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CONGRESS' TREATMENT OF THE VIOLENCE AGAINST WOMEN ACT: ADDING INSULT TO NATIVE WOMENS' INJURY

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DRAFT MANUSCRIPT
COMMENTS TO AUTHOR WELCOME

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INTRODUCTION

Rape and violence against women in Indian Country has recently become the subject of partisan campaign fodder and systemic racism in Washington, DC.[1] It is time to set the record straight on the Violence Against Women Act ("VAWA") reauthorization.[2]

A. Background and Context

Over the years, the U.S. Supreme Court has used numerous excuses to divest tribal governments of their inherent power[3] to assert jurisdiction over

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[1] *See e.g. Adding Injury to Injury: Judiciary Committee's Decision on HR 4970 is a Black Eye to Women*, PONTE AL DIA, May 11, 2012; Laura Bassett, *John Conyers: GOP's Violence Against Women Act Is A "Flat-Out Attack On Women"*, HUFFINGTON POST, May 8, 2012; Irin Carmon, *The Coming Fight Over Violence Against Women*, SALON, Mar. 20, 2012; Jonathan Weisman, *Women Figure Anew in Senate's Latest Battle*, NEW YORK TIMES, Mar. 14, 2012.

[2] The VAWA was first passed as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified primarily in scattered sections of 42 U.S.C.). The Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960, extended authorization for various VAWA spending provisions through fiscal year 2011. This article discusses legislation to reauthorize VAWA spending provisions through fiscal year 2016.

[3] That tribal governments held, at one point, the inherent sovereign "power[] of autonomous states" to assert both criminal and civil jurisdiction over citizens who purposefully availed themselves of tribal lands, persons, or resources has never seriously been questioned by the Court. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978). Rather, the question has been whether and to what extent that power has been "implicitly divested," *U.S. v. Wheeler*, 435 U.S. 313, 326 (1978), by a tribe's "inconsistent

non-Indians who enter Indian lands: "intrusion[s] on personal liberties" if non-Indians are subject to tribal jurisdiction[4]; non-Indians have no say in tribal political decisions[5]; tribes are not bound by the U.S. Constitution[6]; tribal law is "unfamiliar" to non-Indians and will therefore be "unusually difficult for an outsider to sort out."[7] The list of such pretexts seems to grow with each inevitable[8] sovereignty-eroding decision.[9] This, despite that *numerous* studies have found the guarantees and traditions of fairness in tribal statutory and common law are equivalent to – and, indeed, sometimes even go far beyond[10] – those granted in state and federal forums.[11] That is

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. . . status [as a] conquered and dependent" sovereign. Oliphant, 435 U.S. at 196 (quoting Morton v. Mancari, 417 U.S. 535, 554 (1974)); *see also generally* Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)Construction of the Indian Cannons*, 35 VT. L. REV. 623 (2011); *but see infra* notes 110-18 and accompanying text.

[4] Duro v. Reina, 495 U.S. 676, 688 (1990).

[5] Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408, 445 (1989). This argument is somewhat ironic, considering that it is tribal nations that "have been subjected to the domestic legislation and policies of the United States without being formally included in the policymaking process." Angelique EagleWoman, *Bringing Balance to Mid-North America: Restructuring the Sovereign Relationships Between Tribal Nations and the United States*, 41 BALT. L. REV. 671, 689 (forthcoming 2012).

[6] Nevada v. Hicks, 533 U.S. 353, 383-84 (2001) (citing Talton v. Mayes, 163 U.S. 376, 384 (1896)). Still, the Indian Civil Rights Act ("ICRA"), 25 U.S.C. 1301-1303, requires that tribal courts provide all rights afforded to defendants in state and federal court, save appointed counsel for indigent criminal defendants. Persons convicted by tribal courts may seek a federal *habeas* review, per 25 U.S.C. § 1303, to determine whether these rights were properly afforded. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe, 634 F.2d 474, 477 (9th Cir. 1980); *see also* Quintin Cushner, & Jon M. Sands, *Tribal Law and Order Act of 2010: A Primer, With Reservations*, 34 CHAMPION 38, 41 (2010) (discussing the *habeas corpus* practice in Indian Country); Letter from Kevin Washburn, et al., Law Professors, to Senator Patrick Leahy, at al., Chairmen and Ranking Members of the Senate Judiciary Committee (Apr. 21, 2012), at 5-6, *available at* http://turtletalk.files.wordpress.com/2012/04/vawa-letter-from-law-professors-tribal-provisions.pdf (noting that the proposed VAWA's tribal protections "re-emphasize[] and reinforce[] the protections afforded under ICRA").

[7] Hicks, 533 U.S. at 385.

[8] *See* Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973 (2010); Ennis, *supra* note 3; David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996).

[9] *See* Bethany Berger, *Testing U.S. Supreme Court Assumptions Regarding Tribal Courts*, at 1 (2005) (unpublished paper), *available at* http://www.ncaiprc.org/files/Testing%20U.S.%20Supreme%20Court%20Assumptions%20Regarding%20Tribal%20Courts.pdf; *see also generally Rulings of the U.S. Supreme Court as They Affect the Powers and Authorities of the Indian Tribal Governments: Hearing on Concerns of Recent Decisions of the U.S. Supreme Court and the Future of Indian Tribal Governments in America Before the S. Comm. on Indian Affairs*, S. Hrg 107-338, 107th Cong. (2002).

[10] *See* Elizabeth Ann Kronk, *American Indian Tribal Courts as Models for*

Incorporating Customary Law, 3. J. COURT INNOVATION 231 (2010) (discussing the advantage of a tribal forum from a civil and human rights perspective); Korey Wahwassuck, John P. Smith, & John R. Hawkinson, *Building a Legacy of Hope: Perspectives on Joint Tribal-State Jurisdiction*, 36 WM. MITCHELL L. REV. 859, 882 (2010) ("If the choice were mine, I would choose Indian tribal courts over existing rural state alternatives as more suitable, more economical, and more just . . . .").

[11] *See generally* Wenona T. Singel, *Indian Tribes and Human Rights Accountability*, __ SAN DIEGO L. REV. __ (forthcoming 2013) (on file with author); Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness:* Indian Courts and the Future *Revisited* (Michigan State University College of Law, Research Paper No. 10-15, 2012); Mark D. Rosen, *Evaluating Tribal Courts' Interpretations of the Indian Civil Rights Act*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY 275 (Kristen A. Carpenter, et al., eds. 2012); Leah Catherine Shearer, Justice in Indian Country: A Case Study of the Tulalip Tribes (2011) (unpublished M.A. dissertation, University of California, Los Angeles), *available at* http://turtletalk.files.wordpress.com/2012/02/justice-in-indian-country-a-casestudy-of-the-tulalip-tribes1.pdf; Matthew L.M. Fletcher, *Tribal Courts, the Indian Civil Rights Act, and Customary Law: Preliminary Data* (Michigan State University College of Law Research Paper No. 06-05, 2008); Benjamin J. Cordiano, Note, *Unspoken Assumptions: Examining Tribal Jurisdiction over Nonmembers Nearly Two Decades After* Duro V. Reina, 41 CONN. L. REV. 265 (2008) Patrick M. Garry, et al., *Tribal Incorporation of First Amendment Norms: A Case Study of the Indian Tribes of South Dakota*, 53 S.D. L. REV. 335 (2008); Troy A. Eid, *Beyond* Oliphant*: Strengthening Criminal Justice in Indian Country*, 54 FED. LAW. 40 (2007); Berger, *supra* note 9; Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule* (Harvard University, John F. Kennedy School of Government Faculty Research Working Paper Series. Working Paper No RWP04-016, 2004); NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL, MEANINGFUL INVOLVEMENT AND FAIR TREATMENT BY TRIBAL ENVIRONMENTAL REGULATORY PROGRAMS: A REPORT OF THE NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL (2004); Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889 (2003); Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Tribal Courts & the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479 (2000); Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1998); Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts*, 46 AM. J. COMP. L. 287 (1998); Christian M. Freitag, *Putting* Martinez *to the Test: Tribal Court Disposition of Due Process*, 72 IND. L.J. 831 (1997); Frank Pommersheim, *Tribal Court Jurisprudence: A Snapshot From the Field*, 21 VT. L. REV. 7 (1996); Douglas B.L. Endreson, *The Challenges Facing Tribal Courts Today*, 79 JUDICATURE 142, 146 (1995); Frank Pommersheim, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411 (1992); UNITED STATES COMMISSION ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS (1991); Elmer R. Rusco, *Civil Liberties Guarantees Under Tribal Law: A survey of Civil Rights Provisions in Tribal Constitutions*, 14 AM. INDIAN L. REV. 269 (1989); Richard B. Collins, *Indian Courts in the Southwest*, 63 A.B.A. J. 808 (1977); *see also* Letter from Troy A. Eid & Thomas B. Heffelfinger, Former United States Attorneys, to U.S. House Representatives (Apr. 30, 2012), *available at* http://turtletalk.files.wordpress.com/2012/05/vawa-4-30-12-support-ltr.pdf (noting that "as a practical reality, the last thing Indian tribes want to do is to encourage federal court review that eviscerates" tribal jurisdiction, and that "tribes are working diligently to 'get it right' in the event of federal judicial review by protecting non-

not to say that tribal courts are perfect; like all courts, tribal courts do sometimes make mistakes, particularly when tribal politics rear their ugly head.[12] In the main, however, the excuses relied upon by the Supreme Court were – and are – empirically baseless.

The tribal jurisdiction-stripping trend arguably[13] began in 1978 when the U.S. Supreme Court ruled in *Oliphant v. Suquamish Indian Tribe*[14] that non-Indians are not subject to the criminal jurisdiction of Indian tribes.[15] Aside from the political and economic upset that this intrusion into tribal sovereignty has caused,[16] the more important practical consequence of

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Indian defendants' federal constitutional rights" and ensuring "that judges, prosecutors and public defenders have the same quality of training and credentials as their state and federal counterparts"); *but see* Patience Drake Roggensack, *Plains Commerce Bank's Potential Collision With the Expansion of Tribal Court Jurisdiction by Senate Bill 3320*, 38 U. BALT. L. REV. 29, 38-39 (2008) (making unfounded criticisms of tribal courts).

[12] *See* Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1096-97 (2005) (noting that the chances of a rogue tribal court making decisions in bad faith are similar to the chances of state courts doing the same); Stephen Cornell & Joseph P. Kalt, *Two Approaches to the Development of Native Nations: One Works, the Other Doesn't*, *in* REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 24 (Miriam Jorgensen, ed. 2007) (discussing the importance of a tribal court that is insulated from tribal politics).

[13] Congress asserted jurisdiction over "major" Indian-on-Indian crimes in 1885, a response to the Supreme Court's decision of *Ex Parte Crow Dog* holding that criminal jurisdiction over these crimes was exclusive to tribes. 109 U.S. 556 (1883). Arguably, the *Crow Dog* case was purposefully set up as a means to incite Congress to impose greater federal criminal jurisdiction over Indian lands. *See generally* Robert Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through the Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976),

[14] 435 U.S. 191.

[15] *Oliphant* relied purely on unsupported legal conclusions to bolster its "implicit divestiture" theory. *See* Press Release, Matthew L.M. Fletcher, et al., Statement of the Michigan State University College of Law Indigenous Law and Policy Center on the Tribal Law and Order Act, at 2 (Nov. 10, 2011); Geoffrey C. Heisey, Comment, Oliphant *and Tribal Criminal Jurisdiction Over Non-Indians: Asserting Congress's Plenary Power to Restore Territorial Jurisdiction*, 73 IND. L.J. 1051, 1062-70 (1998); Peter C. Maxfield, Oliphant v. Suquamish Tribe*: The Whole is Greater than the Sum of the Parts*, 19 J. CONTEMP. L. 391, 396 (1993); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 265-74 (1986). Some have noted that the decision was likely intended to have little practical effect – of the 127 reservations that exercised criminal jurisdiction in 1978, only 33 extended jurisdiction to non-Indians. Amy Radon, Note, *Tribal Jurisdiction and Domestic Violence: The Need for Non-Indian Accountability on the Reservation*, 37 U. MICH. J.L. REFORM 1275, 1292 (2004).

[16] *See generally* sources collected in Ryan Dreveskracht, *Tribal Court Jurisdiction and Native Nation Economies: A Trip Down the Rabbit Hole*, 67 NAT'L LAW. GUILD REV. 65 (2010).

Oliphant was the creation of a jurisdictional gap that allowed non-Indian criminals to enter Indian reservations and literally get away with murder[17] – or, more commonly, rape.[18] Neither the federal government[19] nor the states[20] have filled this jurisdictional void.[21] Indeed, sex offenders are now

[17] *See e.g.* Levi Rickert, *Cold Case Pine Ridge Murders Review: A Step Toward Justice*, NATIVE CONDITION, June 4, 2012; Dennis Wagner, *Poor Justice on Arizona Indian Reservations Has Crime Running Rampant*, ARIZONA REPUBLIC, Sept. 13, 2010.

[18] *See* Timothy Williams, *For Native American Women, Scourge of Rape, Rare Justice*, NEW YORK TIMES, May 22, 2012; *see also generally* authority cited *infra* notes 49-83 and accompanying text. Misdemeanor crimes are also subject to the rule, and are scarcely prosecuted. Gavin Clarkson & David DeKorte, *Unguarded Indians: The Complete Failure of the Post*-Oliphant *Guardian and the Dual-Edged Nature of Parens Patriae*, 2010 U. ILL. L. REV. 1119, 1145 (2010). The relatively small Salt River Indian Reservation, for example, faces more than 450 misdemeanor domestic violence complaints a year – one act of domestic violence every 19 hours. National Congress of American Indians, *Title IX of S. 1925, Fighting Domestic Violence Locally to Stop Violence Against Native Women*, http://turtletalk.files.wordpress.com/2012/04/vawa-combat-dv-locally.pdf (last visited July 18, 2012). In 2006 and 2007, U.S. Attorneys prosecuted an average of 24 misdemeanor crimes on Indian lands, total. *Id.* "As any expert on domestic violence knows, these kinds of crimes have a snowball effect. If the perpetrator isn't stopped early on, when the crimes are mere misdemeanors, they have a troubling tendency to escalate to felonious assault and even murder." Fletcher, et al., *supra* note 15, at 4.

[19] In most states, non-Indian on Indian criminal jurisdiction is exclusively federal under the General Crimes Act, 18 U.S.C. § 1152. CARRIE E. GARROW & SARAH DEER, TRIBAL CRIMINAL LAW AND PROCEDURE 93 (2004); U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL, EXCLUSIVE FEDERAL JURISDICTION OVER OFFENSES BY NON-INDIANS AGAINST INDIANS § 9-20.685. In light of this responsibility, both the executive and legislative branches of the federal government have explicitly acknowledged a trust and fiduciary obligation to protect tribal members from non-Indian crime. *See id.* ("United States Attorneys have . . . a very important role to play in reacting to crimes by non-Indians against Indians. It is their responsibility to make sure that the tribal community is protected from crimes by persons over whom neither the tribe nor the state has jurisdiction."); Pub. L. No. 111-211, § 202, 124 Stat. 2262 (2010) (finding that "the United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian country"). As to enrolled members of Indian tribes, "tribal nations retain authority over all crimes committed by Indians, whether they are misdemeanors or felonies" – although this jurisdiction may be concurrent with the federal government and/or neighboring states. Sarah Deer, *Violence Against Women and Tribal Law*, INDIAN COUNTRY TODAY, July 16, 2012. While tribes can prosecute Indian defendants, they are not, however, allowed to impose jail sentence that is longer than one year. Indian Civil Rights Act, 25 U.S.C. §1302(7) (2006).

[20] *See* STEWART WAKELING, ET AL., POLICING ON AMERICAN INDIAN RESERVATIONS: A REPORT TO THE NATIONAL INSTITUTE OF JUSTICE (2001); Eileen M. Luna, *Law Enforcement Oversight in the American Indian Community*, 4 GEO. PUB. POL'Y REV. 149 (1999). A number of tribes rely on state and local authorities for police services under Pub. L. No. 280, 67 Stat. 588 (1953) ("P.L. 280"). This law was passed as part of a larger effort to "terminate" Indian tribal governments and gave California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska the power to enforce the same criminal laws within Indian Country as they did outside of Indian Country. The surrounding, and generally larger, non-

using Indian reservations as safe havens to commit sex crimes against Indian women.[22]

The United States' failure to prevent systematic violence inflicted upon Native American women by non-Indian men is nothing new.[23] During westward expansion by early American and British colonizers, sexual abuse of native women occurred quite frequently.[24] In the late Nineteenth

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Indian community is supposed to pay for these local police services – but rarely does so to adequate levels. TRIBAL LAW AND POLICY INSTITUTE, FINAL REPORT: FOCUS GROUP ON PUBLIC LAW 280 AND THE SEXUAL ASSAULT OF NATIVE WOMEN 7 (Dec. 31, 2007); WAKELING, ET AL., *supra* at 8. Giving states jurisdiction under P.L. 280 has made the problem of Indian Country crime much worse. *See generally* Valentina Dimitrova-Grajzl, et al., *Jurisdiction, Crime, and Development: The Impact of Public Law 280 in Indian Country* (2012) (unpublished paper), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2093681; Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697 (2006); U.S. DEP'T OF JUSTICE, PUBLIC LAW 280 AND LAW ENFORCEMENT IN INDIAN COUNTRY – RESEARCH PRIORITIES (2005); Carole Goldberg & Heather Valdez Singleton, *Research Priorities: Law Enforcement in Public Law 280 States* (2005) (unpublished manuscript), *available at* https:// www.ncjrs.gov/pdffiles1/nij/grants/209926.pdf; U.S. DEP'T OF JUSTICE, PUBLIC LAW 280: ISSUES & CONCERNS FOR VICTIMS OF CRIME IN INDIAN COUNTRY (2004); Carole Goldberg, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405 (1997). For decades, despite much outrage by tribal victims of domestic violence that states have failed to fulfill their obligations assumed under P.L. 280, the complaints have fallen on deaf ears. *See e.g.* Jon Stark, *Lummis Rally to Support Tougher Domestic Violence Law*, BELLINGHAM HERALD, June 26, 2012; Deborah S. Brennan, *Tribes Seek More Power for Their Police Forces*, L.A. TIMES, Dec. 27, 2000.

[21] *See* Laura E. Pisarello, Comment, *Lawless by Design: Jurisdiction, Gender and Justice in Indian Country*, 59 EMORY L.J. 1515, 1516 (2010) ("[I]f you want to rape or kill somebody and get away with it, do it on an Indian reservation.").

[22] Williams, *supra* note 18; Brian P. McClatchey, *The Tribal Law and Order Act of 2010: Toward Safe Tribal Communities*, 54 ADVOCATE 24, 25 (2011). This problem is not limited solely to domestic violence crimes. Some pedophiles, for example, have found employment as teachers in Bureau of Indian Affairs' schools even after being caught molesting children in other jurisdictions. Gavin Clarkson, *Justice Declined: Criminals Prey on the Unprotected*, INDIAN COUNTRY TODAY, Aug. 29, 2007, at A3. Reports indicate that by exploiting the jurisdictional gap, these pedophiles continued to rape and exploit children with no fear of prosecution. *Id.*

[23] *See* Andrea L. Johnson, Note, *A Perfect Storm: The U.S. Anti-Trafficking Regime's Failure to Stop the Sex Trafficking of American Indian Women and Girls*, 43 COLUM. HUM. RTS. L. REV. 617, 631-32 (2012) ("European colonizers used Native women for their own sexual fulfillment . . . . Native women captured in the wars between colonizers and tribes were frequently used for sex and labor or sold for profit.").

[24] *Id.* at 632. Indeed, rape of Native women was not even prohibited under the U.S. legal regime until, arguably, the late nineteenth century. *Id.* (citing Andrea Smith, *Not an Indian Tradition: The Sexual Colonization of Native Peoples*, 18 HYPATIA 70, 73 (2003)); BRAD ASHER, INDIANS, SETTLERS, AND THE LAW IN WASHINGTON TERRITORY, 1853-1889,

Century, forced relocation to reservations resulted in numerous accounts of sexual assault by military forces, who often demanded sexual favors for food, clothing, and shelter.[25] The urban relocation programs of the 1940's and 1950's[26] left Indian women stranded in urban areas where they were unemployed at eight to ten times the national average – a situation that experts describe as "the perfect opportunity" for sexual assault by non-Indians.[27] Forced sterilization[28] and child removal policies[29] of the 1960's and 1970's further "ensured that yet another generation of Native women would be exposed to sexual abuse."[30]

That we have known for some time how to put an end to this epidemic makes it that much worse. A 2001 Department of Justice study on reservation policing, for instance, found the following:

> Beginning in the 1970s, a handful of Indian nations embarked on successful paths of social and economic development.[31] Research by the Harvard Project on American Indian Economic Development[32] indicates that the common denominator among

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at 3-10 (1999); Virginia H. Murray, *A Comparative Survey of the Historic Civil, Common, and American Indian Tribal Law Responses to Domestic Violence*, 23 OKLA. CITY U. L. REV. 433, 441-43 (1998).

[25] Sarah Deer, *Relocation Revisited*, 36 WM. MITCHELL L. REV. 621, 653, 661-62 (2010); *see also* EagleWoman, *supra* note 5, at 674 ("[T]he United States employed military force . . . to consolidate political and social power. . . . Without [traditional] food sources, tribal peoples became instantly dependent on the U.S. rations provided as part of the payments for the millions of acres ceded in treaties and agreements.").

[26] Under these programs, federal employees traveled to reservations in order to "recruit[] young Native people to move to the city, where they were promised that jobs and housing were plentiful." *Id.* at 670.

[27] *Id.* at 670-71.

[28] *See* MATTHEW CONNELLY, FATAL MISCONCEPTION: THE STRUGGLE TO CONTROL WORLD POPULATION 271 (2008) (discussing the forced sterilization policies of the federal government vis-à-vis Indian women).

[29] Under this policy, "Indian children were taken from their families on the reservations and sent, often across the country, to attend boarding schools." Patrice H. Kunesh, *Transcending Frontiers: Indian Child Welfare in the United States*, 16 B.C. THIRD WORLD L.J. 17, 22 (1996). It was the goal of the federal government to place Indian children "in a totally foreign and controlled environment where they would throw off all vestiges of Indian identity and put on the habits of 'civilized' people." *Id.*

[30] Deer, *supra* note 25, at 665.

[31] *See generally* Matthew L.M. Fletcher & Peter S. Vicaire, *Indian Wars: Old and New*, 15 J. GENDER RACE & JUST. 201, 203-11 (2012); Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777 (2006); Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779 (2006).

[32] *See generally* HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, THE STATE OF NATIVE NATIONS (2008); Cornell & Kalt, *supra* note 12; Kalt & Singer,

> these successful tribes was an effective government – one that was capable of both determining and implementing the policy priorities of the community. One indicator of a tribal government's ability to make and implement effective decisions is whether or not it has increased control over its own institutions. . . . An important lesson from this research is the effect of increased tribal control over tribal institutions. Only those tribes that have acquired meaningful control over their governing institutions have experienced improvements in local economic and social conditions. The research has not found a single case of sustained economic development where the tribe is not in the driver's seat. . . . The general point is that self-determined institutions, ones that reflect American Indian nations' sovereignty, are more effective.[33]

When it comes to crimes committed against Native women, however, Congress has taken a backwards approach: an "*increase[d]* federalization of tribal law enforcement."[34] Congress knew as early as the 1980s that this approach had failed in every instance and had no reason to believe that it would work to prevent the disturbingly high rates of domestic violence and sex crimes in Indian Country that existed even at that time[35] – it is clearly not working today.[36] As noted in a recent Columbia Human Rights Law Review article:

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supra note 11; Miriam Jorgensen, Bringing the Background Forward: Evidence From Indian Country on the Social and Cultural Determinates of Economic Development (2000) (unpublished Ph.D. dissertation, Harvard University) (on file with author); *Economic Development Hearing Before the Comm. on Indian Affairs*, 104th Cong. 8 (1996) (testimony of Joseph P. Kalt, Harvard Project on American Indian Economic Development).

[33] WAKELING, ET AL., *supra* note 20, at viii.

[34] McClatchey, *supra* note 22, at 25 (emphasis added); *see also* WAKELING, ET AL., *supra* note 19, at 54 n.2 ("It is impossible to be truly sovereign without exercising real self-determination in policing.").

[35] *See* Indian Self-Determination and Education Assistance Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285, 2296 (1988) ("[C]ompared to state, county and municipal governments of similar demographic and geographic characteristics, the level of development attained by [t]ribal governments over the past twelve years in remarkable. This progress is directly attributable to the success of the federal policy of Indian self-determination."); McClatchey, *supra* note 22, at 25 (noting that "[r]eservations have long been places where criminals can . . . get away with drug trafficking, domestic violence, rape, [and] assault" and that these crimes have been "beyond the reach of tribal courts and often not worthy of the scarce resources of the U.S. Attorneys").

[36] *See* authority cited *infra* notes 50-84 and accompanying text; Suzianne D. Painter-Thorne, *Tangled up in Knots: How Continued Federal Jurisdiction Over Sexual Praetors on Indian Reservations Hobbles Effective Law Enforcement to the Detriment of Indian Women*, 41 N.M. L. REV. 239, 243 (2011) ("[W]hile crime outside Indian reservations has generally declined in recent years, reservations have seen violent crime spiral upward over the same time period. For sexual assaults, the number of reported cases is staggering.").

> This jurisdictional paradox disables those who are best positioned to effectively intervene: the tribes . . . whose prosecutors and investigators are more invested in and aware of the challenges in their local tribal communities. Embedded within Native communities and Native culture and priorities, tribal courts are considered by many to be the most appropriate forum for adjudicating cases arising on reservations, particularly culturally sensitive cases involving sexual exploitation.[37]

These conclusions reverberate throughout every study to analyze the epidemic.[38] The most recent U.S. Government Accountability Office study on the topic, for instance, found that: "tribal justice systems are often the most appropriate institutions for maintaining law and order in Indian country."[39] Experience teaches the same. According to former U.S.

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[37] Johnson, *supra* note 23, at 689.

[38] *See* Clarkson & DeKorte, *supra* note 18, at 1138-39 (noting that federal agencies have "little incentive to be responsive to the urgency or emotional impact of a crime and . . . often have little accountability to the tribal community itself"); Painter-Thorne, *supra* note 36, at 284 (noting that "authorizing tribal governments to prosecute reservation crime regardless of the offence or perpetrator" is the "most obvious solution"); McClatchey, *supra* note 22, at 25 (noting that "the ultimate solution to this problem" is to "authorize tribal justice systems to prosecute any offenders within the reservation boundaries and fully fund tribal justice systems"); Matthew Handler, *Tribal Law and Disorder*, 75 BROOK. L. REV. 261, 286-87 (2010) (finding that federal prosecutors are not well-positioned to prosecute crimes on tribal reservations because they are not aware of community priorities and values); Paul Schmelzer, *Bachman Votes Against Act to Help Native American Police Combat Rape "Epidemic"*, MINNESOTA INDEPENDENT (July 28, 2010) (noting that reservation crime is a local issue best resolved by local authorities); MINNESOTA INDIAN WOMEN'S RESOURCE CENTER, SHATTERED HEARTS 112 (2009) [hereinafter SHATTERED HEARTS] (finding that "[a]ny approach to addressing the problem must prioritize the healing and empowerment of Native communities, and ensure that they are not re-victimized" as a result of efforts to address the problem); Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL'Y 121, 126 (2004) ("[S]tate and federal government[s] cannot address the unique spiritual and emotional issues that arise in the context of a sexual assault. A woman's ability to seek justice in her own community may facilitate healing and emotional wellness."); *see also generally* U.S. DEP'T OF JUSTICE, BUILDING TRUST BETWEEN THE POLICE AND THE CITIZENS THEY SERVE (2010); AMNESTY INTERNATIONAL, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 30 (2007) [hereinafter MAZE OF INJUSTICE]; THOMAS PEACOCK, ET AL., COMMUNITY-BASED ANALYSIS OF THE U.S. LEGAL SYSTEM'S INTERVENTION IN DOMESTIC ABUSE CASES INVOLVING INDIGENOUS WOMEN (1999).

[39] U.S. Government Accountability Office, *Tribal Law and Order Act: None of the Surveyed Tribes Reported Exercising the New Sentencing Authority, and the Department of Justice Could Clarify Tribal Eligibility for Certain Grant Funds*, Report No. GAO-12-658R (May 30, 2012).

Attorneys Troy A. Eid and Thomas B. Heffelfinger,

> local public safety institutions – those that are closer and more accountable to their communities – are the best positioned to protect their citizens and promote equal justice for all. . . . Given the alarmingly high rates of domestic violence and abuse in much of Indian Country, it is senseless – if not unconscionable – to deprive Native American communities of the basic legal tools needed to protect their most vulnerable citizens. Tribal governments need and deserve the right to prevent, prosecute and punish crimes on their lands . . . .[40]

This year, Congress *finally* addressed – or at least began to address – the issue.[41] On April 26, 2012, the Senate passed S. 1925,[42] a version of VAWA that attempted to close the *Oliphant* gap by reauthorizing[43] tribes to exercise criminal jurisdiction over non-Indians who violate Indian women. The proposed tribal amendments specifically incorporate the known solution to the epidemic by "respecting the power of local governments to be more accountable to the communities they serve."[44] Importantly, this return of jurisdiction to tribal governments is a very limited fist step: under S. 1925 tribal governments would only be allowed to assert criminal jurisdiction when the victim is an enrolled member of an Indian tribe and the defendant resides in Indian Country or has some "sufficient ties" with a prosecuting tribe.[45]

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[40] Eid & Heffelfinger, *supra* note 11.

[41] Congress was indisputably aware of the causes, at least under the current legal scheme, for the prevalence of violence against Native women since October of 2009:

> [C]auses for the prevalence of violence against Native women [include]: (1) a lack of resources for police to investigate these crimes and resources to collect evidence, (2) a lack of police training for investigations and evidence collection, and (3) a lack of urgency at the federal level in investigating and prosecuting crimes of domestic and sexual violence.

S. Rep. No. 111-93, at 19 (2009). Congress was also aware of the solution. *See id.* at 16 ("When federal officials decline to prosecute alleged reservation crimes, tribal courts often provide the last opportunity for justice for the victim and the tribal community.").

[42] Violence Against Women Reauthorization Act of 2011, S. 1925, 112th Cong. (2012).

[43] From the explicit terms of S. 1925, tribal criminal jurisdiction was not derived from the federal government and delegated to tribes, but, rather, was "recognized and affirmed" as the "**inherent** power . . . to exercise special domestic violence criminal jurisdiction over all persons." *Id.*, at § 204(b)(1) (emphasis added).

[44] Eid & Heffelfinger, *supra* note 11.

[45] The text of the Senate bill reads, in relevant part:

> In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the case shall be dismissed if: (A)

In May, however, the Republican-controlled House passed its version of the VAWA, H.R. 4970,[46] which omitted the Senate's tribal provisions. Curiously, during the House Judiciary Committee markup of the bill, Committee Chairman Lamar Smith (R-TX) refused to allow consideration of a substitute amendment offered by Ranking Member John Conyers, Jr. (D-MI) that would reinsert the tribal provisions.[47] Representative Darrell Issa (R-CA) attempted to offer a similar amendment, which was also disregarded by the Judiciary Committee Chairman.[48]

In an apparent acknowledgement that the Supreme Court's previous excuses are largely unsubstantiated, all of the aforementioned pretexts were virtually absent from the House Report accompanying H.R. 4970 ("House Report").[49] Unfortunately, in their place was an even more insulting and bigoted expression of subterfuge.

B. What's the Big Deal? It Isn't *That* Bad

That there exists a rape and violent crime epidemic in Indian Country is well established. Consider these statistics:

- Native American women suffer violent crime at the highest rates in the United States.[50]
- 34% of Native women will be raped in their lifetimes.[51] 39% will suffer domestic violence.[52]

> the defendant files a pretrial motion to dismiss on the grounds that the defendant and the alleged victim lack sufficient ties to the Indian tribe; and (B) the prosecuting tribe fails to prove that the defendant or an alleged victim: (i) resides in the Indian country of the participating tribe; (ii) is employed in the Indian country of the participating tribe; or (iii) is a spouse or intimate partner of a member of the participating tribe.

Id. at § 204(d)(3); *see also* Letter from Kevin Washburn, et al., *supra* note 6, at 4-5, (noting that "[t]he scope of the restored jurisdiction [in the VAWA] is quite narrow" and discussing the scope of VAWA tribal jurisdiction).

[46] A Bill to Reauthorize the Violence Against Women Act of 1994, H.R. 4970, 112th Cong. (2012).

[47] H.R. Rep. No. 112-480, at 227 (2012) [hereinafter House Report].

[48] *Id.* at 246.

[49] *See generally id.*

[50] Pub. L. No. 109-162 § 901 (2006); Press Release, Lynn Rosenthal & Kimberly Teehee, The White House, *Strengthening the Violence Against Women Act* (Apr. 25, 2012), *available at* http://www.whitehouse.gov/blog/2012/04/25/strengthening-violence-against-women-act.

[51] S. Rep. No. 111-93, at 2; PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE: FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF

- On many reservations, Native women are murdered at a rate more than ten times the national average.[53]
- Violent crime rates in Indian country are more than 2.5 times the national rate.[54] Some reservations face more than 20 times the national rate of violence.[55]
- 46% of all Native women have experienced rape, physical violence, and/or stalking at some point in their life.[56]
- The rate of violent victimization among Native women is more than double that among all women.[57]
- When Native women are victimized, they are victimized much more violently than non-Indians, with 56% of their injuries requiring medical attention, compared to 38% for whites.[58]
- American Indians experience approximately 1 violent crime for every 10 residents age 12 or older, compared to 1 violent victimization for every 25 whites.[59]
- Native women rank at the bottom of nearly every social, health, and economic indicator.[60]
- In some rural Alaskan villages, the rate of sexual violence against Native women is 12 times higher than the national rate.[61]
- In South Dakota, Indians make up 10% of the population, but account for 40% of the victims of sexual assault.
- Alaska Natives make up 15% of the state's population, but account for 61% of the victims of sexual assault.
- Non-Indians commit over a very large majority of the rapes and sexual assaults against Indian women.[62]

VIOLENCE AGAINST WOMEN 22 (2000); MAZE OF INJUSTICE, *supra* note 38, at 2.

[52] S. Rep. No. 111-93, at 19; Centers for Disease Control, *Adverse Health Conditions and Health Risk Behaviors Associated with Intimate Partner Violence*, 57 MORBIDITY AND MORTALITY WEEKLY REP, 113, 115 (2008).

[53] *Obama Wants to Increase DV Sanctions to Protect Indian DV Victims on Tribal Lands*, 17 NAT. BULL. DOMESTIC VIOLENCE PROTECTION, art. 9 (2011).

[54] STEVEN W. PERRY, AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE, 1992-2002 (2004) (report of the U.S. Department of Justice, Bureau of Justice Statistics).

[55] *Id.*

[56] CENTER FOR DISEASE CONTROL, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 3 (2011).

[57] PERRY, *supra* note 54, at v.

[58] RONET BACHMAN, ET AL., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN 49 (2008)

[59] *Id.* at 5.

[60] U.S. COMM'N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY, at ix (2003).

[61] Williams, *supra* note 18.

[62] PERRY, *supra* note 54, at 9; PEACOCK, ET AL., *supra* note 38, at 339 n.55; BACHMAN,

> • Although the FBI is responsible for investigating rape and sexual assault crimes across the country, approximately 1 in 4 of those prosecuted occur on Indian reservations.[63]

On some of the most crime-ridden reservations, as few as three federal officers are responsible for patrolling millions of acres of land.[64] These officers are typically located a substantial distance from tribal communities and are generally unaware of the exigency of many of the reported incidents of rape and violence.[65] It is not uncommon for Native victims of sexual assault to "have to wait hours or days to receive a response from police and, in many situations, [victims] receive no response at all."[66] On some reservations – such as those on the Upper Peninsula of Michigan, which is covered by a U.S. Attorney's Office over 11 hours away – sexual assaults are literally impossible to prosecute, given the short timeframes for properly using a "rape kit"[67] (less than 11 hours).[68] On the off chance that a victim's call is answered, local federal facilities often lack the necessary specialized training to collect evidence.[69] In addition, 44% of these federal facilities lack personnel trained to provide emergency services to respond to sexual

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ET AL., *supra* note 58, at 38; Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 SUFFOLK U. L. REV. 455, 457 (2005); *see also* Johnson, *supra* note 23, at 637 (Indian women sex traffickers are primarily non-Indian).

[63] Federal Bureau of Investigation, *Journey Through Indian Country Part I*, FBI STORIES (June 1, 2012), *available at* http://www.fbi.gov/news/stories/2012/june/indian-country_060112.

[64] Johnson, *supra* note 23, at 676.

[65] *Id.*

[66] MAZE OF INJUSTICE, *supra* note 38, at 43; *see also* Deer, *supra* note 25, at 680 ("Tribal law enforcement responses . . . are often too little, too late."). According to the FBI, these difficulties arise from their inability to navigate in Indian country:

> On many reservations there are few paved roads or marked streets. Agents might be called to a crime scene in the middle of the night 120 miles away and given these directions: "Go 10 miles off the main road, turn right at the pile of tires, and go up the hill." In some areas, crime scenes are so remote that cell phones and police radios don't work.

Federal Bureau of Investigation, *supra* note 63.

[67] "A 'rape kit' is the name of the product frequently employed for the examination of a sexual assault victim in which pubic hair, blood samples, swabs, and specimens from various parts of the victim's body and clothing are collected and retained for further forensic examination and evaluation." U.S. v. Boyles, 57 F.3d 535 (7th Cir. 1995).

[68] Fletcher, et al., *supra* note 15, at 3; *see also e.g. id.* ("The Turtle Mountain Band Reservation in northwest North Dakota is more than 10 hours from Fargo, where the U.S. Attorney's Office is located. The U.S. Attorney's Office in Cheyenne, Wyoming is as far from the Wind River Reservation as you can get in the state.").

[69] S. Rep. No. 111-93, at 20.

violence, and 30% lack the basic protocols for treating victims.[70]

"Because federal prosecutors have to prove (or disprove) whether the crime occurred within Indian Country, whether the suspect is Indian or non-Indian, and whether the victim is Indian or non-Indian, in addition to definitional requirements, many crimes are not prosecuted due to lack of sufficient evidence."[71] Thus, charges are rarely filed against the perpetrators of Indian violence.[72] According to one former federal agent, federal prosecutors will "only take the [cases] with a confession."[73] Federal policing agents are "forced to triage [their] cases" – leaving officers feeling as though they are "standing in the middle of the river trying to hold back a flood."[74] In the Navajo Nation, for example, 329 rape cases were reported in 2007 – "five years later, there have been only 17 arrests."[75] Other studies have found a federal prosecutorial culture that views Indian reservation

[70] *Id.* (citing MAZE OF INJUSTICE, *supra* note 38, at 41-59). In order to alive some of the evidentiary problems associated with the lack of federal prosecutions, various sections of the Tribal Law and Order Act of 2010, Pub. L. No. 111-211, instruct that that federal law enforcement consult, cooperate, and coordinate with tribal law enforcement. Federal agents have, however, largely ignored this mandate. *See e.g.* Confederated Tribes and Bands of the Yakama Nation v. Holder, No. 11-3028 (E.D. Wa. Mar. 8, 2011), ECF No. 1.

[71] Fletcher, et al., *supra* note 15, at 4

[72] Johnson, *supra* note 23, at 687 ("[F]ederal prosecutors decline 50% of cases from Indian country – even more when sexual abuse is involved."); S. Rep. No. 111-93, at 20 ("76.5% of adult rapes against Indian women, and 72% of sex crimes against Indian children were declined for prosecution between 2004 and 2007."); N. Bruce Duthu, *Broken Justice in Indian Country*, NEW YORK TIMES, Aug. 10, 2008, at A17 ("The Department of Justice's own records show that in 2006, prosecutors filed only 606 criminal cases in all of Indian Country Indian Country . . . [which includes] more than 560 federally recognized tribes."); *see also generally* Timothy Williams, *Higher Crimes, Fewer Charges on Indian Land*, NEW YORK TIMES (Feb. 20, 2012); U.S. Government Accountability Office, *U.S. Department of Justice Declinations of Indian Country Criminal Matters*, Report No. GAO-11-167R (Dec. 13, 2010). Prejudice likely plays a large part in the declamation rate. *See* Johnson, *supra* note 23, at 690 (noting that Indian women are further "victimized by the prejudice of federal and state prosecutors and even jurors, who are often quick to stereotype victims as 'drunken Indians' . . . , leaving Native women and girls vulnerable to increasing numbers of sex [offenders] seeking to exploit this lawlessness."); *see e.g. Examining the Prevalence of and Solutions to Stopping Violence Against Indian Women: Hearing Before the Senate Comm. on Indian Affairs*, 110th Cong., at 63 (Sept. 27, 2007) (statement of Karen Artichoker, Director, Sacred Circle National Resource Center to End Violence Against Native Women) ("A young woman came to me, she had been raped in her own home, in her own bed. And she had reported it, she said the criminal investigator told her, sounds to me like you need to change your lifestyle.").

[73] S. Rep. No. 111-93, at 20 (citing Laura Sullivan, *Rape Cases on Indian Lands Go Uninvestigated*, NATIONAL PUBLIC RADIO (July 25, 2007), *transcript available at* http://www.npr.org/templates/transcript/transcript.php?storyId=12203114).

[74] *Id.*

[75] Williams, *supra* note 18.

crimes as "unimportant" and "unworthy of federal resources."[76] Indeed, the Department of Justice's policies bolster this sentiment: Prosecution of Indian Country crime is not part of the criteria used to evaluate federal officials.[77] Instead, cases involving terrorism, organized crime, large drug busts, and white-collar crimes are used to measure performance.[78] Federal attorneys consider prosecution of Indian Country sexual assault cases to be "career killers."[79] Nationwide, arrests are made in only 13 percent of sexual assaults reported by Native women.[80]

Of the few suspects that are arrested, months will pass before any efforts are made to apprehend them.[81] This gives plenty of time for retaliatory violence to be inflicted upon the victim.[82] Because a large majority of these perpetrators are non-Indian[83] – thereby limiting, per *Oliphant*, any chance that local tribal police are able prosecute the offender – over 80% of these sexual offenders will go free if not prosecuted by the federal government.[84]

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[76] BONNIE MATHEWS, U.S. COMMISSION ON CIVIL RIGHTS, INDIAN TRIBES: A CONTINUING QUEST FOR SURVIVAL 154 (1981); *see also* Painter-Thorne, *supra* note 36, at 269 ("[P]rosecution of reservation crime is dismissed as serving too small of a population and taking scarce federal resources away from more pressing national priorities such as terrorism and immigration."); Pisarello, *supra* note 21, at 1525 (same); Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 39 (1993) (same).

[77] Painter-Thorne, *supra* note 36, at 269.

[78] *Id.*

[79] *Id.*; *see also id.*, at 265 ("[F]ederal judges echo these feelings, with some complaining that they would have 'stayed in state court' if they had wanted to handle such cases.").

[80] Williams, *supra* note 18.

[81] *See e.g.* MAZE OF INJUSTICE, *supra* note 38, at 48 ("[O]n the Standing Rock Sioux Reservation there are on average 600-700 outstanding tribal court warrants for arrest of individuals charged with criminal offences.").

[82] Williams, *supra* note 17; Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 769 (2005); Deborah Epstein, et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U.J. GENDER SOC. POL'Y & L. 465, 476, n.38 (2003); Laura Dugan, et al., *Exposure Reduction or Retaliation? The Effects of Domestic Violence Resources on Intimate-Partner Homicide*, 37 LAW & SOC'Y REV. 169, 179 (2003); AMERICAN MEDICAL ASSOCIATION, DIAGNOSTIC AND TREATMENT GUIDELINES ON DOMESTIC VIOLENCE 6 (1992).

[83] *See supra* note 62 and accompanying text.

[84] *See* Johnson, *supra* note 23, at 676-77 ("As a result of this complex jurisdictional algorithm, the first question police will usually ask when approached by a Native victim . . . is '[w]as it in our jurisdiction?' If this question is not quickly resolved, reported crimes often go unaddressed by tribal, state, and federal authorities.") (quoting MAZE OF INJUSTICE, *supra* note 38, at 8).

> With non-Indians constituting more than 76 percent of the overall population living on reservations and other Indian lands, interracial

House Republicans, however, apparently believe – or, want the American electorate to believe – that the plethora of data evidencing widespread rape and murder of Native women is sheer statistic fabrication. According to the House Report, proponents of the tribal provisions are merely "tout[ing] unverifiable statistics about the rate of non-Indian violence against Indian women on Indian land, claiming that 88 percent of the perpetrators of violence against Indians are non-Indians," in order to pass some other, hidden agenda.[85] House Republicans would rather rely solely on a "2008 study by the South Dakota Attorney General ('SDAG')"[86] concluding that a mere "69 percent of . . . Indian rape or sexual assault [cases] were, in fact, intra-racial."[87] In short, according to House Republicans, the incidence of rape and sexual assault isn't *that* bad.

What the House Report did not note is that the SDAG study was limited

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> dating and marriage are common, and many of the abusers of Native American women are non-Indian men. Too often, non-Indian men who batter their Indian wives and girlfriends go unpunished because tribes cannot prosecute non-Indians, even if the offender lives on the reservation and is married to a tribal member, and because Federal law enforcement resources are hours away from reservations and stretched thin.

Rosenthal & Teehee, *supra* note 50; *see also* NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, INDIAN COURTS AND THE FUTURE 84 (David Getches, ed. 1978) (noting that there is no safety net of criminal prosecution authority if the federal government declines to prosecute a case).

[85] House Report, at 59; *see also generally* Scott Seaborne, *Crime Data Misrepresented to Serve Hidden Tribal Agenda*, INDIAN COUNTRY TODAY, June 14, 2012. Ironically, the sole study relied upon for the House Report's later conclusion that the VAWA provisions are "unconstitutional" also contradicts this number. *See* JANE M. SMITH, & RICHARD M. THOMPSON II, TRIBAL CRIMINAL JURISDICTION OVER NON-INDIANS IN THE VIOLENCE AGAINST WOMEN ACT (VAWA) REAUTHORIZATION AND THE SAVE NATIVE WOMEN ACT, CRS Rep. No. R42488, at 1 (2012) (stating that "most" violence against Native women "involves an offender of a different race") (citing National Congress of American Indians, *Fact Sheet: Violence Against Women in Indian Country*, http://www.mhifc.org/Articles/Violence%20Against%20Native%20American%20Women%20Fact%20Sheet.pdf (last visited July 20, 2012) ("A significant characteristic of violence against Native women is the identity of the offender: about 9 out of 10 rape or sexual assault victims estimated the offender was someone of a different race. Among American Indian victims of violence, 75% of the intimate victimization . . . involved an offender of a different race.")).

[86] Larry Long, et al., *Understanding Contextual Differences in American Indian Criminal Justice*, 32 AMER. INDIAN CULTURE & RESEARCH J. 4 (2008), *available at* http://www.standupca.org/reports/Long%20article%20on%20DOJ%20Statistics%20SATPR1P4510011215380.pdf.

[87] House Report, at 59-60.

to the State of South Dakota and used only police prosecution records. This police data, of course, did not include the numerous instances in which on-reservation perpetrators went free due to the very jurisdictional gap indicated above (which, by its nature, excludes non-Indians), where police had refused to investigate the crimes,[88] or where the crimes went unreported.[89] The House Report's reading of this study has been contradicted by numerous independent reports, including recent studies conducted by the U.S. Department of Justice[90] and Amnesty International.[91] Indeed, as noted by the National Congress of American Indians:

> Upon analysis, [the SDAG study] supports [the] concern that domestic violence crimes committed by non-Indians are often unprosecuted. The DOJ statistics measure reported assaults. [The SDAG study] compares that to prosecutions, and concludes that most of the defendants in South Dakota are Indians. That is [the] point – non-Indians commit many assaults on Indians, and they are not prosecuted. This is particularly true in South Dakota.[92]

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[88] "A memorandum uncovered during a mass firing of U.S. Attorneys scandal during the Bush Administration revealed that some were fired, in part, for giving too much attention to Indian Crimes." *Obama Wants to Increase DV Sanctions to Protect Indian DV Victims on Tribal Lands*, *supra* note 53.

[89] *See* Johnson, *supra* note 23, at 636 ("[M]any Native victims do not report such crimes, believing no one will investigate."); *id.* at 671 ("Native victims' relationship with law enforcement is comparable to that of foreign victims trafficked from unstable, impoverished nations without rule of law."); Pisarello, *supra* note 21, at 1530 ("Many Indian women do not report sexual assaults because such cases are rarely prosecuted.") (citing *Law Enforcement in Indian Country, Hearing Before the Committee on Indian Affairs*, 110th Cong. 22 (2007)); SHATTERED HEARTS, *supra* note 38, at 5 ("Native victims of sexual assault often do not report the assault because they do not believe that authorities will investigate or charge the crime, and they fear being blamed or criticized by people in their communities."); CARYN NEUMANN, SEXUAL CRIME: A REFERENCE HANDBOOK 51-52 (2009) (reporting findings that "Native American women did not report rape because of their suspicion of law enforcement" and because they "may not get a police response for hours or days"); MINNESOTA DEP'T OF PUBLIC SAFETY, SAFETY & ACCOUNTABILITY: AUDIT OF THE RESPONSE TO NATIVE WOMEN WHO REPORT SEXUAL ASSAULT IN DULUTH MINNESOTA 68 (2008) (finding that "race plays a negative part" in how Native American women are treated by law enforcement and that victims who do report crimes have "such bad experiences that, if they [a]re subsequently raped again, they d[o] not report it."); Barbara Perry, *From Ethnocide to Ethnoviolence: Layers of Native American Victimization*, 5 CONTEMP. JUSTICE REV. 231, 243 (2002) ("[T]he feelings of powerlessness experienced by so many American Indians . . . tend to drain them of the will or capacity to confront the dominant white society in the face of violence done to them.").

[90] PERRY, *supra* note 54.

[91] MAZE OF INJUSTICE, *supra* note 38.

[92] Letter from Jacqueline Johnson Pata, Executive Director, National Congress of American Indians, to Lamar Smith & John Conyers, Committee on the Judiciary, U.S. House of Representatives (May 3, 2012), *available at*

What is more important; who cares if it is 88 percent or 31 percent of sexual predators who are allowed to violate native women and get away scot-free? The fact that House Republicans take the position that Indian rape and violence is tolerable up to some point between the those two numbers is absolutely deplorable.[93] Was this the case in any other part of the country, affecting any other racial demographic, such atrocities would surely not be tolerated.

Attempting to depict some legitimate support for their position, the House Report states that it is the Department of the Interior's "opinion that non-native domestic violence offenders represent a very small percentage of domestic violence-reported crimes in Indian Country."[94] Shortly after the House Report was issued, however, the Interior released a letter to the Chairman of the House Judiciary Committee "in order to set the record straight on statements" in the Report. The Interior stated that the Report made the reference "[w]ithout any citation or footnote" – because the statement was "not true." The letter went on: "To the contrary, the [Bureau of Indian Affairs] recognizes that over half of all Indian married women have non-Indian husbands and that Indian women experience some of the highest domestic-violence victimization rates in the country." The Interior then chided the House Republicans for "los[ing] sight of the simple fact that there is no acceptable rate of domestic violence by non-Indian men on Indian women." For House Republicans "[t]o argue otherwise," the Interior stated, "is an assault on our national conscience."

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http://democrats.judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/NCAI120503.pdf (emphasis in original); *see also* Letter from Judith C. Appelbaum, Acting Assistant Attorney General, U.S. Dep't of Justice, Office of Legislative Affairs, to the Honorable Lamar Smith, Committee on the Judiciary, U.S. House of Representatives (July 17, 2012) (on file with author) (similarly criticizing unsubstantiated statements made in the House Report).

[93] *See* Sharon Stapel, *House VAWA Bill is Racist, Elitist, Homophobic, and Anti-Victim*, RH REALITY CHECK (May 15, 2012), *available at* http://www.rhrealitycheck.org/print/19652 (noting that H.R. 4970 "would not just roll back protections for all survivors of violence in this country but . . . would specifically and explicitly say to some victims: we will not protect you. We do not care about you. You are not worth it."); *but see* Caroline P. Mayhew, *VAWA Tribal Provisions and Race Discrimination Arguments*, INDIAN COUNTRY TODAY (May 29, 2012) (noting that H.R. 4970 discriminates against tribal sovereignty, not the Native American race, necessarily). While Mayhew's point is well taken, writ large, the House Report's discussion of rape and domestic violence statistics – statistics that *are* race-based – misses this point altogether.

[94] House Report, at 60.

C. Constitutionality and Supreme Court Review

The other explanation offered by the House Report is that because tribal governments "are not subject to the government limitations enumerated in the Constitution[,][95] it is an unsettled question of constitutional law whether Congress has the authority . . . to recognize inherent tribal sovereignty over non-Indians."[96] This is a blatant misstatement of federal law.

In *Duro v. Reina*,[97] the Supreme Court held that in addition to being unable to assert criminal jurisdiction over non-Indians per *Oliphant*, tribal governments also could not assert criminal jurisdiction over an Indian defendant that is not a member of the tribe attempting to assert such jurisdiction.[98] A result of *Duro*, because non-member Indians are still Indians, a vast abyss was created where nobody had jurisdiction to try non-member Indians for misdemeanors committed on tribal lands. In response, Congress quickly enacted the so-called "*Duro* Fix" by affirming "the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians."[99] In *United States v. Lara*,[100] a defendant contested the constitutionality of the *Duro* Fix by arguing that Constitution dictated the metes and bounds of tribal autonomy to end at its own members.[101] Finding this argument unpersuasive, the Court explicitly held that "*Congress does possess the constitutional power to lift the restrictions on the tribes' criminal jurisdiction*."[102] The High Court asserted that while *Oliphant* and *Duro* do reflect the Court's view of tribal sovereign status, those decisions in no way imply "constitutional limits prohibiting Congress from taking actions to modify or adjust that status."[103] Rather, the Supreme Court held that Congress possesses the power to "relax restrictions that the political branches have, over time, placed on the exercise of a tribe's inherent legal

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[95] *See* Talton, 163 U.S. at 384 ("[T]he powers of local self government enjoyed by [tribal governments] existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which . . . had for its sole object to control . . . the National Government."); EagleWoman, *supra* note 5, at 678 ("Tribal Nations are extra-constitutional, meaning there is no role for tribal governments in the U.S. Constitution, and furthermore, the Tribes have never consented to participate in the U.S. Constitutional structure.").

[96] House Report, at 58.

[97] 495 U.S. 676.

[98] *Id.* at 677-78.

[99] 25 U.S.C. §1301(2) (2006).

[100] 541 U.S. 193 (2004).

[101] *Id.* at 205.

[102] *Id.* at 200 (emphasis added).

[103] *Id.* at 194.

authority."[104] The decision is especially important to the VAWA tribal provisions because of the Court's acknowledgement that its own determination of what aspects of sovereignty have been "implicitly" divested "are not determinative" regarding tribal sovereignty and jurisdiction – Congress is the final authority on the status of tribes, and can give back what has been implicitly divested when it sees fit.[105] The question is settled, and has been for some time.

House Republicans purportedly relied upon a report by the Congressional Research Service ("CRS Report") to support their "unconstitutionality" argument.[106] Although the CRS Report was somewhat disingenuous,[107] it did not – as the House Report credits it as doing – conclude that the VAWA tribal provisions presented "an unsettled question of constitutional law." Rather, the report stated that "[a]lthough the Supreme Court stated in *Lara* that Congress has authority to relax restrictions on the tribes' inherent authority so that they may try non-member Indians, it is not clear that today's Court would reach the same result."[108] Essentially speculating that the Roberts Court of 2012 would rule differently than the Rehnquist Court of 2004 had ruled in *Lara*, the CRS Report went on to surmise that "it is not clear that the Court considering a tribal court conviction under the [VAWA tribal provisions] would find that Congress has the authority to expand inherent sovereignty of tribes to try non-Indian defendants."[109] Of course, to do so today the Roberts Court would need to overturn *Lara*.

This is not to say, though, that there is no legitimate question of Supreme Court ideology presented by the VAWA tribal provisions.[110] Although the *Lara* Court made quite clear that Congress has the power to lift restrictions on tribes' inherent criminal jurisdiction, the scope of that

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[104] *Id.* at 196.

[105] *Id.* at 207.

[106] House Report, at 58 (citing SMITH, & THOMPSON, *supra* note 84).

[107] Harold Monteau, *Congressional Research Service Shows Bias With VAWA Legal Opinion*, INDIAN COUNTRY TODAY, June 13, 2012.

[108] SMITH, & THOMPSON, *supra* note 85, at 6.

[109] *Id.* at 7.

[110] *See* Matthew L.M. Fletcher, *Legislating in Light of the Ideology and Politics of the Super-Legislature (On Obamacare and an* Oliphant *Fix)*, TURTLE TALK (June 25, 2012, 9:15AM), http://turtletalk.wordpress.com/2012/06/25/legislating-in-light-of-the-politics-of-the-super-legislature-on-obamacare-and-an-oliphant-fix/ (noting that "[t]he Court changes Indian law all the time. Ideology matters here, more than politics" and that "during the VAWA Reauthorization . . . debates, Dems assumed the constitutionality of a partial *Oliphant* fix. Under current law, it's obviously constitutional. But the Supreme Court can change things.").

inherent criminal jurisdiction has yet to be *explicitly* determined *as to non-Indians*, at least by the Supreme Court.[111] In *Oliphant*, the Court seemed to signal that inherent criminal jurisdiction did include the power to prosecute non-Indians, and called on Congress to reauthorize the assertion of tribal sovereignty in this area:

> We recognize that some Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts. We also acknowledge that with the passage of the Indian Civil Rights Act of 1968, which extends certain basic procedural rights to anyone tried in Indian tribal court, many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared. Finally, we are not unaware of the prevalence of non-Indian crime on today's reservations which the tribes forcefully argue requires the ability to try non-Indians. But these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians.[112]

In *Lara*, the Court appeared to indicate the same:

> [T]he Court in [*Oliphant* and *Duro*] based its descriptions of inherent tribal authority upon the sources as they existed at the time the Court issued its decisions. Congressional legislation constituted one such important source. And that source was subject to change. Indeed *Duro* itself anticipated change by inviting interested parties to "address the problem [to] Congress." 495 U.S., at 698. We concede that *Duro*, like several other cases, referred only to the need to obtain a congressional statute that "delegated" power to the tribes. But in so stating, *Duro* (like the other cases) simply did not consider whether a statute, like the present one, could constitutionally achieve the same end by removing restrictions on the tribes' inherent authority. Consequently we do not read any of these cases as holding that the Constitution forbids Congress to change "judicially made" federal Indian law through this kind of legislation.[113]

The Court has, however, in the past (at least arguably) determined that some aspects of on-reservation criminal and civil jurisdiction are not

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[111] *Cf.* U.S. v. Wheeler, 435 U.S. 313, 323-24 (holding that "the sovereign power to punish *tribal offenders* has never been given up . . . and that tribal exercise of that power today is therefore the continued exercise of retained tribal sovereignty") (emphasis added).

[112] 435 U.S. at 211-12.

[113] 541 U.S. at 206-07 (selected citation omitted).

inherent. In *Rice v. Rehner*[114] the Court seemed to find that the regulation of liquor was never an aspect of "tribal self-government."[115] Rather, according to the Court, this power was vested solely in the federal government from the time that liquor was introduced to Indian Country.[116]

Indeed, in his concurrence in *Lara*, Justice Kennedy indicated his mistaken belief that the historical status of tribal sovereignty was similarly limited vis-à-vis non-Indian criminal jurisdiction when he stated that this jurisdiction would "subject American citizens to the authority of an extraconstitutional sovereign *to which they had not previously been subject*."[117] Tribal governments *never* had the power to prosecute non-Indian criminals – their inherent sovereign authority never extended that far; so the argument would go.[118] Indeed, in what could be perceived as a preemptive strike – or a very cleaver placement of indoctrination – the House Report again misleads in its statement that "[i]f signed into law, this would be the first time that Indian Tribal governments have civil and criminal jurisdiction over non-Indians . . . ."[119]

Of course, this is absolutely false. Tribal courts currently have limited civil jurisdiction over non-Indians, exercised in a number of contexts,

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[114] 463 U.S. 713 (1983).

[115] *Id.* at 724.

[116] The Court's conclusion was somewhat wavering. At some points it seems clear that tribal governments *never* had the inherent power to regulate alcohol:

> Unlike the authority to tax certain transactions on reservations that we have characterized as "a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status," tradition simply has not recognized . . . inherent authority in favor of liquor regulation by Indians. . . . With respect to the regulation of liquor transactions, as opposed to . . . state income taxation . . . , Indians cannot be said to "possess the usual accoutrements of tribal self-government."

Id. at 722-24 (citation omitted). At other points, the Court states that the power to regulate was congressionally divested: "There can be no doubt that Congress has divested the Indians of any inherent power to regulate in this area." *Id.* at 724; *see also id.* at 723 (noting a "congressional divestment of tribal self-government in this area"). Of course, liquor is quite different from crime – criminal regulation of nonmembers was nothing "new." Although, neither was alcohol. *See* ANDREW BARR, DRINK: A SOCIAL HISTORY OF AMERICA 1 (2000) (noting that "[i]t is not true (as is often supposed) that [tribes] had no alcoholic drinks").

[117] 541 U.S. at 213 (Kennedy, J., concurring) (emphasis added).

[118] The counter argument was made in Justice Stevens' concurrence, where he argued that if Congress can allow the states – entities that rely *entirely* on the federal government's recognition – this inherent power over non-citizens, then it must do the same for tribes. *See id.* at 210-11 (Stevens, J., concurring).

[119] House Report, at 58.

usually related to Indian/non-Indian business transactions.[120] As to criminal jurisdiction, prior to the Supreme Court's decision of *Oliphant* in 1978, tribal governments exercised full authority to prosecute non-Indians who entered into Indian Country and committed crimes.[121] Indeed, four years before *Oliphant*, the Solicitor General issued lengthy opinion concluding that "Indian tribes originally had the power to exercise criminal jurisdiction over non-Indians."[122] Logic, in other words, prevailed: "[j]ust as residents of one state can be held to account for breaking the laws of another state they voluntarily enter, someone who enter[ed] an Indian reservation [would] be held to account for the violence he commit[ted] there."[123] As to

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[120] Tribal civil jurisdiction over non-Indians extends (1) "where non-Indians 'enter consensual relationships with the tribe or its members'"; *or* (2) "where the conduct of a non-Indian 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'" Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 806 n.2 (9th Cir. 2011) (quoting Montana v. United States, 450 U.S. 544, 566 (1981)); *see e.g.* Dish Network Service LLC v. Laducer, No. 12-0058, 2012 WL 2782585 (D.N.D. July 9, 2012).

[121] Clarkson & DeKorte, *supra* note 18, at 1139; Marie Quasius, Note, *Native American Rape Victims: Desperately Seeking an* Oliphant-*Fix*, 93 MINN. L. REV. 1902, 1930 (2009); MATTHEW L.M. FLETCHER, ADDRESSING THE EPIDEMIC OF DOMESTIC VIOLENCE IN INDIAN COUNTRY BY RESTORING TRIBAL SOVEREIGNTY 3 (2009); EILEEN LUNA-FIREBAUGH, TRIBAL POLICING: ASSERTING SOVEREIGNTY, SEEKING JUSTICE 31 (2007); Elizabeth Ann Kronk, *Promoting Tribal Self-Determination in a Post*-Oliphant *World: An Alternative Road Map*, 54 FED. LAW. 41, 41 (2007); Goldberg & Champagne, *supra* note 19, at 700; COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §1.02[3] (Nell Jessup Newton ed., 2005); Radon, *supra* note 15, at 1292; Gavin Clarkson, *Reclaiming Jurisprudential Sovereignty: A Tribal Judiciary Analysis*, 50 U. KAN. L. REV. 473, 482 (2002); G.D. Crawford, *Looking Again at Tribal Jurisdiction: "Unwarranted Intrusions on Their Personal Liberty"*, 76 MARQ. L. REV. 401, 420 (1993); Nell Jessup Newton, Comment, *Permanent Legislation to Correct* Duro v. Reina, 17 AM. INDIAN L. REV. 109, 124 (1992).

[122] ALEX TALLCHIEF SKIBINE & MELANIE BETH OLIVIERO, LAW ENFORCEMENT ON INDIAN RESERVATION AFTER Oliphant v. Suquamish Indian Tribe: AN IDENTIFICATION OF THE PROBLEMS, AND RECOMMENDATIONS FOR REMEDIES 7 (1980) (internal quotation omitted).

[123] Painter-Thorne, *supra* note 36, at 192. Some have argued that because non-Indians who bought on Indian reservations pursuant to the General Allotment Act, 25 U.S.C. 331, *et seq.* (1887), must have thought that the reservations and tribal governments would soon disappear, in accordance with congressional intent, and therefore did not conceive of the possibility that tribal jurisdiction over them would remain. *See e.g.* Seaborne, *supra* note 84. Because these expectations were justified, so the argument goes, the modern-day court should protect these on-reservation landowners by generally denying tribal jurisdiction over all non-members found on Indian reservations. *Id.* As reasonable is it may seem, this revisionist argument is factually inaccurate and, more importantly, legally unsound. *See generally* Ann E. Tweedy, *Unjustifiable Expectations: Laying to Rest the Ghosts of Allotment-Era Settlers*, 36 SEATTLE L. REV. ___ (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2005413.

violence against women, specifically, before *Oliphant* tribes were very "willing and able to deal with perpetrators of violence against women"; and the "ability to enforce their laws bred a culture where women were safe."[124] For the Supreme Court to make a factual finding otherwise would be a vast departure from reality.

Unfortunately – as Indian Country is acutely aware per *Oliphant*,[125] similar cases,[126] and Justice Kennedy's concurrence in *Lara*[127] – the Supreme Court is no stranger to rewriting history; particularly when it involves tribal sovereignty. But this should not deter our elected officials in the Beltway. As noted by professors at the Michigan State University College of Law Indigenous Law and Policy Center "any solution to Indian country crime that places Indian tribes in the front-line – where they properly should be – requires a clear and cogent response to these concerns, regardless of whether the Supreme Court would strike down an Act of Congress providing for such a solution."[128]

CONCLUSION

The federal government has a distinct legal responsibility to ensure that the rights, well-being, and safety of Indian women is maintained.[129] For much of the history of federal-tribal relations, the United States has failed

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[124] Amanda M.K. Pacheco, *Broken Traditions: Overcoming the Jurisdictional Maze to Protect Native Women From Sexual Violence*, 11 J.L. & SOC. CHALLENGES 1, 3 (2009).

[125] *See* Fletcher, et al., *supra* note 15, at 2 (noting that *Oliphant* was "crafted out of 150 years of self-serving legislative history for bills never enacted by Congress, Interior Solicitor's opinions later withdrawn, and U.S. Attorney General opinions defending the rights of slaveowners to murder their slaves") (citing ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 97-113 (2005))

[126] *See e.g.* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 289-90 (1955) ("Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food, and trinkets, it was not a sale but the conquerors' will that deprived them of their land."); *cf.* Joseph William Singer, *Well Settled? The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481, 526 (1994) (noting that when Justice Reed in *Tee-Hit-Ton* rewrote "history to suit his purposes.").

[127] 541 U.S. at 213 (Kennedy, J., concurring in the judgment).

[128] Fletcher, et al., *supra* note 15, at 11.

[129] Pub. L. No. 111-211, § 202(a)(1) ("[T]he United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian Country"); *see also generally* 155 Cong. Rec. S4333 (daily ed. Apr. 2, 2009); STEPHEN L. PEVAR, THE FEDERAL-TRIBAL TRUST RELATIONSHIP: ITS ORIGIN, NATURE, AND SCOPE 3 (2008); sources cited *infra* note 17.

miserably in fulfilling this obligation.[130] Despite an abundance of evidence identifying exactly where the solution to the epidemic of domestic violence and sexual assault in Indian country lies, Congress has yet to take action.[131] Again, were this the situation in any other part of the United States, affecting any other racial group, Congress would simply not allow such atrocity to continue. As it stands today, the blood is on House Republicans' hands.

According to the White House, the President will veto any VAWA reauthorization bill that does not include protections for Indian Country domestic violence victims.[132] Washington's Senator Patty Murray (D-WA)

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[130] *See* MAZE OF INJUSTICE, *supra* note 38, at 42 (noting that "federal and state governments provide significantly fewer resources for policing in Indian Country . . . than are provided to comparable non-Native communities" and citing DOJ statistics that show that tribes have 55% to 75% of the policing resources available to comparable rural communities). Some have suggested that "a return to an international framework" may force the federal government to "assist in healing the . . . social injuries inflicted upon Tribal Nations." EagleWoman, *supra* note 6, at 672; *see also generally* Gabriel S. Galanda, American Indian Treaties: The Consultation Mandate, U.N. Doc. HR/GENEVA//SEM/EXPERT/2012/BP.2 (July 17, 2012) (providing a roadmap on how to enforce international law domestically). Indeed, the U.S.' failure to take corrective action to cure this epidemic undoubtedly violates numerous international laws. *See* Brief for Indian Law Resource Center & Sacred Circle National Resource Center to End Violence Against Native Women as Amici Curiae Supporting Plaintiff, Gonzales v. United States, No. 12.626, Inter-Am. Comm'n H.R. (Nov. 13, 2008), at 29-40.

[131] *See* Clarkson & DeKorte, *supra* note 18, at 1166 ("[I]f anything, non-Indian against Indian crime has increased over the past thirty years, while Congress has not assumed the responsibility that the Court laid at its feet.").

[132] Press Release, Executive Office of the President, Statement of Administration Policy: H.R. 4970 – Violence Against Women Reauthorization Act of 2012 (May 15, 2012). The statement reads, in relevant part:

> H.R. 4970 retreats from this forward progress by failing to include several critical provisions that are part of the Senate-passed VAWA reauthorization bill. For instance, H.R. 4970 fails to provide for concurrent special domestic violence criminal jurisdiction by tribal authorities over non-Indians, and omits clarification of tribal courts' full civil jurisdiction regarding certain protection orders over non-Indians. Given that three out of five Native American women experience domestic violence in their lifetime, these omissions in H.R. 4970 are unacceptable.

Id.; *see also* Press Release, Jodi Gillette, Senior Policy Advisor for Native American Affairs, White House Domestic Policy Council, Celebrating the Two-Year Anniversary of the Tribal Law and Order Act (Aug. 1, 2012) ("[T]he tribal provisions in the bipartisan version of VAWA passed by the Senate would provide tribes with the authority to hold offenders accountable for their crimes against Native American women, regardless of the perpetrator's race. Congress should approve the bipartisan version of VAWA passed by the Senate.")

has also vowed to reject any agreement with the House that does not include the tribal provisions,[133] as has Fellow Washingtonian Senator Maria Cantwell (D-WA).[134] Ranking House Democrats Edward Markey (D-MA) and Dan Boren (D-OK) are putting further pressure on the House by requesting hearings to address the "accountability for violent crimes in Indian country" that they fear is "decreasing as Native women continue to be victims of sexual assault at alarming rates."[135] Former U.S. Attorneys Troy A. Eid and Thomas B. Heffelfinger – both Republican Presidential appointees – have also been "prompt[ed] to speak out on the need for the[VAWA] amendments."[136] The American Bar Association has passed a Resolution "urg[ing] Congress to strengthen tribal jurisdiction to address crimes of gender-based violence committed on tribal lands in the reauthorization of the Violence Against Women Act."[137] As I write, hundreds of concerned tribal and women advocates are making their voices heard on Capitol Hill.[138]

The jurisdictional gap created by our High Court nearly thirty-five years

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[133] Russell Berman, *Sen. Murray Balks at Compromise with House on Violence Against Women Act*, THE HILL (June 26, 2012, 12:12 PM), http://thehill.com/homenews/senate/234787-sen-murray-balks-at-compromise-with-house-on-violence-against-women-act.

[134] Weisman, *supra* note 1. At the same time, Washington State Republican gubernatorial hopeful Rob McKenna advocates for mere "tribal civil authority" over non-Indian rapists, stopping short of recommending the jurisdictional power that is needed to bring criminal justice – and safety – to Indian Country. Rob McKenna, Washington State Attorney General, Address at the Twenty-Third Annual Centennial Accord (June 7, 2012). While Attorney General McKenna is at least addressing the issue with some thought, which is much more than can be said of his fellow GOPers, fines and civil restraining orders are not adequate responses to reservation murder, rape, and sexual assault. McKenna's gubernatorial opponent, Congressman Jay Inslee (D-WA), on the other hand, actually introduced the Stand Against Violence and Empower Native Women Act, H.R. 4154, 112th Cong. (2012), this March. The bill tracks S. 1925 almost word for word. *See also* E-mail from Jay Inslee, to author (Jul. 26, 2012, 10:52 PST) ("[V]iolence against Native women is at epidemic levels and the current system is not doing enough to ensure their safety.") (on file with author).

[135] Letter from Edward J. Markey & Dan Boren, Ranking Members of the House Natural Resources Committee, to Doc Hastings & Don Young, House Committee Chairmen (May 30, 2012), *available at* http://democrats.naturalresources.house.gov/sites/democrats.naturalresources.house.gov/files/documents/2012-05-30_NativeWomen.pdf.

[136] Eid & Heffelfinger, *supra* note 11.

[137] ABA Res. No. 301 (Aug. 7, 2012), *available at* http://turtletalk.files.wordpress.com/2012/08/aba-final-tribal-jurisdiction-vawa-reauthorization-resolution-as-approved-8-7-2012.pdf.

[138] *See e.g.* Rob Capriccioso, *Native Women Warriors Lobby for Pro-Tribal VAWA*, INDIAN COUNTRY TODAY, June 27, 2012.

ago has created an extremely dangerous environment for Native women. It is only now that a solution to the sexual assault epidemic in Indian Country has finally been proffered in the Senate's VAWA reauthorization bill. But if the House Republicans' willful ignorance and misogyny is allowed to prevail, the solution will fall through the political cracks.

Meanwhile, Native women remain vulnerable to violent criminals who remain above the law.