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Until Yesterday: Deterring and Healing the Cyclical Gender Based Violence in Indian Country

Erratum

Due to error, volume 1, issue 2 was originally published as volume 2, issue 1. This document reflects the correct version of volume 2, issue 1.

UNTIL YESTERDAY: DETERRING AND HEALING THE CYCLICAL GENDER-BASED VIOLENCE IN INDIAN COUNTRY

Samantha Ivette Morales*

INTRODUCTION

“As ancient sovereign nations, we must look to our histories, beliefs, resources, and experiences to reclaim safety and empowerment for all women.”¹

Despite our modern day lives and laws of the twenty first century, Native women are just now being afforded the protections and privileges that non-Native women have had for decades. A number of scholars have written about the need to protect Native women from sexual assaults and domestic violence on tribal lands.² For *any woman*, breaking the cycle of domestic violence or recounting the horrors behind a sexual invasion can be painful, degrading, and traumatic. It takes courage, strength, and power to face their fears and their perpetrators. For Native women specifically, coming forward has often been useless because the law has often failed to protect them, until now.

* Third year law student at Thomas Jefferson School of Law (expected graduation in May 2014). The author acknowledges the contributions and guidance of Thomas Jefferson School of Law Professor Bryan H. Wildenthal on this article. A special note of appreciation to Elaine Whitefeather, Executive Director of A Community for Peace (formerly the Domestic Violence Intervention Center) for her inspirational guidance, support and leadership. With gratitude to my guiding stars and the courageous women who found their voice and spoke their truths to pass on their teachings to my rainbow sisters and I. For my daughters Laura and Nevaeh who inspire me every day.

¹ Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POLICY 121, 143 (2004) [hereinafter Deer, *Indigenous Jurisprudence*].

² Deer, *Indigenous Jurisprudence*, *supra* note 1; see also Hossein Dabiri, *Kiss The Ring, But Never Touch The Crown: How U.S. Policy Denies Indian Women Bodily Autonomy And The Save Native Women Act's Attempt To Reverse That Policy*, 36 AM. INDIAN L. REV. 385 (2011); Andrea Johnson, *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 (2012); Samuel D. Cardick, *The Failure Of The Tribal Law And Order Act Of 2010 To End The Rape Of American Indian Women*, 31 ST. LOUIS U. PUB. L. REV. 539 (2012).

This article examines the need to address gender violence³ within Indian Country in a way that deters offenders and offers culturally sensitive restorative justice programs to help heal victims. Part I demonstrates the magnitude of what many have called an epidemic of violence against Native women. Part II provides an overview of the criminal jurisdictional challenges and describes how the recently enacted Tribal Law and Order Act and Violence Against Women Act (VAWA) partly address those challenges. Part III discusses, in more depth, how Native governments need to enforce current legislation that protects women, and discusses ways in which restorative justice programs can be incorporated within tribal criminal justice infrastructures to provide healing options for victims.

I. WOMEN ARE SACRED, RIGHT?

A. *The Epidemic of Gender-Based Violence in Indian Country*

Some scholars trace the prevalence of gender violence against Native women to the history of Spanish colonization where rape and assault were used as a means for conquest to exterminate the conquered population.⁴ Essentially, when the women of a tribe were taken away, their tribe could no longer reproduce their lineage and would therefore be exterminated. Decades of treating Native women in the United States like second-class citizens, without ensuring adequate legal protections and enforcements of their rights, have resulted in statistics that are alarming and unsettling. Native women suffer from the highest rates of intimate partner violence⁵ and stalking,⁶ and the highest rate of rape and sexual victimization compared to non-Native women.⁷ Murder is the third leading

³ “Gender violence” is used to address both sexual and physical assaults against women.

⁴ Dabiri, *supra* note 2 at 393.

⁵ OFFICE ON VIOLENCE AGAINST WOMEN AND THE NATIONAL CENTER ON FULL FAITH AND CREDIT, VIOLENCE AGAINST NATIVE WOMEN A GUIDE FOR PRACTITIONER ACTION 1 (2006), available at http://www.bwjp.org/files/bwjp/articles/Violence_Against_Native_Women.pdf (last visited Jan 13, 2014) [hereinafter OVW, GUIDE] (citing PATRICIA T. JADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT ON THE PREVALENCE, INCIDENCE AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 21-23 (2000)).

⁶ *Id.*

⁷ *Id.*

cause of death for Native women, and on some Indian Reservations the murder rate of women is ten times the national average.⁸

Although perpetrators can come from all backgrounds, research indicates that most crimes committed against Native women are by non-Natives. Recent studies indicate that 76 percent of the people living on-reservations are non-Native.⁹ Native women suffer inter-racial violence at five times the rate of other racial groups.¹⁰ In domestic violence cases amongst spouses, one fourth of all cases involve a non-Native perpetrator.¹¹ Sexual assaults are also more likely to be interracial and involve perpetrators under the influence of drugs or alcohol. Between 1992 and 2002, 88 percent of rapes or sexual assaults against Native women were at the hands of non-Native perpetrators.¹² Furthermore, over two thirds of Native women report their perpetrators were under the influence of drugs or alcohol before the attacks.¹³

Rape is much more than an invasion of a woman's body. "Rape is laden with psychological and spiritual ramifications.' Rape is a lived experienced."¹⁴ It degrades the human spirit, shatters a woman's psychological well-being, and has been happening to Native women at

⁸ S. REP. NO. 112-265, at n.25 (2012).

⁹ STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, TRIBAL CRIME DATA COLLECTION ACTIVITIES 1 (2012), *available at* <http://www.bjs.gov/content/pub/pdf/tcdca12.pdf> (last visited Nov 24, 2013) [hereinafter PERRY, TRIBAL CRIME].

¹⁰ FUTURES WITHOUT VIOLENCE, FORMERLY FAMILY VIOLENCE PREVENTION FUND, THE FACTS ON VIOLENCE AGAINST AMERICAN INDIAN/ALASKAN NATIVE WOMEN 5, *available at* <http://www.futureswithoutviolence.org/userfiles/file/Violence%20Against%20AI%20AN%20Women%20Fact%20Sheet.pdf> (last visited Nov 24, 2013) [hereinafter FWV, FACTS ON VIOLENCE] (citing GREENFIELD, LAWRENCE & SMITH, STEVEN, U.S DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, AMERICAN INDIANS AND CRIME (1999), *available at* http://www.justice.gov/otj/pdf/american_indians_and_crime.pdf (last visited Jan. 9, 2014)).

¹¹ *Id.*

¹² Johnson, *supra* note 2 at 638 (citing STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROFILE 1992-2002: AMERICAN INDIANS AND CRIME (2004), *available at* http://www.justice.gov/otj/pdf/american_indians_and_crime.pdf (last visited Nov. 24, 2013)).

¹³ FWV, FACTS ON VIOLENCE, *supra* note 10, at 20 (citing U.S. DEP'T OF JUSTICE, VIOLENCE AGAINST INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN 39 (2008)).

¹⁴ Dabiri, *supra* note 2, at 3 (citing Deer, *Indigenous Jurisprudence*, *supra* note 1, at 123).

startling rates. Native women are two and half times more likely to be raped or sexually assaulted.¹⁵ One out of three Native women is projected to be raped within their lifetime;¹⁶ whereas, less than one in five women is projected for the general population.¹⁷ Compared to non-Native women, Native women are more likely to suffer from violent rapes and twice as likely to face armed offenders and require medical care for injuries from an attack.¹⁸ 91 percent are struck by their perpetrators as they are being raped; whereas, 71 percent of white women and 78 percent of African American women are struck during their rapes.¹⁹ A study of Native sex trafficking victims²⁰ in Minnesota found 92 percent had been raped and 73 percent suffered traumatic brain injuries.²¹

As shocking as these statistics are, the sad reality is that these numbers are likely to just show the tip of the iceberg in this epidemic of violence against Native women. A vast majority of crimes go unreported because many women do not always come forward to report their crimes. Estimates vary between 17 percent and 49 percent of Native rape victims

¹⁵ AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 2 (2007), *available at* <http://www.amnestyusa.org/pdfs/MazeOfInjustice.pdf> (last visited Nov. 24, 2013) [hereinafter AMNESTY INT'L, MAZE] (citing STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, AMERICAN INDIANS AND CRIME – A BJS STATISTICAL PROFILE 1192-2002 (2004), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/aic02.pdf> (last visited Nov. 24, 2013)).

¹⁶ OVW, GUIDE, *supra* note 5, at 1.

¹⁷ Johnson, *supra* note 2, at 627 (citing AMNESTY INT'L, MAZE, *supra* note 15, at 21-23).

¹⁸ RONET BACHMAN ET.AL, U.S. DEP'T OF JUSTICE, VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN 37 (2008), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf> (last visited Nov. 24, 2013) (unpublished report).

¹⁹ Cardick, *supra* note 2, at 534 (citing Cf. Ronet Bachman et al., *Estimating The Magnitude Of Rape And Sexual Assault Against American Indian And Alaska Native (AIAN) Women*, 43 AUST. & N.Z.J. CRIMINOLOGY 199, 211 (2010)).

²⁰ I use the term sex trafficking victims synonymous with prostitutes.

²¹ Dabiri, *supra* note 2, at 392 (citing Melissa Farley et al., *Garden of Truth: The Prostitution And Trafficking Of Native Women In Minnesota* 3 (2011)). The same study also found Native women were overrepresented as sex trafficking victims and that 84 percent of the sex trafficking victims interviewed reported having been psychically assaulted. See Johnson, *supra* note 2, at 621 (citing U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS IN FISCAL YEAR 2009 16 (2010)).

reporting their attacks.²² In the Navajo Nation, one of the largest reservations, only about 10 percent of victims report their sexual assaults.²³ Besides having to gather the strength and courage needed to come forward, many women are paralyzed by the fear that “breaches in confidentiality, retaliation, and a lack of confidence that reports will be taken seriously and result in perpetrators being brought to justice.”²⁴

Many Native women have had to ask themselves, what good will it do to come forward if my perpetrator will still walk as a *free* man? Their lack of faith in the justice system is not unfounded given the high declination rates from federal and state authorities. In 2011, 65 percent of rape cases in Indian Country went unprosecuted by the Department of Justice.²⁵ Out of the 329 rapes reported in 2007 within the Navajo Nation, only seventeen arrests had been made by 2012.²⁶ According to the Department of Justice, arrests are made in only 13 percent of the sexual assaults reported by Native women compared to 35 percent for African American and 32 percent for Caucasian women.²⁷ Other estimates place the arrest and conviction rate at 6 percent for rapes against Native women compared to 11-12 percent for non-Native women.²⁸ What is undisputed is that in 2010, cases in Indian Country only accounted for 1 percent of the offenses investigated for violating federal laws and 1 percent of the criminal cases filed by federal prosecutors.²⁹

²² Cardick, *supra* note 2, at n.38-39 (citing Ct. Bachman et al., *Estimating the Magnitude of Rape and Sexual Assault Against American Indian and Alaska Native (AIAN) Women*, 43 AUST. & N.Z.J. CRIMINOLOGY 199, 211 (2010)).

²³ Timothy Williams et al., *For Native American Women, Scourge of Rape, Rare Justice*, NEW YORK TIMES, May 23, 2012 [hereinafter Williams, *Native American Women*]. This article also highlighted that in South Dakota, Natives make up 10 percent of the population, but account for 40 percent of the victims of sexual assault. Alaska Natives account for 15 percent of the population in Alaska, but account for 61 percent of its victims of sexual assault.

²⁴ AMNESTY INT'L, MAZE, *supra* note 15, at 4.

²⁵ Williams, *Native American Women*, *supra* note 23.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Cardick, *supra* note 2 (citing Ct. Bachman et al., *Estimating the Magnitude of Rape and Sexual Assault Against American Indian and Alaska Native (AIAN) Women*, 43 AUST. & N.Z.J. CRIMINOLOGY 199, 211 (2010)).

²⁹ PERRY, TRIBAL CRIME, *supra* note 9, at 13-14.

II. THE LEGAL BACKGROUND OF GENDER-BASED CRIME AND (LACK OF) PUNISHMENTS ON INDIAN RESERVATIONS

A. *History of Criminal Jurisdictional Restrictions on Tribal Sovereignty*

In America, we rely on the assumption that in an emergency we can call 911 and trust that first responders will be dispatched immediately to aid us. Given the federal trust relationship between tribes and the government,³⁰ it is hard to fathom that Native women in Indian Country cannot rely on this safeguard to stop their non-Native partners from abusing them. “Before asking ‘what happened’ police ask: ‘what is our jurisdiction? Was the perpetrator Native American?’”³¹ Tribal jurisdiction has been limited by a number of laws throughout the years, and until recently,³² tribal authorities could not exercise criminal jurisdiction over non-Natives committing crimes within their reservations.

Nineteenth century laws still impact tribal jurisdiction today. During the Relocation Era, Congress was concerned with crimes in Indian Country affecting non-Natives and in 1817, passed the Indian Country Crimes Act (ICCA) that expanded the General Crimes Act (GCA). It recognized tribal jurisdiction for crimes where both victim and defendant were Natives and federal jurisdiction over interracial crimes.³³ In 1883, the Supreme Court reaffirmed exclusive tribal jurisdiction over crimes committed on their tribal lands involving Natives.³⁴ In response, Congress passed the Major Crimes Act (MCA) of 1885, which extended concurrent

³⁰ See *Cherokee Nation v. State of Ga.*, 30 U.S. 17 (1831)(holding that tribes were considered domestic dependent nations noting that their relation to the United States “resembles that of a ward to his guardian”).

³¹ AMNESTY INT’L, MAZE, *supra* note 15, at 8 (citing an interview with a support worker for Native American survivors of sexual violence in May 2005).

³² See *infra* Section III; Violence Against Women Reauthorization Act of 2013, 42 U.S.C.A § 13701 (West 2014) (The 2013 Violence Against Women Act will give qualifying tribal authorities “special domestic violence jurisdiction” over non-Natives in 2015).

³³ The government retained jurisdiction over interracial crimes (Native against non-Native or vice versa), except where offenses were already punished by the tribe or where treaty rights gave tribes exclusive jurisdiction. See 18 U.S.C. § 1152 (2006).

³⁴ *Ex parte Crow Dog*, 109 U.S. 556 (1883).

federal jurisdiction over Natives committing murder, manslaughter, rape, and assault with intent to commit murder, arson, burglary, or larceny.³⁵

During the Termination Era, Congressional policies were aimed towards terminating federal obligations to tribes. Public Law 280³⁶ (PL 280) was passed in 1953, without consent from tribal governments.³⁷ It transferred federal jurisdiction over Indian Country to “mandatory” states and gave “optional states” the ability to exercise the same jurisdiction if they amended their Constitutions.³⁸ The effects in Indian Country were devastating. State authorities became “reluctant to become involved in Indian Country crimes,”³⁹ and Native communities became vulnerable and dependent on them to prosecute crimes because their funding was reduced across PL 280 states.⁴⁰

The Indian Civil Rights Act (ICRA) of 1968 imposed further limitations on tribal jurisdiction.⁴¹ If and when tribes exercised exclusive or

³⁵ 18 U.S.C.A. § 1153 (2006)(MCA has been amended several times to extended federal jurisdiction over Natives committing maiming, sexual abuse, incest, assault with a dangerous weapon, assault resulting in serious bodily injury, assault against minors under 16 years, felony child abuse or neglect, and embezzlement).

³⁶ Pub. L. No. 83-280 (1953) (codified as 18 U.S.C. § 1162, 28 U.S.C. § 1360 and 25 U.S.C. § 1321-1326).

³⁷ Pub. L. No. 280 was amended in 1968 by ICRA to require tribal consent to extend mandatory jurisdiction to states. Since then, no tribe has consented. See U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, PUBLIC LAW 280 AND LAW ENFORCEMENT IN INDIAN COUNTRY – RESEARCH PRIORITIES 4 (2005), *available at* <https://www.ncjrs.gov/pdffiles1/nij/209839.pdf> (last visited Nov. 24, 2013).

³⁸ Mandatory states were California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska. Optional states who have asserted all or partial criminal jurisdiction include Nevada, South Dakota, Washington, Florida, Montana, North Dakota, Arizona, Iowa and Utah. See 28 U.S.C. § 1360 (2006).

³⁹ OVW, GUIDE, *supra* note 5, at 9 (citing Sarah Deer, *Expanding The Network Of Safety: Tribal Protection Orders For Survivors of Sexual Assault*, 4 TRIBAL L.J. SECTION II.B.2. (2004)).

⁴⁰ *Id.*

⁴¹ 25 U.S.C. § 1302 (2006). ICRA also introduced some of the guarantees from the Bill of Rights into Tribal Courts such as due process and right to counsel. See Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. COLO. L. REV. 59, 95 (2013) noting “ICRA has served, and will continue to serve, an important purpose in assisting tribal courts, litigants, and legislatures in providing the legal infrastructure necessary to guarantee fundamental fairness in Indian country.”

concurrent jurisdiction with PL280 states or the federal government,⁴² ICRA's sentencing caps essentially eliminated tribal government's power to prosecute felony level crimes. Under ICRA, tribes could not impose punishments exceeding one year imprisonment or \$5,000 in fines.⁴³ Consequently, Native perpetrators faced little, if any, deterrence because they only faced misdemeanor level penalties. They could also commit repeated offenses against Native women without the threat of repeat offender laws in place outside Indian Country.

The most devastating blow to tribal sovereignty with regard to criminal jurisdiction came in 1978 with the heavily criticized Supreme Court decision in *Oliphant v. Suquamish Indian Tribe*.⁴⁴ The court held that unless expressly granted by Congress, tribal authorities did not hold criminal jurisdiction over non-Natives for crimes committed in Indian Country.⁴⁵ Native women had to hope and pray their perpetrators would be brought to justice and prosecuted by state or federal authorities. *Oliphant* eliminated tribes' ability to prosecute non-Natives for attacking Native women. Tribal authorities could only offer their women protection if attacked by another Native.⁴⁶

Consequently, *Oliphant* also eliminated a critical level of deterrence for non-Natives wishing to commit crimes on reservations. "Criminals tend to see Indian reservations and Alaska Native villages as places of free reign, where they can hide behind the current ineffectiveness of the judicial system."⁴⁷

⁴² See *United States v. Wheeler*, 435 U.S. 313, 318.

⁴³ 25 U.S.C. § 1302 (2006).

⁴⁴ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

⁴⁵ *Id.*

⁴⁶ See 25 U.S.C. § 1301 (2006); see *Duro v. Reina*, 495 U.S. 676 (1990) in which the Supreme Court ruled Native tribes could not prosecute Natives who were members of other tribes. In response, Congress amended ICRA in 1991 in what has been called the "Duro-fix", to expressly designate criminal jurisdiction over all Natives regardless of tribal membership due to their inherent sovereignty. See also *United States v. Lara*, 541 U.S. 193, where the Court implied that the "Duro-fix" amendment to ICRA was generally valid and upheld concurrent jurisdiction amongst tribes and the federal government. The Court has not yet resolved possible equal protection challenges to the law.

⁴⁷ S. Rep. No. 112-265 at n.39 (2012).

B. *Attempting to Undo Historical Harm Through the Tribal Law and Order Act*

High rates of violent crime on reservations, specifically sexual and domestic violence against Native women, prompted Congress in 2010 to pass the Tribal Law and Order Act (TLOA).⁴⁸ TLOA amended PL 280, strengthening tribal law enforcement and addressed concerns that state authorities in PL 280 states were reluctant to “become involved” with Indian Country issues. Tribal governments may now exercise concurrent jurisdiction over reservation crimes in PL 280 states with approval by the Attorney General.⁴⁹ TLOA also amended ICRA to increase tribal sentencing caps.⁵⁰ Tribes that meet certain conditions may now sentence offenders to three years imprisonment, a \$15,000 fine, or both, for each offense with the discretion to stack them for a maximum sentence of nine years.⁵¹

In terms of preventive measures, TLOA established a sexual assault protocol that requires the Indian Health Service (IHS) to consult with tribes, tribal organizations, and the Department of Justice’s Office on Violence Against Women to develop new standardized policies for addressing sexual assaults.⁵² To help ensure follow-through and increase victim's confidence that their reports will be taken seriously, TLOA requires “any federal department or agency” to communicate with local tribal law enforcement whenever non-referrals or declinations of criminal investigations occur.⁵³ To help with the prosecution of crimes in Indian

⁴⁸ Indian Arts and Crafts Amendments Act of 2010, 25 U.S.C.A. § 305 (2013); Tribal Law and Order Act of 2010, 25 U.S.C.A. § 2801 (2013).

⁴⁹ *Id.*

⁵⁰ See NATIONAL CONGRESS OF AMERICAN INDIANS', THE TRIBAL LAW & ORDER ACT ONE YEAR LATER: AN UPDATE ON IMPLEMENTATION 3 (2011), *available at* http://tloa.ncai.org/documentlibrary/2011/07/TLOA_comprehensive_one_year_FINAL1.pdf (last visited Nov. 24, 2013). The report highlights that it will take time before tribal courts can use their enhanced sentencing authority because under the ICRA amendment by TLOA, tribes must provide indigent counsel for defendants, train and license judges, publicize their tribal codes, provide detention facilities that are certified for long-term detention.

⁵¹ Tribal Law and Order Act of 2010, 25 U.S.C.A. § 2801 (2013).

⁵² *Id.*

⁵³ *Id.*

Country, TLOA expanded the use of Assistant United States Attorneys within Indian Country.⁵⁴

While TLOA was successful in remedying some of the criminal jurisdictional limitations that prior laws had placed on Native authorities, its major flaw and criticism stems from what it failed to do. TLOA did not undo *Oliphant* and return criminal jurisdiction to tribes over non-Natives.⁵⁵ It failed to provide Native Women with the same protections and rights as non-Native women.

C. The 2013 Violence Against Women Act: Long Awaited Protections or Just a Band Aid?

Efforts to adopt legislation to address domestic and sexual violence against women led to the first version of VAWA drafted by Vice President Joe Biden and signed into law by President Bill Clinton in 1994.⁵⁶ VAWA created the Violence Against Women Office, now the Office of Violence Against Women (OAW) within the Department of Justice.⁵⁷ This established: harsher penalties for repeat sex offenders; created the federal “rape shield law;” increased victim's accessibility to rape examinations and restraining orders; established full faith and credit for restraining orders; funded specialized enforcement and prosecution units to increase prosecution and convictions of perpetrators; developed training for law enforcement; created the National Domestic Violence Hotline; and introduced immigration relief for undocumented, battered immigrants leaving the cycle of violence.⁵⁸ Thanks to VAWA, more raped

⁵⁴ Tribal Law and Order Act of 2010, 25 U.S.C.A. § 2801 (2013); Michael J. Bulzomi, *Indian Country And The Tribal Law And Order Act of 2010*, LAW ENFORCEMENT BULLETIN (2012), available at <http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/may-2012/indian-country-and-the-tribal-law-and-order-act-of-2010> [hereinafter Bulzomi, *TLOA of 2010*] (citing U.S. DEPARTMENT OF JUSTICE DECLINATIONS OF INDIAN COUNTY CRIMINAL MATTERS, GAO-11-167R, § 213 (2010)).

⁵⁵ Cardick, *supra* note 2, at 564.

⁵⁶ Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C § 13701 (2006).

⁵⁷ FWV, FACTS ON VIOLENCE, *supra* note 10, at n.36 (citing U.S DEP'T. OF JUSTICE, OFFICE OF VICTIMS OF CRIME UNIVERSITY OF OKLAHOMA HEALTH SCIENCES CENTER (1997)).

⁵⁸ Violence Against Women Reauthorization Act of 2013, 42 U.S.C.A § 13701 (West 2014); THE WHITE HOUSE, FACT SHEET: THE VIOLENCE AGAINST WOMEN ACT, available at http://www.whitehouse.gov/sites/default/files/docs/vawa_factsheet.pdf (last visited Nov. 24, 2013).

and battered women have come forward to make reports; states have reformed laws to take violence against women “more seriously,” and intimate partner violence declined by 67 percent between 1993 and 2010.⁵⁹ Although women across the country have benefited from VAWA's protections, earlier versions did nothing to address the specific needs of Native women.

VAWA was reauthorized in 2000 and 2005 with bi-partisan support, but died in 2012 after House Republicans opposed the Senate version that afforded protections to Native women, undocumented immigrants, and the LGTB community.⁶⁰ In his letter to the Majority Leader of the House, the President of the National Congress of American Indians summarized the need for VAWA's reauthorization to specifically protect Native women:

Tribes are dealing with felony violence in domestic situations—such as beatings and rapes of young Native women by non-Native boyfriends, some of whom are engaged in drug trafficking and understand that they are untouchable under the current system of law on Indian lands. U.S. Attorneys currently decline 67 percent of sexual abuse and related cases. If a case is declined at the federal level the felony crime would go back to tribal court as a misdemeanor—where the defendant can immediately remove the case back for the U.S. Attorney for a dismissal. Even if the U.S. Attorney is interested in prosecuting, the offender would likely be set free until the U.S. Attorneys can obtain a grand jury indictment, which can take months. Until that indictment is obtained, the offender is often set free to walk the very community that he haunts. The federal criminal justice system is simply not equipped to handle local crimes,

⁵⁹ *Id.*

⁶⁰ Tom Cohen, *House Passes Violence Against Women Act After GOP Version Defeated*, CNN (February 28, 2013), <http://www.cnn.com/2013/02/28/politics/violence-against-women> (last visited Nov. 24, 2013).

and this is the primary reason that tribes seek local control over these crimes that are plaguing our communities.⁶¹

Tribal courts were finally authorized to exercise jurisdiction over non-Native perpetrators when the House of Representatives voted 286 to 138 to pass the Senate version of VAWA on February 28, 2013.⁶² Before signing the Bill on March 7, 2013, President Barack Obama acknowledged, “Indian Country has some of the highest rates of domestic abuse in America. And one of the reasons is that when Native American women are abused on tribal lands by an attacker who is not Native American, the attacker is immune from prosecution by tribal courts. Well, as soon as I sign this bill that ends.”⁶³

For the first time, Title IX of VAWA lays out the specific protections afforded to Native women.⁶⁴ VAWA amended ICRA by giving concurrent jurisdiction to eligible tribes⁶⁵ able to exercise their “special domestic violence” jurisdiction over non-Native perpetrators with pre-existing state and federal authorities.⁶⁶ “Special domestic violence” jurisdiction is triggered for domestic violence, dating violence, and certain protective order violations.⁶⁷ VAWA amended the federal assault statute for domestic

⁶¹ Jefferson Keel, *Letter to Hon. Eric Cantor, Majority Leader for United States House of Representatives*, 1 (December 20, 2012), http://turtletalk.files.wordpress.com/2012/12/letter-to-majority-leader-cantor_122012.pdf (last visited Jan. 14, 2014)(emphasis added).

⁶² Jane C. Time, *VAWA Passes House, With Full Protections For LGBT, Native Americans*, MSNBC (February 28, 2013), <http://tv.msnbc.com/2013/02/28/vawa-passes-house-with-full-protections-for-lgbt-native-americans/> (last visited Nov. 24, 2013); <http://clerk.house.gov/evs/2013/roll055.xml> (last visited Jan. 20, 2014).

⁶³ *Remarks by the President and Vice President at Signing of the Violence Against Women Act*, THE WHITE HOUSE (March 7, 2013), <http://www.whitehouse.gov/the-press-office/2013/03/07/remarks-president-and-vice-president-signing-violence-against-women-act> (last visited Jan. 14, 2014).

⁶⁴ Violence Against Women Reauthorization Act of 2013, 42 U.S.C.A § 13701 (West 2014).

⁶⁵ *Id.*

⁶⁶ *Id.* Eligible tribes must provide indigent defendants with defense counsel, timely notification of their rights under VAWA and the Constitution as well as their right to a trial by an impartial jury reflecting a fair cross section of the community, and their right to file a writ of habeas corpus.

⁶⁷ *Id.* Applicable protection orders must provide protection against violent or threatening acts or harassment, sexual violence, contact or communication or physical proximity issued against the defendant, enforceable by the participating tribe and consistent with

violence by increasing the sentences for numerous offenses.⁶⁸ It also amended 18 U.S.C. § 2265 and finally closed the loophole for repeat offenders with tribal convictions. Federal prosecutors can now use tribal convictions against perpetrators and no longer have to try them as first time offenders.⁶⁹

The current VAWA's incorporation of Title IX is undeniably a landmark piece of legislation and a significant step towards providing Native women with some of the same protections that non-Native women have had for decades. However, it is far from being the comprehensive piece of legislation needed to stop gender-based violence in Indian Country. It is very limited in that the “special domestic violence” jurisdictional expansion only applies to a very narrow and specific portion of cases. First, tribes cannot assert jurisdiction in cases where both defendant and victim are non-Native.⁷⁰ Second, tribal governments may only assert jurisdiction over non-Native defendants who are residents or employees of the tribe, a spouse, an intimate or dating partner of a tribal member, or a Native residing on the lands of a participating tribe.⁷¹ Hence, it only protects Native women who are intimately involved with their abusers and not from perpetrators who are strangers. Aside from enforcing protective orders, it does little to protect Native women from attacks by those who do not live or work for the tribe. VAWA has very little impact on non-recognized tribes,⁷² and excludes most Alaskan Native women from its protections.⁷³ Except for the few tribal nations

U.S.C. 18 § 2265(b). VAWA also gives tribal courts full civil jurisdiction to “issue and enforce orders involving any person, including the authority to enforce orders through civil contempt proceedings, to exclude violators from Indian land” *Id.*

⁶⁸ *Id.* at § 906. Federal sentencing guidelines were increased to 10 years for assaulting a spouse, intimate partner, or dating partner by strangling or suffocating, 5 years for assaulting a spouse, intimate partner, or dating partner resulting in substantial bodily injury, and 1 year for assaulting a person by striking, beating, or wounding.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² There are currently 556 federally recognized tribes. 25 U.S.C. §§ 479a (2013).

⁷³ Violence Against Women Reauthorization Act of 2013, 42 U.S.C.A § 13701 (West 2014). VAWA only confers special domestic violence criminal jurisdiction to the Metlakatla Indian Community and Annette Indian Reserve in Alaska.

participating in the two-year “pilot program,”⁷⁴ the special domestic violence jurisdiction will not be available to eligible tribal governments until March 7, 2015.⁷⁵ Waiting one day is inexcusable; waiting two years is simply outrageous.

Developing and funding strong tribal criminal justice systems that are in compliance with the ICRA will be a significant hurdle for tribes wishing to exercise special domestic jurisdictions as “participating tribes.” Adequate funding will be crucial to repair tribal governments that have been severely understaffed and underfunded. To combat this, VAWA authorizes appropriations of \$5,000,000 each year⁷⁶ to ensure tribal governments build and support the criminal justice infrastructure they need.

III. RIPPLES OF CHANGE: FIGHTING BACK AND HEALING GENDER-BASED VIOLENCE AGAINST NATIVE WOMEN

A. *Tribal Government Needs*

1. *The Tribal Court System*

The Indian Country judicial system has five legal institutions: traditional courts, Courts of Indian Offenses, inter-tribal courts, courts of appeal and tribal courts of general jurisdiction. Their size and funding varies according to the tribe. Even though all must adhere to ICRA provisions, some have not written nor publicized their criminal codes for crimes against women.⁷⁷ VAWA's implementation will take time and

⁷⁴ The Department of Justice published procedures and solicited preliminary expressions of interest from Native tribes requesting designation as a participating tribe under “the Pilot Project” in the Federal Register. Pilot Project for Tribal Jurisdiction Over Crimes of Domestic Violence, 78 Fed. Reg. 115 (June 14, 2013), <http://www.gpo.gov/fdsys/pkg/FR-2013-06-14/pdf/2013-14158.pdf> (last visited Nov. 24, 2013).

⁷⁵ Violence Against Women Reauthorization Act of 2013, 42 U.S.C.A § 13701 (West 2014).

⁷⁶ 25 U.S.C.A. § 1304 (West 2014). Authorizes appropriations for the 2014-2018 fiscal years for the Attorney General to award grants to supplement already existing monetary relief so tribes can strengthen their tribal criminal justice systems, carry out their duty, and provide “training, technical assistance, data collection, and evaluation of the criminal justice systems of participating tribes”. *Id.*

⁷⁷ PERRY, TRIBAL CRIME, *supra* note 9, at 15. Right now, it is not clear which tribes need specialized help. However, in 2012 the Bureau of Justice Statistics (BJS) initiated a

funding so that tribal Courts can ensure defendants receive rights that are consistent with both 18 U.S.C. § 3771(a) and “tribal law and custom.”⁷⁸

In response to this need, VAWA appropriates funding for the development of tribal court systems. Tribal Coalition Grants will assist tribes in developing and promoting state and local tribal legislation and policies to respond to violent crimes against Native women including domestic violence, dating violence, sexual assault, sex trafficking, and stalking.⁷⁹ VAWA funding will also help tribal courts develop culturally appropriate services for victims and their families: including, the use of criminal codes, the rules of evidence and criminal and appellate procedure, as well as, funding for indigent defense counsel representation and proper procedures for juror selection and jury instruction.⁸⁰

2. Tribal Law Enforcement

As discussed in Part I, 76 percent of the 4.6 million people living on reservations are non-Native.⁸¹ When tribal courts begin to exercise “special domestic violence” jurisdiction over non-Natives, the need for law enforcement will increase dramatically. Adequate funding and cooperation amongst new and existing law enforcement agencies will be critical. The most significant obstacle towards fighting gender violence on reservations is the lack of tribal law enforcement's ability to enforce the protections afforded by TLOA and VAWA:

Many tribal law enforcement agencies face unique obstacles that often challenge their ability to promote and sustain community policing effectively. Unlike municipal police agencies, many tribes still lack basic technology to modernize their departments, such as laptops installed in

national survey of tribal court systems and in 2013 BJS will coordinate with federal justice agencies to gather data from 2009-2011 which will be published on its web page. BUREAU OF JUSTICE STATISTICS, INDIAN COUNTY JUSTICE STATISTICS, <http://bjs.gov/index.cfm?ty=tp&tid=200000> (last visited Jan. 14, 2014).

⁷⁸ *Id.*

⁷⁹ Violence Against Women Reauthorization Act of 2013, 42 U.S.C.A § 13701 (West 2014).

⁸⁰ *Id.*

⁸¹ PERRY, TRIBAL CRIME, *supra* note 9, at 1.

police vehicles. The officer-to-population ratio still remains lower on Indian reservations than in other jurisdictions across the country. Finally, tribal law enforcement has a unique challenge of patrolling large areas of sparsely populated land.⁸²

Tribes need funding to support the tribal law enforcement agencies that are severely underfunded and understaffed. The latest numbers reveal 178 tribal law enforcement agencies employ about 3,000 full-time personnel across twenty-eight states.⁸³ In 2008, the Bureau of Indian Affairs (BIA) operated forty-two agencies and employed an additional 227 full time personnel to provide law enforcement services to tribes without police agencies.⁸⁴ The Navajo Nation has a population of 174,000⁸⁵ on a reservation that spans four states and only has 393 officers.⁸⁶ The recruitment and retention of tribal officers is also a problem. According to the FBI, many tribal officers leave their departments within two years of hire.⁸⁷

Partnership relations between tribal, state, and federal authorities are imperative to deal with tribal law enforcement understaffing. TLOA established grants and technical assistance as incentives for cooperative law enforcement agreements between state and tribal authorities to cross-deputize their officers.⁸⁸ Cross-deputizing would be helpful because it would expand a tribal officer's authority to enforce laws that would

⁸² DEP'T OF JUSTICE, BUDGET AND PERFORMANCE SUMMARY 12 (2013), <http://www.justice.gov/jmd/2013summary/pdf/fy13-bud-summary-request-performance.pdf> (emphasis added).

⁸³ *Id.* at 2.

⁸⁴ *Id.* at 6.

⁸⁵ THE UNITED STATES CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION 14 (2010), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf> (last visited Nov. 24, 2013).

⁸⁶ PERRY, TRIBAL CRIME, *supra* note 9, at 6.

⁸⁷ Bulzomi, *TLOA of 2010*, *supra* note 54.

⁸⁸ *Id.* at n.46 (citing THE U.S. DEP'T OF THE INTERIOR'S, BUDGET JUSTIFICATIONS AND PERFORMANCE INFORMATION: FISCAL YEAR 2009, INDIAN AFFAIRS, IA-PSJ-6, noted there were 2,758 BIA and tribal criminal investigators and police serving Indian country).

normally be out of their jurisdiction, regardless of the perpetrator's identity.⁸⁹

Without their own tribal police departments, tribal nations are likely to have a difficult time establishing a strong criminal justice infrastructure because the majority of the funding available is already earmarked for strengthening *existing* tribal police departments. Tribes with tribal law enforcement agencies may obtain funding through the Department of Justice's Coordinated Tribal Assistance Solicitation (CTAS) program that is administered through the Community Oriented Policing Services (COPS) program.⁹⁰ In 2012, the Department of Justice awarded \$101,472,879 to tribal governments.⁹¹

Tribes may also obtain funding by collaborating with state and federal agencies through the use of crime databases. The Bureau of Justice Statistics (BJS) awards funds to tribal agencies that participate in the Tribal Criminal History Records Improvement Program (T-CHIRP).⁹² A 2007 survey highlighted tribal law enforcement's serious underuse of T-CHIRP: 72 percent of tribal law enforcement agencies reported they did not regularly submit criminal history records to State or Federal databases, less than 25 percent submitted basic criminal records to State or Federal authorities, 75 percent did not submit sex offender information to the National Sex Offender Registry (NSOR), and less than 20 percent were electronically networked to federal, state, or local law enforcement agencies.⁹³ BJS also provides funding through the Edward Byrne

⁸⁹ *Id.*

⁹⁰ See DEP'T OF JUSTICE COMMUNITY ORIENTED POLICING SERVICES, <http://www.cops.usdoj.gov/> (last visited Nov. 24, 2013).

⁹¹ DEP'T OF JUSTICE, DEP'T OF JUSTICE, COORDINATED TRIBAL ASSISTANCE SOLICITATION – FY 12, COMBINED AWARD LIST 1 (2012), *available at* <http://www.cops.usdoj.gov/pdf/2012AwardDocs/CTAS/FY-2012-CTAS-Full-Award-List.pdf> (last visited Nov. 24, 2013).

⁹² STEVEN PERRY, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, TRIBAL CRIMINAL HISTORY RECORDS IMPROVEMENT PROGRAM (T-CHIRP): IMPROVING CRIMINAL HISTORY RECORDS IN INDIAN COUNTRY 2004-2006 1 (2007), *available at* <http://bjs.gov/content/pub/pdf/ichric06.pdf> (last visited Nov. 24, 2013). T-CHIRP is aimed at improving the completeness, quality and accessibility of tribal criminal history records.

⁹³ *Id.* at 1.

Memorial Justice Assistance Grant (JAG)⁹⁴ to tribes participating in the FBI's Uniform Crime Reporting (UCR) Program.⁹⁵ However, tribal law enforcement agencies that do not use UCR are not eligible for JAG funding. By 2010 only about seventy tribal law enforcement agencies had received the requisite UCR training.⁹⁶ To address this, VAWA has specifically allocated funding to assist tribal law enforcement to enter and obtain information from national crime information databases.⁹⁷

B. Victim Needs

Victims of sexual abuse and domestic violence should be able to count on a criminal justice system that meets their needs. One explanation for the high declination rates for rape prosecution discussed in Part I is due to a lack of forensic evidence. Indian Health Services (IHS) on reservations has been historically underfunded. Rape kits needed to perform forensic exams were considered “extraneous to core health care needs,”⁹⁸ and there was no funding allocated to train IHS employees on sexual assault forensic examinations.⁹⁹ Consequently, IHS did not have standardized protocols in place for collecting forensic sexual assault evidence for federal prosecutors to rely on.¹⁰⁰ The funding for these services allocated by TLOA and VAWA needs to be allocated to remote tribal communities so that these services can be easily accessed.

Domestic violence experts agree that the most dangerous time for battered women is amidst escape and securing a safe place to hide. Funding is needed to help Native women leave and stay away from their perpetrators. Unfortunately, Native domestic violence victims have few, if

⁹⁴ *Id.* at 1-3. JAG is the leading source of federal justice funding to state and local jurisdictions.

⁹⁵ *Id.* The UCR is national collection system capturing information of crimes known to law enforcement agencies nationwide.

⁹⁶ *Id.* at 7. Only 21 the 70 agencies had been trained to use the FBI's National Incident Based Reporting system (NIBRS), which houses comprehensive and detailed crime data across agencies nationwide.

⁹⁷ Violence Against Women Reauthorization Act of 2013, 42 U.S.C.A § 13701 (West 2014).

⁹⁸ Williams, *Native American Women*, *supra* note 23.

⁹⁹ Deer, *Indigenous Jurisprudence*, *supra* note 1, at 14.

¹⁰⁰ Williams, *Native American Women*, *supra* note 23.

any, safe havens available to them because there are only twenty-six Native specific shelters serving Indian Country.¹⁰¹ However, shelters are only a temporary solution. They cannot “provide the time or the stability for women to create a solid base for change in their lives.”¹⁰² Many will be single mothers and self-sufficiency will be critical in order to provide for themselves, their children, and their communities. Survivors of domestic violence need long-term affordable housing programs, counseling, support, and tools to enter the workforce. Organizations like *A Community for Peace in California* are leading the way with an effective delivery service model offering co-located wrap around services for victims.¹⁰³

C. Healing Through Restorative Justice Programs

1. Indigenous Restorative Justice Ceremonies

Implementing restorative justice programs as part of the infrastructure of tribal criminal justice systems is critical. They present culturally sensitive adjudications that are specific to each tribe and can supply victims with healing and closure where appropriate.

The power of individual woman’s stories of surviving sexual assault should not be underestimated. Indeed, there are accounts of the power of a single woman’s story to affect change within her tribal government¹⁰⁴ Other social problems cannot be resolved unless psychological trauma is addressed in a systemic way.¹⁰⁵

Tribal courts are unique because they respect and protect the values of their tribal communities while following the rules and customs of non-tribal courts. The indigenous justice system has a restorative and reparative foundation that includes peacemaking and talking circles, family and

¹⁰¹ FWV, FACTS ON VIOLENCE, *supra* note 10, at 38.

¹⁰² *Id.*

¹⁰³ More information on A Community for Peace’s wrap around programs for domestic violence victims and their families is *available at* <http://acomunityforpeace.org/> (last visited Nov. 24, 2013).

¹⁰⁴ Deer, *Indigenous Jurisprudence*, *supra* note 1, at 151.

¹⁰⁵ *Id.* at 138 [emphasis added].

community gatherings, and traditional dispute resolution like meditation.¹⁰⁶ Spirituality, humanity, community and respect are values that play a central role in the everyday life of Native Americans. “Whereas Western law is based on punishment, Indian law is based on healing.”¹⁰⁷ Furthermore, “[w]estern law does not attempt to reach into the mind or deal with psychological injuries, much less seek spiritual help in doing this. Traditional Indian law does, and that is why it heals.”¹⁰⁸

Restorative justice ceremonies are aimed toward preserving ongoing relationships and restoring a state of balance, harmony, and peace amongst the parties and their communities.¹⁰⁹ Tribes try to restore this balance by giving offenders the opportunity to make amends for the damage they caused by entering into healing contracts.¹¹⁰ Participation makes offenders endure the shame and humiliation of answering for their crimes directly to their victims and communities rather than just serving time in prison.¹¹¹ Tribes believe “observing and hearing the apologies helps victims and their families to discern the offender’s sincerity and move toward forgiveness and healing.”¹¹²

Ceremonies vary according to tribal culture and the needs of each case. Ceremonial sweats, fasting, purification, and rituals are often used.¹¹³ For the Navajo, *Hozhooji Naat’aannii* is a peacemaking and healing ceremony that is used to recommend or reduce sentences with consent of both parties.¹¹⁴ Prayers are offered to seek help from the spirit world and opinion evidence is allowed because everyone is free to

¹⁰⁶ WANDA D. McCASLIN, JUSTICE AS HEALING: INDIGENOUS WAYS, WRITINGS ON COMMUNITY PEACEMAKING AND RESTORATIVE JUSTICE FROM THE NATIVE LAW CENTRE, 114-115 (2005).

¹⁰⁷ *Id.* at 70.

¹⁰⁸ *Id.* at 69.

¹⁰⁹ U.S. DEP’T OF JUSTICE, U.S. DEP’T OF INTERIOR, TRIBAL LAW AND ORDER ACT (TLOA) LONG TERM PLAN TO BUILD AND ENHANCE TRIBAL JUSTICE SYSTEMS 18 n.29 (August 2011), available at <http://www.justice.gov/tribal/docs/tloa-tsp-aug2011.pdf> (last visited Nov. 24, 2013) (hereinafter TLOA PLAN).

¹¹⁰ ANDREA SMITH, CONQUEST; SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE 140 (2005) [hereinafter SMITH, CONQUEST].

¹¹¹ *Id.* at 188.

¹¹² McCASLIN, *supra* note 106, at 115.

¹¹³ *Id.* at 116.

¹¹⁴ *Id.* at 124, 131. See TLOA PLAN, *supra* note 109, at 29. The Navajo Nation has 242 certified Peacemakers and a Peacemaker Liaison in each district court.

express how they feel.¹¹⁵ After expressions are shared, the *Naat'aanii*,¹¹⁶ acting as the judge, offers guidance from stories, traditions, and ceremonies. A discussion is held between the parties, reconciliation plans are created, and the parties reach a consensus about what to do.¹¹⁷ The offender's relatives pay a restitution to make the victim whole, and act as the offender's "probation officer" to ensure he will not offend again.¹¹⁸

The Canadian Hollow Water First Nation developed the Community Holistic Circle Healing (CHCH) sentencing circle. It targets sexual victimization believing victimizers are created, that the cycle of abuse must be broken, and that healing is possible in a safe place.¹¹⁹ The circle takes place in a courtroom where the victim, offender, and their families are joined by the community and local law enforcement.¹²⁰ Personal smudges¹²¹ and prayers are offered before a judge reads pleas and establishes ground rules for the circle. Participants engage in four go-arounds speaking to the victim and offender and outline their expectations to the offender before the judge issues a sentence. The circle is concluded by a closing prayer and a debriefing.¹²²

Similarly to the Hollow Water circle, the Millie Lacs Indian Reservation in central Minnesota created the Millie Lacs Band of Ojibwe Circle Sentencing Project. The circle also brings together victims, offenders, and the community in a safe place before a judge where all parties have an equal voice. Smudging and prayers in the Tribe's native language are also offered before participants speak. It mirrors

¹¹⁵ *Id.* at 125. The use of opinion evidence is very different from non-Native courts. In a city court proceeding for example, when a man accused of beating his wife was in denial, his sister was able to confront him and make him accountable for his actions.

¹¹⁶ *Naat'aanii* means "wise one".

¹¹⁷ *Id.* at 125-128.

¹¹⁸ *Id.*

¹¹⁹ McCASLIN, *supra* note 106, at 190.

¹²⁰ *Id.* at 192.

¹²¹ Smudging is a cleansing ritual.

¹²² McCaslin, *supra* note 106, at 192.

Westernized jury deliberations in that everyone must reach a consensus to sentence the offender.¹²³

2. *Criticisms of Indigenous Justice Ceremonies*

Critics of peacemaking and sentencing circles justifiably caution against their use for domestic violence and sexual assault crimes. Congress in the TLOA specifically recommended peacemaking circles as alternatives to incarceration, but warned that they may not be appropriate in cases of *violent* sexual or domestic violence assaults.¹²⁴ The University of Texas's Institute for Restorative Justice and Restorative Dialogue notes that opponents are concerned with the inherent risk to victims of domestic violence because of the lack of safety measures.¹²⁵ Others prefer that circles involve the community and not the individual stakeholders noting “the victim's cooperation with the defendant may not be appropriate under any circumstances”¹²⁶ for rape or domestic violence cases.

Despite these criticisms, the traditional Native law restorative justice framework has gained international support over the last few decades. In 2002, The United Nations Economic and Social Council (ECOSOC) passed Resolution 2002/12 to use restorative justice programs in criminal matters. In response to the 2000 Vienna Declaration on Crime and Justice,¹²⁷ Resolution 2002/12 urged “the formation of national strategies and policies aimed at the development of restorative justice and

¹²³ *Restorative Justice Programs in Minnesota*, THE ENTERPRISE FOUNDATION RESOURCE CENTER, <http://content.knowledgeplex.org/kp2/cache/documents/849/849.html> (last visited Nov. 24, 2013).

¹²⁴ TLOA PLAN, *supra* note 109, at 18.

¹²⁵ See *The Institute for Restorative Justice and Restorative Dialogue*, UNIVERSITY OF TEXAS, <http://www.utexas.edu/research/cswr/rji/ourinitiatives.html> (last visited Nov. 24, 2013) [hereinafter UT Program].

¹²⁶ Chris Longman, *Making a Case for Restorative Justice*, 1 AM. BAR ASS'N. 3, available at http://www.americanbar.org/publications/gpsolo_ereport/2011/october_2011/making_case_restorative_justice.html (last visited Nov. 24, 2013).

¹²⁷ BASIC PRINCIPLES ON THE USE OF RESTORATIVE JUSTICE PROGRAMMES IN CRIMINAL MATTERS, U.N. ECONOMIC AND SOCIAL COUNCIL RES. 2002/12, available at <http://www.un.org/en/ecosoc/docs/2002/resolution%202002-12.pdf> (last visited Nov. 24, 2013). The 2000 Vienna Convention of Crime and Justice called for “the development of restorative justice policies, procedures, and programs that are respectful of the rights, needs, and interests of victims, offenders and communities and all other parties”.

at the promotion of a culture favorable to the use of restorative justice among law enforcement, judicial and social authorizes, as well as local communities.”¹²⁸ The United Nations Office of Drugs and Crime has even published a Handbook on Restorative Justice Programs to assist governments with criminal justice reforms and the implementation of restorative programs.¹²⁹

Restorative justice programs have already been implemented successfully throughout the United States. The American Bar Association confirms “restorative justice programs have been patterned after victim and defendant experiences in tribal courts in the 1990s.”¹³⁰ In 1992, Minnesota’s Department of Corrections created the Restorative Justice Initiative, promoting victim-offender mediation, family group conferencing, neighborhood conferencing and the introduction of sentencing circles.¹³¹ Since then, communities in Texas, Baltimore, Minneapolis, Oakland, Vermont, Oregon, Missouri, and Colorado have implemented restorative justice programs.¹³²

There is no “one size fits all” approach to implementing restorative justice circles. The best solution to their use is on a case-by-case approach within the autonomy and discretion of the victims and their tribal governments. The National Institute of Justice (NIJ) notes that although

¹²⁸ *Id.*

¹²⁹ UNITED NATIONS OFFICE OF DRUGS AND CRIME, HANDBOOK ON RESTORATIVE JUSTICE PROGRAMMES (2006), *available at* http://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf (last visited Nov. 24, 2013).

¹³⁰ Longman, *supra* note 126.

¹³¹ LEENA KURKI DEPT’ OF JUSTICE, INCORPORATING RESTORATIVE AND COMMUNITY JUSTICE INTO AMERICAN SENTENCING AND CORRECTIONS 5 (1999) *available at* <https://www.ncjrs.gov/pdffiles1/nij/175723.pdf> (last visited Nov. 24, 2013).

¹³² See TEXAS DEP’T OF CRIMINAL JUSTICE, http://www.tdcj.state.tx.us/divisions/vs/victim_helpful_links.html (last visited Nov. 24, 2013); see Paul Tullis, *Can Forgiveness Play a Role in Criminal Justice*, N.Y. TIMES (January 4, 2013), <http://www.nytimes.com/2013/01/06/magazine/can-forgiveness-play-a-role-in-criminal-justice.html?pagewanted=all> (last visited Nov. 24, 2013); see BALSAM, NINA, MISSOURI RESTORATIVE JUSTICE COALITION, MISSOURI RESTORATIVE JUSTICE PROGRAMS/RESOURCES, *available at* http://www.dps.mo.gov/dir/programs/jj/documents/rj/MO_RJ_Programs_Resources-Nina_Balsam%5B1%5D.pdf (last visited Oct. 14, 2013); see RESTORATIVE SOLUTIONS, <http://wp.restorativesolutions.us/resources/resources-and-links-programs#colorado> (last visited Nov. 24, 2013).

restorative methods may not be appropriate for all offenders, they can be used with a variety of offenses to provide healing for the victims and the offenders.¹³³ The University of Texas' Institute for Restorative Justice and Restorative Dialogue promotes modified versions of restorative practices.¹³⁴ However, advocates agree these justice ceremonies are important for addressing violence against Native women, but are insufficient by themselves. In order to be fully effective, "[t]hey must be backed up by the threat of incarceration."¹³⁵

CONCLUSION

All women should be protected by their government. It is difficult to believe that for Native women this is *still* only a partial truth. While the landmark VAWA legislation gives tribal governments the possibility to exercise "special domestic violence" jurisdiction, it fails to protect women outside of its limitations. Until comprehensive legislation returns criminal jurisdiction to tribes over all crimes and defendants, VAWA will remain a band-aid where loopholes in the law fail to deter violence against Native women. Funding is underway to ensure tribal governments create a strong criminal justice infrastructure. However, this will take time, collaboration between agencies, and continued funding. Tribes without current tribal law enforcement departments and skeleton-like criminal justice systems need significant help before they can be eligible for "participating tribe" status and exert their jurisdiction over non-Native perpetrators. As these efforts continue, it will be crucial that Indian Tribes be given continued funding that ensures rape victims have access to adequate medical treatment and domestic violence victims have services to aid their journey towards self-sufficiency. Lastly and more importantly, Native women need to be given the option to heal and take back some of the power that their perpetrators took from them. Restorative justice ceremony circles can be a feasible option in some cases. There are differing opinions as to whether their use is effective. Ultimately, the decision should be the victim's. *Only she*

¹³³ *Sentencing Circles*, OFFICE OF JUSTICE PROGRAMS, NATIONAL INSTITUTE OF JUSTICE, <http://www.nij.gov/nij/topics/courts/restorative-justice/promising-practices/sentencing-circles.htm> (last visited Nov. 24, 2013).

¹³⁴ See UT Program, *supra* note 125.

¹³⁵ SMITH, *supra* note 110.

knows the damage her perpetrator inflicted and *only she* can determine if confronting him through long standing culturally traditional ways will aid her in her journey towards healing.