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MIRRORED HARMS: UNINTENDED CONSEQUENCES IN THE GRANT OF TRIBAL COURT JURISDICTION OVER NON-INDIAN ABUSERS

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Rates of domestic violence are astonishingly high in Indian Country. More than half of Indian women have experienced physical violence in their lifetimes. They are twice as likely to experience rape as white women and to experience more violent rape when it occurs. Their plight is also deeply intertwined with race: 90% of women reported that the intimate partner violence they experienced was at the hands of a non-Indian perpetrator. At the same time, tribes are largely unable to address this problem through their criminal laws due to the centuries-long erosion of tribal sovereignty. In the 1977 case of Oliphant v. Suquamish Tribe*, the Supreme Court held that tribes had no inherent authority to prosecute non-Indians for crimes committed on Indian land. This departure from commonly understood tribal sovereignty principles created a vacuum that disproportionately affected Indian victims of domestic violence. Non-Indians could act with virtual impunity, immune from prosecution by the tribe and, usually, the state. Meanwhile, the federal government, which retained criminal jurisdiction, declined to prosecute an astonishing two-thirds of sexual violence cases and nearly half of assault crimes. In response to these problems, Congress passed Special Domestic Violence Criminal Jurisdiction (SDVCJ) in its 2013 reauthorization of the Violence Against Women Act. This provision "recognize[s] and affirm[s]" the "inherent power" of tribes to exercise criminal jurisdiction over non-Indians, effectively overruling* Oliphant *with respect to crimes of domestic violence. Many tribes and advocacy organizations applauded this legislation for its enhancement of tribal sovereignty and for its effort to combat the scourge of domestic violence in Indian territory.*

Despite the best intentions of the legislators, however, a number of defects in the legislation undermine its goal of protecting Indian victims of

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domestic violence. In this paper, I argue that SDVCJ creates unintended harms mirroring the very harms that the domestic violence movement as a whole tries to address. I do not argue that SDVCJ is a net detriment to remediating domestic violence or enhancing tribal sovereignty, but that the harms present in the current iteration of SDVCJ should concern legislators and advocates seeking to actually address domestic violence. In particular, I track how limitations on the type of crimes that can be prosecuted—essentially, only physical assaults—mirror problems from early periods in the domestic violence movement, including the perception that only physical assaults are sufficiently serious to be worthy of state sanction and the failure to recognize domestic violence as an exertion of power and control over a victim rather than a series of discrete, isolated incidents. I also explore how a perpetrator can manipulate the elements of SDVCJ based on his own identity or the identity of the victim—a problem that is unique to the intersection of SDVCJ and the political classification and racial makeup of Indians on tribal lands—and argue that this, too, mirrors existing and prior harms of domestic violence's interaction with the law. I further argue that SDVCJ's definition of a victim puts the onus on her to prove that she is worthy of protection, reflecting the traditional blame placed on the woman for failure to prevent her own battering. Finally, I discuss some potential solutions, and conclude that SDVCJ should be expanded to encompass all crimes committed within a domestic violence context and without regard to the identity of perpetrator or victim.

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Introduction

There are two truths about modern life on Indian reservations.[1] The first truth is that rates of domestic violence in tribal territory are astonishingly high. A total of 55% of Indian women have experienced physical violence,[2] compared with 34.5% of women in the United States as a whole.[3] Indian women are 1.2 times more likely than white women to experience violence over their lifetime and 1.7 times more likely to experience it in a given year.[4] At a rate of 34%, Indian women are twice as likely to experience rape

1. As this paper intends to make clear, Indian identity is complex. Throughout this paper, I will use the term "tribes" and "tribal" where possible and "Indian" otherwise. "Native American" may be interchangeable or preferred in some circles, but there appears to be a preference for "Indian" in the legal context. *See* STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 1 n.* (4th ed. 2012).

2. NAT'L CONG. OF AM. INDIANS, VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION (SDVCJ) FIVE-YEAR REPORT 3 (2018) [hereinafter NCAI REPORT], http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf [https://perma.cc/M49A-YCKU].

3. ANDRÉ B. ROSAY, NAT'L INST. OF JUST., NCJ 249736, VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN: 2010 FINDINGS FROM THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 44 (2016), https://www.ncjrs.gov/pdffiles1/nij/249736.pdf.

4. *Id.* at 2.

as white women[5] and to experience more violent rape when it occurs.[6] This is also a problem deeply intertwined with race:[7] 90% of women reported that the intimate partner violence they experienced was at the hands of a non-Indian perpetrator,[8] while intra-racial rates of sexual violence are actually lower among Indian women than among white women.[9]

The second truth about life on Indian lands is that tribes are largely unable to remediate this problem through criminal prosecution. Tribal sovereignty, a concept that was recognized well before the founding of the United States and has consistently been recognized since the late 1960s, provides that unless the federal government says otherwise, tribes have complete authority to exercise civil and criminal jurisdiction over persons and conduct on Indian land.[10] But tribes' ability to govern their own affairs has also been constricted for centuries. Congress has attempted to assimilate them;[11] the executive has planned to eradicate them;[12] and a series of Supreme Court decisions has given the federal government plenary power over them.[13] In the context of criminal jurisdiction, the Supreme Court limited the tribal sovereignty concept in 1977, where it held, in *Oliphant v. Suquamish Tribe*, that tribes had no inherent authority to prosecute non-Indians for crimes committed on Indian land.[14] Later, the Court extended this holding to Indians who were not members of the

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5. *Id.* at 11.

6. *Id.* at 14 (showing that rates of forced penetration are twice as high among Indian women as among white women).

7. In addition to the evidence presented herein, I wish to remark on the lachrymose story of Indian women, namely, that pre-colonial Indian women had something more akin to gender parity than anything seen in the post-colonial period. *See generally* Bethany Ruth Berger, *After Pocahontas: Indian Women and the Law, 1830 to 1934*, 21 AM. INDIAN L. REV. 1 (1997) (discussing the changing role of Indian women in their societies as European influence waxed).

8. NCAI REPORT, *supra* note 2, at 3.

9. ROSAY, *supra* note 3, at 19.

10. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01, at 206–22 (Nell Jessup Newton et al. eds., 2012) [hereinafter COHEN]; PEVAR, *supra* note 1, at 81–82 (describing tribal jurisdiction); ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 525 (3d ed. 2015) (describing Cohen's framework).

11. *See* PEVAR, *supra* note 1, at 7–12.

12. *Id.* at 7–10.

13. *See id.* at 56–58; *see also* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16–17 (1830) (holding that Indian nations were not "foreign nations" within the meaning of Article I of the Constitution); Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) (holding that the federal government's power over Indians is "[p]lenary").

14. 435 U.S. 191, 212 (1978).

governing tribe[15] as well as to many civil cases.[16] This departure from commonly understood tribal sovereignty principles created a vacuum that disproportionately affected Indian victims of domestic violence. Non-Indians could commit crimes on Indian land with virtual impunity, as they were immune from prosecution by the tribe and, usually, the state.[17] Although the federal government retained criminal jurisdiction on Indian land, this was cold comfort: two-thirds of sexual violence and 46% of assault crimes on tribal reservations went unprosecuted,[18] despite making up more than half of all referred cases.[19]

In response to these problems, Congress passed Special Domestic Violence Criminal Jurisdiction (SDVCJ) in its 2013 reauthorization of the Violence Against Women Act.[20] This provision "recognize[s] and affirm[s]" the "inherent power" of tribes to exercise criminal jurisdiction over non-Indians,[21] effectively overruling the *Oliphant* Court's analysis of tribal sovereignty, but only with respect to crimes of domestic violence.[22] Many tribes and advocacy organizations applauded this legislation for its enhancement of tribal sovereignty and for its effort to combat the scourge of domestic violence in Indian territory. Tribes, which have their own constitutions, legislative systems, courts, and criminal codes, can now

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15. *See* Duro v. Reina, 495 U.S. 676 (1990), *superseded by statute*, Department of Defense Appropriations Act, 1991, Pub. L. No. 101–511, § 8077(b)–(d), 104 Stat. 1892, 1892–93; Act of Oct. 28, 1991, Pub. L. No. 102–137, 105 Stat. 646 (codified at 25 U.S.C. § 1301(2)), *as recognized in* United States v. Lara, 541 U.S. 193 (2004).

16. *See* Montana v. United States, 450 U.S. 544 (1981).

17. States generally do not have authority to prosecute for crimes committed in Indian territory. In 1953, the federal government passed a controversial law called Public Law 280, which authorized six states, somewhat arbitrarily chosen, to exercise criminal jurisdiction. That framework is largely in place today. *See generally* ANDERSON ET AL., *supra* note 10, at 408–11 (describing Public Law 280's background and scope); DUANE CHAMPAGNE & CAROLE GOLDBERG, CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280, at 1–25 (2012); Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535 (1975) (discussing the history of Public Law 280). For a complete look at what governments may pursue what crimes against whom in Indian territory, see CHAMPAGNE & GOLDBERG, *supra*, at 8–9.

18. U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-167R, U.S. DEPARTMENT OF JUSTICE DECLINATIONS OF INDIAN COUNTRY CRIMINAL MATTERS 9, 24 (2010) [hereinafter DOJ DECLINATION STATISTICS], http://www.gao.gov/new.items/d11167r.pdf.

19. *Id.* at 9.

20. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–4, § 904, 127 Stat. 54, 120 (codified at 25 U.S.C. § 1304).

21. 25 U.S.C. § 1304(b)(1).

22. *Id.* § 1304(b).

voluntarily opt in to prosecuting non-Indians for committing domestic violence crimes against Indians.[23] The tribes themselves define the crime, the procedure, and the punishment, so long as they also abide by other provisions of federal law.[24]

Despite the best intentions of the legislators, however, a number of defects in the legislation undermine both of its goals—protecting Indian victims of domestic violence and enhancing tribal sovereignty. In this paper, I focus on the former problem and argue that SDVCJ has created unintended harms that mirror the very harms that the domestic violence movement as a whole has been trying to address. In particular, because SDVCJ limits tribal jurisdiction based on the type of crime and the identities of the perpetrator and victim, tribal prosecutors end up with few tools to address the plight of domestic violence on their lands.[25]

I do not argue that SDVCJ is a net detriment to remediating domestic violence or tribal sovereignty. Like many new developments, whether in law, science, medicine, or technology, the first iteration of an undeniably good thing is full of glitches. This paper exposes those glitches in SDVCJ and views them through the lens of domestic violence scholarship so that legislators are familiar with the defects when they craft new legislation.[26]

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23. *See* ANDERSON ET AL., *supra* note 10, at 317–18. Congress has not reauthorized VAWA as of the writing of this paper. *See infra* note 26 and accompanying text. This failure to reauthorize has not affected tribal ability to prosecute non-Indians, however. Because Congress reaffirmed tribes' power as "inherent" rather than as a temporary special grant of jurisdiction, the deficits in prosecution are now more the result of funding shortfalls. *See* 25 U.S.C. § 1304(b)(1).

24. These provisions include the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. § 1301 (providing a range of civil rights protections to Indian defendants), the Tribal Law and Order Act of 2010 (TLOA), Pub. L. No. 111-211, 124 Stat. 2258 (codified in scattered sections of 25 U.S.C.) (providing enhancement of jurisdiction, sentencing, and coordination between law enforcement), and the Violence Against Women Reauthorization Act of 2013, § 904, 127 Stat. at 120 (providing that non-Indian defendants be given all protections of the U.S. Constitution in prosecutions in addition to the protections of ICRA and TLOA).

25. I should like to make clear that I do not advocate in this paper for the traditional American approach to increased criminal prosecution and the accompanying harm of mass incarceration, nor is this paper intended to capture any part of the debate over theories of punishment, including restorative justice. Indeed, this paper supports the idea that tribes should determine what approach to criminal justice is best for their communities. Any reference to increased punishment for offenders is intended to showcase disparities rather than the best path forward.

26. Although VAWA has not yet been reauthorized, one provision in the House version of the bill would expand the definition of domestic violence slightly, but significantly, by replacing the term "crimes of domestic violence" with "crimes of domestic violence, dating violence, obstruction of justice, sexual violence, sex trafficking, stalking, and assault of a

SDVCJ constitutes a step in the right direction but, to maintain its effectiveness, it must be reformed.

This paper proceeds in four parts. In Part I, I identify how the limitations on the type of crimes that can be prosecuted in tribal courts mirror problems from early periods in the domestic violence movement; specifically, I discuss the perception that only physical assaults are sufficiently serious to be worthy of state sanction, the failure to recognize that domestic violence is about power and control over a victim rather than discrete incidents, and the systematic challenges in the investigation and prosecution of domestic violence crimes. In Part II, I explore how a perpetrator can manipulate the elements of SDVCJ, and that even if criminal jurisdiction may be found, non-Indian abusers receive more protections than Indian abusers, which serves to downplay the severity of battering. In Part III, I argue that SDVCJ's definition of a victim puts the onus on her to prove that she is worthy of protection, reflecting the traditional blame placed on the woman for failure to prevent her own battering. Finally, in Part IV, I discuss potential solutions to these problems and conclude that an extension of SDVCJ is appropriate. In particular, I argue that any future iteration of SDVCJ should encompass all crimes committed within a domestic violence context and without regard to the identity of perpetrator or victim, rather than employ a limited focus on discrete incidents and individuals.

I. Limitations on the Type of Crimes

The first key limitation of Special Domestic Violence Criminal Jurisdiction is the types of crimes that tribal prosecutors may charge. This limitation is not built into the statutory language but rather endemic to the reality of domestic violence as a complex pattern of behavior rather than a few discrete acts. Indeed, the federal statute embraces a rather expansive conception of "domestic violence" for purposes of criminal jurisdiction. It includes dating violence, domestic violence, and violations of orders of protection.[27] Potential defendants include not only spouses but also intimate partners, cohabitators, parents of children in common, or "person[s] similarly situated to a spouse . . . under the domestic- or family- violence

law enforcement or corrections officer" and would also include child abuse in the scope of "domestic violence." *See* Violence Against Women Reauthorization Act of 2019, H.R. 1585, 116th Cong. § 903 (as passed on April 4, 2019). Although this bill still places significant emphasis on physical abuse as the epitome of domestic violence, its expansion of jurisdiction is a positive step.

27. 25 U.S.C. § 1304(a).

laws of an Indian tribe."[28] And the tribe itself is free to chart its own course in codifying domestic violence crimes: the mens rea, actus reus, elements of the crime, penalties,[29] and even whether to have a generic "crime of domestic violence."[30] Facially, then, the law does everything it is supposed to in giving tribes full authority to prosecute domestic violence perpetrators. Examining the statute's application in practice, however, exposes significant gaps.

A. The Scope of Domestic "Violence"

What is violence? When does a government deem it sufficiently serious to be criminally sanctionable? Is violence somehow more or less tolerable when the abuse occurs between romantic partners? The answers to these questions have evolved over time. In this section, I consider how modern legislation tries to account for modern realities but may in fact enable frameworks that belong to a bygone era.

1. De Facto Physical Contact Requirement

Domestic violence is not just a single act, but SDVCJ cannot account for this reality in a meaningful way. In *United States v. Castleman*,[31] the Court interpreted a statutory provision against a perpetrator of domestic abuse, but its reasoning has broad effects. Under federal law, a person cannot possess a gun if he has been convicted of a "misdemeanor crime of domestic violence,"[32] defined to include "the use or attempted use of physical force" against an intimate partner.[33] The Court held that "the common-law

28. *Id.* § 1304(a)(2).

29. *See* United States v. Wheeler, 435 U.S. 313, 322 (1978) ("It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members . . . . Their right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions."); Talton v. Mayes, 163 U.S. 376, 380 (1896) (recognizing that "as an autonomous body," a tribe has the "power to make laws defining offences and providing for the trial and punishment of those who violate them"); PEVAR, *supra* note 1, at 99 ("[T]ribes, like other nations, have the inherent right to maintain law and order[, which] includes the power to create a police force, establish courts and jails, . . . punish tribal members[,] . . . prescribe laws applicable to tribe members and to enforce those laws.").

30. *See* Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 1019–21 (2004) (arguing for a distinct battering statute in order to "account for truths antithetical to existing criminal law paradigms").

31. 572 U.S. 157 (2014).

32. 18 U.S.C. § 922(g)(9).

33. *Id.* § 921(a)(33)(A)(ii).

meaning of 'force'—namely, offensive touching"—was incorporated within that definition.[34] Thus construed, an offense involving "offensive touching" (or an attempt) might be considered a misdemeanor crime of domestic violence, but a possible implication is that anything that is *not* offensive touching *does not* constitute domestic violence. The majority correctly notes that "[m]inor uses of force may not constitute 'violence' in the generic sense"; rather, acts like the "relatively minor" physical assaults common in domestic violence relationships—pushing, grabbing, pinching, squeezing an arm to cause a bruise—are "easy to describe as 'domestic violence,'" a term of art.[35] But the examples the Court gives all involve physical contact of some sort, causing authorities at the federal and tribal levels to express some uneasiness about whether other kinds of acts of domestic violence could be so construed in a criminal statute.

Now consider a case from the Pascua Yaqui Tribe in which a non-Indian attempted to strike his wife but was so drunk that he missed and fell.[36] Tribal prosecutors had a domestic violence law under which they could prosecute the husband, but they declined to do so in part because there was no actual physical contact.[37] In the wake of the *Castleman* decision—handed down just one month after SDVCJ went into effect for the Pascua Yaqui and a few other tribes[38]—tribes worried that such crimes would not be considered "domestic violence" under federal law.[39] Even if an abuser does strike his spouse, other crimes committed in the process—ripping pictures off the wall and destroying them,[40] striking his child,[41] threatening

34. *Castleman*, 572 U.S. at 162–63.

35. *Id.* at 165–66.

36. NCAI REPORT, *supra* note 2, at 29.

37. *Id.*

38. A pilot program for SDVCJ for the Pascua Yaqui, Umatilla, and Tulalip Tribes started on February 6, 2014. All tribes were able to exercise SDVCJ starting in March 2015. ANDERSON ET AL., *supra* note 10, at 318.

39. NCAI REPORT, *supra* note 2, at 29.

40. *See* Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 873–74, 873 n.438 (1993) (remarking on a study finding that 59% of abusers engaged in property damage as a manifestation of their abuse and collecting sources); SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 223 (1982) (noting how "destroying favorite objects" maintains the culture of fear in abusive households).

41. *See* Klein & Orloff, *supra* note 40, at 1169–71, 1170 (noting that a "batterer may abuse a child to maintain coercive control over the abused parent") (citing Evan Stark & Anne H. Flitcraft, *Women and Children at Risk: A Feminist Perspective of Child Abuse*, 18 INT'L J. HEALTH SERV. 97, 104 (1988)). Klein and Orloff note that the vast majority of

a non-cohabitating uncle,[42] kicking the dog across the room,[43] or striking a tribal officer who has arrived to keep the peace[44]—go unprosecuted. While scholars, advocates, and even tribal prosecutors might immediately recognize all of these acts as manifestations of domestic violence,[45] a tribal prosecutor may have doubts about whether anything but a physical assault against the other member of an intimate relationship could be proven as a crime of domestic violence under the language of the statute.

This gap is reminiscent of failures in the law that battered women's advocates fought to remedy beginning in the 1970s and 1980s. It evokes early notions that domestic violence can exist only if it is physical battery,

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children witness domestic violence when it occurs, that children are also battered in the vast majority of homes where domestic violence occurs, and that the risk of children going on to commit crimes, including domestic violence, themselves, is quite high. *See id.* at 1169–70.

42. In many tribal communities, family structure is very different from the traditional European model. Extended family make much more of an appearance, and some choose a second set of parents to rear a child as demonstrating shared community "responsibility for others' actions." *See* Harriett K. Light & Ruth E. Martin, *American Indian Families*, J. AM. INDIAN EDUC., Oct. 1986, at 1, 2. In this context, it may be far more impactful for a non-Indian abuser to strike a person who is not the direct spouse because of that person's relationship to the community as a whole.

43. The connection between domestic violence and animal abuse is also strong. *See* ELIZABETH M. SCHNEIDER, CHERYL HANNA, EMILY J. SACK & JUDITH G. GREENBERG, DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE 232 (3d ed. 2013) (noting the high correlation and the fact that "[m]any abusers will harm or threaten to harm pets to further abuse victims" and the arguments for extending orders of protection to encompass pets); Klein & Orloff, *supra* note 40, at 873 n.444 ("In 83% to 88% of families where children are abused, animals in the home are also abused, usually by the abusive parents.").

44. Unlike the other crimes listed, this *would* constitute a crime of violence because it involves a physical assault. However, it would not be prosecutable because the officer is not a victim of domestic violence within the scope of the statute. *But see* H.R. 1585, 116th Cong. § 903(4)(G) (2019) (providing for jurisdiction over non-Indians for assaults against a law enforcement officer).

45. *See* Klein & Orloff, *supra* note 40, at 873 n.438 ("Approximately 80% of batterers engage in violent behavior towards other targets, such as harming pets and destroying objects.") (citing Lenore E. Walker, Eliminating Sexism to End Battering Relationships: Paper Presented at the American Psychological Association, Toronto, Ont. (1984)). Explosive, irrational anger at targets other than the victim is a common manifestation of abuse. *See* ANGELA BROWNE, WHEN BATTERED WOMEN KILL 45 (1987) ("Early outbursts of violence were frequently directed at objects or against pets, rather than against persons."). It is also present on the Power and Control Wheel under the heading "Using Intimidation." *See* Domestic Abuse Intervention Programs, Power and Control Wheel [Graphical Material] (n.d.), https://www.theduluthmodel.org/wp-content/uploads/2017/03/PowerandControl.pdf (last visited Nov. 17, 2019) [hereinafter Power & Control Wheel] (providing examples of "smashing things," "destroying her property," and "abusing pets").

and even then condemned by the law only if it is sufficiently serious.[46] The hurdle is also present only as a result of SDVCJ; in ordinary state prosecutions, proving that the act of violence actually is a crime of domestic violence is irrelevant as a matter of substantive criminal law.[47] In contrast, tribes can prosecute non-Indians *only* if they engage in domestic violence.[48] Given the evolving nature of "domestic violence," including its contours and even its definition,[49] it is not the legislature that sets the baseline for elements of a crime; rather, the baseline is what society, through prosecutorial discretion, jury decision-making, and judicial interpretation, thinks constitutes a crime worthy of punishment in the tribal courts. And it is not a purely hypothetical matter; the National Congress of American Indians has documented several situations in which tribal prosecutors declined to press charges based on the confusion around the physical force requirement.[50]

Thus, even clear incidents that demonstrate other dimensions of the battering experience, such as treating all of a victim's income as the abuser's own (economic abuse) or blackmailing the victim for her perceived misdeeds, may be, for the most part, abandoned by tribal prosecutors. This is not just a gap that federal prosecutors must fill for efficiency purposes; it causes real harm. As we understand from other contexts, emphasizing *physical* violence over other forms of violence has a psychologically damaging effect on victims,[51] a distorting effect on societal

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46. *See, e.g.*, Bradley v. State, 1 Miss. (1 Walker) 158 (1824) (holding that a husband had the "right of moderate chastisement" in the battering of his wife if he "confined himself within reasonable bounds").

47. While classifications as "domestic violence" crimes may be relevant for sentencing or collateral consequences—possibility of deportation for noncitizens, or restrictions on gun possession, for instance—these classifications do not matter in obtaining a conviction, so long as the prosecutor proves every element of the crime beyond a reasonable doubt.

48. *See supra* notes 21–23 and accompanying text.

49. One definition of domestic violence may be "the use of emotional, psychological, physical, sexual abuse, or threats in intimate adult or teen relationships in order to exert power and control over the other." The absence of a unified definition may be a strength, as it allows our understanding of domestic violence to be dynamic, but it also presents a challenge in writing a federal statute.

50. For examples of such declinations, see NCAI REPORT, *supra* note 2, at 28–29.

51. *See* Diane R. Follingstad et al., *The Role of Emotional Abuse in Physically Abusive Relationships*, 5 J. FAM. VIOLENCE 107, 109, 113–14 (1990) (providing statistics about the emotional and psychological effect of abusers engaging in property damage, including the fact that 72% of women reported that the emotional abuse was worse than the physical abuse); Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2123–24 (1993) ("Some battered women have

understandings of domestic violence,[52] a suppressive effect on the gathering of statistical evidence of its prevalence,[53] and a recursive effect on the justice system.[54] As scholars note, "[t]he same emphasis on incidents of physical violence, independent of the broader context in which they occur, has tended to characterize the legal framework within which crimes of domestic violence are adjudicated."[55] What society views as most harmful, and what is often a sine qua non of vindication of a victim's rights in the courtroom, are these kinds of physical assaults;[56] this "limited legal focus often results in an underestimation of the danger posed by a batterer, and the imposition of an inadequate sanction, which leaves his partner vulnerable to continued abuse."[57]

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described psychological degradation and humiliation as the most painful abuse they have experienced. The impact of this kind of abuse can be long lasting and harmful to women's psychological health.").

52. *See* Fischer et al., *supra* note 51, at 2121–22 ("[T]he prevailing stereotype about domestic violence is that assaults are 'physical, frequent, and life threatening.' Yet, the reality of battered women's lives does not conform solely to this image. Advocates for battered women have long noted that financial abuse and property abuse are forms of emotional abuse inflicted upon women . . . in an effort to gain control over them or keep them in a state of fear.") (quoting LIZ KELLY, SURVIVING SEXUAL VIOLENCE 150 (1988)).

53. *See* Follingstad et al., *supra* note 51, at 109–10 (discussing the extent to which emotional abuse may be present but unreported and its relationship to physical abuse).

54. *See* PAUL C. FRIDAY ET AL., EVALUATING THE IMPACT OF A SPECIALIZED DOMESTIC VIOLENCE POLICE UNIT (2006), https://www.ncjrs.gov/pdffiles1/nij/grants/215916.pdf. This study noted that the historical treatment of women "has often been superficial, inefficient and left victims confused and discouraged." *Id.* at 10. Further, "crimes of violence among intimates, more than other forms of violent instances, are under-reported and underestimated . . . . [A]lmost half of all incidents of violence against women by intimates are never reported to the police." *Id.* at 9. The study also remarks that other entities claim that non-physical forms of abuse may never be reported, putting the number down to only one in 100. *Id.* In any event, "woman-battering incidents constitute the largest category of calls screened by police officers each year." *Id.* According to the authors, "family disturbance calls account for between 15 and 40 percent of all calls received by police departments nationwide." *Id.* (citing JAMES E. HENDRICKS & CINDY S. HENDRICKS, CRISIS INTERVENTION IN CRIMINAL JUSTICE AND SOCIAL SERVICE (1991)).

55. SCHNEIDER ET AL., *supra* note 43, at 43.

56. Even courts sympathetic to domestic violence tend to center the discussion on physical abuse. *See* United States v. Castleman, 572 U.S. 157, 161–63 (2014).

57. SCHNEIDER ET AL., *supra* note 43, at 43.

2. Lax Enforcement

Tribal governments' refusal to prosecute these crimes—otherwise prosecutable but for this difficulty of proving a domestic violence component—echoes earlier refusals to arrest or prosecute abusers despite clear evidence that they committed an abusive act. For example, police would encourage the abuser to calm down by taking a walk around the block or blame the victim for provoking his anger.[58] In the 1970s, the

58. Reva Siegel describes unsettling tales of the police's historical abandonment of women in need. She writes:

> . . . Rather than punish those who assaulted their partners, the judges and social workers urged couples to reconcile, providing informal or formal counseling designed to preserve the relationship whenever possible. Battered wives were discouraged from filing criminal charges against their husbands, urged to accept responsibility for their role in provoking the violence, and encouraged to remain in the relationship and rebuild it rather than attempt to separate or divorce. The police adjusted their arrest procedures to accord with the new philosophy of the domestic relations courts, channeling family violence cases out of the criminal justice system and into counseling whenever possible. In this institutional framework, physical assault was not viewed as criminal conduct; instead it was viewed as an expression of emotions that needed to be adjusted and rechanneled into marriage.
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> The criminal justice system regulated marital violence in this "therapeutic" framework for much of the twentieth century. There was no formal immunity rule as in tort law, but the criminal justice system developed a set of formal procedures for handling marital violence—which it justified in the discourse of affective privacy—that provided informal immunity for the conduct in many circumstances. In the 1960s, for example, the training bulletin of the International Association of Chiefs of Police offered the following instructions for handling "family disturbances":
>
> > For the most part these disputes are personal matters requiring no direct police action. However, an inquiry into the facts must be made to satisfy the originating complaint . . . . Once inside the home, the officer's sole purpose is to *preserve the peace . . . [a]ttempt to soothe feelings, pacify parties* . . . [s]uggest parties refer their problem to a church or a community agency . . . . In dealing with family disputes *the power of arrest should be exercised as a last resort. The officer should never create a police problem when there is only a family problem existing*.
>
> Until the last decade, this set of instructions was quite typical of police procedure in American cities.

Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2170–71 (1996) (quoting INT'L ASS'N OF POLICE CHIEFS, TRAINING KEY NO. 16, HANDLING DISTURBANCE CALLS 94–95 (1968-69)) (alterations in original) (footnotes deleted).

failure of police to arrest batterers was challenged in the courts, "rais[ing] the dramatic notion that domestic violence was criminal, sanctionable activity that was a harm against the 'public,' the state, not just an individual woman."[59] SDVCJ now unintentionally rolls back this progress by narrowing jurisdiction to only the most "serious" forms of violence, which in effect tells a victim that the law will only intervene to protect her when it violates some indignity that the whole community would identify as too far—a "rule of thumb"[60] of sorts. Many aspects of domestic violence that fall short of physical assaults affect tribal communities, but SDVCJ ignores this effect and informs a victim that she cannot take charge of her own safety except in very limited, public-adjacent circumstances; such situations are those that members of the relevant community would all agree constitute "real" violence. We have heard this before, that power and control over a woman is a "private" affair—one for which the courthouse doors are rarely opened.[61] While there is no doubt modern tribal prosecutors do not believe this assertion personally or professionally, SDVCJ ties their hands, in effect making power and control tolerable so long as it stays within the four walls of a home. And given lax enforcement at the federal level of even serious violence against women, Congress's delegation of enforcement of a crime they themselves were unwilling to take seriously has unwittingly reinforced the idea that the tribe alone must reckon with this problem.

The domestic violence movement as a whole is combatting this effect by encouraging societal and judicial recognition of domestic violence as an interpersonal dynamic shaped by one person's power and control over the other, rather than as a series of discrete abusive incidents.[62] But even after

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59. SCHNEIDER ET AL., *supra* note 43, at 22.

60. The "rule of thumb" has taken on a meaning in some circles, similar to the holding of *Bradley v. State*, 1 Miss. (1 Walker) 158 (1824), that a man might beat his wife with a tool no wider than a thumb. The origin of the phrase may lie elsewhere, *see* PATRICIA T. O'CONNER & STEWART KELLERMAN, ORIGINS OF THE SPECIOUS: MYTHS AND MISCONCEPTIONS OF THE ENGLISH LANGUAGE 123–24 (2009), but the concept endures.

61. *See generally* Siegel, *supra* note 58, at 2150–61 (discussing the role of "privacy" in marriage as a barrier to treating domestic violence seriously).

62. Emily J. Sack, United States v. Castleman*: The Meaning of Domestic Violence*, 20 ROGER WILLIAMS U. L. REV. 128 (2015). Sack argues that the Court "expressed a refined and accurate understanding of the concept of domestic violence," *id.* at 141, by centering "power and control" over a victim as the lynchpin of domestic violence relationships, *id.* at 142. It is this accuracy that creates some anxiety about the fate of SDVCJ: Power and control is not a legal definition, unlike the more concrete "offensive touching", and this abstractness may be beyond the willingness or ability of juries to understand without a physical assault. As a

Castleman, the broadest statutory language must be tethered to public perceptions of domestic violence, which do not track those of scholars and advocates.[63] Because SDVCJ is attached only to domestic violence crimes, the Department of Justice advised tribes to prosecute crimes only when they came into the ambit of the "common understanding of the term 'violence' in ordinary language" and fell under conduct described in the term "crime of violence" as codified in 18 U.S.C. § 16(a), a definitional section of the general provisions chapter of the federal criminal code.[64] For better or worse, the state of confusion around precisely what conduct falls under this provision has only increased after the Supreme Court recently ruled that the residual clause of § 16(b)[65]—a closely related definitional provision that could be relevant in a tribal prosecution—was "unconstitutionally vague."[66] Nonetheless consistent with *Castleman*, there appears to be de facto built-in requirements of "force" and "injury" that make SDVCJ only as good as unenlightened arbiters of the law would recognize. In other words, public perception of "violence" is narrow in the same way Justice Scalia argued in his *Castleman* concurrence: it only extends to physical assaults involving "force" and "injury"—components that victims tend to say is not nearly as harmful as non-physical forms of violence such as humiliation and domination.[67]

This bare fact recalls mid-century notions of domestic abuse as having a qualitatively more private character than what we know is a matter of public concern today: that "battering ha[s] to be declared socially, not privately, caused."[68] The reticence of government to extend their power beyond a narrow, physical assault-based view of domestic violence means

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result, tribes exercising SDVCJ must be careful not to extend the carefully crafted holding of *Castleman* too far. *See also supra* text accompanying notes 31–45 (discussing the Court's focus, necessary by the facts of the case but worrisome for broader implications, on physical touching).

63. *See* Sack, *supra* note 62.

64. NCAI REPORT, *supra* note 2, at 28; *see also* 18 U.S.C. § 16(a) ("The term 'crime of violence' means . . . (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another . . . .").

65. 18 U.S.C. § 16(b) ("The term 'crime of violence' means . . . (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.").

66. Sessions v. Dimaya, 138 S. Ct. 1204, 1223, (2018) (5-4 decision) (quoting Johnson v. United States, 576 U.S. 591, 597 (2015)).

67. *See supra* note 51; *see also* United States v. Castleman, 572 U.S. 157, 173–83 (2014) (Scalia, J., concurring).

68. SCHECHTER, *supra* note 40, at 43; *see also id.* at 29–81 (discussing the origins of the domestic violence movement and its move from private life to public discourse).

victims will be frozen in time until law enforcement can convince fact-finders of the broader potential implication of *Castleman*—that domestic violence encompasses far more than what the neighbors think it does. This consequence has not yet been explicitly stated by the Court. By de facto authorizing only the prosecution of physical assaults, SDVCJ returns the prosecution of domestic violence to the pre-modern era, when no other kinds of crimes were even recognized as domestic violence in the first place. The effect is that SDVCJ leaves large categories of domestic violence entirely excluded from the public definition of this phenomenon, relegating acts within those categories to a state of private affairs unworthy of public sanction.

3. Auxiliary Crimes

Third, SDVCJ will not cover crimes that are offshoots of domestic violence, even if they are not crimes of domestic violence themselves. This phenomenon appears in two varieties. First, a non-Indian abuser may involve the Indian victim in a series of non-domestic-violence crimes, such as forcing his spouse to steal or to use drugs. The non-Indian abuser cannot be held to account in tribal court for the underlying larceny and drug offenses.[69] Meanwhile, prosecutors may easily charge the victim for these crimes, as there are no barriers to prosecuting Indians in tribal court,[70] and the victim's defenses to these charges (duress, for example) may be less probative to a jury if she cannot point to a parallel charge or conviction against her abuser. Assuming evidence of her abuser's charges[71] is admissible in her own trial in tribal court, it would bear directly on her mental state, which is generally deemed exculpatory if duress is truly present.[72] The absence of a similar prosecution against the abuser, solely for

69. *See* Oliphant v. Suquamish Tribe, 435 U.S. 191, 212 (1978); *see also supra* text accompanying notes 21–23.

70. On tribal lands, tribal court jurisdiction is exclusive over Indians who commit minor crimes against other Indians, and concurrent with the federal government over Indians who commit major crimes or crimes against non-Indians. *See* PEVAR, *supra* note 1, at 128; ANDERSON ET AL., *supra* note 10, at 307–13.

71. It is not only convictions that may be admitted in some tribal courts. Each tribe defines the scope of admissible evidence, and some tribes may not have a strong presumption of innocence until proven guilty. *See* PEVAR, *supra* note 1, at 99 (remarking that tribal governments retain general powers to establish criminal systems).

72. *See, e.g.*, United States v. Hearst, 563 F.2d 1331, 1335 n.1 (9th Cir. 1977) ("A defendant who, without opportunity to escape, has a well grounded fear of imminent death or serious injury unless [s]he complies with [her] captor's wrongful commands entertains a

jurisdictional reasons, would force the Indian victim to testify in her own defense or rely on other less probative evidence of her mental state. The fact that her abuser has not faced any reprimand for his abuse also dilutes the quality of the victim's own testimony, as demonstrated in cases like *Dixon v. United States*;[73] here, judicial reluctance to admit expert testimony on battered women's syndrome (BWS) likely played a role in causing her duress defense to be unsuccessful.[74] Even as expert testimony on battering has become admissible in all fifty states, the admissibility is only probative if the jury has other evidence that battering actually occurred. Because non-Indians are not prosecuted for such acts in the context of a drug abuse incident, for example, the misalignment may cause juries to view BWS testimony with suspicion.

In a second variety, a non-Indian abuser may engage in domestic violence without involving the victim per se—something even the favorable dicta of *Castleman* would not plausibly entertain.[75] Witness tampering, juror intimidation, bribing government officials, assaulting tribal officers, and perjury are all crimes that denigrate the judicial process by which abusers may be held to account and victims may be protected. But these kinds of crimes are "auxiliary" in the sense that they are not usually considered crimes of domestic violence, even though they arise only because the perpetrator is seeking to further entrench his power and control over the victim. While states and local governments would ordinarily have no barriers to attaching such crimes onto other charges or charging them independently, these crimes cannot be prosecuted under SDVCJ in any instance.[76]

In one situation, a non-Indian man was haled into court for a domestic violence charge, but walked out of the courtroom in the middle of the proceeding, constituting a brazen offense of contempt of court.[77] Acts such

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mental state recognized as exculpatory with respect to most crimes. Compulsion or duress producing this state of mind is a defense to most criminal accusations.").

73. 548 U.S. 1 (2006).

74. The defendant was tried on multiple firearms charges after providing false information to dealers at a gun show. The trial court refused to admit evidence of BWS, and the appellate court affirmed. *Id.* at 3–4.

75. Again, scholars and advocates may differ from the judiciary on what constitutes domestic violence. Using others to achieve abusive ends is a prominent feature of the power and control wheel. *See* Power & Control Wheel, *supra* note 45 (providing examples of how an abuser might use the judicial systems against a victim or use children as pawns).

76. *But see supra* note 26 (discussing a House bill that would allow prosecutions for obstruction of justice).

77. NCAI REPORT, *supra* note 2, at 27.

as this impugn the integrity of the proceeding—a hallmark of the branch of government with the power of neither purse nor sword—and diminish the public *perception* of justice essential to the rule of law. The likelihood of women reporting, testifying, and cooperating is diminished by such extra-legal acts because of the women's relationship with their abusers[78] and also by their satisfaction with the justice system and the perception of fairness within it.[79]

In some sense, then, SDVCJ misses the forest for the trees; by granting jurisdiction over *crimes of domestic violence*, it ignores *incidents of domestic violence that may also be crimes*. This failure is just as harmful to the protection of the victim and to the sense of justice in tribal communities as is allowing these forms of abuse to continue. Tribes recognize this harmful effect, remarking that prosecutors are left "unable to hold offenders accountable for criminal conduct not covered by SDVCJ," allowing offenders to escape with a criminal record that "may not accurately reflect the magnitude of the crimes committed."[80] There is also a concern that the grant of jurisdiction to tribes over the domestic violence charge would have a mitigating effect: the federal government may simply decline to prosecute either crime when the tribe charged one crime.[81] But empirical evidence on this point is limited because SDVCJ is just seven years old and its future hangs in doubt due to an ongoing funding lapse.

B. Prosecution Strategy

Because SDVCJ limits the types of crimes that may be charged, prosecutors also have limited tools to contain domestic violence. In

78. *See* Judith S. Kaye & Susan K. Knipps, *Judicial Responses to Domestic Violence: The Case for a Problem Solving Approach*, 27 W. ST. U. L. REV. 1, 4 (2000) ("Unlike victims of random attacks, battered women often have compelling reasons—like fear, economic dependence or affection—to feel ambivalent about cooperating with the legal process. In a system that generally assumes a victim's willingness to cooperate, this ambivalence is an anomaly that frequently results in the dismissal of the case.").

79. *See Victim Satisfaction with the Criminal Justice System*, NAT'L INST. JUST. (Jan. 1, 2006), https://nij.ojp.gov/topics/articles/victim-satisfaction-criminal-justice-system ("[V]ictim satisfaction in domestic violence cases appeared to hinge on the extent to which the victim felt control over ending the violence in the incident, control over her offender's future conduct—and even over the criminal justice system. When the victim had a low sense of control, satisfaction with the system decreased significantly."). Many women felt that "the actions of the police negatively affected their safety" and "wanted the prosecutor to make charges against the offender more severe." *Id.*

80. NCAI REPORT, *supra* note 2, at 22.

81. *See also infra* note 85 (describing federal abstention practices when the tribe has already punished a member for an infraction).

ordinary state prosecutions, there are often multiple crimes a prosecutor may charge with respect to a single incident. But during the plea negotiations process, prosecutors often drop, reduce, or never formally file charges in order to secure a guilty plea from the defendant and save the tribe's resources. In tribal prosecutions, by contrast, prosecutors cannot charge non-Indian defendants with disorderly conduct, harassment, public drunkenness, or other "minor" crimes that might be likely to disappear in a typical plea negotiation.[82]

1. No Incentive for Defendant to Plea Bargain

There are two primary effects of this impairment on prosecutorial strategy. First, unless the incident is truly confined to a physical assault or other uncontestable incident of "domestic violence" and nothing more—rare, by the lights of prosecutors[83]—then the defendant has little incentive to cooperate. While federal prosecutors may take up non-domestic violence charges, this possibility is true regardless of whether the defendant is Indian or non-Indian and regardless of whether the crime is one of domestic violence.[84] Moreover, federal prosecutors would have less of an incentive to take up the case for the "additional" charges if tribes proceeded toward prosecuting the domestic violence crime already.[85] Because the defendant

82. *See* Oliphant v. Suquamish Tribe, 435 U.S. 191, 212 (1978).

83. *See* NAT'L DIST. ATT'YS ASS'N, WOMEN PROSECUTORS SECTION, NATIONAL DOMESTIC VIOLENCE PROSECUTION BEST PRACTICES GUIDE 24 (2017), https://ndaa.org/wp-content/uploads/NDAA-DV-White-Paper-FINAL-revised-July-17-2017-1.pdf (noting that other charges "commonly supported by the evidence include assault, battery, burglary, robbery, theft, false imprisonment, carjacking, mayhem, stalking, criminal threats, kidnapping, and child endangerment").

84. At this point in the doctrine, both tribes and the federal government have independent sovereign interests and therefore there is no double jeopardy problem. *See* United States v. Wheeler, 435 U.S. 313, 329–30 (1978). This was one major consideration in the overruling of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). *See* United States v. Lara, 541 U.S. 193, 205–07 (2004). Congress carefully crafted language to avoid any double jeopardy implications by reaffirming the "inherent" power of tribes to prosecute non-Indians but limiting it to domestic violence cases. *See* 25 U.S.C. § 1304(b)(1).

85. The General Crimes Act actually contains a carveout, disclaiming federal jurisdiction over Indians who have been punished by the tribe already for the same crime. *See* 18 U.S.C. § 1152. This means that although there is no double jeopardy implication, *see Wheeler*, 435 U.S. 313, there may not be a crime to charge on the federal level if it is against an Indian. Federal prosecutors would therefore almost certainly decline to prosecute an Indian where the tribe has been involved in prosecuting "minor" crimes, and therefore may have a presumption against any prosecution at all. *See* DOJ DECLINATION STATISTICS, *supra* note 18, at 10 (noting that at least 10% of declinations occurred because another authority planned to prosecute); PEVAR, *supra* note 1, at 131–34.

has little incentive to cooperate, he may be more likely to take the case to trial, representing higher costs for the tribe. A trial may also provide a relatively high chance of acquittal, since a non-Indian is guaranteed a jury that contains a cross-section of non-Indians.[86] This guarantee is *not* required as a matter of federal Indian law,[87] nor is it typically required as a matter of tribal law; rather, it is specifically imposed by SDVCJ.[88]

As a result, a non-Indian defendant has all of the bargaining power. Prosecutors have virtually no chips to give away. They could refer the case to the federal government, but this is known to have little effect, since federal declination rates were extremely high prior to the enactment of SDVCJ.[89] They could also simply charge the highest domestic violence crime available and stick to it, but this means that the starting point in plea negotiations is the lowest it can go. These impediments constitute a substantial intrusion into prosecutorial discretion, a core executive function. They also threaten overall conviction rates, since the highest charge available is also often the most difficult to prove beyond a reasonable doubt. The limitation on charging decisions has harmful ripple effects on other aspects of prosecution, including the assurance of particular witnesses' presence, resource constraints in prosecuting crimes in rural areas, and increased detention costs to the tribe.

Again, the harm that this dynamic recalls is the power and control the abuser persistently holds over the judicial system. In such situations, the victim is relegated to a state of quasi-coverture: she has de jure legal existence separate from her husband, but de facto cannot petition her government for protection unless and until he physically incapacitates her. The lower quantity of crimes chargeable, and lower rates of convictions on those crimes, effectively puts the state's imprimatur on non-recognition of the societal factors leading to domestic violence, such as the culture of fear maintained through property damage, threats, substance abuse, and

86. It is no surprise that juries composed of people of the defendant's race are more likely to acquit. *Cf.* Strauder v. West Virginia, 100 U.S. 303, 304 (1879) (holding that the jury venire in a black man's trial must enjoy a cross-section of the community, including other black men, and discussing approvingly the defendant's argument that "the probabilities of a denial of them to him as such citizen on every trial which might take place on the indictment in the courts of the State were much more enhanced than if he was a white man").

87. *See* Talton v. Mayes, 163 U.S. 376 (1896) (holding that protections of the U.S. Constitution do not apply to tribal court proceedings). *But see* 25 U.S.C. § 1302 (providing the extension of most constitutional protections by statute).

88. 25 U.S.C. § 1304(d)(3)(B).

89. *See* DOJ DECLINATION STATISTICS, *supra* note 18, at 24 (noting that half of all crimes referred to federal prosecutors were declined).

arbitrary coercive rules. This bargaining power differential reflects abusers' intimidation tactics[90] and enhances their perception that they have done little wrong.[91]

2. Evidence and Trial Strategy

The second effect of this limited prosecutorial capability is on evidence and trial strategy. Absent the ability to charge other crimes, the domestic violence charge will be the focus of any trial. In turn, the victim's testimony will be indispensable, creating a host of problems for burdens of proof and witness credibility. As cases like *State v. Borelli*[92] and *People v. Santiago*[93] demonstrate, victims of domestic violence often recant their testimony or act as unreliable narrators as a result of the psychological and emotional abuse at the hands of their abusers.[94] And as many Confrontation Clause cases present, victims may not even testify at all—whether for fear of reprisal, a desire to stay out of re-traumatizing judicial process, or because they retain an emotional attachment to the abuser.[95] In some circumstances, a defendant acts to keep victims off the stand without triggering the forfeiture-by-wrongdoing doctrine, allowing critical testimonial statements to remain hidden from the jury.[96]

The inability to prosecute certain crimes as a result of SDVCJ mirrors the harms present in the Confrontation Clause cases.[97] As Cheryl Hanna

90. *See* Power & Control Wheel, *supra* note 45.

91. *See* DAVID ADAMS, WHY DO THEY KILL? 26–32 (2007) (discussing batterer profiles as nearly invariably consisting of "jealousy and possessiveness," and often consisting of minimization of their role in violence or refusal to believe their "intimidating behaviors" are violent).

92. 629 A.2d 1105 (Conn. 1993) (discussing the evidentiary difficulties when the victim recanted her testimony on the stand).

93. No. 2725–02, 2003 WL 21507176 (N.Y. Sup. Ct. Apr. 7, 2003) (noting that the victim declined to testify against the defendant or otherwise cooperate with the prosecution in part because the defendant had intimidated her from his jail cell).

94. *See also* People v. Brown, 117 Cal. Rptr. 2d 738 (Cal. App. Dep't Super. Ct. 2001) (discussing a domestic violence victim's inconsistent statements between the incident and the time of trial).

95. See the approach to the admissibility of hearsay evidence that the Court took with respect to the diverging results in the domestic violence scenarios in *Davis v. Washington*, 547 U.S. 813 (2006) (consolidating Davis v. Washington, 64 P.3d 661 (Wash. Ct. App. 2003) and Hammon v. Indiana, 809 N.E.2d 945 (Ind. Ct. App. 2004)).

96. *See, e.g.*, Giles v. California, 554 U.S. 353 (2008).

97. The doctrine of the Confrontation Clause has been in development since the watershed case of *Crawford v. Washington*, 541 U.S. 36 (2004), in which the Court held that a defendant has a constitutional right to confront witnesses against him when they make

recounts, victim participation in trials against abusers is notoriously difficult, even when prosecutorial policies mandate it.[98] While certainly not a bad thing in the abstract, a relatively pro-defendant understanding of the Confrontation Clause has deleterious consequences on domestic violence victims; here, it is quite simple for abusers to eliminate a crucial piece of evidence.

Hanna argues for a shift away from victim testimony to other kinds of evidence.[99] While this argument may be persuasive in theory, the reality for tribes is different. On Indian reservations, which are predominantly rural and overwhelmingly poor, there are fewer witnesses to call, fewer police to investigate and collect physical evidence, fewer techniques to evaluate such physical evidence, fewer resources to pay experts to testify about these techniques, and so on.[100] Moreover, the harm in rural areas, including Indian reservations, may be more severe just because the areas are rural.[101] A victim's testimony therefore means more on the reservation than it does off the reservation; a system like SDVCJ that unwittingly places prime importance on the quality of the victim's testimony risks lower prosecution of domestic violence all around. The federal government has bowed out in

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testimonial statements. This raised important questions about whether domestic violence victims had to confront their abusers in court. *See* Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747 (2005). The Court confirmed that *Crawford*'s constitutional protection also extended to abusers, even when it meant that the victims would not testify. *See Davis*, 547 U.S. at 832–33 ("This particular type of crime [domestic violence] is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. When this occurs, the Confrontation Clause gives the criminal a windfall. We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free.").

98. *See* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996).

99. *Id.* at 1900 ("[P]rosecutors [who] rely only on victim testimony to obtain convictions . . . are not doing their jobs, and may in fact be breaching their ethical obligations.").

100. *See, e.g.*, John Koppisch, *Why Are Indian Reservations So Poor? A Look at the Bottom 1%*, FORBES (Dec. 13, 2011), https://www.forbes.com/sites/johnkoppisch/2011/12/13/why-are-indian-reservations-so-poor-a-look-at-the-bottom-1/?sh=12e9ba1d3c07 (discussing some of the challenges that face reservations, including government interventions that inhibited property-based prosperity, undeveloped markets and legal systems, unreliable business climates, and dependency).

101. *See* Lisa R. Pruitt, *Place Matters: Domestic Violence and Rural Difference*, 23 WIS. J. L. GENDER & SOC'Y 347, 349–50 (2008) ("Place is . . . a very strong predictor of intimate partner homicide . . . . [R]ural perpetrators of intimate abuse were nearly twice as likely as their urban counterparts to inflict severe physical injuries. They were also more likely to use a weapon during their assaults.").

deference to tribal sovereignty, but the Confrontation Clause and hearsay rules remain the same, and life on reservations presents unique challenges to prosecution of domestic violence. The legal, financial, and logistical constraints on amassing proper evidence therefore make the tribes unable to fill the vacuum, and the perverse effect of SDVCJ is that it may actually *increase* the impunity of abusers.

C. Investigation Constraints

A third key constraint on the justice system as a result of SDVCJ is the tribal police's ability to investigate other crimes in the context of the domestic violence incident. As opposed to the prosecutors' role in obtaining convictions for crimes, investigation of crimes comes early in the process, possibly even before prosecutors know that a potential defendant is Indian or non-Indian. With drug crimes, which heavily correlate independently with both Indian reservations[102] and domestic abuse,[103] a tribal officer may be precluded from arresting a person, searching a home, or mitigating a threat due to continued drug use. They will be deterred from consuming resources on even an easily provable crime if they cannot identify the defendant's race up-front.

For example, on the Sisseton-Wahpeton Oyate Reservation in South Dakota, tribal police discovered methamphetamines on the premises after a domestic violence call but were unable to obtain a search warrant from a tribal court judge to perform a urinalysis.[104] The fact pattern described does not mention the nature of the relationship between the drug possessor and the victim,[105] but one could easily imagine situations in which justice to the victim is denied. It is possible, and even likely, that the use of methamphetamines was a factor in causing or exacerbating an assault on the victim, but because jurisdiction is not available in such circumstances,

102. *See* SUBST. ABUSE & MENTAL HEALTH SERVS. ADMIN., RESULTS FROM THE 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 26, 88 (2014), https://www.samhsa.gov/data/sites/default/files/NSDUHresultsPDFWHTML2013/Web/NSDUHresults2013.pdf (noting that Indians had higher rates of drug use than any other racial or ethnic category and the highest rate of drug and alcohol dependence at 14.9% of the population).

103. *See* ADAMS, *supra* note 91, at 24 (collecting research showing that 40% to 60% of abusive men suffer from alcoholism and 40% from drug abuse, and 31% had criminal involvement due to their drinking, such as drunk driving or fighting). Preliminary data showed that 51% of SDVCJ cases involved drug or alcohol use. NCAI REPORT, *supra* note 2, at 8.

104. NCAI REPORT, *supra* note 2, at 26.

105. *See id.*

the involvement of methamphetamines is essentially ignored. For context, the federal government has a peculiar disposition toward prosecuting drug crimes in Indian Country and largely ignoring violent crimes against women.[106] When advocates speak of domestic violence as operating within a broader context, they mean to include potential factors like drug use and concurrent crimes as contributing to the perpetuation of domestic violence.[107] But because of SDVCJ, tribal officers and courts must shut their eyes to such factors. Whether this willful blindness has a negative effect on the overall ability of tribes to achieve their desired criminal justice objectives through traditional prosecutorial decision-making remains to be seen.

In addition to investigators ignoring the attendant circumstances, so to speak, one can also imagine an opportunity for willful obstruction that the tribe cannot punish. In the Sisseton-Wahpeton Oyate case, for instance, suppose that the victim answered the door with no ongoing domestic violence emergency, but consented to a search of her home because she said that her non-Indian co-occupant was abusing methamphetamines on the premises.[108] The rule stated in *Georgia v. Randolph*[109] is that a present co-occupant may refuse to permit entry without a warrant. The non-Indian co-occupant could refuse to allow entry, and, since the crime to be investigated would be unrelated to domestic violence, he would evade tribal jurisdiction for drug charges. By the time a federal court granted a search warrant on referral to federal prosecutors, evidence could be flushed or

106. *See* DOJ DECLINATION STATISTICS, *supra* note 18, at 9, 24. Of all crimes referred to federal prosecutors in a period prior to SDVCJ, homicide, assault, and sexual abuse and related offenses comprised at least 61% of referrals. *Id.* at 9. Drug offenses comprised 7% of referrals. *Id.* At the same time, federal prosecutors declined to charge in 3378 out of 6142 referrals for homicide, assault, and sexual abuse and related offenses, for a combined rate of 55%. *Id.* at 24. Meanwhile, the declination rate for drug crimes was 18%. *Id.*

107. *See* ADAMS, *supra* note 91, at 24 (discussing the role of alcoholism and drug abuse in battering).

108. The principal protections of the Fourth Amendment for Indian defendants are codified in a statute, the Tribal Law and Order Act (TLOA), not the Constitution. *See* 25 U.S.C. § 1302(a)(2) ("No Indian tribe in exercising powers of self-government shall . . . violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized."). Tribal courts operating under TLOA and interpreting these statutes do not have to follow U.S. Supreme Court precedent. As a result, the rule in *Georgia v. Randolph*, 547 U.S. 103 (2006), may or may not apply to Indian defendants, depending on the law of the tribe.

109. 547 U.S. 103 (2006).

destroyed,[110] or the prosecution would have to be bifurcated between the tribal court and the federal court, which probably would result in a federal declination.[111] This fact would make the incident of violence "less severe" in the eyes of the law because it appears as a simple, isolated incident of assault, with no corresponding exacerbating circumstance like substance abuse.

This characterization is actively harmful. As scholars note, "the legal system has historically denied or minimized abuse in intimate relationships, and focused on single incidents of violence rather than grappling with the broader context in which these incidents occur."[112] Much like older court cases that portray domestic violence as "invisible or distorted,"[113] SDVCJ forces tribes to grapple with domestic violence in a superficial way. Tribal officers can stop a single incident of assault, but the factors that allow domestic violence to continue will not be abated without considering the broader context of the role of substance abuse in domestic violence. Notice, too, how *Randolph*'s nominally stronger civil libertarian rule—that a present co-occupant may prevent an otherwise lawful search—serves to prioritize the "private" aspects of a relationship over the "public" nature of harm to community members; this prioritization has historically harmed victims.[114]

II. Limitations Based on the Identity of the Perpetrator

Another restriction on SDVCJ is the identity of the perpetrator. If the abuser is Indian, there are few restrictions on the tribe's ability to prosecute. And while SDVCJ specifically grants jurisdiction over non-Indian abusers, an abuser may be able to evade jurisdiction by manipulating the elements of the statute or by garnering maximum advantage due solely to his race as a non-Indian.

A. Manipulable Elements of Jurisdiction

The statute conferring SDVCJ has a few requirements that must be met to establish tribal jurisdiction over a non-Indian. At the outset, the non-

110. *See id.* at 138 (Roberts, C.J., dissenting) (expressing concern about the destruction of evidence in such situations). *But see id.* at 116 n.6 (majority opinion) (responding that the "exigent circumstances" doctrine would solve such cases).

111. *See supra* note 85.

112. SCHNEIDER ET AL., *supra* note 43, at 202.

113. *Id.*

114. *See supra* Section I.A.2.

Indian must be an intimate partner of some kind to the victim.[115] As discussed in the Introduction, the statute is broad enough to cover most, if not all, kinds of intimate partners; in that respect, the statute is not deficient in my view.

1. Territory

One manipulable element of SDVCJ is that the act of domestic violence must occur on land over which the prosecuting tribe has jurisdiction. As each tribe is sovereign within its own territory, determining whether territory-based tribal jurisdiction exists can be relatively simple in large, mostly contiguous land areas such as Navajo Country in New Mexico. But in most circumstances, deciding whether tribal jurisdiction exists can be quite thorny.

In 1887, during a period of immense hostility towards Indians in the United States, Congress passed the General Allotment Act, which allowed non-Indians to purchase "unused" parcels of land, even within tribal territory.[116] Over the years, Congress and the president have terminated tribal recognition, diminished reservation area, or disestablished a reservation and removed Indians to another place (often Oklahoma, which used to be called "Indian Territory").[117] As a result, Indians have control over far less territory than they once did. To make matters worse, the Supreme Court held that even if tribes repurchase land within the four corners of the reservation from non-Indians who owned it in fee simple, due to the long passage of time, such land does not automatically become Indian Country.[118]

Despite a broad definition of "Indian country" in the statute,[119] these legislative, executive, and judicial acts of oppression on tribes have caused

115. 25 U.S.C. § 1304(a)(2) (providing that the non-Indian must be a "current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family- violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs"); *id.* § 1304(a)(1) (covering dating violence).

116. *See* PEVAR, *supra* note 1, at 8–10.

117. *Id.* at 75–76 (discussing various mechanisms of federal power over Indian land); *id.* at 264–67 (discussing the unique status of Oklahoma).

118. *See* City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005).

119. 18 U.S.C. § 1151(a)–(c) ("[T]he term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the

Indian Country to be marked by odd boundaries, significantly varying in size, and "checkerboarded"[120] within such territories. While all lands within the boundaries of the reservation will be considered "Indian country,"[121] some checkerboarding exists outside of reservations, such that individual Indians may own property in fee simple that is Indian Country but which is surrounded on all sides by territory that is non-Indian.

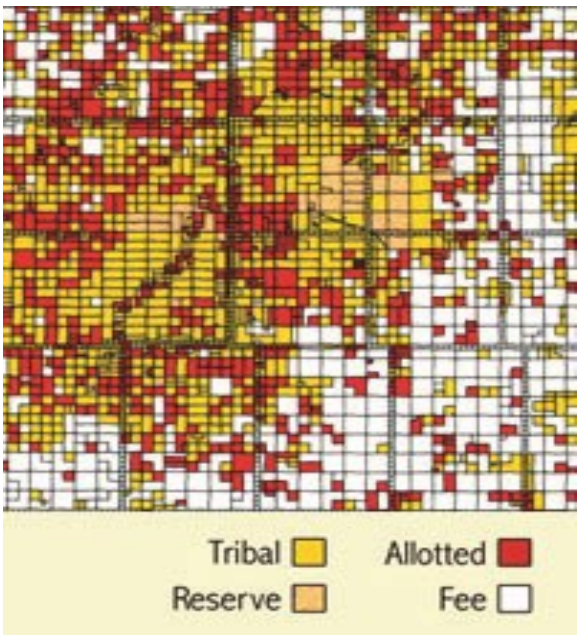

Figure 1: Example of Checkerboarding on the Rosebud Reservation[122]

Because reservations vary significantly in size and may border non-Indian land or Indian Country over which a tribe has no jurisdiction, a defendant may be able to evade tribal prosecution simply by being a good

borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.").

120. PEVAR, *supra* note 1, at 98–99.

121. 18 U.S.C. § 1151(a).

122. *Land Tenure Issues*, INDIAN LAND TENURE FOUND., https://iltf.org/land-issues/issues (last visited Oct. 4, 2020).

traveler. Some reservations are only a few miles wide, making flight across boundaries, or asserting a defense to jurisdiction based on sowing doubt about where precisely the activity occurred, a simple matter.[123]

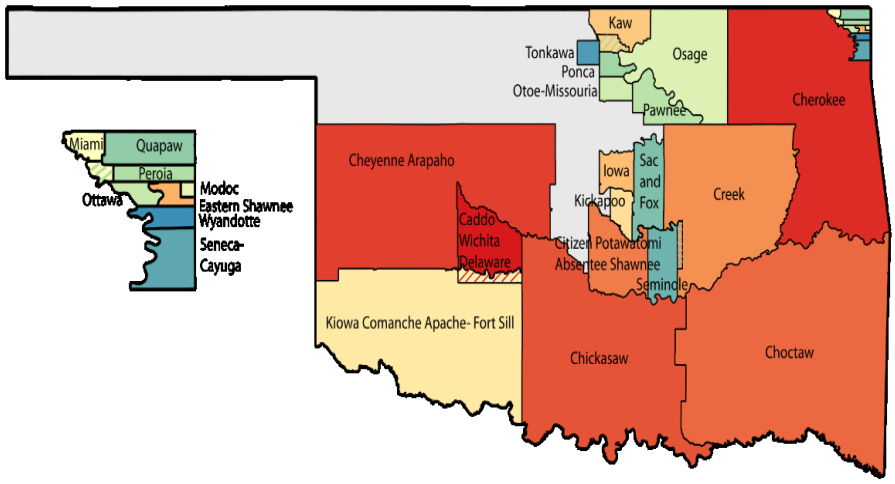

Figure 2: Reservation Boundaries in Oklahoma[124]

There are a few harms within the domestic violence movement that this patchwork evokes. First, SDVCJ's territory-based jurisdictional limitation again ignores that domestic violence is not a series of discrete acts but a pattern of power and control. A non-Indian who strikes his Indian girlfriend commits an act of domestic violence that the victim's tribe has a sovereign interest in deterring. It is not less of an offense against the tribe just because it occurs a mile or two outside of Indian Country. Restrictions on jurisdiction that may have a rational basis in other areas of the law can seem arbitrary in the domestic violence context.[125] For example, a victim might

123. For a list of reservations by land area, see *List of Indian Reservations in the United States*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_Indian_reservations_in_the_United_States [https://perma.cc/CB2H-8KZS] (Nov. 7, 2020, 00:13 UTC) (showing 186 tribal reservation areas with ten square miles or less).

124. *Oklahoma Tribal Statistical Area*, WIKIPEDIA, https://en.wikipedia.org/wiki/Oklahoma_Tribal_Statistical_Area [https://perma.cc/J524-AJNQ] (Aug. 29, 2020, 15:38 UTC).

125. *See, e.g.*, Kaye & Knipps, *supra* note 78 ("The basic outlines of our criminal justice system—including what we expect courts to do and how we expect them to do it—were

not be entitled to a protective order if an abuser had never stepped foot in the state. The domestic violence movement has worked to change this status quo,[126] but SDVCJ has the effect of restoring this antiquated idea that harm only occurs in discrete places. Because of a focus on particular incidents of violence, only one tribe may be able to prosecute for each incident, resulting in multiple, non-joinable trials at great expense to each individual tribe. As detailed above, this compounds burdens on the victim to cooperate with law enforcement and testify as if it is her responsibility, rather than the state's, to protect herself. A common public judgment about victims is something along the lines of "why do these women stay?"[127] But the checkerboard may make it literally impossible to leave or to secure justice against an abuser even with help from local authorities.

A second harm from this territorial patchwork is the historical abandonment of Indian communities nationwide. Disclaiming responsibility for non-Indian crimes against Indian women due to jurisdictional hurdles is reminiscent of governments' total abandonment of Indian communities until the harm became egregious. In *United States v. Deegan*, the dissenting judge on the Eighth Circuit added an appendix in an attempt to "lift[] the curtain on assaults against women and children in Indian country."[128] The *Deegan* dissent and other awareness-boosting decisions helped catalyze passage of SDVCJ three years later, but it is shortsighted to assume that granting tribes criminal jurisdiction only over their own territory would comprehensively address the broader context of domestic violence within tribal lands. Without a more nuanced discussion of how domestic violence relationships operate, tribal communities will not be better enabled to prevent domestic violence in the future.

2. Ties

Another requirement for jurisdiction is that the non-Indian have certain "ties" to the prosecuting tribe. These "ties" exist only if the defendant "resides in the Indian country of the participating tribe[,]" "is employed in

formed long before domestic violence was recognized as an act deserving criminal sanction. Not surprisingly, a system built on the model of offenses against strangers may falter when applied to crimes that occur in the context of intimate human relationships.").

126. *See, e.g.*, Rios v. Fergusan, 978 A.2d 592 (Conn. Super. Ct. 2008) (holding that threats over the internet were sufficient to constitute personal jurisdiction over an abuser who had never entered Connecticut).

127. SCHECHTER, *supra* note 40, at 16.

128. 605 F.3d 625, 662–65 (8th Cir. 2010) (Bright, C.J., dissenting). Part of lifting this curtain involved providing harrowing statistics about abuse that occurs on Indian lands as well as the government's failure to remedy these harms.

the Indian country of the participating tribe[,]" or is in a qualifying relationship with "a member of the participating tribe" or "an Indian who resides in the Indian country of the participating tribe."[129] Note that, while the qualifying relationship prong will allow jurisdiction over many perpetrators, there are plenty of gaps depending on the tribal ties of the *victim*.

As a doctrinal matter, it may seem commonplace, even desirable, to require a connection between the prosecuting tribe and the accused. As a practical matter, however, the abuser can manipulate this requirement. First, because the relevant portion of SDVCJ contains only the present tense ("resides," "is employed"),[130] strict textualists may be unwilling to read in jurisdiction over defendants if the defendants no longer meet the jurisdictional requirements at the time of charging or trial. An abuser could simply quit his job if charged under subsection (B)(ii).[131] This may seem like a losing argument to some criminal procedure experts, but it is by no means beyond the realm of argumentation given the presumption against jurisdiction by tribes that lurks beneath Supreme Court decisions like *Oliphant*[132] and *Montana*.[133] Indeed, some defendants have evaded tribal court jurisdictional requirements by taking themselves out of the precise statutory language. For instance, in *Las Vegas Tribe of Paiute Indians v. Phebus*, the defendant capitalized on the political identity requirement of being an Indian by "disenrolling" from the tribe.[134] The tribal court found this to vitiate jurisdiction, and the district court tenuously agreed with the reasoning, finding that proof of the defendant's identity as an Indian was an element that had to be proven to a jury beyond a reasonable doubt.[135]

The ability of the abuser to manipulate facts represents a dimension of the battering experience that is familiar to victims: gaslighting and minimization.[136] While this is no doubt a valid defense strategy,[137] the effect

129. 25 U.S.C. § 1304(b)(4)(B).

130. *Id.*

131. *See id.* § 1304(b)(4)(B)(ii).

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

133. Montana v. United States, 450 U.S. 544 (1981).

134. 5 F. Supp. 3d 1221, 1225–26 (D. Nev. 2014).

135. *Id.* at 1230, 1237.

136. *See* Power & Control Wheel, *supra* note 45.

137. *But see* CAROLYN C. HARTLEY & ROXANN RYAN, PROSECUTION STRATEGIES IN DOMESTIC VIOLENCE FELONIES: TELLING THE STORY OF DOMESTIC VIOLENCE, EXECUTIVE SUMMARY 9–11 (1998), https://www.ncjrs.gov/pdffiles1/nij/grants/194074.pdf (remarking that defense strategies to prosecution for domestic violence crimes often involve "manipulat[ing] many common abuse dynamics and myths about domestic violence,"

on victims feels obfuscating and punitive; a victim being told by tribal prosecutors that her abuser is not employed in the Indian Country where the violence occurred, but was employed there days before, feels like a cruel trick by the justice system. Much like courts that were not receptive to certain kinds of claims about domestic violence, in divorce and family proceedings, for instance, the forum in which a perpetrator is likely to face reprimand may affect whether a victim seeks help.[138]

Second, this jurisdictional limitation allows domestic violence to occur with impunity anywhere off the home turf. If an abuser and his Indian spouse live and work on a particular reservation, abuse that occurs on another reservation would not be prosecutable by either tribe.[139] This scenario may seem unrealistic, given that domestic violence is often conducted in the home[140] and because abusers do not often think they are doing anything wrong,[141] and therefore would be unlikely to evade jurisdiction so intentionally. However, remember that the line between Indian Country and non-Indian land may be wafer-thin; rather than being marked by bridge or tunnel or billboard, the lines between reservations in rural areas may not be marked at all, and the totality of the reservation just a few miles in length.[142] On a series of errands, the couple could enter and exit Indian Country a dozen times. Intent to evade jurisdiction is therefore not necessary; loss of jurisdiction can happen by walking down the street. Moreover, incidents outside the home are more likely to be witnessed by outsiders and thus have a higher likelihood of being noticed and stopped by law enforcement in the moment. The fact that these incidents are less likely to be prosecuted because of jurisdictional reasons makes help seem all the less attainable to victims.

B. Explicit Racial Distinctions

Another distinction SDVCJ makes with regard to perpetrators is race. Explicit racial distinctions, when it comes to Indian law, are permissible,

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including isolation as a means of preserving privacy, normalization of abusive relationships, minimization to avoid responsibility, and character assassination).

138. *See supra* notes 78–79 and accompanying text (discussing how public perception of fairness is critical to victims' willingness to come forward).

139. *See* 25 U.S.C. § 1304(b)(4)(B) (providing that a defendant must have statutorily defined "ties" to the prosecuting tribe).

140. In one study, 86.2% of reported domestic violence incidents took place in a residential setting. *See* FRIDAY ET AL., *supra* note 54, at 31.

141. *See* ADAMS, *supra* note 91, at 26–32 (noting that abusers often make excuses for their violent behavior).

142. *See supra* fig. 2.

despite the Fourteenth Amendment and reverse-incorporation of its mandate to the federal government.[143] Categorization as an "Indian" in statutes is viewed as a political classification, not a racial classification;[144] this distinction serves the Indian community well, and I do not argue that it should be overturned. But Congress, concerned that tribal courts will not serve a minimum quantum of justice against non-Indians, has imposed several requirements on tribes when they exercise SDVCJ. Some of these requirements come from the Tribal Law and Order Act of 2010 (TLOA),[145] but the 2013 VAWA went above and beyond the requirements of TLOA when non-Indians are prosecuted.[146] Some of these additional protections include the right to free counsel for indigent defendants;[147] the right to a jury consisting of a cross-section of the community, including non-Indians;[148] a maximum penalty of three years' incarceration;[149] and the right to petition for a writ of habeas for an immediate stay of the non-Indian's detention.[150]

1. Minimization of the Severity of Harm

As a matter of societal concern for the rights of criminal defendants, these protections undoubtedly constitute a positive development. But as a matter of domestic violence law and policy, non-Indian abusers garner more protections than Indians when prosecuted for the same offense.[151] Historically, the law downplayed or minimized the harm of domestic violence, and advocates fought long battles to make sure serious legal sanctions and societal opprobrium attached to violent conduct towards women. Here, the law mirrors ancient harms by providing *enhanced* protections to certain abusers by imposing a cap on sentencing. For instance, a man who beats his wife so severely that she falls into a coma

143. *See* Morton v. Mancari, 417 U.S. 535 (1974).

144. *Id.* at 553 n.24.

145. Pub. L. No. 111-211, 124 Stat. 2258 (2010).

146. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54.

147. *See* 25 U.S.C. §§ 1304(d)(2); 1302(c)(2).

148. 25 U.S.C. § 1304(d)(3).

149. *Id.* § 1304(d)(2), (a)(7)(C).

150. *Id.* § 1304(e).

151. For an analysis of the interests at play, see Margaret H. Zhang, Note, *Special Domestic Violence Criminal Jurisdiction for Indian Tribes: Inherent Tribal Sovereignty Versus Defendants' Complete Constitutional Rights*, 164 U. PA. L. REV. 243 (2015). Zhang argues that tribal sovereignty is inherently in tension with granting the same rights to non-Indian defendants as are available under the federal Constitution. *See id.* at 244–45.

would be prosecutable by the tribe only if the tribe was willing to settle for a maximum punishment of three years of imprisonment.[152] To those who would say the federal government should get involved with such a major crime, the retort is that they simply do not; federal prosecutors declined to prosecute 52% of violent crimes in tribal territory prior to the passage of SDVCJ.[153]

2. Minimization of the Role of Race

A second harm is that explicit racial benefits for non-Indians reinforce the notion, which domestic violence advocates work to counteract, that domestic violence is not a white person's problem. By requiring Indian abusers to submit to fates that reflect the judgment of the community as a whole, but allowing non-Indians fewer charges and lesser sentences stemming from convictions, SDVCJ unwittingly brands domestic violence as a "tribal territory" problem rather than as a problem that is inherently racial. According to referral statistics, white male violence against Indian females is far more prevalent than any other kind of violence within tribal territory,[154] yet white males can far more easily escape jurisdiction through provisions explicitly built into the law out of an unfounded concern that tribal courts lack order and sophistication.[155] As Kimberle Crenshaw cogently explains:

> Among the most troubling political consequences of the failure of antiracist and feminist discourses to address the intersections of race and gender is the fact that, to the extent they can forward the interest of "people of color" and "women," respectively, one analysis often implicitly denies the validity of the other. The failure of feminism to interrogate race means that the resistance

152. 25 U.S.C. § 1302(b) ("A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense . . . .").

153. *See* DOJ DECLINATION STATISTICS, *supra* note 18, at 3.

154. This inference is not directly supported by statistical evidence, but there is a mass of information demonstrating the prevalence of crime on Indian victims by white men that certainly seems to support this circumstantially. *See* ROSAY, *supra* note 3, at 24; RONET BACHMAN ET AL., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN 38 (2008), https://www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf.

155. For instance, the passage of the Indian Civil Rights Act of 1968, which guarantees Indian defendants some of the rights guaranteed to non-Indians by virtue of the federal Constitution, was motivated in part by a view that tribal courts were "puppets of the government and issued biased decisions" and tribal officials were "tyrannical and biased". *See* PEVAR, *supra* note 1, at 241–43.

> strategies of feminism will often replicate and reinforce the subordination of people of color, and the failure of antiracism to interrogate patriarchy means that antiracism will frequently reproduce the subordination of women. These mutual elisions present a particularly difficult political dilemma for women of color. Adopting either analysis constitutes a denial of a fundamental dimension of our subordination and precludes the development of a political discourse that more fully empowers women of color.[156]

In the context of non-Indian defendants receiving more favorable treatment, ignoring the intersectionality of domestic violence is an ongoing harm because it minimizes the role that race plays in the continuing problem of domestic violence on tribal lands. Crenshaw's warning is prescient: SDVCJ presents this "difficult political dilemma for women of color" by forcing women to choose between protection of their physical selves as victims or embracing their political subordination to white men in the criminal justice system.[157]

III. Limitations Based on the Identity of the Victim

A final key component of SDVCJ is that the victim must be an Indian.[158] While this is often an uncontested matter in a domestic violence prosecution, several scenarios may emerge that harm Indian victims.

A. Forced Identity as Victim

Identifying oneself as an Indian victim may seem like a matter of course, but determining who is an "Indian" actually changes dramatically with the circumstances. Whether a person is an Indian has sociological, ethnological, and political components. For U.S. Census purposes, holding yourself out as a sociological Indian makes you one.[159] Ethnologically, an Indian is simply a descendant of one of the people native to the Americas, which may be shown through a simple blood test.[160] Politically, each sovereign—

156. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1252 (1991).

157. *Id.*

158. 25 U.S.C. § 1304(b)(4)(A).

159. JACK UTTER, AMERICAN INDIANS: ANSWERS TO TODAY'S QUESTIONS 25 (2d ed. 2001).

160. *See* PEVAR, *supra* note 1, at 17–18.

the federal government, as well as each of the federally recognized tribes—defines for itself what makes someone a member of the tribe.[161]

To make matters worse, the federal government has multiple definitions for different purposes, which are not consistent from one statute and regulation to the next.[162] Tribes may require registration with the tribe, proof that an individual has a particular quantum of Indian blood (one-fourth, for example), or proof that an individual is a direct descendant of someone on the "tribe's original membership tribal roll" from the late nineteenth and early twentieth centuries.[163] Courts may apply different tests, but in criminal cases, prosecutors must prove, beyond a reasonable doubt, the race of a person whose identity is necessary to establish jurisdiction.[164]

1. Mixed-Race Women and Victimhood Identity

As a result, an individual may be an "Indian" for some purposes but not others. Women of mixed ancestry may hold themselves out as Indian

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161. *Id.*

162. *See* Vince Two Eagles, *What Is an Indian? A Legal Definition, Part 1*, P'SHIP WITH NATIVE AMS. (Dec. 6, 2011), http://blog.nativepartnership.org/what-is-an-indian-a-legal-definition-part-1. The federal government's general definition from the 1934 Indian Reorganization Act is quite broad, and includes

> all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

25 U.S.C. § 5129. This is generally a good thing, as it determines eligibility for certain federal benefits available only to Indians. However, the definition does not set a floor, and therefore leaves it to the courts to determine who may count as an Indian in other contexts, such as criminal jurisdiction. *See* COHEN, *supra* note 10, § 3.03[4], at 176–79; United States v. Maggi, 598 F.3d 1073, 1078–81 (9th Cir. 2010) (requiring both "tribal or government recognition" and at least some blood quantum); *cf.* United States v. Rogers, 45 U.S. (1 How.) 567 (1846) (Taney, C.J.) (holding that an adult white man who had joined the Cherokee Tribe and was accepted as a member of the Tribe could not be an "Indian" for criminal jurisdiction purposes because he did not have Indian blood). For more context on different views of what makes an "Indian," see 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 (1993).

163. *See* PEVAR, *supra* note 1, at 91.

164. *See, e.g.*, United States v. Bruce, 394 F.3d 1215 (9th Cir. 2005) (holding that a woman successfully proved her affirmative defense that she was an Indian and therefore not subject to prosecution by the federal government for choking her five-year-old child); Las Vegas Tribe of Paiute Indians v. Phebus, 5 F. Supp. 3d 1221 (D. Nev. 2014) (holding that the tribe must submit to the jury the question of whether the defendant is an Indian).

among Indian communities and as white among white communities for some recognizable social objective, such as to take advantage of certain rights available only from tribal enrollment, avoid discrimination, or to change how they identify over time.[165] Women of mixed Indian ancestry may be enrolled only with one of many tribes they would be eligible to enroll in or feel more strongly associated with one tribe than another despite ancestry in multiple.[166] While this fact would not necessarily obviate SDVCJ, the fragility of SDVCJ on an eventual appeal to a federal court may cause prosecutors to think twice about pursuing a case where the victim is not surely an Indian, and a member of the prosecuting tribe at that.[167]

Requiring proof of identity as a condition of victimhood in order for their abuser to be held accountable should remind the reader of harms previously encountered. Identity is frequently complex; the pitfalls facing mixed-race

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165. *See* Carolyn A. Liebler et al., *America's Churning Races: Race and Ethnic Response Changes Between Census 2000 and the 2010 Census* 25 ((U.S. Census Bureau, No. 2014-09, 2014), https://www.census.gov/content/dam/Census/library/working-papers/2014/adrm/carra-wp-2014-09.pdf (noting "substantial single-race-to-single-race response change between white and American Indian, again with complementary, countervailing flows" between decennial census records); D'Vera Cohn, *American Indian and White, but Not 'Multiracial,'* PEW RESEARCH CTR. (June 11, 2015), https://www.pewresearch.org/fact-tank/2015/06/11/american-indian-and-white-but-not-multiracial (noting the remarkable fluidity in racial identity that Indians have as a group). As an astute reader will recall, Senator Elizabeth Warren recently faced a massive public outcry for (correctly) identifying herself as having at most one-sixty-fourth Indian blood. *See* Jonathan Martin, *Elizabeth Warren's DNA Results Draw Rebuke from Trump and Raise Questions*, N.Y. TIMES (Oct. 15, 2018), https://www.nytimes.com/2018/10/15/us/politics/elizabeth-warren-dna-ancestry.html. This blood quantum and the fact that she held herself out as an Indian as a professor at some point in the past, with almost certain ancestors in Oklahoma in 1934, might actually allow her to be an Indian under some federal definitions, and possibly in some tribes that require only proof of ancestry, *see supra* note 162, but fails to meet a more culturally accepted definition.

166. *See* Cohn, *supra* note 165 (noting that sixty-three percent of self-identified multiracial American Indians specified a tribe with which they were associated).

167. See, for example, the discussions about political and ethnological identity of individual Indian defendants in *United States v. Bruce*, 394 F.3d 1215 (9th Cir. 2005), and *Las Vegas Tribe of Paiute Indians v. Phebus*, 5 F. Supp. 3d 1221 (D. Nev. 2014), mentioned *supra* note 164. Note that Indian victims do not necessarily have to be members of the prosecuting tribe, but there are still some restrictions. If the defendant does not live or work on the reservations, "[a] participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant . . . is a spouse, intimate partner, or dating partner of—(I) *a member of the participating tribe*; or (II) *an Indian who resides in the Indian country* of the participating tribe." 25 U.S.C. § 1304(b)(4)(B) (emphasis added).

victims operating in SDVCJ epitomize Kimberle Crenshaw's essential thesis that intersectional identities can form the basis for the perpetration of further harm.[168] Even when taking domestic violence seriously, governments' "failure . . . to interrogate race means that the resistance strategies of feminism will often replicate and reinforce the subordination of people of color."[169] As a result, "[t]he political interests of women of color are obscured and sometimes jeopardized by political strategies that ignore or suppress intersectional issues."[170] SDVCJ crystallizes this dynamic with eerie precision: every day jurisdiction is limited by the race of the victim is a day that forces mixed-race victims into a position subordinate to that of other-race women.

2. Mixed-Race Women and Political Identity

It is a futile effort to attempt to disentangle mixed-race victims' identities as Indians from the political context of tribal sovereignty. Advocates who seek to dismantle this component of SDVCJ for its harmful effect on mixed-race women risk tremendous backlash from tribal communities who have long fought for a more robust concept of tribal sovereignty. In this way, SDVCJ echoes Crenshaw's supporting argument that "[w]ithin communities of color, efforts to stem the politicization of domestic violence are often grounded in attempts to maintain the integrity of the community"; this dynamic forces people of color to "weigh their interests in avoiding issues that might reinforce distorted public perceptions" and absorb "the cost of suppression" as incidental to their victimhood.[171] If you are a mixed-race Indian, you are worthy of the tribe's protection only if you ignore half your identity; if you are a mixed-race non-Indian, take your case to the local state prosecutor for help. The Catch-22 is in the quantum of your blood and therefore beyond your control.

An abuser could capitalize on the victim's mixed identity by suggesting that the victim is "not Indian enough." Emotional abuse of this sort—sowing confusion in the victim's sense of self, gaslighting, humiliating, and minimizing self-worth—is a common tactic used to control a victim. By denying the victim her sense of self, the abuser also puts the blame for his own situation on the victim. That is, if she were not an Indian, the tribal court proceeding would go away; by convincing the victim that she is not an Indian, the abuser evades reprimand. Asserting that a mixed-race victim

168. *See* Crenshaw, *supra* note 156, at 1252.
169. *Id.*
170. *Id.*
171. *Id.* at 1255–56.

is not Indian as a defense to prosecution is the jurisprudential equivalent of a common refrain of abusers: "it's your fault."[172]

B. Forced Identity as Witness or Litigant

The effect of a victim's declaring herself as Indian or not Indian may have consequences far outside the individual case and even far outside the justice system. One salient example is, again, the Confrontation Clause. As a witness, a victim is likely to face vigorous cross-examination on the stand. As identity matters are particularly intricate, mixed-race victims may be subject to being probed on all of the ways she has ever held herself out as non-Indian, whether on credit card applications or social media accounts or at cocktail parties. Such accosting could easily be enough to deter her from coming forward in the first place, recalling the post-*Crawford* difficulties of prosecuting domestic violence cases.[173] While Indian defendants are not necessarily entitled to the same level of confrontation as in *Crawford*, as this right is only codified in a 1968 statute that does not have to be interpreted the same as constitutional rights,[174] non-Indian defendants have the same *Crawford* right of confrontation in tribal courts as if it were in a federal court.[175]

This conundrum may also affect a subsequent or concurrent civil case. If a prosecuting tribal jury found beyond a reasonable doubt that a mixed-race victim was an Indian, would collateral estoppel preclude her from asserting that she is non-Indian for some other purpose? In civil cases, the Supreme Court has increasingly turned to a totality-of-the-circumstances approach to determining whether tribal court jurisdiction exists.[176] Sometimes, the determination can turn on the identity of a single party, such as the driver of a car in an accident occurring on tribal lands.[177] Thus, the victim may be

172. *See* Power & Control Wheel, *supra* note 45.

173. *See* Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747 (2005).

174. 25 U.S.C. § 1302.

175. *Id.* § 1304(d)(4).

176. *See* Strate v. A-1 Contractors, 520 U.S. 438, 442 (1997) (holding that a non-Indian who had five Indian children and was the widow of a tribal member could not maintain an action in tribal court even though the accident occurred on tribal lands); Montana v. United States, 450 U.S. 544, 565–66 (1981) (holding that an Indian tribe could not exercise civil jurisdiction over a non-Indian on non-Indian land, even on the reservation, unless the tribe could prove either a "consensual relationship[]" with the tribe or the non-Indian is engaged in some activity that threatens or directly affects "the political integrity, the economic security, or the health or welfare of the tribe").

177. *See Strate*, 520 U.S. at 442.

deterred from bringing a simple civil suit against her abuser—a commonly available remedy against assaulters[178]—in tandem or after a tribal prosecution. In an even more disturbing scenario, if a jury found beyond a reasonable doubt that the victim was *not* Indian, would the victim then be denied certain federal benefits only available to Indians because of federal preclusion rules? Would she suddenly become subject to state taxation?

This point recalls the idea that domestic violence must be understood in its broader political context to be effectively eradicated.[179] Even if a prosecution successfully ended the domestic violence between an Indian victim and her abuser—the central goal of the domestic violence movement, in a limited sense—the prosecution or other events within the justice system may impede the victim from regaining her autonomy in the future or may disable other forms of justice.

C. Forced Identity as Defendant

A final manner in which SDVCJ harms victims is in the unusual but vexing cases where a domestic violence victim is also a defendant. Because of the patchwork of jurisdiction based on the race of the perpetrator and the victim, a mixed-race victim pursuing a criminal case against her abuser in coordination with tribal prosecutors has a significant incentive to identify as an Indian. At the same time, if she is prosecuted for attacking her non-Indian abuser, she is placed in the position of making the difficult choice of how to identify. If she does not have tribal enrollment, she would have a foolproof defense to identify as non-Indian, so as to force the tribal court out of jurisdiction and hope that the state—which has jurisdiction over non-Indians who commit crimes against non-Indians[180]—declines to prosecute. This reality may also force the abuser to go free from tribal custody.

On the other hand, the victim may be incentivized to identify as an Indian to retain the good graces and typically lower punishments imposed by her own tribe. In other words, some mixed-race victims who are also prosecuted for attacks on their abuser must choose between being prosecuted along with their abuser in tribal court or giving her abuser the

178. It was not always this way. *See* Siegel, *supra* note 58, at 2162–70 (discussing interspousal tort immunity and official denial of civil damages claims without the husband's joinder).

179. *See, e.g.*, Wini Breines & Linda Gordon, *The New Scholarship on Family Violence*, 8 SIGNS 490, 492 (1983) ("[A]ll violence must be seen in the context of wider power relations . . . . [V]iolence cannot be accurately viewed as a set of isolated events but must be placed in an entire social context.").

180. *See* United States v. McBratney, 104 U.S. 621, 624 (1881).

key to the handcuffs in exchange for her own freedom. Though no such cases have reached a federal court's docket since VAWA's enactment, some criminal cases turn completely on whether the defendant is an Indian.[181] It is only a matter of time before courts must confront this mare's nest.

Once a woman appears in the tribal court as a defendant, the abuser has numerous arrows in his quiver. Given that many tribes have strong family-dependence traditions and family networks,[182] an abuser has an incentive to exploit this fact to gain sympathy for his own misdeeds. He can manipulate tribal concepts of interdependence, in which extended family members or friends help to raise a child, to paint the victim-defendant as unable to care for her children alone.[183] Even if this argument was not persuasive to finders of fact in the victim's criminal proceeding, it could still have damaging psychological effects on her and deter her from coming forward on any domestic violence cases in the future. Additionally, an acquittal by an Indian factfinder on such grounds, when the abuser has painted her as a bad mother, could damage public perceptions about the justice received in tribal courts and ultimately hinder tribal sovereignty efforts nationwide.[184]

The experience of a woman simultaneously as victim and defendant, caught between a rock and a hard place in how to proceed—in her home forum and among her tribal community, no less—echoes the experience of battered women in the cycle of violence.[185] During what scholars have dubbed the "tension-building phase" of a common domestic violence

181. *See, e.g.*, United States v. Bruce, 394 F.3d 1215 (9th Cir. 2005).

182. For instance, some tribal members may leave their young children with extended family members for months at a time in order to develop stronger family relationships. *See supra* note 42; *see also, e.g.*, Benjamin Grant Purzycki, *Comparison of the Traditional and Contemporary Extended Family Units of the Hopi and Lakota (Sioux): A Study of the Deterioration of Kinship Structures and Functions*, 19 NEB. ANTHROPOLOGIST 16, 18 (2004) (remarking that "[s]isters are responsible for each other's children and share all of the labor" in Hopi families).

183. *Cf.* SCHNEIDER ET AL., *supra* note 43, at 623 (discussing the Catch-22 of a woman leaving with her children and facing child kidnapping charges and adverse custody presumptions, leaving without her children and suffering adverse custody presumptions, or staying and remaining vulnerable to continued abuse).

184. Public perception of lawlessness on tribal lands has traditionally been, and still is, a major impetus for legislative action. *See* Goldberg, *supra* note 17, at 541 (discussing the perception of "lawlessness" as motivating the passage of Public Law 280); PEVAR, *supra* note 1, at 79, 112, 242 (discussing perceptions of lawlessness on Indian lands that spurred the passage of the Major Crimes Act, Public Law 280, and ICRA, respectively).

185. LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 42–54 (1989).

relationship, women often feel restricted by a set of arbitrarily imposed and enforced "rules" of the house.[186] Efforts to avoid breaking these rules are futile, even when walking on eggshells to avoid angering the abuser.[187] The victim's inability to predict when the next manifestation of acute violence will occur spurs the development of "learned helplessness"—a "lack of ability to predict the efficacy of one's own behavior."[188] Similarly, a victim facing prosecution in tribal court is unable to properly protect herself without subjecting herself to a countervailing harm. She risks further abuse, dilution of her own identity,[189] and weakened ties with her community[190] at the hands of her abuser to evade prosecution; alternatively, she risks self-flagellation by subjecting herself to both the sword and the aegis of the tribal court. This injustice exists only because of the narrow scope of SDVCJ.

IV. Potential Solutions

Having discussed multiple manners in which SDVCJ unintentionally embodies harms it is meant to combat, I will now address potential solutions. At the outset of this discussion, I will lay out a few caveats. First, as the persistence of domestic violence rates stymieing scholars and advocates demonstrates, there is likely no silver bullet that will solve all of the problems inherent in a system for combatting domestic violence. Second, the complexities and expense of SDVCJ may explain why very few tribes have actually taken advantage of it. As a result, any of the problems I have described above are generally contained to a handful of prosecuting tribes around the country, and there is time to enact amended legislation to head off problems before more tribes consider employing SDVCJ. Finally, despite the many problems surrounding SDVCJ, it is important to keep in mind that, in the decades leading up to its enactment, the conditions for

186. *See* Fischer et al., *supra* note 51, at 2126–37, 2128 n.56 (discussing the culture of "rules" in abusive households).

187. *See id.* at 2126–37, 2170.

188. WALKER, *supra* note 185, at 50; *see also id.* at 49–53 (describing "learned helplessness" generally).

189. *See* Fischer et al., *supra* note 51, at 2132 ("It is undoubtedly easier to control someone if they think less of themselves.").

190. Isolation is a common tactic of abuse. *See* Power & Control Wheel, *supra* note 45; *see also* Fischer et al., *supra* note 51, at 2132 ("Limiting victims' interactions with other people enhances the batterers' domination over the family by both cutting off potential sources of support and by making the boundary between the family culture of battering and the outside world more defined.").

domestic violence victims on Indian reservations could scarcely get worse; any expansion of accountability for non-Indian defendants is a positive development. Considering these caveats, a number of solutions with inherent advantages and disadvantages exist.

A. Restore Oliphant

First, a simple solution is to eliminate tribal jurisdiction over non-Indians and restore *Oliphant*, the case in which the Supreme Court ruled that a tribe could not prosecute a non-Indian for crimes even if they are committed on tribal lands.[191] Tribes are not naturally predisposed to this option, as it erodes their powers of self-government. Restoring *Oliphant* also means a full reliance on federal prosecution for crimes committed by non-Indians on tribal lands is wholly inadequate, as pre-2013 conditions made clear.[192] This solution therefore has little hope of addressing the domestic violence scourge on tribal lands.

A related solution is to merely require more aggressive federal prosecution and law enforcement. But for many reasons beyond what this article can cover, forcing or even encouraging prosecutors to prosecute has substantial limits. In any event, dual prosecutions by tribes and the federal government do not trigger double jeopardy prohibitions;[193] thus, if this is truly the solution, it could be implemented at any time.

B. Overrule Oliphant *Completely*

A second solution, originating with and advanced primarily by tribes themselves, is the total opposite: a full and complete overruling of *Oliphant* and a restoration of the principle that tribes have full sovereignty and criminal jurisdiction over any events that occur on tribal territory, regardless of the race of the defendant. Tribes would no longer have to worry about any jurisdictional problems except those that states must ordinarily endure, such as proving where the crime occurred. Just as a person submits to the jurisdiction of another state when traveling interstate, people everywhere will be on notice that they are subject to the law of the local tribe when they enter Indian territory.

Unfortunately, the problems with this approach immediately surface upon closer examination. First, extending jurisdiction over the territory without regard to the race of the defendant will raise the question of

191. Oliphant v. Suquamish Tribe, 435 U.S. 191, 212 (1978).

192. *See generally* DOJ DECLINATION STATISTICS, *supra* note 18 (noting that half of cases referred to federal prosecutors were declined).

193. United States v. Wheeler, 435 U.S. 313 (1978).

whether we must also ignore the race of the victim; otherwise, the problems described in Part III persist. But if the race of the victim is also ignored, it is not just *Oliphant*, but *United States v. McBratney*, too, that must be overruled.[194] Whether Congress's plenary power over Indian affairs extends to designating criminal jurisdiction between two non-Indians without disestablishing Indian territory altogether is a novel and difficult question.

Second, extending jurisdiction to all non-Indian defendants regardless of the crime would raise the question of what kinds of protections non-Indian defendants must be afforded in tribal courts. The Indian Civil Rights Act[195] and the Tribal Law and Order Act[196] provide statutory baselines for all tribal court proceedings, but they are not identical to constitutional protections.[197] Meanwhile, all non-Indian criminal defendants are presumptively entitled to protections of the U.S. Constitution regardless of where they live. The potential problem posed by a non-Indian being unable to assert constitutional rights in a tribal court proceeding is only a non-issue currently because VAWA expressly requires compliance with the U.S. Constitution in order to exercise SDVCJ.[198]

Reconciling these two ideas is not impossible. However, the burden of maintaining this type of prosecutorial system, its constitutionality, and the philosophical quandary of the extent to which tribes would merely become an extension of the U.S. Attorney's office, by mandating a convergence of federal and tribal law, may make this solution a pipe dream.

C. Formalized Referral Program

A third solution to this issue is to establish a formal referral program allowing tribes to prosecute as they currently do, but with a semi-binding catchall: the federal government will step in whenever tribal jurisdiction is questionable. This solution would eliminate the incentive of defendants to avoid plea bargaining; even if the tribe cannot prosecute, the specter of the federal government's indictment looms. A referral program would promote tribal sovereignty because federal prosecution would not begin until after the tribal prosecutor has made a decision as to whether to move forward.

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194. *See* United States v. McBratney, 104 U.S. 621 (1881) (holding that the State has criminal jurisdiction over a crime occurring between two non-Indians).

195. 25 U.S.C. § 1301.

196. Pub. L. No. 111-211, 124 Stat. 2258 (2010) (codified in scattered sections of 25 U.S.C.).

197. *See supra* note 24 (discussing which rights each of these laws gives to defendants).

198. *See* 25 U.S.C. § 1304(d)(2); *id.* § 1302(c)(2); *see also supra* notes 147–50 and accompanying text.

However, this solution faces the same enforceability problems as those discussed in the first solution. One major reason for establishing SDVCJ was that federal prosecutors declined to prosecute huge numbers of cases that were referred to them.[199] In fact, tribes would often refer cases involving non-Indian criminal activity to federal prosecutors, but it was met with little success.

D. Statutory Amendment to Encompass Situational Domestic Violence

A fourth and final solution is to establish a simple rule: any time domestic violence is involved, every crime related to such facts and circumstances may be prosecuted by the tribal court regardless of the race of the perpetrator or victim. That is, whenever a person has suffered "domestic violence" within Indian Country, then the tribe has jurisdiction. "Domestic violence," here, is broadly defined as a relationship of domination and control, rather than a series of crimes. A 2019 bill that passed the House goes partly toward this solution by enumerating particular crimes that would be prosecutable in tribal court,[200] but still falls short of the solution I propose. This solution has several advantages and disadvantages.

1. Advantages

The advantages here are numerous. First, a special criminal jurisdictional scheme centered on situational domestic violence embodies the notion that domestic violence is not just a set of discrete crimes, but rather a systematic and continuous exertion of power and control over another. Prosecutors would not be limited by the *kinds* of crimes they could charge so long as the crime occurs in the broader context of domestic violence. The use of emotional or economic abuse—unlawfully controlling a woman's access to money by stealing her earnings, for instance—can be prosecuted under this solution not because a tribal or federal court must agree that a financial crime is necessarily a crime of domestic violence, but because domestic violence exists within the relationship; therefore, any crime with a reasonable nexus to the victim of a crime can be prosecuted within the tribal court. Thus, a domestic violence incident involving animal abuse, property damage, threats, or an assault on a tribal officer attempting to keep the peace[201] could all fall well within the scope of the amended provision

199. *See generally* DOJ DECLINATION STATISTICS, *supra* note 18 (noting that more than half of cases referred to federal prosecutors were declined).

200. *See supra* note 26 and accompanying text.

201. *See supra* Section I.A.1.

because the original underlying event is a domestic violence incident. Witness intimidation, perjury, contempt of court, and other crimes that trample on the integrity of the justice system would also fall within this scope because the crimes take place pursuant to the domestic violence incident, although Congress should be sure to specify that auxiliary crimes are included to dispel any doubts about jurisdiction.

Indeed, some representatives of tribal communities have recently suggested this:

> SDVCJ would be more effective if it is amended to further clarify that Indian tribes possess the authority to prosecute a non-Indian for the types of offenses that often occur in the cycle of domestic abuse that may or may not involve physical force, but are nonetheless harmful to victims.[202]

Second, broadening the view of domestic violence gives prosecutors and law enforcement officers more tools to prosecute and investigate crimes against Indian victims.[203] The insufficiency of plea bargaining is eliminated with this solution because the abuser is eligible for prosecution on multiple charges. Law enforcement officers would be able to investigate the scenes of crimes even if no active domestic violence is taking place, if the reason for the call to tribal police was originally domestic violence. Illegal drug and alcohol activity that exacerbates, contributes to, or plays some other role in a domestic violence dispute is also prosecutable under this theory.[204]

Third, this expanded jurisdictional approach would unshackle tribes from the requirement that a victim be Indian.[205] Such limitations are absent in most criminal prosecutions at the state level. So long as a crime was committed within a tribe's territory and the tribe recognizes domestic violence as a crime within the community, the identity of the perpetrator or the victim does not matter except in extremely rare cases (such as with diplomats or entities with immunity). An offense against the tribe will be

202. NCAI REPORT, *supra* note 2, at 28.

203. *See supra* Section I.B.

204. Indeed, one should at least take into account the role that controlled substances play in domestic violence. *See supra* Section I.C. One scholar remarked that the first real reforms at combating domestic violence after *Bradley v. State*, 1 Miss. 156 (1824), came in the form of the "Temperance and Abolitionist Movements," which denunciated both alcohol consumption and its connection to wife-beating. *See* LEE E. ROSS, DOMESTIC VIOLENCE AND CRIMINAL JUSTICE 35 (2018). For a summary of alcohol's role on battering, see WALKER, *supra* note 185, at 114–23.

205. *See* 25 U.S.C. § 1304(B)(4)(a)(i) (2018) (providing that SDVCJ does not attach when neither defendant nor victim is Indian).

presumed in every case in which there is domestic violence, even when two non-Indians are involved. This fact poses similar problems to the complete overruling of *Oliphant* because it also requires an overruling of *McBratney*.[206] However, eliminating these constraints on victim identity

206. *See supra* note 180 and accompanying text. There is considerable latitude to argue that *McBratney* should not be considered good law, or at least not for the same reasons as articulated in the decision itself. *McBratney* itself was about whether a *federal* district court had jurisdiction over a crime between two non-Indians, and so the Court did not directly hold that a tribe would have *no* jurisdiction. Indeed, it narrowed its holding to the precise issues:

> The single question that we do or can decide in this case is . . . whether the Circuit Court of the United States for the District of Colorado has jurisdiction of the crime of murder committed by a white man upon a white man within the Ute Reservation, and within the limits of the State of Colorado; . . . [T]hat question must be [a]nswered in the negative.

United States v. McBratney, 104 U.S. 621, 624 (1881).

This case was decided in the same era in which the Supreme Court took an extremely formalistic view of race, nationality, citizenship, and sovereignty. The year after *McBratney*, Congress passed the Chinese Exclusion Act, a notorious race-based immigration exclusion program, and two years after that, the Court determined that Indians could not be born citizens because they were not "subject to the jurisdiction" of the United States within the meaning of the newly ratified Fourteenth Amendment. Elk v. Wilkins, 112 U.S. 94, 102 (1884). Armed with arbitrary and facile conceptions of what kinds of races could ever be citizens, the Court endeavored to draw lines, but their conclusions make the categorization of white-on-white crimes in Indian territory subject to state jurisdiction look obsolete. For a fascinating account of one such story in the early twentieth century, see Kathryn Schulz, *Citizen Khan*, NEW YORKER (May 30, 2016), https://www.newyorker.com/magazine/2016/06/06/zarif-khans-tamales-and-the-muslims-of-sheridan-wyoming. In discussing the tumult of these race-based distinctions (which affect the *McBratney* analysis above), Schulz writes:

> [B]eginning in 1870, those petitioning for American citizenship had to be either black or white.
>
> That left immigrants from Asian nations in the lurch—deliberately, as Congress soon made clear. The 1882 Chinese Exclusion Act prevented anyone born in China from becoming American. The Immigration Act of 1917 established an "Asiatic Barred Zone": a region, encompassing dozens of countries, from the Middle East to Melanesia, whose native citizens could not be naturalized. In theory, such laws were plenty clear. In practice, however, Asians petitioning for citizenship simply contended that they were white. Whether that was true was a matter of heated dispute among ethnologists, anthropologists, political scientists, policymakers, and government officials around the nation.
>
> The courts, brought in to clarify the issue, made a mess of it instead. In "White by Law: The Legal Construction of Race," Berkeley law professor Ian Haney López provides a tragicomic list of court rulings on racial identity,

restores the neutrality of Indian victims' decision to come forward relative to other victims.

A final advantage of this proposal is that it gives tribes the absolute right to prosecute depending on the circumstances, thus promoting tribal sovereignty and prosecutorial discretion while limiting the financial or administrative burdens on tribal courts. Because the proposed jurisdictional approach still limits prosecution to crimes having a component of domestic violence, there is no worry that tribes will go out to persecute non-Indians who commit other crimes—even serious felonies like murder, burglary, or arson. Although tribes will have to provide cross-section juries and free counsel to these non-Indian defendants, the number of cases to which this circumstance applies is relatively small compared to the remainder of tribes' criminal justice systems and all of the costs associated with the protection of defendants' rights within that system.[207]

Moreover, tribes with limited resources can take advantage of the lower types of crime and identity hurdles that currently exist in SDVCJ by choosing whether to prosecute those crimes that they do not prioritize as offenses against the tribe. For instance, under this formulation, a Navajo tribal prosecutor might legitimately choose to decline to prosecute a white abuser where the event took place on Navajo land, but the victim was Hopi. At the same time, Navajo officials would still reserve the right to prosecute if the Hopi tribe, through some kind of treaty or extradition agreement, requested it. Under current SDVCJ rules, that possibility is foreclosed: the federal government must prosecute.

2. Disadvantages

One difficulty of this proposal is that any characterization of this sort may suffer from vagueness. Because domestic violence can involve a

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> together with their legal rationales. Among those rulings: that Hawaiians are not white (based on scientific evidence); that Mexicans are not white (based on legal precedent); that Burmese are not white (based on common knowledge); that Japanese are not white (based on legal precedent); that people who are one-quarter Japanese are not white (based on legal precedent); that Syrians are white (based on scientific evidence); that Syrians are not white (based on common knowledge); that Arabs are white (based on common knowledge); that Arabs are not white (based on common knowledge); that Native Americans are not white (based on nothing).

Id.

207. Congress authorized some SDVCJ funding after the 2013 Act to assist tribes with implementation. *See* 25 U.S.C. § 1304(h) (authorizing $5 million in annual appropriations through Fiscal Year 2018).

number of crimes, someone who commits a crime any time their spouse is involved may conceivably be charged under this statute. We would have to rely on integrity of tribal prosecutors to charge only crimes within the ambit of domestic violence, which would require substantial legal education and training.

Moreover, we may still face line-drawing problems along the margins. For instance, if a domestic violence abuser runs a methamphetamine distribution operation from his basement, but no methamphetamine was visible or consumed during a discrete event of domestic violence for which tribal officers were summoned, the methamphetamine charges may not be prosecutable even under the broadest definition of domestic-violence-based tribal jurisdiction because the charges had no conceivable connection to domestic violence in that moment. In some sense, this is a desirable limitation to conceptually distinguish the problem of domestic violence from the problem of crime in general. However, one may imagine scenarios in which the abuser manipulates the extent of other crimes' involvement in his exertion of power and control over the victim. In the same regard, one may imagine instances in which the victim downplays the role that other crimes played in her own domestic violence, lest she be blamed for her own abuse or, worse, lest she incriminate herself.[208]

Additionally, the limitation confining jurisdiction to domestic violence scenarios would pose its own problems as to other violence against women. For instance, even under a broad definition of "domestic violence," sexual assault by "random" people or public groping and other forms of sexual harassment would still not be prosecutable.[209] These types of crimes are arguably under the same umbrella as domestic violence, as they inflict similar societal damage to feminist causes and contribute to a culture of male patriarchy, which certainly undergirds domestic violence as a problem in our society.[210]

Finally, my proposed jurisdictional approach would not eliminate the trend of convergence between federal and tribal law due to the enhanced substantive and procedural protections afforded under SDVCJ. Because any proposed expansion of SDVCJ is politically unlikely to forego compliance with the U.S. Constitution for non-Indian defendants, the harm of treating

208. *See supra* Section III.C; *see also* SCHECHTER, *supra* note 40, at 20–27 (discussing victim blaming and inadequate police responses).

209. Some language in the new House bill would provide protections beyond intimate partner violence. *See supra* note 26 and accompanying text.

210. SCHECHTER, *supra* note 40, at 3–5, 29–34 (tracking the development of the domestic violence movement as a fundamentally feminist cause).

non-Indian abusers of Indian women more gently than Indian abusers is unlikely to go away, regardless of a solution that closes the jurisdictional gaps.

3. Resolution

Ultimately, this fourth solution—extending SDVCJ to encompass any crimes that occur in a broader context of domestic violence—is the best, given the current jurisdictional patchwork. While there would certainly be challenges related to the implementation of this solution, most of the challenges relate to the ambivalence of the Supreme Court in defining the contours of American Indian law and the capriciousness with which it determines defendants' constitutional rights under the Bill of Rights.

Because these unknowns are external to the expansion of SDVCJ, there is not much reason to defer action. A test of the limits of tribal sovereignty could make its way to the Supreme Court whether SDVCJ covers a small subset of non-Indian abusers or all of them. This is one situation where the federal government's assertion of plenary power over Indian tribes could be a catalyst for sovereignty rather than a tool for oppression, as it has historically been used.

Conclusion

While much legislation has unintended consequences, not all legislation has consequences that mirror the harms the law intends to address. The numerous unintended consequences resulting from SDVCJ's limited scope mimic the harms that the domestic violence movement has been working to remedy over the last several decades. SDVCJ is not hopeless; indeed, some remedial legislation is awaiting a Senate vote. But without a broad understanding of domestic violence and a commitment to filling the gaps that put American Indian women at high risk of revictimization, these problems will endure. Let us hope the waiting period is short.