THE VIOLENCE AGAINST WOMEN ACT: A DOUBLE -

I. BACKGROUND

A. Domestic Violence in Indian Country

Contrary to much of the Western world, not all Native American tribes are predominately patriarchal societies. Several Native American tribes hold women to high esteem and reserve special roles for women within their communities.[9] For example, Cherokee women were traditionally homeowners, and a Cherokee Women's Council decides which men can hold positions of authority within Cherokee tribes.[10] The Iroquois, like the Cherokee, also have a historically matriarchal society. Traditionally, Iroquois women were "keepers of the fai tv0 Tc 0 Tw 6.96cally hehian 6.1(i)-.8(i)5.3(v)11.4(e)adese A 5.3(v)11.p -0.005 Tc4Tc 0

forcing tribes to relocate on reservations out West.[36] Although reservations were designated specifically for Native Americans, many reservations were dependent on federal government funding and overwhelmed by the presence of European missionaries seeking to assimilate Native Americans into Anglo-American culture.[37] In 1887, the period of allotment and assimilation began. The 1887 Dawes Act converted communal tribal land into individual land allotments, granting two-thirds of reservation land to European western settlers.[38] Ofte(Ne(,)-1(8)0.5(ND)5.1((t)4.2(i)4.3(v)10.4(e A)-6.3(m)15.7(er -895(i)4.2(can)-.-1(s)176(w

officer.[72]

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

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

II. VIOLENCE AGAINST WOMEN ACT AND ITS IMPACT

A. Violence Against Women Act, Title IX

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

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

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

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

113. Id.

114. Id.

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

116. Indian Law - Tribal Courts - Congress Recognizes and Affirms Tribal Courts' Special Domestic Violence Jurisdiction Over Non-Indian Defendants. - The Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, TIT. IX, 127 STAT. 54, 120-26 (To Be Codified in Scattered Sections of the U.S. Code), 128 HARV. L. REV. 1509, 1516 (2014).

117. Id. at 1516-17.

118. However, Native American tribes still support VAWA, believing that "the cost is greater than the harm and shame that was being borne by our women and children through" domestic abuse. Additionally, Native Americans find that VAWA still holds their Native American ideals at its core, "namely protecting [Native American] people and providing fairness to the accused." PASCUA YAQUI TRIBE VAWA IMPLEMENTATION, PASCUA YAQUI TRIBE ARIZONA 4,

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

In order to better understand the advantages and disadvantages of prosecuting a non-native within a tribal court, a comparison between the tribal court system and United States federal and state court system is necessary. For this hypothetical comparison, suppose that the domestic violence incident took place on the federally recognized Pascua Yaqui Reservation.

was when she first talked to the tribal police. When the federal prosecutor obtains the investigator's report, the federal prosecutor is unsure whether or

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

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

137. VAWA § 904(d)(3) (2013).

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

139. Id. The United State Census Bureau found that 1.1 million Native Americans living in Indian areas identified themselves "as American Indian or Alaska Native," referring to "having origins in any of the original peoples of North and South American (including Central America)" and maintaining "tribal affiliation or community attachment." TINA NORRIS ET AL., U.S. CENSUS

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

Other than differing in the qualifications for judges, constitutional problems may also arise because tribal courts differ in their funding. Not all tribal courts are as well-funded as the Pascua Yaqui and cannot afford $21 million dollar courthouses. When compared to federal and state courts, tribal courts have significantly less funding and resources, and this could cause defendants to have ineffective assistance of counsel.[150] VAWA authorizes Attorney Generals to exercise the option of awarding grants to Indian tribes to "strengthen tribal criminal justice systems to assist Indian tribes in exercising special domestic violence criminal jurisdiction."[151] These grants help fund law enforcement, prosecution, trial and appellate courts, probation systems, detention and correctional facilities, alternative rehabilitation centers, and family service systems.

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Fifth Circuit's judgment was affirmed by an equally divided Court.[163] In *Dollar General*, John Doe, a member of the Mississippi Band of Choctaw Indians, alleged that he was sexually molested by Dale Townsend, a non-native, at a Dollar General located on the Choctaw's reservation.[164] As a result, Doe and the Mississippi Band of Choctaw brought a civil suit against Dollar

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