, U.S. Department of Justice. Available at *https://www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf.*

18. *Frequently Asked Questions,* Washington, D.C.: U.S. Dep't of Interior, Bureau of Indian Affairs. Available at *https://www.bia.gov/frequently-asked-questions.*

19. **Id.**

20. **Id.**

21. Tina Norris, et al. (2012). U.S.Census Bureau, The American Indian and Alaska Native Population 2010, at 1. Available at *https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf.*

22. **Id.** at 3.

23. **Id.** at 13.

24. 18 U.S.C. §§ 1152-1153 (2012 & Supp. III 2015).

25. **Id.** at § 1153(a).

26. **Id.** at § 1152.

27. **Id.**

28. **Id.**

29. **Id.**

30. 28 U.S.C. § 533 (2012).

31. 18 U.S.C. § 113(a)(8) (2014).

32. **Id.** at § 133(b)(3).

33. 18 U.S.C. § 113(b)(3) (2014).

34. J.L. Luke, et al. (1985). Correlation of circumstances with pathological findings in asphyxial deaths by hanging: A prospective study of 61 cases from Seattle, WA. *J. Forensic Sci. 30(4),*1140-1147.

35. *See, e.g.,* **United States v. Mitchell**, 420 Fed. Appx. 920, 921-22 (11th Cir. 2011) (defendant strangled victim and was charged with one count of assault with intent to commit murder and one count of assault resulting in serious bodily injury); *but see, e.g.,* **United States v. Martin**, 528 F. 3d 746, 748-749 (10th Cir. 2008); **United States v. Juvenile Male N.R.**, 24 Fed. Appx. 638, 639-40 (8th Cir. 2001).

36. **United States v. Jordan Lamott**, 831 F.3d 1153 (9th Cir. 2016).

37. **Id.** at 1155.

38. **Id.**

39. **Id.**

40. **Id.**

41. **Id.**

42. **Id.**

43. **Id.** at 1156.

44. **Id.** at 1157.

45. **Id.**

46. **Id.** at 1158.

47. **Id.**

48. **Id.**

49. **Id.**

50. **Id.**

51. **Id.**

52. **Id.** at 1159.

53. **Id.**

54. U.S. Sentencing Commission (2014). Amendments to the sentencing guidelines, p. 9. Available at *http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140430_RF_Amendments.pdf.*

55. Jennifer Bishop-Jenkins (2014). Written Testimony to the U.S. Sentencing Commission. Available at *http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140213/Testimony_VAG.pdf.* ■

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women in general are second to African-American women, statistics specific to Indian country show that murder rates of Indian women soar to over 10 times the national average.[12]

Underscoring this epidemic are statistics that show non-Indians are often the perpetrators. According to federal statistics, 66% of violent crimes against Indians were perpetrated by non-Indians. Non-Indians also accounted for 85% of rape or sexual assaults against Indian women.[13] The study revealing these statistics was attacked by those opposing tribal jurisdiction under VAWA 2013. Opponents correctly said that the study revealing these statistics was not specific to Indian country but also suggested non-Indian domestic violence was not a problem. While it is true the study was not specific to Indian country, it is not far-fetched to assume that many of the crimes reported by Indian victims in the study arose in Indian country. As for not being a problem, they were wrong.

Non-Indian domestic violence has long been a reality but rarely was reported because the perpetrators usually walked free. But VAWA 2013 does not go far enough.

Despite the dearth of Indian country non-Indian crime statistics, the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) does not need to rely on assumptions. There are approximately 3,280 people living on the Umatilla Reservation, 46% of whom are non-Indian. In 2011, the CTUIR Family Violence Program saw 43 victims of domestic violence. In 35 of those cases we know the race of the perpetrator, and 10 of them were non-Indian. So it appears that at the CTUIR in 2011, at least 29% of the domestic violence cases involved non-Indian perpetrators. The statistics are even worse for 2012. The Family Violence Program saw 35 victims. We know the race of the perpetrator in 23 of those: 14 of those 23 were non-Indian. In other words, in 2012, roughly 61% of the domestic violence incidents at the CTUIR involved non-Indian perpetrators.

Between at least 2006 and 2010 federal prosecutors did not file a single non-Indian domestic violence case from the Umatilla Indian Reservation. One case was prosecuted in 2010. In 2011, two cases were prosecuted. That means that in 2011, 80% of the non-Indian domestic violence incidents were not prosecuted. In 2012 none were prosecuted. But to be fair, the United States Attorney's Office for the District of Oregon has improved a great deal since 2010, as have many other United States Attorney Offices throughout the country. The two cases prosecuted in 2011 were the only two cases involving non-Indian domestic violence that were reported to police. In 2012 there was one case that was reported, and being a Special Assistant United States Attorney at the time, I reviewed and declined the case because there was insufficient evidence to sustain a conviction. What this means is that, in the best case scenario, 80% of the non-Indian domestic violence cases the CTUIR Family Violence Program handled in 2011 were not even reported to the police. In 2012, 93% of the non-Indian cases went unreported. Thankfully, as expected, this all changed after implementing non-Indian domestic violence criminal jurisdiction in 2014 as mentioned below.

There is a very good reason for Indian victims not to report non-Indian domestic violence in Indian country. They know that historically non-Indian domestic violence crimes went unprosecuted and unpunished. If no one gets prosecuted, a victim isn't going to report the crime. Reporting the crime in this situation will make the victims *less* safe, and both anger and embolden the perpetrator.

Given the jurisdictional mess, high rates of crime, historically high declination rates, and the low reporting rate, something needed to be done. That something was VAWA 2013, which gave tribes at least a limited opportunity to prosecute non-Indian domestic violence crimes perpetrated against Indians as an exercise of inherent sovereign power.

VAWA 2013 builds on the Tribal Law and Order Act of 2010 (TLOA). Parts of TLOA amended the Indian Civil Rights Act of 1968, which sharply limited tribal court punishment authority. Pursuant to TLOA, a tribe can exercise felony sentencing authority over crimes that are considered a felony under any similar state or federal law and over any repeat offenses. The authority is limited to three years in jail and $15,000 per offense and up to nine years in jail per criminal proceeding. However, to exercise this authority, a tribe must meet certain requirements, including providing a licensed defense attorney to indigent defendants free of charge, guaranteeing effective assistance of counsel, and ensuring proceedings are presided over by a law trained judge, among others. VAWA 2013 requires tribes to provide these same rights to non-Indian defendants for any offense with which they are charged, requires that a jury pool include a fair cross section of the community, and further, requires that defendants receive timely notice of *habeas corpus* rights.

The CTUIR implemented TLOA felony sentencing in March of 2011. The CTUIR already provided a public defender to anyone who wanted one, regardless of income. Those defense attorneys are graduates of ABA accredited law schools and are State bar licensed. Judge William Johnson is the presiding judge and is a long time member of the Oregon Bar. He has presided over many criminal cases for the past 30 years. He is also a tribal member.

Given that the CTUIR already provided the rights required under TLOA 2010, and in fact provided greater rights, exercising felony sentencing authority only required minor changes to the Criminal Code. Since March of 2011, there have been many felony prosecutions and convictions at the CTUIR. Three individuals were housed in federal prison for tribal court convictions under the Bureau of Prisons TLOA Pilot Program. In the very first Pilot Program case, the CTUIR actually had the defendant's federal defense attorney represent him in tribal court. Unfortunately, that program has since lapsed and needs to be renewed and made permanent.

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Long before VAWA 2013 was enacted into law, the CTUIR included non-Indians in jury pools. Many of the services the CTUIR provides, are provided to any community member regardless of tribal membership, including the services of the Family Violence Program. The CTUIR also has long informed defendants of their right to file *habeas corpus* petitions in federal court. However, no one has ever filed such a petition. In fact, in the first non-Indian criminal conviction under VAWA 2013 at the CTUIR, the CTUIR Office of Legal Counsel encouraged the defendant to file an action in federal court challenging the constitutionality of VAWA 2013. He declined to do so.

In July of 2013, the CTUIR made all the necessary changes to its Criminal Code to exercise criminal jurisdiction over non-Indian domestic violence cases, and also guaranteed all of the rights of non-Indian defendants to all defendants regardless of citizenship status or level of offense. On February 6, 2014, the CTUIR, the Tulalip Tribes, and the Pascua Yaqui Tribe were authorized by the United States Attorney General to exercise VAWA 2013 jurisdictional authority over non-Indians. Since March 7, 2015, any tribe who meets the requirements of VAWA 2013 may do so without prior approval from the Attorney General.

Implementation at the CTUIR has been unexceptional. Cases proceed in the same manner as all other cases. The only difference is that the community member who stands accused happens to be non-Indian. As Judge Johnson likes to say, all non-Indians are given the same rights the CTUIR gives to its members. Between implementation and January 2018, there were 13 non-Indian domestic violence cases involving nine defendants filed in the CTUIR court. Ten cases resulted in convictions, with the others still pending as of January 2018. All are requirement to undergo batterer intervention treatment, which the CTUIR provides free of charge.

These statistics bear out the success of VAWA 2013 at CTUIR. Between 2006 and implementation of VAWA 2013 in 2014, a span of eight years, only three non-Indian domestic violence crimes were prosecuted federally and one was dismissed. These four cases in eight years are the only ones that were reported to police despite many more victims being seen by our Family Violence Program. In the four years since implementation, between 2014 and 2018, CTUIR has prosecuted 13 cases, and have had more reported. In fact, non-Indian domestic violence at the CTUIR makes up 27% of all domestic violence cases prosecuted in that four year period. This means there have been 77% more non-Indian domestic violence crimes prosecuted by the CTUIR under VAWA 2013 in four years than were prosecuted by the federal government in the eight years prior to implementation. It also means more victims are coming forward and reporting to the police about their abuse. We believe this is because victims are becoming aware that non-Indian perpetrators are finally being held accountable for their crimes. Why is this the case? Because tribal nations have finally been given back jurisdiction to prosecute limited non-Indian domestic violence crimes.

These cases remain among the most difficult to prosecute. This is where the ability to charge concurrent non-domestic violence crimes can become vital to ensuring victim safety.

One example of survivors coming forward at CTUIR is Taryn Minthorn. Following her initial abuse at the hands of her boyfriend, he became verbally abusive over the course of several months in 2016. Then, in June of 2016, he assaulted her at her home on the Umatilla Indian Reservation in front of her children. Drunk, he fled the scene in a car and ran through a neighbor's fence injuring a horse. He was booked into jail by tribal police and released with an automatic protection order in place. In September of 2016, he violated that protection order by assaulting Ms. Minthorn again. This time he covered her nose and mouth with his hand, jammed his knee into her sternum, and slammed her head into the wall causing a concussion and lasting injury, as well as a hole in the wall. She called the tribal police who promptly responded, arrested the boyfriend, and investigated the case. When he was arrested and placed in the back of the police vehicle he stated that there would be more blood the next time. Both assault cases and the violation of protection order were ultimately referred to the tribal prosecutor and filed in tribal, not federal, court. In March 2017, Ms. Minthorn's boyfriend pleaded guilty to both assaults. She was present at the hearing and said "[t]o hear him saying that he was pleading to these charges, I literally felt the load come off of me, off my shoulders, off my mind, off my heart."[14] In giving her statement, Ms. Minthorn was able to speak her heart and notably said, "To forgive this person means ignoring his violent and malicious behavior. That I will not do. I will never forgive or forget." Since that hearing she has never interacted with her abuser again. Regarding her experience she has said, "I love my scars, they tell the story of my survival."[15] She has also aptly noted, "It's important for future generations to know that eventually there is justice."[16]

As of March 20, 2018, 18 tribes are exercising non-Indian domestic violence criminal jurisdiction under VAWA 2013. There have been 143 arrests of 128 non-Indian abusers. There have been 74 convictions, and five acquittals, with another 24 cases still pending.[17] In the first Indian country jury trial of a non-Indian under VAWA 2013 at Pascua Yaqui, the jury, which included non-Indians but was predominantly Indian, found the defendant not guilty for lack of proof beyond a reasonable doubt of a dating or domestic relationship between the defendant and victim, a requirement to exercise jurisdiction over non-Indian violent crime. There have been

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five jury trials and one bench trial in all. Of those six trials, there was one jury conviction and five acquittals.[18] At least 58% of these violent crimes involved children. At least 73 defendants had prior criminal records, and 85 defendants account for 378 prior contacts with tribal police *before* VAWA 2013 implementation.[19]

To date, not one non-Indian defendant has filed a petition in federal court claiming his or her rights have been violated. None has expressed an interest in challenging the constitutionality of VAWA 2013. None has expressed a desire to have their case prosecuted in federal court. It appears more victims are coming forward and reporting the abuse. Hopefully, with implementation of VAWA 2013, those victims not only *feel* safer, but *are* safer.

Those who opposed VAWA 2013 on the claim that non-Indian domestic violence against Indian women is a rarity in Indian country have been proven wrong. Those who claimed non-Indians would not be afforded due process in tribal court have been proven wrong. Those who claimed a non-Indian would not be treated fairly by a tribal jury have been proven wrong. This comes as no surprise to those of us who have prosecuted cases in tribal, state, and federal courts. Non-Indian domestic violence has long been a reality but rarely was reported because the perpetrators usually walked free. Criminal defendants in tribal courts, as compared to state and federal courts, are often treated less harshly, with more respect, and with more opportunity to tell their side of things than in other courts. And, there is absolutely no reason to believe that a juror would skirt his or her duties and convict someone of a crime simply because the juror is a member of a tribal nation sitting in judgment of someone who is not.

But VAWA 2013 does not go far enough. Taryn Minthorn's case highlights its shortcomings and the need for a full **Oliphant** fix. In the first tribal assault case against Ms. Minthorn, her boyfriend committed the act in front of her children. This is a serious offense. At the CTUIR it would be charged as endangering the welfare of a minor, one charge for each child. This is an important crime to prosecute because the impact that witnessing abuse has on children is significant, especially in Indian country. Trauma among Native youth is so significant that they suffer rates of Post-Traumatic Stress Disorder (PTSD) at the same rate as those returning from war in Afghanistan and Iraq.[20] The boyfriend also fled the scene in a car while drunk. He could have been charged with DUI, another serious offense. He ran his car into a neighbor's fence, which would be a property crime. He also injured a horse in the process, a crime against an animal. All of these would have been charged in another jurisdiction. But because he is non-Indian, he got away scot free on those charges even though they were all part and parcel of his domestic violence assault. In his second assault, which also involved violating a protection order, he also committed the crime of false imprisonment by not allowing Ms. Minthorn to flee. He also committed malicious mischief by damaging the wall of the house. Finally, he brazenly committed the crime of menacing by telling police, as they were taking him to jail, that there would be more blood the next time. All of these would have been charged in another jurisdiction. But, again, because he is non-Indian he was able to get away with these scot free. This is not only morally wrong, with Native women victims of non-Indian violence having less protection under the law than if it were committed by a Native man, as well as nonsensical because tribes have the power to prosecute one crime but not another, but it also ties the hands of prosecutors and makes holding offenders accountable much more difficult than in any other jurisdiction.

Domestic violence crimes are some of the most difficult crimes to successfully prosecute. Often victims, for good reason, do not want to participate in a trial. When they do it is often against the prosecution and in favor of the defendant. And in those instances when they testify for the prosecution it is difficult to meet the burden of proof beyond a reasonable doubt because, in the minds of the jury, it often boils down to one person's word against another.

While a great deal of effort has gone into improving investigative techniques in domestic violence cases over the past two decades, which improves the ability of prosecutors to meet their burden of proof independent of—or in spite of—witness testimony, these cases remain among the most difficult to prosecute. This is where the ability to charge concurrent non-domestic violence crimes can become vital to ensuring victim safety. Domestic violence does not occur in a vacuum. Often a perpetrator will commit other crimes in the process of assaulting victims.

Ms. Minthorn's case is a perfect example. The concurrent crimes her abuser committed are often much easier to prove. To a typical prosecutor in a typical jurisdiction those crimes become leverage in getting the perpetrator to plead guilty, and ultimately be held accountable for the underlying assault. But under **Oliphant** and the limited non-Indian jurisdiction restored in VAWA 2013 this critical tool is removed from tribal prosecutors and courts. As a result Native women in this country are less protected than non-Native women, and many non-Indians can still commit crimes in Indian country with impunity. That is just wrong.

VAWA is up for reauthorization this year. Rep. Sheila Jackson Lee recently introduced a comprehensive bill to do just that. The bill includes a partial **Oliphant** fix. It would expand tribal criminal jurisdiction to include stalking, sex trafficking, sexual violence independent of a domestic relationship, assaults against children including attempted and threatened assaults, and crimes against law enforcement, probation, and corrections officers when the person has committed a covered domestic violence or violation of a protection order crime. As currently worded, it would *not* reach cases involving the endangerment of a minor for committing a domestic violence assault in the presence of children. Yet these are the bulk of crimes involving children that we have experienced at CTUIR in VAWA 2013 cases. Disturbingly, in non-Indian DV cases, CTUIR found 67% of them to have been committed with children present, and in 83% of those the children directly witnessed the crime. In contrast, in Indian perpetrated DV cases children were present in 30% of the cases.

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Crimes against law enforcement officers etc., are not just limited to crimes committed by a person who has committed domestic violence or violation of a protection order (they exclude stalking, sex trafficking, sexual violence independent of DV, and assaults against children), but also require that the crime be committed "in the course of resisting or interfering with the prevention, detection, investigation, arrest, pretrial detention, prosecution, adjudication, or sentencing . . . related to" the domestic violence or violation of protection order crime.

As will occur with any piecemeal fix, these narrow categories and occasionally vague definitions become cumbersome and open avenues to defendants to get their cases dismissed. This is a problem tribes are already dealing with under VAWA 2013 regarding whether a given crime amounts to "violence committed" against another person. While the most recent changes are a definite improvement to the status quo they still do not adequately protect Native women from non-Indian violence. They are helpful, but not helpful enough. They are a step forward, but a step too short.

Furthermore, just about any crime can be domestic violence depending on the intent of the perpetrator. Assaulting a loved one, destroying someone's home, slashing car tires, identity theft and fraud, these and many other crimes are often committed in the context of domestic violence—and we consider them to be domestic violence—even though they do not involve direct physical violence toward a current or former partner. Without expanding tribal criminal jurisdiction to all non-Indian crime, Native women will continue to be less protected than non-Native women in this country. Non-Indian domestic violence perpetrators will continue to commit crimes with impunity. And Indian country will remain unnecessarily dangerous for Native women.

This is why VAWA 2018 needs to include a full **Oliphant** fix. We need to allow tribes to hold non-Indians accountable for all of the crimes they commit in their communities. I hope, as VAWA 2018 comes up for reauthorization, you will add your voice to the call for a full fix. Native women and Tribal nations need your support and advocacy.

End Notes

1. M. Brent Leonhard, Returning Washington P.L. 280 jurisdiction to its original consent-based grounds, 47 Gonz. L. Rev. 663 (2012).

2. Brief for the United States as Amicus Curiae Supporting Respondents at 5-17, **Oliphant v. Suquamish Indian Tribe,** 435 U.S. 191 (1978) (No. 76-5729).

3. **Oliphant**, 435 U.S. at 210.

4. Prepared Statement of Associate Attorney General Tom Perrelli Before the Senate Committee on Indian Affairs, Wash., D.C., Nov. 10, 2011. Available at *https://www.justice.gov/opa/speech/statement-associate-attorney-general-thomas-j-perrelli-senate-committee-indian-affairs.*

5. Bureau of Justice Statistics, U.S. Dep't of Justice [hereinafter BJS, DOJ] (2005). Compendium of federal justice statistics, 2003, at 33, Table 2.3.

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10. Steven W. Perry (2004). American Indians and crime: A BJS statistical profile, 1992-2002. Washington, D.C.: BJS, DOJ (NCJ 203097).

11. Patricia Tjaden & Nancy Thoennes (2000). Full report of the prevalence, incidence, and consequences of violence against women. Washington, D.C., DOJ.

12. *Id.* at Exhibit 7.

13. American Indians and Crime, *supra* n. 10, p. 9.

14. Brittney Bennett, Law was meant to let American Indians prosecute violence: Is it working? USA TODAY (March 25, 2017). Available at *https://www.usatoday.com/story/news/2017/03/25/american-indian-women-violence/99538182/.*

15. Email from Ms. Minthorn to the author.

16. Bennett, *supra* n. 14.

17. NCAI, VAWA 2013's Special Domestic Violence Criminal Jurisdiction (SDVCJ) Five-Year Report (March 20, 2018), p. 1. Available at *http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf.*

18. *Id.* at 7.

19. *Id.* at 8.

20. Sarah Deer & Mary Kathryn Nagle (2018). Return to Worcester Dollar General and the restoration of tribal jurisdiction to protect Native women and children, 41 Harv. J.L. & Gender 179, 183.

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services resources to respond to violent assaults against women; and

6. 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.[1]

One of Congress's stated purposes for enacting Title IX was "to ensure that perpetrators of violent crimes committed against Indian women are held accountable for their criminal behavior."[2]

Accordingly, Congress created, as a part of Title IX, the new federal crime of domestic assault by an habitual offender, codified at 18 U.S.C. § 117.[3] The statute provides:

> Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction—
>
> (1) any assault, sexual abuse, or serious violent felony against a spouse

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> or intimate partner, or against a child of or in the care of the person committing the domestic assault; or
>
> (2) an offense under chapter 110A, shall be fined under this title, imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results from violation under this section, the offender shall be imprisoned for a term of not more than 10 years.[4]

Thus, VAWA expressly provided that tribal court convictions could serve as predicate offenses for a subsequent habitual domestic violence case being prosecuted in federal court. This statute is a powerful tool and a frequently used offense charge by federal prosecutors working to hold serial batterers in Indian country accountable for their violence. However, the differences between the right to counsel in tribal court as required by the Indian Civil Rights Act and the requirement for indigent representation per the Sixth Amendment of the U.S. Constitution has resulted in a number of appellate challenges when federal prosecutors have relied on tribal court convictions as predicates for a federal prosecution pursuant to §117.

Through the Indian Commerce Clause[5] and the Treaty Clause,[6] Congress has broad power to regulate tribal affairs and limit or expand tribal sovereignty.[7] Pursuant to this authority, Congress passed the Indian Civil Rights Act (ICRA)[8] in 1968. ICRA imposes procedural due process protections for a criminal defendant charged in tribal court. In many respects, ICRA closely mirrors the Bill of Rights found in the U.S. Constitution. However, there are some differences; one significant difference is the right to counsel for indigent defendants. ICRA provides that in tribal court a defendant has the right to assistance of counsel for his defense, but the cost of hiring an attorney is the responsibility of the defendant.[9] ICRA only requires the appointment of law-trained, licensed counsel for an indigent defendant when an Indian person faces more than one year's imprisonment[10] or when a non-Indian defendant is charged with dating violence, domestic violence, or violation of a personal protection order in a tribal court that is exercising special domestic violence criminal jurisdiction.[11] This is in contrast with United States Supreme Court precedent holding "federal and state courts cannot constitutionally impose *any* term of incarceration at the time of a conviction unless a defendant received, or validly waived the right to, counsel."[12]

In the absence of appointing a law-trained licensed attorney, many tribal courts over the years have provided indigent defendants representation via "lay advocates" or "lay counsel." It is unlikely that "lay counsel" or "lay advocates" have attended law school or are licensed by a state bar association. They may be licensed by a tribal bar association depending on that association's requirements. For example, the Navajo Nation has its own bar association and rigorous requirements for being admitted as a member to the Navajo Nation Bar Association (NNBA); however, the NNBA does not require members to be graduates of an accredited law school.[13] Contrast this practice with an indigent defendant charged in a western or Anglo court where an indigent defendant facing incarceration is provided a licensed attorney at the expense of the jurisdiction bringing the charges.[14] The reader should note that a number of tribal courts do provide law-trained licensed attorneys for all criminal defendants, Indian or non-Indian; one example of this practice is in the Tulalip Tribal Court.[15]

The first appellate decision concerning a conviction for §117 came in 2011 in the case of **United States v. Roman Cavanaugh, Jr**.[16] Cavanaugh is an enrolled member of the Spirit Lake Sioux Tribe.[17] On the night of the assault, Cavanaugh and the victim, who was also his common-law wife and mother of his child, were riding together in a car on the reservation. Cavanaugh was driving when an argument started; both Cavanaugh and the victim were intoxicated. Cavanaugh threatened to kill the victim, grabbed her head, jerked it back and forth, and slammed it into the dashboard. Cavanaugh drove into a field and the victim jumped out of the car and hid. Cavanaugh eventually drove away.[18] Law enforcement subsequently arrested Cavanaugh and the United States Attorney's Office for the District of North Dakota charged him with one count of §117, domestic assault by an habitual offender.

Prior to being charged by the federal government, Cavanaugh had been convicted in the Spirit Lake Tribal Court for misdemeanor domestic abuse offenses in March 2005, April 2005 (two counts), and January 2008.[19] In each of his tribal court cases, he was advised of his right to retain counsel at his own expense, but he did not do so. When he was charged in federal court, he maintained that he was indigent at the time of his tribal court cases. Importantly, Cavanaugh did not allege in federal court that any irregularities occurred during the tribal court proceedings beyond the absence of counsel.[20]

Cavanaugh moved to quash the indictment in the district court, arguing that the use of uncounseled tribal court convictions in a federal prosecution was a violation of his Constitutional rights. The district court found that uncounseled tribal court convictions could result in incarceration in a tribal detention facility. The district court went on to find that a sentence to jail time in tribal court did not violate the U.S. Constitution because the Bill of Rights and the Fourteenth Amendment do not apply in Indian country. Instead, ICRA governs what rights a defendant has in tribal court, and it does not require the appointment of counsel for an indigent defendant.[21] Nevertheless, the district court quashed the indictment holding that an uncounseled tribal court conviction could not be used in federal court to prove the elements of a criminal offense. The district court reasoned that because the right to counsel applies in federal courts, use of an uncounseled tribal court conviction would essentially create a Sixth Amendment violation by imposing federal punishment, in part, based upon the uncounseled conviction.[22]

The government appealed. The Court of Appeals for the Eighth Circuit stated the issue in the case as "whether an uncounseled conviction resulting in a tribal incarceration that involved no actual constitutional violation may be used later in federal court."[23] The Eighth Circuit went on to say "we do

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not believe we are free to preclude use of the prior conviction merely because it *would have been* invalid had it arisen from a state or federal court."[24] The appellate court concluded by holding "in the absence of any other allegations of irregularities or claims of actual innocence surrounding the prior convictions, we cannot preclude the use of such a conviction in the absence of an actual constitutional violation."[25]

Two weeks after **Cavanaugh** was decided, the Tenth Circuit similarly upheld the use of uncounseled tribal court convictions for the purpose of a § 117 prosecution in **United States v. Shavanaux**.[26] Also, in 2011, defendant Michael Bryant, Jr. committed multiple acts of domestic assault that would find him facing federal charges for §117 violations committed against two different women. His case and the issue of using uncounseled tribal court convictions in a § 117 prosecution ultimately ended up in the United States Supreme Court.[27]

Bryant is an enrolled member of the Northern Cheyenne Tribe in Montana and was living on the reservation.[28] In February 2011, Bryant dragged his then girlfriend off the bed, pulled her hair, and repeatedly punched and kicked her. When law enforcement investigated this assault, Bryant admitted to physically assaulting her on five or six separate occasions.[29] Several months later, Bryant assaulted, by strangling, a different woman with whom he was living at the time. He admitted to law enforcement that he had assaulted her on three separate occasions during the two months they dated.[30] Based on these 2011 assaults, a federal grand jury sitting in Montana indicted Bryant on two counts of §117. Bryant moved to dismiss the indictment in the federal district court arguing that the Sixth Amendment right to counsel prohibited the use of his uncounseled tribal court misdemeanor convictions as predicate offenses for a § 117 prosecution.[31] The district court denied defendant's motion.

Bryant entered a conditional guilty plea and received concurrent sentences of 46 months imprisonment and three years of supervised release.[32] He appealed his convictions to the Ninth Circuit Court of Appeals. The circuit court found that his tribal court convictions were not constitutionally infirm because the Sixth Amendment right to counsel does not apply in tribal court. Instead, tribal courts are governed by ICRA. However, the Ninth Circuit went on to find that had the convictions been obtained in state or federal court they would have violated the Sixth Amendment because the defendant received a sentence of imprisonment without the assistance of a court appointed lawyer.[33] The Ninth Circuit, citing to its earlier decision in **United States v. Ant**,[34] held that "tribal court convictions may be used in subsequent [federal] prosecutions only if the tribal court guarantees a right to counsel that is, at minimum, coextensive with the Sixth Amendment right."[35] A concurring Judge wrote that while **Ant** was controlling, the case should be reexamined in light of the U.S. Supreme Court decision in **Nichols v. United States**, which held that an uncounseled misdemeanor conviction, valid because no prison term was imposed, is also valid when used to enhance punishment for a later conviction.[36]

The Ninth Circuit decision in **Bryant** created a circuit split. Thus, in 2015, the U.S. Supreme Court granted *certiorari* in the case.[37] The U.S Supreme Court reversed the Ninth Circuit Court of Appeals decision.[38]

Michael Bryant, Jr. is the exact type of serial batterer that Congress had in mind when passing VAWA 2005 and creating the crime of domestic assault by an habitual offender. The Supreme Court noted Bryant's record of over 100 tribal court convictions, including five domestic abuse convictions.[39] Importantly, a number of his domestic abuse convictions in tribal court were particularly violent involving assault with a beer bottle, strangulation, and bloodying a victim and breaking her nose.[40] During the tribal court proceedings, Bryant was indigent and did not receive court-appointed counsel. However, Bryant acknowledged that his proceedings in tribal court complied[41] with ICRA, and his convictions in tribal court were valid. Moreover, Bryant never sought *habeas* relief in federal court following any of his tribal court convictions.

The U.S. Supreme Court relied on **Nichols** and ruled that Bryant's prison sentence, following his conditional guilty plea to §117(a), was punishment for the domestic assaults in committed in 2011 and not his prior convictions in tribal court.[42] Bryant argued that issues of reliability underlie the court's previous right-to-counsel decisions. The Court responded that it saw no reason to assume that tribal court proceedings are less reliable when a sentence of a year's imprisonment is imposed versus when a mere fine is the punishment.[43] Bryant also raised a Fifth Amendment Due Process Clause argument as a reason why tribal court convictions should not be used as predicates in federal court. The Supreme Court dismissed this argument, too, finding that tribes are bound by ICRA, which requires that tribes do afford a defendant due process of law.[44] The U.S. Supreme Court, in a unanimous decision, found that "because Bryant's tribal court convictions occurred in proceedings that complied with ICRA and were therefore valid when entered, use of those convictions as predicate offenses in a §117(a) prosecution does not violate the Constitution."[45]

A review of the Department of Justice's case management data shows the number of defendants indicted by federal prosecutors for violations of §117 has steadily increased from 12 defendants in FY'2010, 33 defendants in FY'2016, 41 defendants in FY'2017, and 36 indicted for the first three quarters of FY'2018.[46] The **Bryant** decision is likely, in part, a reason for this steady increase in prosecution rates.

Tribal court misdemeanor domestic violence convictions can also serve as a predicate offense for federal Gun Control Act violations. Since 1996, when Congress passed the Lautenberg Amendment, it has been illegal for any person "who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."[47] In **U.S. v. Long**, defendant Michael Lee Long, Jr., was convicted by a jury in 2015 for multiple

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charges resulting from an incident at a gas station and convenience store on the Rosebud Sioux Indian Reservation in South Dakota.[48] The victim was riding in a vehicle, along with some family members, when they stopped at the gas station and convenience store. Long got in line behind the victim and made a derogatory remark. The victim told Long she did not want to speak with him. After the victim completed her purchase, she went back to the car, called the police, and reported that Long was harassing her. She got out of the car to get his license plate number; this enraged Long. He opened the passenger door of the car the victim was in, pulled a gun and pointed it at the victim's head. The driver put the car in gear. The vehicle hit Long as it sped away. Long then opened fire on the car.[49]

One of the crimes Long was charged with following this incident was a violation of 18 U.S.C. §922(g)(9). Long moved to dismiss this charge arguing that his underlying tribal court conviction for domestic violence was obtained without counsel and that it consequently did not qualify as a predicate offense as required by 18 U.S.C. § 921(a)(33)(B)(i).[50] Long pled guilty to a domestic abuse charge in the Rosebud Tribal Court in 2011. During that proceeding he was represented by counsel who had not attended law school and was not a licensed attorney.[51] The district court denied his motion. Defendant Long raised the issue again on appeal to the Court of Appeals for the Eighth Circuit.

The Eighth Circuit stated the requirements for proving a case of § 922(g)(9) that a person convicted in any court of a misdemeanor crime of domestic violence is prohibited from purchasing or possessing a firearm or ammunition. However, a person shall not be considered to have been convicted of such an offense, unless "the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case."[52] The Eighth Circuit, citing to the Ninth Circuit decision in **United States v. First**,[53] found that the phrase "right to counsel" refers to the right to counsel as it existed in the predicate misdemeanor case.[54] The Eighth Circuit also cited to the *Bryant* decision and reiterated that the Sixth Amendment does not apply to proceedings in tribal court.[55] The court further noted that pursuant to ICRA, an Indian defendant in tribal court is entitled to appointed counsel only when they will be sentenced to greater than one-year imprisonment. In his domestic assault case, Long received a sentence of 365 days with 305 days suspended. Thus, any right to counsel he had in that case would have had to come from the Rosebud tribal code.[56] The Eighth Circuit reported that the Rosebud Sioux Law and Order Code allows both "professional attorneys and lay counsel to practice in tribal court."[57] In affirming Long's conviction, the court found that Long presented no evidence that his counsel in the 2011 domestic assault case was not admitted to practice as lay counsel in tribal court. "Because lay counsel are admitted to practice before the tribal court, we conclude that Long was represented by counsel in the tribal-court proceeding within the meaning of 18 U.S.C. § 921(a)(33)(B), and that his conviction there thus constituted a valid predicate offense under 18 U.S.C. § 922(g)(9)."[58]

Tribal court convictions are important. The law is now settled following the **Bryant** decision that uncounseled tribal court convictions can serve as predicate offenses in a federal domestic violence case. As the then-Deputy Attorney General said in a memorandum to United States Attorneys with Indian country responsibility in 2010:

> Tribal leaders have confirmed what our own experts working in Indian Country have reported: violent crime in Indian Country is at unacceptable levels and has a devastating impact on the basic quality of life there. Many tribes experience rates of violent crime far higher than most other Americans; indeed, some face murder rates against Native American women more than ten times the national average.[59]

Over the past 15 years, Congress has provided federal prosecutors with statutes that allow for robust prosecution in federal court of serial batterers in tribal communities and domestic abusers who possess firearms.

Per the Deputy Attorney General, "[t]he Department has a responsibility to build a successful and sustainable response to the scourge of violent crime on reservations. In partnership with tribes, our goal is to find and implement solutions to immediate and long-term public safety challenges confronting Indian Country."[60] Domestic violence is definitely a long-term public safety challenge in many tribal communities. The sharing of tribal court convictions with federal prosecutors and the use of those convictions in federal court cases will greatly assist tribes when there are offenders with dozens or, like Michael Bryant, Jr., even 100 previous convictions in tribal court. Getting dangerous recidivists off the reservation for an extended period of time may provide some measure of safety to the victim, her children, and the community.

In addition, many of these offenders struggle with drug and alcohol issues. A sentence of incarceration to the federal Bureau of Prisons may allow for extensive drug and alcohol treatment that so many inmates desperately need. There is a saying that domestic violence is homicide on the installment plan. Hopefully, the ability to use uncounseled tribal court convictions as predicates in federal cases will allow a significant intervention with the victim and offender and ultimately prevent a homicide.

End Notes

1. Violence Against Women Reauthorization Act of 2005, S. 1197, 109th Cong. § 901, 42 U.S.C.A § 3796gg–10 Note (2005).

2. Violence Against Women Reauthorization Act of 2005, S. 1197, 109th Cong. § 902, 42 U.S.C.A § 3796gg–10 Note (2005).

3. 18 U.S.C. § 117 (2012) (amended 2014).

4. **Id.**

5. U.S. Constitution, art. I, § 8, cl. 3.

6. U.S. Constitution, art. II, § 2, cl. 2.

7. **United States v. Cavanaugh**, 643 F.3d 592, 595 (8th Cir. 2011).

8. 25 U.S.C. §§ 1301 *et seq.* (2012).

9. 25 U.S.C. § 1302(a)(6).

10. 25 U.S.C. § 1302(c).

11. 25 U.S.C. § 1304.

12. **Cavanaugh**, 643 F.3d at 596 (citing **Gideon v. Wainwright**, 372 U.S. 335 (1963) and **Scott v. Illinois**, 440 U.S. 367 (1979)).

See FEDERAL COURT, next page

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13. Navajo Bar Association, Inc. (2016). Admissions Committee Policies and Procedures. Available at *https://static1.squarespace.com/static/585c36ead482e9dc5dd4d61c/t/5885323e9de4bb68c3067376/1485124160380/Admissions+Committee+Policies++Procedures+11+18+2016++FINAL.pdf.*

14. See *e.g.*, **Strange v. James**, 323 F. Supp. 1230 (D. Kan. 1971), *aff'd*, 407 U.S. 128 (1972) (unconstitutional for a state statute to require an indigent defendant to repay state for legal services).

15. University of Washington Native American Law Center Public Defense Clinic (for Criminal Charges on the Tulalip Reservation Only). Available at *https://www.tulaliptribesn-sn.gov/Home/Government/Departments/Tribal-Court/Attorneys/ DefenseCounsel.aspx.*

16. **Cavanaugh**, 643 F.3d 592.

17. **Id.** at 594.

18. **Id.**

19. **Id.**

20. **Id.**

21. **Id.** at 595.

22. **Id.**

23. **Id.** at 603.

24. **Id.** at 604.

25. **Id.** at 605.

26. **United States v. Shavanaux**, 647 F.3d 993 (10th Cir. 2011).

27. **United States v. Bryant**, 136 S. Ct. 1954 (2016), as revised (July 7, 2016).

28. **Id.** at 1963.

29. **Id.**

30. **Id.**

31. **Id.** at 1964.

32. **Id.**

33. **Id.**

34. **United States v. Ant**, 882 F.2d 1389, 1391 (9th Cir. 1989).

35. **Bryant**, 136 S. Ct. at 1964, 195 L. Ed. 2d 317 (*citing* **United States v. Bryant**, 769 F.3d 671, 677 (9th Cir. 2014), *rev'd and remanded*, 136 S. Ct. 1954 (2016), as revised (July 7, 2016).

36. **Nichols v. United States**, 511 U.S. 738 (1994).

37. **United States v. Bryant**, 136 S. Ct. 690 (2015).

38. **Bryant**, supra n. 27.

39. **Id.**

40. **Id.** at 1163.

41. **Id.**

42. **Id.** at 1165.

43. **Id.** at 1966.

44. **Id.**

45. **Id.**

46. Office on Violence Against Women (2018). 2018 Update on the Status of Tribal Consultation Recommendations. Available at *http://www.justice.gov/ovw/tribal-consultation #2018.*

47. 18 U.S.C. § 922(g)(9) (2012).

48. **United States v. Long**, 870 F.3d 741,744 (8th Cir. 2017), *cert. demed*, 138 S. Ct. 2048 1034 (2018).

49. **Id.** at 744.

50. **Id.** at 745.

51. **Id.**

52. 18 U.S.C. § 921(a)(33)(B)(i)(I) (2012).

53. **United States v. First**, 731 F.3d 998 (9th Cir. 2013).

54. **Long**, 870 F.3d at 746.

55. **Id.** at 746-47.

56. **Id.** at 747.

57. **Id.**

58. **Id.**

59. Memorandum for U.S. Att'ys with Dists. Containing Indian Country, David W. Ogden, Deputy Attorney General (Jan. 11, 2010) (on file in the Department of Justice Archives). Available at *http://www.justice.gov/dag/dag-memo-indian-country.html.*

60. **Id.**

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TRIBAL COURTS, from page 8

End Notes

1. Indian Law and Order Commission (2013) (Troy Eid, Chairman). A Roadmap for Making Native America Safer, Report to the President and Congress of the United States [hereinafter "Roadmap"] (2013), p.5. Available at *https://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf.*

2. Tribal communities are oftentimes comprised of tribal members, non-member Indians and non-Indians.

3. National Congress of American Indians [hereinafter "NCAI"] (2018). VAWA 2013's Special Domestic Violence Criminal Jurisdiction 5-Year Report [hereinafter "NCAI Report"]. Available at *http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf.*

4. 18 U.S.C. § 1151.

5. *Brief for National Network to End Domestic Violence et al. as Amici Curiae Supporting Respondents at 2, Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709 (2008) (No. 07-411); Steven W Perry (December 2004). *American Indians and Crime: A BJS Statistical Profile* 1992-2002, Bureau of Justice Statistics, U.S. Department of Justice, Office of Justice Programs.

6. National Institute of Justice (2016). *National Institute of Justice Research Report: Violence Against American Indian and Alaska Native Women and Men*. U.S. Department of Justice.

7. Power and Control Wheels are available at the Domestic Abuse Intervention Program, *https://www.theduluthmodel.org/wheels/.*

8. 18 U.S.C § 1151.

9. **U.S. v. Montana,** 450 U.S. 544 (1981). Note that Public Law 280, (18 U.S.C. § 1162 et seq.) extended the authority of six states to apply state law in Indian country over civil matters with some exceptions. For information on the parameters of Public Law 280 in applicable Indian countries *see* Carole E. Goldberg, Public Law 280: The Limits of State Jurisdiction Over Reservation Indians, 22 UCLA L. Rev. 535, 541 (1975). Various other states exercise some limited civil jurisdiction in Indian country pursuant to later federal law. Note that the tribe will also exercise concurrent civil and criminal jurisdiction in Public Law 280 states. For a helpful chart setting forth civil jurisdiction in Indian country by parties and subject matter *see* William Canby, Jr., *American Indian Law in a Nutshell* (West Publishing, 2015) at 256-260.

10. Indian Civil Rights Act (ICRA), 25 U.S.C. § 1304(d) as amended by § 904 of VAWA 2013.

11. 18 U.S.C. § 2265.

12. 18 U.S.C. § 2265. More particularly, to be consistent with "subsection (b)" the Tribal Court must make evident on the face of the protective order document that (1) it has subject matter jurisdiction over the action; (2) it has personal jurisdiction over the parties; (3) that due process has been observed.

13. 18 U.S.C. § 2265 (a) and (b).

14. Roadmap, Executive Summary, page ix. Available at *https://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf.*

15. 18 U.S.C. § 2265.

16. See also Hallie B. White, Kelly G. Stoner, James G. White, Creative Civil Remedies Against Non-Indian Offenders in Indian Country, 44 Tulsa L. Rev. 427 (2013).

17. See NCAI Report, supra n. 3.

18. **U.S. v. McBratney**, 104 U.S. 621 (1881); see also **Draper v. United States**, 164, U.S. 240 (1896).

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

20. For more information see NCAI Report, supra n. 3.

21. ICRA, 25 U.S.C. § 1304, as amended by Section 904 of VAWA 2013.

22. Roadmap, supra n. 1, at p. 5, fn 15.

23. Criminal jurisdictional charts may be found at *http://www.tribal-institute.org/lists/jurisdiction.htm.*

24. Id.

25. 25 U.S.C. § 1302(a)(7)(B).

26. ICRA, 25 U.S.C. § 1304 (d) as amended by Section 904 of VAWA 2013. ■

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Mother's stipulation alone and refusal to grant him a non-jury trial "effectively deemed him unfit to take responsibility and care for [J.C.] without affording him the opportunity to contest the deprived determination." The court agreed with Father that "allowing Mother's stipulation to bind both parents, and to thereby deny Father custody and control of [J.C.] without a hearing, violated Father's right to due process." The court referenced U.S. Supreme Court precedent, in the case of an unwed father, which held that "states must provide a parent with an individualized hearing on the parent's fitness before removing a child from the parent's custody." The court also reasoned that there was nothing to suggest that the parental liberty interests at stake belong to one parent alone. "Whether different conditions exist for each parent cannot be fairly determined if one parent is permitted to bind the other parent without the explicit or implicit agreement of the parent so bound."

In the instant case. Father and Mother's status as divorced was undisputed, and nothing in the record demonstrated that Father was aware of or involved in Mother's activities when J.C. was taken into protective custody. The court concluded that "Father should not be denied the opportunity to be heard on his defense that [J.C.] would not be deprived—under state and ICWA standards—if allowed to remain in Father's custody." The court therefore found that the trial court had committed reversible error and the order adjudicating J.C. as deprived was vacated and the matter remanded. **In the Matter of J.C.**, 417 P.3d 1218 (Okla. Civ. App. 2018).

One of the major protections in child welfare proceedings is the opportunity for a hearing on the allegations.

Editors' Note: The case reflects the fact that one of the major protections in child welfare proceedings is the opportunity for a hearing on the allegations. Here, the court agreed that the father should not be deprived of this opportunity. ■

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