

FEDERAL RESTRICTIONS ON TRIBAL CUSTOMARY LAW: THE IMPORTANCE OF TRIBAL CUSTOMARY LAW IN TRIBAL COURTS

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INTRODUCTION

History, customs, and language are vital elements of Native American customary laws. Customary law is law that is given by holy deities that governs a tribe's way of life. If federal laws continue to restrict or outright deny the incorporation of tribal customary law within tribal courts, Native American peoples will continue to lose their cultural heritage. This article examines the adverse effects of federal case law and legislation on tribal courts and tribal courts' ability to incorporate tribal customary law. The practice of tribal customary law within tribal courts is critical to the maintenance of tribal sovereignty. However, recent legislation that expands tribal jurisdiction, including the Tribal Law and Order Act of 2010¹ and the reauthorization of the Violence Against Women Act,² do not fully embrace tribal customary law. As a result, the practice of tribal customary law continues to be threatened. Yet, tribes can utilize aspects of these federal statutes to ensure tribal customary law is preserved in tribal courts. Thus, this article aims to encourage lawmakers and practitioners to acknowledge the importance of tribal customary law and to advocate for its continued use in tribal court. This article also discusses potential avenues tribes can utilize to expand tribal jurisdiction while protecting their customary laws, especially customary laws around two-spirit tribal members.

Part I of this article explains the importance of customary law within tribal courts. Part II examines federal court recognition of tribal customary law as evident in cases such as *Ex Parte Crow Dog*³ and *Santa Clara Pueblo v. Martinez*.⁴ Part II also scrutinizes Supreme Court cases like *United States v. Kagama*,⁵

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¹ Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(b)(6), 124 Stat 2258, 2262-63 (codified as amended in various sections of 18 U.S.C., 21 U.S.C., 25 U.S.C., 28 U.S.C., and 42 U.S.C.).

² Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 902(d)(1)(A)-(B), 127 Stat. 54, 119.

³ *Ex Parte Crow Dog*, 109 U.S. 556 (1883).

⁴ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

⁵ *United States v. Kagama*, 118 U.S. 375 (1886).

which upheld the constitutionality of federal legislation and limited the application of tribal customary law. Part III examines federal statutes like the Major Crimes Act, the Indian Civil Rights Act (ICRA), the Tribal Law and Order Act (TLOA), and the Violence Against Women Act (VAWA), and the adverse effects of this legislation on the use of tribal customary law. Part III primarily focuses on TLOA and VAWA, because TLOA affects a tribe's ability to implement VAWA.

I. THE IMPORTANCE OF TRIBAL CUSTOMARY LAW

Tribal customary law is law given from holy deities that governs the tribe's way of life including the tribe's justice systems. Tribal customary law is fundamental to tribal governance because it originates from tribal cultural foundations set forth in creation stories and teachings from holy deities.⁶ It is important to maintain tribal customary law because it strengthens tribal communities' identities and cultural foundations. For example, the Stockbridge-Munsee Band of Mohican Indians recognizes that “[h]aving a cultural thread [of tribal customary law] weaving throughout tribal codes and through tribal court processes is helping to make tribal communities stronger.”⁷ Another example of cultural foundations embodying tribal customary law is given by the Honorable Robert Yazzie's⁸ description of Diné (Navajo) fundamental law:

The Navajo word for ‘law’ is *beehaz'aanii*. It means something fundamental, and something that is absolute and exists from the beginning of time. Navajos believe that the Holy People ‘put it there for us from the time of beginning’ for better thinking, planning, and guidance.⁹

Tribal customary law incorporates tribal histories and cultural foundations into a tribe's law.¹⁰ These cultural foundations serve as a critical guide for how we, as tribal peoples, conduct ourselves with the surrounding environment.¹¹ Our presence must not disrupt the natural harmony of the environment.¹² This is

⁶ Ezra Rosser, *Customary Law: The Way Things Were Codified*, 8 TRIBAL L. J. 18, 19 (2008).

⁷ STOCKBRIDGE-MUNSEE COMMUNITY, *Tribal Court*, <http://www.mohican.com/tribalcourt/> (2015).

⁸ Chief Justice Robert Yazzie served as the Chief Justice of the Navajo Nation Supreme Court and is a graduate of the University of New Mexico School of Law.

⁹ Robert Yazzie, “*Life Comes From It*”: *Navajo Justice Concepts*, 24 N.M. L. REV. 175, 175 (1994).

¹⁰ See Rosser, *supra* note 6, at 27.

¹¹ H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW*, 65 (3rd ed. 2007) (describing how chthonic law takes a holistic view that everything in the environment is interconnected—that one “cannot understand [chthonic law] without understanding other things,” and that “there is no separation of law and morals, no separation of law and anything else” in chthonic legal traditions.).

¹² *Id.* at 68 (stating “the chthonic legal order is not simply compatible with chthonic religion” rather it is “it is shot through with [chthonic religion].” Further stating that chthonic legal tradition “is a divine legal tradition, and the role one plays is a divine role.”).

evident in many tribes, and prime examples can be found in the laws of the Diné Nation.

The Diné concept of *hozho* provides an example of how tribal customary law serves as a foundational guide for tribal members. Diné customary law, as codified, states, “[i]t is the right and freedom of the people that there always be holistic education values and principles underlying the purpose of living in balance with all creation, walking in beauty, and making a living.”¹³ These concepts describe *hozho*, the Diné concept of “the perfect state.”¹⁴ This perfect state is where the individual, the community, and nature are in harmony and balanced. The concept of *hozho* directly contrasts with the westernized concepts of law. The Diné concept of law is a restorative win-win situation¹⁵ whereas in western law, the goal “is to punish wrongdoers and teach them a lesson.”¹⁶ Achieving a win-win situation for both parties ensures restorative justice and *hozho* (harmony) is maintained within the tribal community and their courts.

In an interview with a Pueblo Tribal Court Judge, the Judge explained the pros and cons of utilizing tribal customary law within tribal courts.¹⁷ For example, the Judge noted that adjudicating family disputes in their tribal courts using western law did not bring the families together. This is where the use of tribal customary law was helpful. The Judge said customary laws bring families together, but their Pueblo Court was not set up to bring criminal defendants together to work out their differences.¹⁸

Professor Ezra Rosser¹⁹ once stated that customary law “naturally appeals to many tribal courts, not only because it allows tribal justice to accord with tribal society as shown through traditions, but also because the use of customary law is thought to reinforce the very same traditions.”²⁰ Thus, the use of customary law and traditions reinforces the need for recognition of these important cultural values.

A prime example of the importance of recognizing cultural values in tribal courts from the Navajo Nation is the use of *hazhó’ógo*. “*Hazhó’ógo* is not man-made law, but rather a fundamental tenet informing us how we must approach each other as individuals.”²¹ This fundamental tenet requires Navajos to take great care when interacting with each other.²² Without *hazhó’ógo*, we make

¹³ NAVAJO NATION CODE ANN. tit. 1, § 204 (2009).

¹⁴ Yazzie, *supra* note 9, at 175.

¹⁵ *Id.* at 182.

¹⁶ *Id.* at 178.

¹⁷ Interview with Anonymous, Pueblo Tribal Court Judge, at the Nat’l Am. Indian Court Judge’s Ass’n (NAICJA) Nat’l Tribal Judicial & Court Pers. Conference, in Catoosa, Okla. (Oct. 9, 2014) (judicial interviewees choose to remain anonymous because they do not want their personal beliefs affecting their judicial posting).

¹⁸ Interview with Anonymous, Tribal Court Judge, in Catoosa, Okla. (Oct. 9, 2014).

¹⁹ Ezra Rosser is a Professor of Law at American University College of Law and has written extensively on federal Indian law. Professor Rosser spent some of his childhood on the Diné Nation.

²⁰ See Rosser, *supra* note 6, at 19.

²¹ Navajo Nation v. Rodriguez, 5 Am. Tribal L. 473, 479 (Dec. 16, 2004).

²² *Id.* at 480.

rushed and uninformed decisions that can have negative consequences.²³ This is why Navajo Courts require police officers to exercise *hazhó'ógo* when processing criminal defendants.²⁴ Restorative cultural tools such as *hazhó'ógo* must continue to be incorporated by tribal courts because it is critical for tribal justice systems to align with their respective tribes' belief systems and community goals.

But the use of customary law requires more than knowing the tribe's traditions; this requires individuals to be present within the community. Tribal court judges who live within the community understand the importance of customary law. For example, Betsy McDougal talked about her brother's role within her tribal community. Ms. McDougal's brother serves as a tribal court judge. Ms. McDougal said his role is equal to that of an elder when he sits on the bench. When cases are tried before him, he speaks to the parties about tribal life lessons and what the tribal community expects of its members.²⁵ Ms. McDougal said it was important for her brother "to maintain his cultural foundation from the bench."²⁶ As such, he stays active within the community by participating in sweats and drumming. He is highly respected within the community. She noted that her brother educates individuals who appear in court about how their conduct is not consistent with the tribe's traditional teachings.²⁷ Those traditional teachings contribute to a strong cultural foundation.

Speaking the tribe's language in court reinforces this strong cultural foundation. This Pueblo tribal court judge stated that it is important to know your language when using customary law. The same Judge said he addresses the court in his native language to honor and respect each individual in the judicial process.²⁸ He says the native language helps set the tone within the courtroom. Further, this Pueblo tribal court judge emphasized that when the tribal court is opened with respect, the fighting parties will reach a resolution. The Judge explained that this respect comes from being a member of the Pueblo and understanding the language, the culture, and the teachings from the elders.²⁹ By continuing to incorporate tribal customary law in the court setting, courts achieve harmony, win-win situations, and retain their cultural practices. The weaving of tribal customary law within tribal court practices ensures the language, culture, and teachings from the elders remain present in the community.

II. SUPREME COURT RECOGNITION OF TRIBAL CUSTOMARY LAW

Historically, tribes incorporated their cultural values by applying customary law to civil and criminal conflicts. The United States Supreme Court

²³ *Id.*

²⁴ *Id.*

²⁵ Interview with Betsy McDougal, Turtle Mountain Band of Chippewa Indians Member, in Catoosa, Okla. (Oct. 9, 2014).

²⁶ *Id.*

²⁷ *Id.*

²⁸ Interview with Anonymous, Pueblo Tribal Court Judge, at the Nat'l Am. Indian Court Judge's Ass'n (NAICJA) Nat'l Tribal Judicial & Court Pers. Conference *supra* note 17.

²⁹ *Id.*

acknowledged the practice of tribal customary law in cases like *Ex Parte Crow Dog*³⁰ and in *Santa Clara Pueblo v. Martinez*.³¹

In *Ex Parte Crow Dog*, the Supreme Court examined whether the United States had jurisdiction over a crime that occurred between two Indians within reservation boundaries.³² Crow Dog and Spotted Tail were members of the Brulé Sioux Band.³³ Crow Dog murdered Spotted Tail and was tried under Brulé Sioux laws.³⁴ Employing its customary law, the Tribe ordered Crow Dog to pay Spotted Tail's family in blankets and horses as reparations for the murder.³⁵ However, Indian Agents believed Crow Dog was not punished for his crime and arrested and imprisoned him.³⁶ Crow Dog's case came before the United States Supreme Court on a writ of habeas corpus for illegal imprisonment.³⁷ The Supreme Court held that the United States did not have jurisdiction over the crime because it occurred within Indian Country between two Indians.³⁸ This case is notable because the federal courts acknowledged and upheld the Brulé Sioux's right to exercise their own tribal customary laws. In *Ex Parte Crow Dog*, the Supreme Court demonstrated this acknowledgment and acceptance of the traditional customary law when it quoted Justice Miller from *United States v. Joseph*:

The tribes for whom the act of 1834 was made were those semi-independent tribes whom our government has always recognized as exempt from our laws, whether within or without the limits of an organized State or Territory, and, in regard to their domestic government, left to their own rules and traditions, in whom we have recognized the capacity to make treaties, and with whom the governments, State and national, deal with few exceptions only, in their national or tribal character, and not as individuals.³⁹

Despite the Supreme Court's support of the use of tribal customary law in *Crow Dog*, Congress believed the Brulé Sioux's customary law was not a sufficient form of justice under western lens of justice.⁴⁰ Thus, in a direct response to the *Crow Dog* decision, Congress enacted the Major Crimes Act in 1885.⁴¹

³⁰ *Ex Parte Crow Dog*, 109 U.S. 556, 572 (1883).

³¹ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978).

³² *Ex Parte Crow Dog*, 109 U.S. at 557.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 568.

³⁶ *Id.* at 557.

³⁷ *Id.*

³⁸ *Id.* at 572.

³⁹ *Id.* at 572 (quoting *United States v. Joseph*, 94 U.S. 614, 618 (1877)).

⁴⁰ U.S. Dep't of Justice, *The Major Crimes Act – 18 U.S.C. § 1153*, CRIMINAL RESOURCE MANUAL 679, <https://www.justice.gov/usam/criminal-resource-manual-679-major-crimes-act-18-usc-1153> (last visited Apr. 19, 2017).

⁴¹ See generally *Offenses committed within Indian Country*, 18 U.S.C. § 1153 (1885) (18 U.S.C. § 1153 removes tribal jurisdiction over crimes committed within Indian County involving murder,

After Congress enacted the Major Crimes Act, the constitutionality of the legislation was questioned in *United States v. Kagama*. In *Kagama*, the Supreme Court examined whether the United States could exercise jurisdiction over major crimes committed between two Indians within reservation boundaries.⁴² The decision from *Kagama* again restricted the application of tribal customary law by upholding the Major Crimes Act. In *Kagama*, two Indians murdered another Indian within reservation boundaries.⁴³ Since murder fell within the federal district court's jurisdiction under the Major Crimes Act,⁴⁴ the Supreme Court held that tribes did not have jurisdiction to apply their own traditional customary laws to major crimes taking place within the bounds of their sovereign lands.⁴⁵ In explaining its rationale, the Supreme Court stated:

The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.⁴⁶

Because Congress diminished tribal power, the Supreme Court held the Major Crimes Act was a constitutional exercise of Congressional power because the tribes are considered "within the geographical limits of the United States."⁴⁷ In other words, because the tribes are within the limits of the United States, the tribes are under the political control of the federal government.⁴⁸ That political control allows Congress to make laws affecting the tribes.⁴⁹

While the *Kagama* decision restricted the use of traditional customary law, the Supreme Court acknowledged the importance of tribal customary law in later cases like *Santa Clara Pueblo v. Martinez*. In *Santa Clara Pueblo v. Martinez*, the Supreme Court examined whether the Santa Clara Pueblo tribal customary laws violated tribal members' equal protection rights under the Indian Civil Rights Act (ICRA).⁵⁰ This case arose when the Santa Clara Pueblo used its customary law to deny tribal enrollment and inheritance rights to the children of a female tribal member who married outside the tribe.⁵¹ The United States District

manslaughter, kidnapping, assault with a dangerous weapon, arson, burglary, and robbery, and gives jurisdiction to the United States).

⁴² *United States v. Kagama*, 118 U.S. 375, 376 (1886).

⁴³ *Id.*

⁴⁴ *See generally* Offenses committed within Indian Country, 18 U.S.C. § 1153 (1885).

⁴⁵ *United States v. Kagama*, 118 U.S. at 379.

⁴⁶ *Id.* at 384-85.

⁴⁷ *Id.* at 379.

⁴⁸ *Id.*

⁴⁹ *Id.* at 380.

⁵⁰ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 51 (1978). *See infra* Part III, Section B.

⁵¹ *Id.* at 51.

Court held that the Pueblo's customary law of restricting inheritance rights and tribal enrollment violated Section 1302(a)(1) of ICRA.⁵² However, the Supreme Court reversed and upheld tribal customary law through the doctrine of sovereign immunity by stating:

Congress may also have considered that resolution of statutory issues under § 1302, and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts.⁵³

The Supreme Court further acknowledged the importance of tribal tradition and custom by agreeing with the federal district court's statement that the tribe's membership rule reflected "traditional values of patriarchy still significant in tribal life."⁵⁴

In *Santa Clara Pueblo*, the Supreme Court highlighted the importance of tribal customary law and "the right of the Indians to govern themselves."⁵⁵ The Supreme Court also stated, "[s]ubject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves may undermine the authority of the tribal court."⁵⁶ Although previous cases like *United States v. Kagama* restricted the application of tribal customary law, *Santa Clara Pueblo* demonstrated that the Supreme Court still recognizes the importance of tribes' ability to govern their own people with their own tribal customary laws.

III. FEDERAL LEGISLATION RESTRICTING TRIBAL CUSTOMARY LAW

Most predominantly, the Major Crimes Act, the Indian Civil Rights Act (ICRA), the Tribal Law and Order Act of 2010 (TLOA), and the recent 2013 reauthorization of the Violence Against Women Act (VAWA) have had adverse effects on tribal customary law. The Major Crimes Act was one of the first restrictions on the application of customary laws. ICRA continued to restrict the application of customary law within tribal courts by imposing western legal concepts. Even "[m]odern federal efforts [like TLOA and VAWA that] are really designed to address the ill effects of colonization and to restore to tribes some of the governmental powers that existed prior to colonization by expanding tribal

⁵² *Id.* at 54; *See generally* Constitutional Rights, 25 U.S.C. § 1302(a)(1) (2010) (stating that tribes have the authority to "make or enforce any law prohibiting the free exercise of religion, or by abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances ...").

⁵³ *Santa Clara Pueblo v. Martinez*, 436 U.S. at 71.

⁵⁴ *Id.* at 54.

⁵⁵ *Id.* at 59 (quoting *Williams v. Lee*, 358 U.S. 217, 223 (1959)).

⁵⁶ *Id.* at 59 (quoting *Fisher v. District Court*, 424 U.S. 382, 387-8 (1976)).

court jurisdiction”⁵⁷ have come at the price of limiting tribes’ ability to apply tribal customary law within tribal courts.

A. *The Major Crimes Act: The Beginning of Federal Restrictions on Tribal Courts*

As discussed in Part II,⁵⁸ the Major Crimes Act was one of the first legislative acts to limit the application of customary law in tribal courts. After the Supreme Court’s decision in *Ex Parte Crow Dog* and “strong pressure by the Indian agents and the Indian Service, in 1885 Congress enacted the Federal Major Crimes Act.”⁵⁹ One reason for the enactment of the Major Crimes Act is that Congress did not consider tribal customary law as a valid legal institution. Further, “the Congressional Record reflects the belief that the resolution of the incident in accordance with tribal customary law amounted to ‘no law at all.’”⁶⁰ The use of tribal customary law purportedly demonstrated to Congress that the tribes lacked the ability to convict criminals within their communities. Congress believed Indians who commit crimes within the United States should be convicted under United States laws.⁶¹

Therefore, the Major Crimes Act granted federal courts jurisdiction over serious crimes that occur within Indian Country.⁶² Distinct federal statutes define serious offenses to include murder, manslaughter, and other felonies.⁶³ “In explicitly allowing the federal government to prosecute offenses between Indians within Indian country, the Act [caused] an avulsive change in federal Indian policy” by taking away tribes’ ability to punish serious offenders in Indian Country under their own tribal laws.⁶⁴ Under the Major Crimes Act, tribes no longer had the ability to protect their communities. Even if a tribe still retained criminal jurisdiction, there was “no explicit recognition of Indian custom in the criminal law of the United States.”⁶⁵ By enacting the Major Crimes Act,

⁵⁷ Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. Rev. 779, 843 (2006).

⁵⁸ See discussion *supra* Part III.

⁵⁹ Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 169 (2002).

⁶⁰ M. Brent Leonhard, *Returning Washington P.L. 280 Jurisdiction to Its Original Consent Based Grounds*, 47 GONZ. L. REV. 663, 672 (2012).

⁶¹ See 16 CONG. REC. 934 (1885).

⁶² See generally 18 U.S.C. § 1153(a) (1885) (establishing that “[a]ny Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.”).

⁶³ U.S. Dep’t of Justice, *The Major Crimes Act – 18 U.S.C. § 1153*, CRIMINAL RESOURCE MANUAL 679, <https://www.justice.gov/usam/criminal-resource-manual-679-major-crimes-act-18-usc-1153> (last visited Apr. 19, 2017).

⁶⁴ Washburn, *supra* note 57, at 809.

⁶⁵ *Recognition of Aboriginal Customary Laws (ALRC Report 31)*, AUSTL. L. REFORM COMMISSION (ALRC) 404 (June 12, 1986), <http://www.alrc.gov.au/publications/report-31>.

Congress attempted “to replace tribal norms and processes with federal norms and processes that Congress deemed superior.”⁶⁶ Thus, the Major Crimes Act “was a simple and straightforward act of colonization”⁶⁷ with the overall goal “to achieve assimilation.”⁶⁸ This “racism and explicit discounting of the customary laws of tribal nations is reflected throughout much of the Act’s legislative history.”⁶⁹

Hence, the passage of the Major Crimes Act significantly intruded into tribal courts’ ability to exercise their traditional customary law in all cases involving serious crimes. Unfortunately, this contempt for tribal customary law continued with the Indian Civil Rights Act.

B. Indian Civil Rights Act: Restricting Customary Law to Protect Individual Rights

The Indian Civil Rights Act (ICRA) also restricted application of customary laws within tribal courts.⁷⁰ ICRA extended a tailored version of the Bill of Rights to tribal members and imposed civil rights restrictions on tribal governments.⁷¹ Those restrictions were to protect individual tribal members from the rampant corruption within tribal governments.⁷² ICRA, as a component of tribal court criminal procedure, “effectively squelched many traditional ways of addressing criminal justice by requiring tribal governments to adjudicate criminal justice in a manner nearly identical to the federal and state governments.”⁷³ Because of the continued attempts to assimilate tribal courts, some tribes resisted ICRA implementation.

For example, Pueblos in New Mexico objected to ICRA, believing the act would diminish or eliminate tribal customs.⁷⁴ These Pueblos objected to the right to a jury trial because the Pueblos believed it would be difficult to find impartial jurors within their close-knit communities.⁷⁵ Similarly, the Ute and Hopi tribes also submitted testimony regarding their concerns of conflict between tribal customs and ICRA.⁷⁶ The Utes and Hopis were specifically worried about the candor of the court and turning tribal court proceedings into a game of who can play “the white man’s justice [game]” best.⁷⁷ Another concern from the tribes was transitioning tribal courts from a non-adversarial system to an adversarial system.⁷⁸

⁶⁶ Washburn, *supra* note 57, at 837.

⁶⁷ *Id.* at 809.

⁶⁸ *Id.* at 828.

⁶⁹ Leonhard, *supra* note 60, at 672.

⁷⁰ See generally Constitutional Rights, 25 U.S.C. § 1302(a)(2010).

⁷¹ U.S. COMM’N ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 1 (1991); See generally Constitutional Rights, 25 U.S.C. § 1302.

⁷² U.S. COMM’N ON CIVIL RIGHTS, *supra* note 71, at 5.

⁷³ See Washburn, *supra* note 57, at 822.

⁷⁴ U.S. COMM’N ON CIVIL RIGHTS, *supra* note 71, at 8.

⁷⁵ *Id.* at 9.

⁷⁶ *Id.* at 8.

⁷⁷ *Id.* at 9.

⁷⁸ *Id.* at 10.

During the implementation of ICRA, some “Indian courts suffered from a lack of legal infrastructure.”⁷⁹ Because tribal law was “generally unavailable to judges, litigants, and the public,”⁸⁰ tribes without tribal constitutions relied on ICRA and precedent from state and federal courts to decide tribal cases.⁸¹ The lack of legal infrastructure and the transition from non-adversarial approaches to a more adversarial court setting had negative effects. Overall, many tribal courts “changed into more formal and less traditional entities ten years after ICRA’s enactment.”⁸² This change caused tribal customary law to play “a smaller role in court proceedings since the Act.”⁸³ Because this change diminished the role of tribal customary law in tribal court, tribal courts shifted from restorative justice to adversarial justice systems. The adversarial justice system does not focus on restoring harmony to the community, rather it focuses on punishment. Thus, the ICRA interference weakened tribal courts and “inadvertently open[ed] the door to state and federal interference with internal tribal affairs”⁸⁴ through the Tribal Law and Order Act.

C. The Tribal Law and Order Act of 2010: The Cost to Expand Tribal Court Jurisdiction

Like earlier case law and legislation, the Tribal Law and Order Act (TLOA) limited tribes’ ability to use customary law in tribal courts. TLOA⁸⁵ was recently enacted to address jurisdictional shortcomings created by “the complexity of [the tribal and federal judicial] system” employed in Indian country that had “contributed to a crisis of violent crime on many Indian reservations that has persisted for decades.”⁸⁶ TLOA was created to address the concern that the “system of justice on Indian reservations [lacked] coordination, accountability, and adequate and consistent funding.”⁸⁷ Thus, in hopes of “empower[ing] tribal governments with the authority, resources, and information necessary to safely

⁷⁹ Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. COLO. L. REV. 59, 66 (2012).

⁸⁰ *Id.* at 77.

⁸¹ *Id.* at 66.

⁸² *Id.*

⁸³ *Id.* at 68.

⁸⁴ *Id.* at 70.

⁸⁵ See generally, Tribal Law and Order Act of 2010, Pub. L. 111-211, § 202 (b), 124 Stat. 2258, 2263 (establishing that the “purposes of this title are (1) to clarify the responsibilities of Federal, State, tribal, and local governments with respect to crimes committed in Indian country; (2) to increase coordination and communication among Federal, State, tribal, and local law enforcement agencies; (3) to empower tribal governments with the authority, resources, and information necessary to safely and effectively provide public safety in Indian country; (4) to reduce the prevalence of violent crime in Indian country and to combat sexual and domestic violence against American Indian and Alaska Native women; (5) to prevent drug trafficking and reduce rates of alcohol and drug addiction in Indian country; and (6) to increase and standardize the collection of criminal data and the sharing of criminal history information among Federal, State, and tribal officials responsible for responding to and investigating crimes in Indian country.”).

⁸⁶ S. REP. NO. 111-93, at 1 (2009).

⁸⁷ *Id.*

and effectively provide public safety in Indian country,” TLOA was signed into law on July 29, 2010.⁸⁸

1. The True Costs of Implementing TLOA

While TLOA was intended to expand the jurisdiction of tribal courts, including their ability to use tribal customary law in criminal cases, the use of tribal customary law in tribal courts continues to be limited by the high costs of TLOA implementation. As Professor Angela Riley indicated, “costs stand as the greatest barrier to making any kind of meaningful change in criminal justice in Indian country.”⁸⁹ TLOA requires that “a sovereign must bear the burden of ensuring all of these various [justice] systems are operational.” This means TLOA requires tribes to bear all the costs to expand tribal jurisdiction.⁹⁰ But many tribes do not have adequate funding to update their tribal courts to meet the TLOA requirements. This lack of funding is one of the primary reasons some tribes have difficulty integrating TLOA into their current tribal judicial systems.

One major financial burden exists under Section 234(c) of TLOA.⁹¹ Section 234(c)(2) states the tribal government must provide the defendant with a defense attorney who is licensed to practice law in any jurisdiction of the United States.⁹² Sections 234(c)(3)(A) and (B) also require the presiding judge to have sufficient legal training *and* be licensed to practice law.⁹³ These requirements mean hiring only attorneys who are law trained and have passed a bar exam. As the pay rate can be very high for individuals who are legally trained and licensed to practice law, offering a comparable salary is difficult and costly for a tribe that has little economic infrastructure. While there are numerous grants to offset the costs of drug enforcement and incarceration under TLOA,⁹⁴ there is unfortunately little funding for the required legal counsel.⁹⁵

⁸⁸ Tribal Law and Order Act, § 202(b)(6), 124 Stat. at 2262.

⁸⁹ Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1631 (2016).

⁹⁰ INDIAN LAW AND ORDER COMM’N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER 134 (June 14, 2012), http://www.aisc.ucla.edu/iloc/report/files/Chapter_5_Detention.pdf.

⁹¹ Tribal Law and Order Act, § 234(c), 124 Stat. at 2280 (“In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall— “(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; (2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys; (3) require that the judge presiding over the criminal proceeding— (A) has sufficient legal training to preside over criminal proceedings; and “(B) is licensed to practice law by any jurisdiction in the United States.”).

⁹² *Id.*

⁹³ *Id.* § 234(c)(2)(A)-(B), 124 Stat. at 2280.

⁹⁴ Seth Fortin, *The Two-Tiered Program of the Tribal Law and Order Act*, 61 UCLA L. REV. DIS. 88, 97 (2013).

⁹⁵ *Id.*

In fact, “there is no single, well-defined funding program devoted exclusively to helping tribal courts meet TLOA’s requirements.”⁹⁶ TLOA has been amended to require legal assistance grants under 25 U.S.C. Section 33 to help offset defense counsel costs, but legal assistance grant money *can* only be used to pay for state licensed criminal defense counsel.⁹⁷ Grants are not a sustainable source of revenue to offset costs for TLOA implementation. Grants are competitive and in short supply. As it is, tribes already “face a number of barriers to raising revenue in traditional ways” and the high costs of providing state licensed law trained tribal court judges and defense attorneys are an insurmountable burden that prevent tribes from using the expanded TLOA jurisdiction.⁹⁸ Because TLOA requires state-licensed defense attorneys, implementation comes at the expense of some of tribes’ greatest resources. Those resources are the tribal court lay judges and tribal lay advocates. Those individuals utilize tribal customary law to ensure harmony remains in their communities. The TLOA defense attorney requirement has ambiguous language regarding licensing. This ambiguity appears to leave the door open for tribal lay advocates, but this unclear language also could create a dangerous precedent to exclude them.

Section 234(c)(2) of TLOA states that a tribal court defense attorney must be “licensed to practice law in *any* jurisdiction of the United States,”⁹⁹ but provides no specific language as to whether tribal lay advocates can practice as defense attorneys under TLOA. Many tribal courts allow lay advocates to practice within their courts. Lay advocates are admitted to practice in tribal courts and advocate for parties who appear before tribal courts, but lay advocates are not trained in state law schools or bar-licensed by any specific state.¹⁰⁰ Like practicing attorneys, lay advocates must meet the tribe’s criteria to practice in tribal courts, and adhere to the same ethical code as licensed attorneys.¹⁰¹ Lay advocates are a great benefit for tribal communities and should be allowed to advocate for tribal clients under expanded criminal jurisdiction.

The Supreme Court acknowledged the benefits of tribal lay advocates when it stated, “[k]nowledgeable lay advocates may offer real advantages to their clients in a criminal court that applies traditional tribal principles to its legal

⁹⁶ *Id.* at 94.

⁹⁷ *Id.*

⁹⁸ *Michigan v. Bay Mills Indian Community*, 134 U.S. 2024, 2041 (2014).

⁹⁹ Tribal Law and Order Act, § 234(c)(2), 124 Stat. at 2280 (emphasis added).

¹⁰⁰ SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS § 87.102(4) (2004) (providing one example of use of lay advocates in tribal courts).

¹⁰¹ *See* SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS § 87.106 (2004) (requiring each applicant to provide documentation of legal or law-related education, and demonstrate a comprehension of tribal traditions and codes); STOCKBRIGE-MUNSEE COMMUNITY, *Tribal Court* (2015), <http://www.mohican.com/tribalcourt/> (requiring lay advocates to pass a standard written exam administered by the tribal court and the exam tests the advocate’s knowledge of tribal law and federal Indian law); Judicial Branch of the Navajo Nation, *Courts & Peacemaking in the Navajo Nation* F. (May 16, 2013), <http://www.navajocourts.org/publicguide.htm> (requiring lay advocates to complete the Tribal Advocates program and pass the Navajo Nation bar exam to practice within the Navajo Nation).

decision making.”¹⁰² Thus, lay advocates are important because they have deep knowledge and experience with customary law. Much of this knowledge and experience stems from tribal lay advocates residing in their own tribal communities, and their fluency in the tribe’s language. This cultural knowledge is crucial in tribal court practice because tribal courts typically incorporate tribal customary law with western legal concepts. For these reasons, instead of imposing a costly requirement of law trained attorneys, TLOA should emphasize the importance of tribal lay advocates within tribal courts. Furthermore, the ambiguous language in TLOA may cause dangerous precedence that could negatively impact tribal lay advocates and their ability to practice in tribal courts. In *United States v. Alone*, a federal district court examined whether tribal lay advocates are now considered licensed attorneys under TLOA.¹⁰³ In *Alone*, an Oglala Sioux man was charged with sexual abuse and asserted that the tribal lay advocate was licensed in federal and tribal court.¹⁰⁴ The defendant argued that TLOA changed the status of the tribal lay advocate to a licensed attorney.¹⁰⁵ The federal district court held that there was no specific provision of TLOA to support his argument.¹⁰⁶ Moreover, the Court stated, “there is a clear distinction between licensed legal counsel and lay representation under the Sixth Amendment.”¹⁰⁷ The Court also stated that, “the United States Supreme Court did not extend the Sixth Amendment to encompass the right to be represented before the bar of a court by a layman.”¹⁰⁸ *Alone* is an example of how the ambiguous language in TLOA adversely affects the status of tribal lay advocates. If tribal lay advocates are excluded from practicing in their tribal courts, it could have a negative effect on the continued use of tribal customary law.

2. The Harmony of Incorporating Customary Law into TLOA

One avenue within TLOA to incorporate tribal customary law is Section 211, the TLOA federal accountability and coordination section. Tribes can use the federal accountability and coordination section of TLOA to ensure the incorporation of customary law with enhanced sentencing. Under Section 211, the Office of Justice Services is required to communicate “with tribal leaders, tribal community and victims’ advocates, tribal justice officials, indigent defense representatives, and residents of Indian country on a regular basis regarding public safety and justice concerns facing tribal communities.”¹⁰⁹ This requirement means the Office of Justice Services must conduct “meaningful and timely consultation[s] with tribal leaders and tribal justice officials in the

¹⁰² See Fortin, *supra* note 94, at 102.

¹⁰³ *United States v. Alone*, No. CR. 11-50031-JLV, 2011 WL 2708732, at *4 (D.S.D. July 12, 2011).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (quoting *United States v. Killeaney*, No. CR 07-300630-01-KES, 2007 WL 4459348, at *5 (D.S.D. Dec. 17, 2007)).

¹⁰⁸ *Id.* (quoting *Wheat v. United States*, 486 U.S. 153, 159 (1988)).

¹⁰⁹ Tribal Law and Order Act of 2010, Pub. L. 111-211, § 211(b)(11), 124 Stat. 2258, 2264.

development of regulatory policies and other actions that affect public safety and justice in Indian country.”¹¹⁰ These consultations could serve as avenues for tribes to advocate for the use of their own customary laws in sentencing individuals while adhering to TLOA requirements.

Tribal customary law may also be incorporated through alternative forms of punishment under TLOA. Under section 234(d)(2), a tribal court may require a defendant “to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.”¹¹¹ This statement opens the door for tribal courts to integrate tribal customary forms of punishment.

The Tulalip Tribal Court is an example of a tribe that successfully integrated customary law as alternative sentencing programs into its justice system while working under the TLOA constraints. The Tulalip Tribes are within the Public Law 280 State of Washington. Public Law 280 (PL-280) was enacted in 1953 and allowed states to exercise criminal jurisdiction within parts of Indian country.¹¹² Though the Tulalip Tribes consented to state jurisdiction,¹¹³ the tribes fought to regain authority over crimes committed within their reservation. In 2001, the Tulalip Tribes successfully regained jurisdiction over criminal misdemeanors and have concurrent federal jurisdiction over criminal felonies.¹¹⁴

After completing the transfer, the Tulalip Tribes implemented TLOA provisions to regain criminal jurisdiction and take advantage of enhanced sentencing. The Tulalip Tribes have developed their own justice program that incorporates their customary laws. The Tulalip Tribal Code’s choice of law provision addresses how customary law will apply within their tribal courts. Specifically, under Chapter 2.05.030(2) the Tulalip Tribal Code states:

The Tulalip Tribal Courts shall apply the laws and ordinances of the Tulalip Tribes, *including* the custom laws of the Tribes, to all matters coming before the Courts; provided, that where no applicable Tulalip Tribal law, ordinance, or *custom law can be found*, the Courts may utilize, in the following order, the procedural laws of other Federally recognized Indian tribes, Federal statutes, Federal common law, State common law, and State statutes as guides to decisions of the Courts (emphasis added).¹¹⁵

In discussing the importance of utilizing tribal customary law in alternative sentencing programs, Chief Judge Theresa Pouly of the Tulalip Tribal

¹¹⁰ *Id.* § 211(b)(12), 124 Stat. at 2264.

¹¹¹ *Id.* § 234(d)(2), 124 Stat. at 2280-81.

¹¹² U.S. Dep’t of Justice, *Frequently Asked Questions about Public Law 280 and the Tribal Law & Order Act*, <http://www.justice.gov/usao/mn/PL-280%20FAQ.html> (last visited Mar. 30, 2015).

¹¹³ See Leonhard, *supra* note 60, at 705.

¹¹⁴ Harvard Project on Am. Indian Econ. Dev., *Tulalip Alternative Sentencing Program, Honoring Nations: 2006 Honoree 1* (2006) https://nnidatabase.org/db/attachments/text/honoring_nations/2006_HN_Tulalip_alternative_sente_ncing_program.pdf.

¹¹⁵ TULALIP TRIBES TRIBAL CODE, § 2.05.030 (2013).

Court stated, “Tulalip wants to maintain that restorative justice code [and] at the same time balance the extended jurisdiction to address really serious crimes.”¹¹⁶ The Tulalip Tribes maintained their customary laws and cultural foundations by creating “a judicial system that Tulalip citizens can trust and that also helps offenders to recover rather than just throwing them away.”¹¹⁷

This restorative judicial system is known as the Tulalip Tribal Court Alternative Sentencing Program. The Tulalip Tribal Court Alternative Sentencing Program incorporates tribal customs into sentences, with successful results. The Tulalip Tribes specifically wanted to exert more control over their growing domestic violence and drug use problems. Part of that control included bringing in traditional values and a focus on “restoration, recovery, healing, community, and the family” through the application of customary law based sentences.¹¹⁸ The program “melds indigenous and therapeutic jurisprudence, [and goes] beyond just placing offenders in jail.”¹¹⁹ Instead of having offenders serve jail sentences, the Tulalip Tribal Court Alternative Sentencing Program provides many services to support and rehabilitate offenders. These services include mental health treatment, meetings with elders, and vocational classes.¹²⁰ This alternative sentencing program allows community input to restore a healthy community and the individual.¹²¹ Based on 2006 statistics, twenty-five percent of the participants did not reoffend and the Tulalip police chief reported a drop in violent crime and gang activity.¹²²

Despite the TLOA restrictions, the Tulalip Tribes found alternative avenues to incorporate tribal customary law. Tribes can look to the Tulalip as a successful model of adopting TLOA and can implement similar models of alternative forms of sentencing. While TLOA potentially can have an adverse effect on a tribe’s ability to continue practicing its customary law, the Tulalip Tribes demonstrated that implementing TLOA does not mean a tribe must stop practicing its customary law in the courtroom. As the Tulalip Tribal Court Alternative Sentencing Program successfully harmonizes TLOA jurisdiction and tribal customary law in order to best serve the Tulalip tribal community, other tribes can use Tulalip’s alternative sentencing model to seek alternative avenues to ensure their customary laws have a place within the tribal courts.

D. Violence Against Women Act: Unanswered Questions of Protecting Our Sisters

The recent reauthorization of the Violence Against Women Act (VAWA) also adversely affects the use of tribal customary law. Title IX of this Act applies to Indian women within Indian country. The purpose of this law was to increase

¹¹⁶ Felicia Fonseca, *Feds Highlight Efforts To Curb Reservation Crime*, NAT’L CONGRESS OF AM. INDIANS, <http://tloa.ncai.org/news.cfm?view=display&aid=57> (last visited Apr. 20, 2017).

¹¹⁷ See Harvard Project on Am. Indian Econ. Dev., *supra* note 114, at 1.

¹¹⁸ *Id.* at 3.

¹¹⁹ *Id.* at 1.

¹²⁰ INDIAN LAW AND ORDER COMM’N, *supra* note 90, at 134.

¹²¹ See Harvard Project on Am. Indian Econ. Dev., *supra* note 114, at 2.

¹²² *Id.*

awareness of violence against Native American women and enhance the response to violence against them.¹²³ Specifically, Title IX of VAWA allows tribes to have jurisdiction over Native and non-Native individuals who commit domestic violence crimes, dating violence crimes, and protection order violations within Indian country.

These amendments to VAWA were made based on the high need for protection of domestic violence victims in Indian country. Native Americans are 2.5 times more likely than all other races to experience sexual assault crimes, and one in three Indian women reports having been raped during her lifetime.¹²⁴ The Justice Department is responsible for prosecuting the most serious crimes that fall under the Major Crimes Act,¹²⁵ but turns down two-thirds of sexual assault cases.¹²⁶ There are many reasons for these low prosecution rates including,¹²⁷ lack of evidence, lack of resources, and lack of communication between the federal government and tribal authorities.¹²⁸

In providing support for the passing of VAWA Senator Franken stated, “We all know too well that Indian women are victimized more than any other population.”¹²⁹ VAWA acknowledged that “[v]iolence in Indian country is compounded by a systemic failure to prosecute offenders.”¹³⁰ Like TLOA, VAWA provides extended sentencing abilities for tribes. But, if tribes want to take advantage of the expanded jurisdiction, tribes must meet the definition of a “participating tribe.”

1. The Difficulties of Qualifying as a Participating Tribe

To qualify as a participating tribe under VAWA, the tribe must satisfy the due process protections in TLOA.¹³¹ As discussed above, one of those due process requirements is to provide indigent defendants with effective legal counsel.¹³² Under TLOA, legal counsel is any attorney licensed to practice law in any jurisdiction of the United States.¹³³ As previously stated, tribal lay advocates still could be excluded, and implementation of the TLOA requirements for expanded jurisdiction is expensive.¹³⁴

¹²³ Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 902 (d)(1)(A-B), 127 Stat. 54, 119.

¹²⁴ U.S. Dept. of Justice, *Tribal Communities*, <http://www.justice.gov/ovw/tribal-communities> (last visited Dec. 8, 2014).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *The Increased Importance of the Violence Against Women Act in a Time of Economic Crisis: Hearing Before the Committee on the Judiciary*, 111 Cong. 13 (2010) (statement of Sen. Franken).

¹³⁰ Tribal Court Clearing House, *Introduction to the Violence Against Women Act*, TRIBAL LAW AND POLICY INST., http://www.tribal-institute.org/lists/title_ix.htm (last visited Apr. 19, 2017).

¹³¹ *See supra* Introduction.

¹³² *See discussion supra* Part III Section C.1.

¹³³ Tribal Law and Order Act of 2010, Pub. L. 111-121, § 234(c)(2), 124 Stat. 2258, 2280.

¹³⁴ *See discussion supra* Part III Section C.

The TLOA defense attorney requirement has ambiguous language regarding licensing. This ambiguity appears to leave the door open for tribal lay advocates, but this unclear language also could create a dangerous precedent to exclude them. Exclusion of tribal lay advocates from tribal courts in conjunction with VAWA's expanded domestic violence jurisdiction is risky. Without tribal lay advocates, domestic violence victims may not be able to attain justice.

Because *Alone* can affect the attorney requirements in TLOA as detailed above,¹³⁵ it can also affect VAWA and prevent tribal lay advocates from practicing within tribal courts that elect to implement both statutes. More precedent like *Alone* can also prevent tribes from qualifying as a participating tribe because the tribe cannot afford to employ a state licensed attorney. Instead of utilizing the tribe's greatest resource of tribal lay advocates, domestic violence will continue to adversely affect the community.

2. Tribal Customary Law Can Be Incorporated into Tribal Courts through Tribal Coalitions

If a tribe does not qualify as a participating tribe to utilize special domestic violence criminal jurisdiction, one solution to combat the domestic violence epidemic while incorporating tribal customary law is through a tribal coalition. Tribal coalitions are non-profit, non-governmental organizations that provide culturally appropriate services to domestic violence victims.¹³⁶ Tribal coalitions incorporate tribal customary laws to help combat domestic violence within the community. An example of such a coalition is the Seven Dancers Coalition in New York which is a community-oriented project that works to better the lives of Native American Women and help individuals live free of violence.¹³⁷

Tribal coalitions can assist tribes in "developing and promoting state, local, and tribal legislation and policies that enhance best practices for responding to violent crimes against Indian women, including the crimes of domestic violence, dating violence, sexual assault, sex trafficking, and stalking."¹³⁸ Tribal coalitions have the ability to implement tribal customs into their awareness and rehabilitation efforts. If a coalition were to create a domestic violence survivor program that incorporated tribal customs, the experience might assist survivors in achieving "an enhanced sense of well-being" and "raise their awareness of the various aspects of domestic violence."¹³⁹ This awareness reaffirms cultural teachings and ensures the continuation of tribal customary laws.

Under VAWA, there are grant programs available to fund tribal coalitions. Section 902(d)(1)(A) gives the Attorney General the power to award grants "to tribal coalitions for purposes of increasing awareness of domestic violence and

¹³⁵ See discussion *supra* Part III Section C.1.

¹³⁶ Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 3, 127 Stat. 54, 58-9.

¹³⁷ *Seven Dancers Coalition*, <http://www.sevendancerscoalition.com> (last visited Apr. 20, 2017).

¹³⁸ Violence Against Women Reauthorization Act, § 902(d)(1)(D), 127 Stat. at 119.

¹³⁹ Jeana Petillo, *Domestic Violence in Indian Country: Improving the Federal Government's Response to This Grave Epidemic*, 45 CONN. L. REV. 1841, 1869 (2013) (internal quotations omitted).

sexual assault against Indian women.”¹⁴⁰ The organization must “meet the criteria of a tribal coalition” under Section 3(a)(35).¹⁴¹ This provision defines a tribal coalition as “an established nonprofit, nongovernmental Indian organization, Alaska Native organization, or a Native Hawaiian organization” that:

- (A) provides education, support, and technical assistance to member Indian service providers in a manner that enables those member providers to establish and maintain culturally appropriate services, including shelter and rape crisis services, designed to assist Indian women and the dependents of those women who are victims of domestic violence, dating violence, sexual assault, and stalking; and
- (B) is comprised of board and general members that are representative of—
 - (i) the member service providers describe in subparagraph (A); and
 - (ii) the tribal communities in which the services are being provided.¹⁴²

Thus, with VAWA funding, tribal coalitions can combat domestic violence by incorporating tribal customary laws to achieve a restorative effect and reduce violence against women in Indian country. Tribal coalitions are great avenues for tribal lay advocates to help their community members if domestic violence victims are unable to use tribal lay advocates’ services in tribal court. The use of a tribal coalition can help tribes and tribal lay advocates ensure the continued use of tribal customary law within their tribal communities.

3. The Protection of Two-Spirit Individuals and Same Sex Couples

While VAWA seeks to protect Native American women from domestic violence in Indian country and has the potential to incorporate customary law in doing so, it leaves open questions about tribal protection of relationships between two spirit individuals. When examining the requirements for tribal jurisdiction under VAWA, the ambiguous language in the Act invites questions about how tribes can protect transgender individuals or spouses of same-sex relationships. The 2013 Reauthorization of VAWA states that special domestic violence criminal jurisdiction extends to individuals regardless of sexual orientation.¹⁴³ However, that ambiguous language still leaves a loophole. Tribal courts may not be able to exercise jurisdiction over non-Indians in same-sex relationships with tribal members if the tribe does not acknowledge the relationship as a qualifying relationship. Thus, VAWA’s vague language as to whether same-sex

¹⁴⁰ Violence Against Women Act, § 902(d)(1)(A), 127 Stat. at 119.

¹⁴¹ Violence Against Women Act, §3(a)(35), 127 Stat. at 58-9.

¹⁴² *Id.*

¹⁴³ *Id.* § 3(a)(39), 127 Stat. at 59.

relationships qualify under the Act can have unintended consequences that lead to less protection of our two-spirited individuals.

Another term for transgendered individuals is two-spirited.¹⁴⁴ The statistics of hate crimes against two-spirited individuals of color are horrific. Two-spirited women of color are 1.6 times more likely to experience physical violence.¹⁴⁵ They are also 1.8 times more likely to experience sexual violence.¹⁴⁶ Moreover, two-spirited women are 2.9 times more likely to experience discrimination when seeking help.¹⁴⁷ Eighty-five percent of two-spirited Native American women are sexually assaulted and seventy-eight percent reported physical assault.¹⁴⁸ These statistics demonstrate a need to offer better protection for our two-spirited sisters. Yet, the failure to incorporate tribal customary law in VAWA does not provide a clear answer to how can our tribes help protect *all* of their members?

25 U.S.C. Section 1304 of VAWA, provides a criteria list for qualifying relationships that meet VAWA's protections. This includes the length of the relationship, the type of relationship, and the frequency of interaction.¹⁴⁹ "Spouse" or "intimate partner" are also defined as someone who has cohabitated with the victim.¹⁵⁰ Marriage also could qualify under a tribe's domestic or family laws,¹⁵¹ but these definitions are vague because they do not clearly include two-spirit individuals. This ambiguity can be harmful to two-spirited individuals or same-sex couples who experience domestic violence by their partners. By not specifically incorporating two-spirited individuals or same-sex couples into the definition of a qualifying relationship can adversely affect their ability to achieve justice in tribal courts.

A case from the Pascua Yaqui Tribe in Arizona, provides an example of how exercising special domestic violence criminal jurisdiction under VAWA can have an adverse effect on same-sex couples.¹⁵² The Pascua Yaqui Tribe received approval to begin exercising special domestic violence criminal jurisdiction under

¹⁴⁴ Walter L. Williams, *The 'two-spirit' people of indigenous North Americans*, THE GUARDIAN (Oct. 11, 2010), <http://www.theguardian.com/music/2010/oct/11/two-spirit-people-north-america>.

¹⁴⁵ National coalition for Antiviolence Programs, *A Report from the National Coalition of Anti-Violence Programs, Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2014* at 9 (2006) http://www.avp.org/storage/documents/Reports/2014_HV_Report-Final.pdf.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ NCAI Policy Research Center, *A Spotlight on Two-Spirit (Native LGBT) Communities* 6, http://www.ncai.org/policy-research-center/research-data/prc-publications/A_Spotlight_on_Native_LGBT.pdf (last visited Apr. 20, 2017).

¹⁴⁹ Tribal jurisdiction over crimes of domestic violence, 25 U.S.C. § 1304(a) (1-2) (2013).

¹⁵⁰ Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904(a)(2), 127 Stat. 54, 120-1.

¹⁵¹ *See* Tribal Jurisdiction Over Crimes of Domestic Violence, 25 U.S.C. § 1304(a)(1)(2) (2013).

¹⁵² Nat'l Cong. of Am. Indians, *Special Domestic Violence Criminal Jurisdiction Pilot Project Report* 6 (2015), http://www.ncai.org/attachments/NewsArticle_VutTUSYSfGPRpZQRYzWcuLekuVNeETAOBBwGyvkWYwPRUJOioqI_SDVCJ%20Pilot%20Project%20Report_6-7-16_Final.pdf (case analyzed within report).

VAWA on February 20, 2014.¹⁵³ In 2014, a case came before the Pascua Yaqui Tribal Court that involved two men in a same-sex relationship. The jury acquitted the defendant because they were not convinced that the individuals were in a relationship.¹⁵⁴ The prosecutor had to prove that a relationship existed between the offender and the victim to meet VAWA jurisdiction because one individual was non-Indian.¹⁵⁵ Under 25 U.S.C. Section 1304(a)(2), tribes can exercise extended VAWA jurisdiction only for domestic violence occurring between individuals who are in a qualifying relationship. In the Pascua Yaqui case, the relationship did not meet the statutory language, which states:

[a] current or former spouse or intimate partner of the victim, by a person 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 jurisdiction over the Indian where the violation occurs.¹⁵⁶

Ultimately, the non-Indian defendant was “extradited to the State of Oklahoma on an outstanding felony warrant.”¹⁵⁷

Although the Pascua Yaqui case was not a total failure of VAWA, this case does bring up some complex issues regarding the protection of our two-spirited tribal members. If the non-Indian defendant had not been extradited to Oklahoma for an outstanding warrant, would he be back on the reservation still abusing his partner? What qualifies a same-sex relationship as a “relationship” under the 2013 Reauthorization of VAWA? These unanswered questions are still present, and given the high abuse rate of our two-spirited tribal members, there needs to be clear answers to ensure our tribal courts can provide justice.

Tribal laws have recognized same-sex marriage to grant equal protection and due process to all tribal members. For example, the Puyallup Tribe passed an amendment to add a section to its tribal code to legalize same-sex marriage.¹⁵⁸ Under Section 7.08.030 of the Puyallup Tribal Code, same-sex marriages are valid if one of the partners is a member of the Puyallup Tribe, at least eighteen years old, and obtained a certificate of marriage.¹⁵⁹

There are tribes that do not recognize same-sex marriage, but their customary laws regard these individuals as respected community members who

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 7.

¹⁵⁵ *Id.*

¹⁵⁶ Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904(a)(2), 127 Stat. 54, 120-1.

¹⁵⁷ Nat'l Cong. of Am. Indians, *supra* note 152, at 6.

¹⁵⁸ Matt Nagle, *Puyallup Tribe Recognizes Same-Sex Marriages*, TACOMA WKLY., July 16, 2014, <http://www.tacomaweekly.com/news/view/puyallup-tribe-recognizes-same-sex-marriages/>.

¹⁵⁹ LAWS OF THE PUYALLUP TRIBE OF INDIANS § 7.08.030 (2014).

guard traditions and stories.¹⁶⁰ For example, the Diné Nation considered *nádleeh* as someone whose identity exists beyond male and female.¹⁶¹ Because of the dual role of *nádleeh*, they were thought to be sacred because they assumed both masculine and feminine roles within the community.¹⁶² Prior to 2005, the Diné Nation did not specifically prohibit same-sex marriages.¹⁶³ However, when the issue of gay marriage reached the national stage, the Diné passed the Diné Marriage Act of 2005. The Diné Marriage Act invalidated marriage between same-sex couples.¹⁶⁴ Many other tribes have passed similar legislation.¹⁶⁵

Other tribes recognize the rights of individuals in same-sex marriages.¹⁶⁶ However, the vague language in VAWA does not provide adequate protection for these couples. If a tribe does not recognize a same-sex marriage, but the surrounding state does, who has jurisdiction? This vagueness creates open questions in tribal courts that need to be resolved to protect two-spirit members. Is there a solution where tribes can utilize customary laws to help a couple reach a resolution in a domestic dispute? Or must tribes turn away these domestic violence cases because tribes must abide by the TLOA and VAWA standards? These questions have yet to be answered.

VAWA was created to “strengthen the capacity of Indian tribes to exercise their sovereign authority to respond to violent crimes against Indian women.”¹⁶⁷ Tribes exercise their sovereign authority by integrating their customary laws with traditional western notions of justice.¹⁶⁸ If tribes combine their legal precedence with VAWA, it can help tribes exercise expanded jurisdiction over same-sex domestic violence cases or cases that involve two-spirited individuals.

As in earlier legislation and even in the most recent legislation, tribal customary law is not considered when tribal jurisdiction is expanded. Like TLOA,

¹⁶⁰ Zachary Pullin, *Two Spirit: The Story of a Movement Unfolds*, NATIVE PEOPLES MAG., May-June 2014, <http://www.nativepeoples.com/Native-Peoples/May-June-2014/Two-Spirit-The-Story-of-a-Movement-Unfolds/>.

¹⁶¹ *Id.*

¹⁶² JERROLD E. LEVY, *IN THE BEGINNING: THE NAVAJO GENESIS 214* (1998).

¹⁶³ Alysa Landry, *Same-Sex Marriages: Unrecognized in Navajo Culture, but for How Long?*, INDIAN COUNTRY MEDIA NETWORK, Feb. 13, 2014, <https://indiancountrymedianetwork.com/news/politics/same-sex-marriages-unrecognized-in-navajo-culture-but-for-how-long/>.

¹⁶⁴ See Diné Marriage Act, 9 N.N.C. §2(C) (2009).

¹⁶⁵ See generally, CHICKASAW NATION CODE § 6-101.9 (2016) (establishing that “[m]arriage Between Persons of the Same Gender Not Recognized”); CHOCTAW NATION MARRIAGE AND DIVORCE CODE § 3.1 (establishing that “[r]ecognition of marriage between persons of same gender prohibited”); LAW AND ORDER CODE OF THE KALISPEL TRIBE OF INDIANS § 8-1.03 (1985) (establishing that “[m]arriage shall mean a personal relationship between two (2) persons of the opposite sex arising out of a civil contract to which the consent of the parties is essential.”).

¹⁶⁶ See generally CENTRAL COUNCIL OF THE TLINGIT AND HAIDA TRIBES OF ALASKA TRIBAL STATUTE § 05.01.004 (C) (2015) (“Persons Who May Marry”); CONFEDERATED TRIBES OF COOS, LOWER UMPQUA AND SIUSLAW TRIBAL CODE § 4-7-1 (2014); SILETZ MARRIAGE ORDINANCE, SILETZ TRIBAL CODE § 8.400 (2015).

¹⁶⁷ Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109–162, § 902(2), 119 Stat. 2960.

¹⁶⁸ See Rosser, *supra* note 6, at 23.

VAWA has areas that call for the incorporation of tribal customary law and cultural values to ensure tribes can protect *all* of our Indigenous people.

CONCLUSION

While the recent reauthorization of the Violence Against Women Act (VAWA) appears to be a victory for Native women and tribes, there are many unanswered questions. If “we lose our prayers and ceremonies, we will lose the foundations of life,”¹⁶⁹ and “if we lose those teachings, we will have broken [our] law.”¹⁷⁰ Federal cases and statutes have greatly reduced tribal sovereignty and the application of tribal customary law. Federal interference into tribal affairs has increased the presence of western legal concepts and diminished the cultural foundation of many tribes. The requirements of the Major Crimes Act and the Indian Civil Rights Act (ICRA) began to adversely affect tribes by diminishing cultural foundations of customary law. If we allow more recent federal legislation like the Tribal Law and Order Act (TLOA) and VAWA to continue chipping away at tribes’ cultural foundations, tribal customary laws will fade into obscurity and threaten the survival of tribes.

In order to continue flourishing, tribes must have the ability to practice their own customary laws within tribal courts. Federal legislation needs to be amended to stress the importance of customary law and tribal lay advocates. The absence of customary law in tribal courts and unanswered questions about federal legislation like TLOA and VAWA continue to leave our tribal members unprotected. It is important that we address the unanswered questions such as incorporation of customary laws, the status of tribal lay advocates, and protection of two-spirited individuals before we lose more of our tribal members and customary laws.

¹⁶⁹ See Yazzie, *supra* note 9, at 177.

¹⁷⁰ *Id.*