

## Violence Against Women Act: A Gap in Protection for Children

*Abstract:* The Violence Against Women Act (VAWA) reauthorization of 2013 was supposed to represent a pivotal moment for American Indian tribes throughout the United States, greatly extending tribal jurisdiction to encompass more than it had in previous decades. The reauthorization would finally allow for legal proceedings to be prosecuted by tribal courts on Indian land, also against non-Indian offenders. However, the reauthorization appears to limit a tribe's ability to protect American Indian women from violence by strangers, as well as the protection of American Indian children against physical abuse and exposure to domestic violence. Furthermore, it limits a tribe's ability to hold perpetrators of violence against women and children accountable. This paper focuses on the recommended amendments to improve the protection of American Indian children and expand the prosecutorial powers to hold perpetrators accountable when American Indian children become victims of domestic violence. A new piece of legislation that is currently being discussed is the Native Child Protection Initiative (NCPI), for which the use of both explicit and inclusive language is imperative for the protection of Native children and the safety and future of tribal communities. Another possible recommendation for VAWA that is supported at a national level asks for the mandatory implementation of Coordinated Community Response Teams for tribal communities to help protect victims of domestic violence and hold offenders accountable.

## **Introduction**

The Violence Against Women Act (VAWA) was passed in 1994 by Congress. Violent crimes against women, such as sexual assault, stalking, and domestic violence, were a serious issue in the 1970s and 1980s, without much federal effort to address these problems (Laney, 2010). The original purpose of VAWA was to shift societal views of domestic violence and of victims of domestic violence, as well as create services for victims and establish a better way in which criminal justice systems dealt with these cases and crimes (Sacco, 2015). VAWA also raised awareness and facilitated more swift and focused prosecutions and investigations of such crimes. In addition, the act allowed for funding programs to help local governments combat violent crimes against women such as projects and grants to aid local governments in gaining resources, training, and tools to prevent these crimes (Laney, 2010).

Since VAWA's implementation, the act has been revised and reauthorized multiple times: in 2000, 2005, and 2013. The latest revision recognizes tribes' inherent power to exercise Special Domestic Violence Criminal Jurisdiction (SDVCJ), giving federally recognized tribes in the United States (U.S.) civil and criminal jurisdiction over any individual, Native or non-Native, involved in a domestic violence case affecting a Native American woman in Indian country (Sacco, 2015; U.S. Department of Justice, 2015a). In this paper, to encompass the different uses in the law and related literature the terms *Native American* and

*American Indian* (AI) are used as synonyms. VAWA 2013 has been in effect since March 7, 2015, but prior its enforcement it was approved as a voluntary pilot project to test SDVCJ (U.S. Department of Justice, 2015b). The pilot project included five tribes: the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation in Montana, the Confederated Tribes of the Umatilla Indian Reservation in Oregon, the Pascua Yaqui Tribe of Arizona, the Sisseton Wahpeton Oyate of the Lake Traverse Reservation in South Dakota, and the Tulalip Tribes of Washington (U.S. Department of Justice, 2015b).

Although VAWA has been updated to include Native American women, it has several limitations that affect children and with regard to prosecutions on tribal land, which has turned VAWA into a complex and multifaceted issue. In this paper, our particular focus lies on the limited level of protection afforded by VAWA to AI children living on tribal land. However, as a prelude, we will first present a brief analysis of the various other challenges and shortcomings of VAWA with regard to protecting potential victims such as AI women on tribal land who have been subject to violence by a stranger—which would not be classified as domestic violence, dating violence, or criminal violations of protection orders—and the negative effects of an overly narrow definition of what constitutes violence. Furthermore, a set of crimes is not covered by VAWA 2013: crimes committed between two non-Indians, between two strangers (including sexual assaults), those committed by persons who lack sufficient ties to the tribe (e.g. not living or working

on the reservation), and child or elder abuses that do not involve the violation of a protection order (VAWA, 2013).

### **Recognized Shortcomings of VAWA 2013**

As noted above, VAWA grants protection to women from domestic violence, i.e., violence committed by the spouse or long-term partner, but it does not mention assaults and incidents by strangers or within informal romantic relationships. Creppelle (2017) noted that VAWA, in its current form, is inadequate for unmarried women and should be amended to extend protections to underage girls. While VAWA is meant to protect women from domestic violence, the levels of protection are very different for Native women living in Indian Country due to various limitations. The goal of VAWA 2013 was to “give tribes at least a limited opportunity to prosecute non-Indian domestic violence crimes perpetrated against Indians as an exercise of inherent sovereign power” (Leonhard, 2015, para. 10).

Specific to tribal jurisdictions, sexual assault crimes are covered by the Tribal Law and Order Act (TLOA) of 2010, which is a precursor to VAWA 2013. TLOA 2010 was created with the intention of reducing crime in Indian country, with a “strong emphasis on decreasing violence against American Indian and Alaska Native [AI/AN] women,” for example, by authorizing the development of guidelines to handle both sexual assault and domestic violence (U.S. Department of Justice, 2018, para. 3). The prescription for VAWA 2013 includes a provision for tribes, in which they must “protect the rights of defendants described in the

Tribal Law and Order Act of 2010” (U.S. Department of Justice, 2015b, para. 8). While under VAWA 2013 rape by a stranger or a random sexual assault incident are not stipulated, TLOA 2010 does not have a specific provision for tribal authorities to prosecute and punish non-Indians criminals.

Alongside with these limitations, Crepelle (2017) stated, “Upon finding 34 percent of Indian women will be raped and 39 percent will be victims of domestic violence during their lifetimes, Congress stated the rates of sexual and domestic violence are epidemic” (p. 237). These percentages indicate that Native women are still among the most vulnerable and at a high risk of experiencing violent assaults. Additionally, once VAWA is exercised in a court of law, courts will apply what is explicitly outlined within the act framework, which would then limit protections for the women’s children. Children are left the most vulnerable because their rights are not protected under VAWA. The rates of crimes against Native American children (including rates of passive exposure to violence) are among the highest in the nation compared to other ethnicities.

The limitations inherent in VAWA make it very difficult to hold offenders accountable, irrespective of whether they are non-Native or Native. If the reservation where a crime has been committed is located in a state where Public Law 280 (P.L. 280) jurisdiction was not assumed, the implementation of VAWA is further complicated by a lack of resources. In 1953, P.L. 280 was introduced to enable states to assume criminal and civil jurisdiction over tribal matters that were

previously dealt with in federal or tribal court (Deer, 2005). In non-P.L. 280 states, if there is no tribal police force to respond to domestic violence emergencies and federal law enforcement agencies fail to respond, then state and local law enforcement agencies have no jurisdiction to intervene on behalf of the victim and detain or prosecute the abuser (Hart & Lowther, 2008). And even if VAWA is applied, it is specific to protect adult females from acts of domestic violence but does not protect children, who are often among the victims; this group would be protected by TLOA 2010 and other legislation, but with explicit limitations for tribal authorities. Furthermore, the Supreme Court made a clear distinction between a tribe's right to self-governance and the obligation of the justice system to protect Indian Country and Native American tribes under the government's trust responsibility, meaning that despite self-governance a tribe remains subject to the overriding power of the United States. Thus, a political relationship has evolved that has come to be called the "trust" relationship (Monette, 1995). The lack of adequate assistance with law enforcement, social services, or preventative services by the federal government is detrimental to this trust relationship.

In recent years, the National Institute of Justice (NIJ) has researched the federal and tribal responses to Indian country crimes, in particular violence against women, with the aim of gaining a better understanding of how practices and policies are utilized and implemented to bring justice to Native women victims. NIJ found that there is no systematic national data collection effort or program of

research focused on crime in Indian Country. It is very rare that federal, state, and local crime data reports evenly distinguish between offenses committed in Indian Country from those committed elsewhere (Crossland, Palmer, & Brooks, 2013). The failure by the national government to acknowledge that violence against Native women has reached epidemic proportions, and the resulting inactivity to remedy those jurisdictional issues that deprive Native women of the necessary protections enables predators to continue to commit these acts of violence without having to fear legal repercussions.

There are complex jurisdictional issues with the latest 2013 version of VAWA regarding tribal nations and the protections for children. Tribes are subject to federal law but retain some of their inherent sovereignty. In analyzing the limitations and problems existant under VAWA 2013, it is essential to discuss children and their protections or lack thereof. Raia (2017) acknowledged that “rates of child abuse committed against AI/AN children are clearly high—the second highest of any racial group from 2010-2013 and are climbing” (p. 308). Due to the perceived lack of criminal persecution of perpetrators, the dark figure could be considerable. According to Raia, “More than 75% of residents on Indian reservations in the United States are non-Indians, and this percentage does not include non-Indians who work on the reservation but live outside of it” (p. 309). While VAWA stipulates that non-Natives who commit violent crimes against women can be tried in tribal courts, Burton (2017) noted that “Non-Indians who

commit crimes against AI children are even further insulated from government intervention because of the powerlessness of tribes to prosecute them, creating a heightened privacy for non-Indians who commit crimes against Indian children” (p. 210), thus highlighting the urgent need to amend VAWA so its protections also extend to AI children. Evidently, there is a correlation between domestic violence and child abuse and a high rate of violence to AI children by non-Native abusers. Congress should therefore extend protections for children and give tribes the necessary jurisdiction to prosecute (Burton, 2017).

Initially, tribes throughout Indian Country were elated with the 2013 provisions of VAWA because they finally afforded tribes the jurisdictional ability to prosecute non-Native perpetrators of domestic violence against tribal citizens. While tribal courts, law enforcement, and even social services thought this act would finally provide justice for Indian families exposed to domestic violence, the tribes who first ventured into exercising SDVCJ under VAWA 2013, found it to be surprisingly complicated and wrought with unexpected pitfalls and challenges.

In terms of the pilot project among the five approved tribes, here we discuss the case of three tribes that approved implementing SDVCJ in criminal cases involving domestic violence: Pascua Yaqui, the Tulalip, and the Confederated Tribes of Umatilla Indian Reservation in southeast Oregon (National Congress of American Indians [NCAI], 2017). As noted earlier, all three tribes had a large percentage of children who were either personally subject to or at least passively



witnessing acts of domestic violence. Additionally, there has been some controversy with regard to how “domestic violence” should be defined (NCAI, 2015a). The language needs to be explicit and unambiguous so that proper interventions can be put into place for each type of domestic violence scenario. To provide an example, a report of the NCAI, titled *Special Domestic Violence Criminal Jurisdiction Pilot Project Report*” presented a case study of a woman who removed her intoxicated partner from her home, only to find him back in the house upon her return one hour later, attempting to punch her but missing and falling to the ground. The tribal prosecutor refused to prosecute the assailant since there had been no actual physical contact (NCAI, 2015a). There are thus two different issues at play that complicate prosecution on the tribal level: (a) an overly narrow definition of what constitutes domestic violence, and (b) an atmosphere of legal pluralism in which the SDVCJ may obstruct the prosecution of VAWA offenders by tribal authorities. Another aspect to account for is that while VAWA allows for domestic violence offenses to be prosecuted, issues of property damage and drug possession convictions may hinder a successful conviction of domestic violence, as these fall outside the scope of the tribe’s jurisdiction (NCAI, 2015a).

Finally, financial resources available is an issue of important consideration. During Obama’s administration, to assist tribes in the enforcement of VAWA 2013, an appropriation of \$5 million distributed was annually 2014 to 2018; in Fiscal Year 2016 \$2.5 million was appropriated (U.S. Department of Justice, 2017).

Furthermore, according to the U.S. Department of Justice (2018, para. 9), “Congress authorized up to \$25 million total for tribal grants in fiscal years 2014 to 2018, but Congress has not yet appropriated any of those funds.” In March 2018, only 18 of the 562 federally recognized tribes in the U.S. have adopted SDVCJ, and none of these tribes have received the grant funding from the program authorized in VAWA 2013 to support the exercise of SDVCJ (NCAI, 2018). Several tribes have reported that it was difficult to fully implement and exercise SDVCJ, because of the lack of funding and access to resources (NCAI, 2015b). These funds would have enabled tribes to devote more resources to services such as preventative or intervention programs, community response teams to violence, as well as care services for victims of domestic violence.

### **Limited Protection to Children and Possible Areas of Intervention**

Before discussing the limited protection afforded by VAWA to children in more detail, we must first provide an overview of the intersectionality between domestic violence against women and child abuse, to identify potential gaps in community development. All three tribes who obtained criminal jurisdiction for cases of domestic violence during the pilot project following the reauthorization of VAWA in 2013 cited many challenges regarding the prosecution of perpetrators when children were involved or exposed to violence. Tribal prosecutors reported that SDVCJ could be more effective if it were amended to clarify that Indian tribes possess the authority to prosecute a non-Indian for the types of offenses that

typically occur alongside the domestic abuse of women. For example, “Tribal prosecutors are unable to charge the full range of criminal conduct that may occur in a domestic violence incident, they may be more dependent on victim cooperation and the offenders’ criminal history may not accurately reflect the severity of his actions” (NCAI, 2015a, p. 28). Such clarification would reaffirm tribal jurisdiction over crimes that frequently cooccur with domestic violence and overall types of violent crimes that occur within the family, including child abuse (NCAI, 2015a).

The lack of interventions offered by VAWA for the protection of children calls for a new policy, either in the form of an addendum to VAWA or, ideally, entirely new legislation to remedy the issue of vulnerable children on tribal land being left unprotected by existing laws. Initially, VAWA was intended to protect women in general from acts of domestic violence. However, over the years additional provisions and measures have been identified to offer the necessary protections also to particularly vulnerable populations who live under more complicated jurisdictions, such as Native women. While these amendments were enacted in the 2013 revision of VAWA, other vulnerable populations are still left unprotected. A new piece of legislation such as the already publicly debated Native Child Protection Initiative (NCPI) might be an adequate measure to alleviate the situation.

This initiative would accord specific rights, provisions, and privileges to Native American minors living both on and off reservation land. It could also

implement some necessary reforms of tribal governance and sovereignty. Tribal communities might have the opportunity to prosecute crimes against children internally, both at the state and national level. Additionally, this shift would open up avenues for obtaining federal funding to provide adequate services to child victims, which would be a significant improvement over the current situation. Legislation specific to Native American children is necessary to address the void of protection that has been left by the current version of VAWA. Other initiatives include targeted research and programs directed to improve the health of children living both on and off Tribal land.

Tulalip Tribes in Washington State were among the tribes who implemented the SDVCJ as part of the VAWA Pilot Project. Through SDVCJ the tribe was able to negotiate plea deals in four cases involving non-Native perpetrators. One case was eventually dismissed and another referred to the federal government because severe injuries had been inflicted on children (U.S. Department of Justice, 2015b). The pilot project could increase the perception of justice for victims of crimes that usually go unnoticed or unpunished in Indian Country. Native American children often witness these crimes, leading to a number of health and wellness problems (Stoner & Van Schilfgaarde, 2016).

While children in general are among the most vulnerable groups in society, the VAWA Pilot Project illustrated that Native American children are even more vulnerable and at a greater risk of experiencing violence, trauma, neglect, or abuse

than children of any other race. Advocating for better child welfare practices and services in Indian Country and bridging the jurisdictional gap between federal and tribal justice while working on the prevention side as well would lead to significant improvement over the status quo. According to object relations theory, beginning in infancy, and continuing during childhood, individuals develop mental representations of themselves, of others, and of the relationships they form. These mental representations carry over into adulthood and influence interpersonal relationships throughout life (Fife & Schragar 2012). Therefore, exposing children to episodes of violence can increase their likelihood of perpetuating the cycle of violence as adults; Indian country is becoming aware of these devastating impacts that continuing to burden their communities. Complete self-governance in combination with appropriate resources may enable tribes to reduce the levels of domestic violence in Indian Country. The experiences of the Tulalip Tribes, as reported by the NCAI (2015b), suggest that just increasing resources allocated to preventative programs may go a long way in bringing quick relief to tribal communities while the legal issues are still being resolved. Furthermore, considering the legal precedence that VAWA 2013 represents and the lessons learned from the Pilot Project, it seems paramount to allow tribes to exercise tribal sovereignty so that they can develop programs and services in their communities that address their specific needs.

To set the context for the Pascua Yaqui Tribe of Arizona, who participated in the pilot project, on the Pascua Yaqui reservation, the typical family unit consists of single-mother homes and the most frequently treated crimes in tribal court are related to domestic violence (NCAI, 2015b). From all three participating tribes, the Pascua Yaqui had the most SDVCJ cases to deal with. Of the 18 cases handled by the Tribe, four resulted in guilty pleas, four were taken on by the federal government, 10 cases were dropped due mostly to jurisdictional issues, and one case saw an acquittal. These 18 cases 15 non-Native offenders, all with previous crime police records, and in every case a Native American child was either witness to and/or victim of domestic violence (NCAI, 2015b).

In one particular case study presented by the Pascua Yaqui Tribe, a non-Native man was charged with various counts of domestic violence against a Native American woman and eventually sentenced. The crime had been witnessed by a Native child (U.S. Department of Justice, 2015b). The same case study also states that if this offender reoffends, he will be subjected to federal domestic violence prosecution because of his prior conviction on tribal lands (U.S. Department of Justice, 2015b). Clearly, giving the Tribe jurisdiction to deal with crimes committed on tribal land allowed them to prosecute non-Native offenders who might otherwise have gone unpunished (U.S. Department of Justice, 2015b). If these men had already been prosecuted for their first and second offenses, many of the subsequent incidents could have been prevented. It would be helpful to pass an addendum to

VAWA that would allow Tribes to take the criminal history of repeat offenders into consideration enabling them to pass an adequate sentence for current crimes.

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) had already enacted VAWA when they participated in the pilot project. VAWA incorporates parts of the TLOA 2010, which amended the sentencing guidelines of the Indian Civil Rights Act (ICRA) of 1968. It requires tribes to provide indigent defendants with a licensed defense attorney, as already required under the Constitution. In addition, cases need to be presided over by a judge with adequate training and knowledge of criminal law. Furthermore, tribal laws need to be made publicly available and records need to be preserved (Leonhard, 2015). VAWA 2013 also requires that “Tribes must provide these defendants with all rights enumerated in the ICRA and the right to a trial by an impartial jury drawn from sources that reflect a fair cross section of the community and do not systematically exclude any distinctive group in the community, including non-Indians” (Raia, 2017). The CTUIR had already implemented the TLOA felony sentencing in March 2011 and included non-Indians in jury pools to account for the 46% non-Indian residents of the reservation (Leonhard, 2015).

Leonhard (2015, para. 17) further stated that the “implementation [of TLOA felony sentencing] at the CTUIR has been nonexceptional. Cases proceed in the same way as all other cases. The only difference is that the community member

who stands accused happens to be non-Indian.” To date, there have been four non-Indian domestic violence cases involving three defendants in the CTUIR court. Two defendants pleaded guilty in three cases, while one case is still pending. Those who pleaded guilty are subject to tribal probation, including the requirement to undergo batterer intervention treatment, which the CTUIR provides free of charge (Leonhard, 2015).

After a review of the results from the VAWA Pilot Project, we have identified several issues that need to be addressed at the legislative, welfare, and community levels. First, VAWA 2013 should be expanded to include protections for children, because children often experience domestic violence perpetrated by a non-Indian offender (U.S. Department of Justice, 2015b). Any act of domestic violence, irrespective of whether it is committed against a woman, man, or child, should be included in the bill. The pilot project report of the NCAI (2015b) concluded that non-Indian domestic violence represents a significant problem in tribal communities, and that most of the assailants have close personal ties to the victims. The training of social service workers and law enforcement officers is crucial for increasing awareness and facilitating the implementation of the SDVCJ



through VAWA. Peer-to-peer learning among tribal nations, in combination with the development of tribal services and programs, will be vital in ensuring that VAWA will be successful within those communities. There is an evident confusion about the statutory definition of “domestic violence” (U.S. Department of Justice, 2015b), so the wording needs to be broadened and clarified accordingly. Federal partners are important for the successful implementation of VAWA and for providing the necessary resources to carry out SDVCJ.

### **Recommendations**

The VAWA Pilot Project highlighted the need for an addendum to VAWA to explicitly include Native children living in tribal communities (NCAI, 2015a). With VAWA’s current wording, tribal courts cannot effectively prosecute non-Native offenders. In order to provide adequate protection for Native children living on tribal land, tribal courts must be able to prosecute cases of domestic violence that involve children, whose presence causes the crimes to be considered aggravated offenses. In 2015, Chief Judge of the Tulalip Tribes Theresa Pouley stated that Tribes do not have criminal jurisdiction over children in domestic violence situations where they are either witnesses or indirect recipients of domestic violence (NCAI, 2015b). Although individual tribal codes may already provide

explicit protection for children subject to domestic abuse by a non-Native, these codes are unenforceable until there is a change to VAWA at the federal level. In addition, we recommend including provisions for the protection of children in all tribal codes, in combination with adequate allocation of funds for social services, shelters, and victim response.

Another measure could be the mandatory implementation of Coordinated Community Response Teams with federal financial support and legitimized through appropriate amendments to VAWA. For example, the Oneida Tribe of Indians of Wisconsin developed a Coordinated Community Response (CCR) to improve the protection of victims of domestic violence and hold offenders accountable (Red Hail, 1999). The CCR team includes professionals of various disciplines, who collaborate to share information more effectively, deliver needed services to victims, ensure victim safety, and promote offender accountability (Red Hail, 1999). Unfortunately, few tribal and nontribal agencies have established CCR teams to date.

Since 1999, the Oneida Tribe of Indians of Wisconsin, supported through VAWA, have maintained CCR teams and demonstrated their effectiveness (Red Hail, 1999). Also, in those tribes who took part in the pilot project for the 2013 reauthorization of VAWA, CCR teams proved to be highly effective. The CCR teams work primarily with the victim and the aggressor, but the family as a whole

is involved with the care following episodes of domestic violence. Because of partnering with agencies such as Indian Child Welfare, district attorney offices, and domestic violence shelters, Coordinator of the CCR team program Red Hail (1999) attributed the program's success to the vast experience gained over 15 years of operation and to the dedicated collaboration of all partners involved.

Legislative tribal jurisdictional provisions pertaining to Title IX-Safety for Indian Women are recommended as systematic addenda to VAWA. According to VAWA, tribes should be free to decide whether to adopt Title IX and can tailor it according to their specific tribal jurisdictional specifications and guidelines. Federal tribal laws subjected all tribal communities to a single piece of legislation without regard for the diverse attitudes toward sovereignty. The legislative innovations to VAWA were identified as jurisdictional matters.

To facilitate the prosecution of acts of domestic violence committed by non-Native offenders on tribal lands, closer collaboration between the state and tribal jurisdiction is necessary. Ideally, more effective processes should be enacted that support both jurisdictions i.e., allow both jurisdictions access to and use of all legal records and information to enter into an appropriate verdict.

Another important recommendation is to ensure the financial means for faithful compliance with the law in order ensure the safety of the victims in cases related to VAWA. Direct services to victims where the law is serving to protect them throughout their day, such as via increased police presence, is crucial. The

judicial process involving both the state and tribal communities can be rather convoluted, and a universal federal order of protection could remedy this.

Finally, involved stakeholders and agencies (law enforcement, attorneys, etc.) need to be trained in these new provisions to ensure full compliance and an efficient cooperation for the benefit of the victims.

### **Conclusion**

Violence against women and children in Indian Country is not only a local issue concerning the victims or their tribes, but a national one. Given that residents in Indian Country are far more vulnerable and experience much higher rates of domestic violence, it is imperative to partner with agencies from within and outside Tribal communities to facilitate change and bring justice to these communities.

One crucial point is to extend the protections and services afforded to women under VAWA to explicitly include children as well. Pilot projects giving Tribes jurisdiction to prosecute all types of violent offenses among its residents, irrespective of the perpetrators ethnicity have proven to be highly effective at delivering justice to the affected victims. Tribal citizens have an inherent right to self-determination and control over the issues that affect their lives and culture. By amending VAWA to fill the jurisdictional void that currently exists in Indian Country with regard to non-Native offenders, tribes can regain control over their communities and improve the safety and wellbeing of its most vulnerable residents.



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