

ISSUES IN IMPLEMENTING SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION IN ALASKA'S TRIBAL COURTS

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ABSTRACT

Until 2022, all but one of the 229 Alaska tribes were barred from special domestic violence criminal jurisdiction (SDVCJ): Congress's jurisdictional tool for tribal courts to address domestic violence and hold perpetrators of violence against Alaska Native women criminally accountable. The reauthorization of the Violence Against Women Act (VAWA) in 2022 brought SDVCJ to Alaska's rural Native communities. This landmark achievement was made possible by decades of advocacy from Alaska's tribal, state, and federal leadership. In the wake of VAWA 2022, Alaska tribes and tribal justice systems face several significant legal, political, and cultural challenges. This Article outlines the legal and practical issues Alaska Native tribes face when implementing SDVCJ. To do so, this Article includes an overview of tribal jurisdiction under VAWA and Alaska Native tribes' inclusion in VAWA 2022. This Article explores the lessons learned from the Lower 48 Tribes Accelerated Pilot Program, which was an accelerated pilot project that permitted specific tribes to begin exercising SDVCJ more than a year before the law was implemented for all tribes, and considerations based on Alaska's ongoing public safety and domestic violence crisis, community needs and standards, and unique tribal law enforcement context. The Article also discusses how Alaskan tribes moving towards implementing SDVCJ in their courts may create Native-led, trauma-informed judicial processes for domestic violence survivors and communities in partnership with existing resources from Alaska Native-led civil organizations while including lessons learned from the Lower 48 Tribes Accelerated Pilot Program.

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I. INTRODUCTION

“The outrage and anguish of the Native families who have lost loved ones to violence – whose mothers, daughters, sisters, and aunties have disappeared or been murdered – has recently propelled a conversation about missing and murdered indigenous women to the national level. But these deaths, these missing women, are the devastating manifestation of centuries of oppression and broken systems that have failed to protect Native women and children from birth to death for generations.”

Michelle Demmert, Tlingit Citizen

Former Chief Justice of Central Council Tlingit and Haida Indian Tribes of Alaska’s Supreme Court, Policy Director of Alaska Native Women’s Resource Center Policy Director

“We have always known that non-Indians can come onto our lands and they can beat, rape and murder us and there is nothing we can do about it . . . Now, our tribal officers have jurisdiction for the first time to do something about certain crimes. But it is just the first sliver of the full moon that we need to protect us.”

Lisa Brunner, White Earth Ojibwe Nation

Intergenerational Domestic Violence Survivor

Alaska Native women face staggering rates of domestic violence. More than four in five American Indian and Alaska Native women experience violence.¹ Sisters, mothers, aunts, cousins, and loved ones are violated at rates that are unacceptable in any other state, and law enforcement has failed to protect them. This failure can largely be attributed to the 1978 Supreme Court decision that stripped Native tribes nationwide of the authority to prosecute offenses committed by non-Natives.² While most non-Native populations primarily report intra-racial rape, sexual assault, and other forms of violence, American Indian and Alaska Native women are more likely to be raped or assaulted by someone of non-Native descent.³ In fact, around ninety percent of Alaska Native and American Indian women subjected to intimate partner physical violence report an interracial perpetrator.⁴ Therefore, without the ability to prosecute non-Native offenders, Native victims were left to

1. André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, 277 NAT’L INST. OF JUST. 38, 39 (Sept. 2016).

2. See discussion *infra* Section II.A.

3. See NAT’L CONG. OF AM. INDIANS, VAWA 2013’S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 1, 3 (2018), https://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf [hereinafter NAT’L CONG. OF AM. INDIANS, FIVE-YEAR REPORT].

4. *Id.*

the mercy of the state and federal criminal systems.

Tribes lacked jurisdictional power until 1994 when Congress enacted the Violence Against Women Act (VAWA).⁵ VAWA formally recognized Native tribes' inherent sovereign authority to prosecute crimes occurring on their lands or against their people.⁶

It was not until 2013, when Congress passed the Violence Against Women Reauthorization Act (hereinafter, VAWA 2013), that the modern landscape of tribal jurisdiction fundamentally changed for the benefit of Native victims of sexual violence. VAWA 2013 recognized and affirmed tribes' jurisdictional authority to prosecute domestic violence crimes committed against Native people in Native communities.⁷ This is known as special domestic violence criminal jurisdiction (SDVCJ). SDVCJ remapped the "jurisdictional maze"⁸ of law structuring the relationships between tribes and the U.S. government by restoring tribes' jurisdiction. Crucially, this jurisdiction permits tribes to prosecute crimes perpetrated by non-Natives.⁹

However, while expanded tribal jurisdiction crucially increased tribal control over safety and security in a critical area, there was a "trade-off."¹⁰ As Professor Angela Riley notes, SDVCJ raises the central paradox of criminal jurisdiction for tribes: it supports tribal sovereignty and self-governance but imports the increased involvement of the U.S. government.¹¹ For example, the statute requires that "tribes follow additional procedural requirements and standards" in cooperation with the federal government, which may import the contours – and failures – of the American carceral model.¹² Additionally, the statute recalls the history in which the American criminal justice model "was imposed onto tribes in the nineteenth century, specifically to disrupt and destroy tribal cultures, Indian justice systems, and traditional dispute resolution

5. *Looking Back: American Indian Tribes and VAWA, 1994-2013*, NAT'L INDIGENOUS WOMEN'S RES. CTR., <https://www.niwrc.org/restoration-magazine/october-2018/looking-back-american-indian-tribes-and-vawa-1994-2013> (last visited Apr. 24, 2023).

6. See discussion *infra* Section II.B.

7. NAT'L CONG. OF AM. INDIANS, FIVE-YEAR REPORT, *supra* note 3, at 1.

8. See generally Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 504 (1976) (describing the complex criminal jurisdictional framework prior to the establishment of SDVCJs).

9. See Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1567 (2016) ("[S]tates have no criminal jurisdiction in Indian country if either the defendant or victim is Indian.").

10. See *id.* at 1571 (noting the trade-offs associated with increased criminal authority for tribes).

11. *Id.*

12. *Id.*

practices.”¹³ Some tribes saw traditional restorative justice models of dispute resolution—characterized by accountability and re-establishing harmonious relationships—erased and replaced by assimilationist carceral punishment models.¹⁴ Thus, as tribes begin to implement SDVCJ in partnership with the Department of Justice (DOJ), the systems they build will both be “critical to autonomy and self-governance” and “have the potential to homogenize tribal justice systems legally, politically, and—in particular—culturally.”¹⁵

In partnership with the DOJ, five tribes brought SDVCJ into their tribal court and law enforcement systems a year before the law was implemented nationwide. Through this pilot program, authorities made twenty-eight arrests of twenty-four abusers, resulting in thirteen guilty pleas and two referrals for federal prosecution.¹⁶ However, one glaring gap emerged, VAWA 2013 left out *all but one* of the Native communities in Alaska because the statute covered crimes committed by perpetrators who had connections to “Indian country,” or reservations.¹⁷ Alaska Natives govern themselves through Native-run corporations, not reservations.¹⁸ As momentum built toward the 2022 reauthorization of the Violence Against Women Reauthorization Act (hereinafter VAWA 2022), including Alaska Natives became a key issue for tribes and the federal government.¹⁹ Nearly ten years after the initial reauthorization overhaul,

13. *Id.* at 1579 (footnotes omitted).

14. *See id.* at 1577–78 (detailing restorative tribal resolution of a murder case spurring congressional passage of 1885 Major Crimes Act that extended federal jurisdiction to major crimes in Indian country).

15. *Id.* at 1564.

16. NAT’L CONG. OF AM. INDIANS, SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION PILOT PROJECT REPORT 5 (2015), https://www.ncai.org/attachments/NewsArticle_VutTUSYSfGPRpZQRYzWcuLekuVNeeTAOBBwGyvkwYwPRUJOioqL_SDVCJ%20Pilot%20Project%20Report_6-7-16_Final.pdf [hereinafter NAT’L CONG. OF AM. INDIANS, PILOT PROJECT REPORT].

17. 25 U.S.C. § 1304(b)(4)(B) (2013).

18. Tami Truett Jerue, *VAWA Special Domestic Violence Jurisdiction for Alaska Indian Tribes is Essential*, 17 NAT’L INDIGENOUS WOMEN’S RES. CTR. 68, 68 (June 2020), <https://www.niwrc.org/sites/default/files/files/magazine/restoration.17.2.pdf>.

19. *See, e.g.,* Cecily Hilleary, *Alaska Natives to Congress: Expand Violence Against Women Act*, VOICE OF AM. (Oct. 12, 2018), <https://www.voanews.com/a/alaska-natives-to-congress-expand-violence-against-women-act/4609353.html> (detailing the need for VAWA’s incorporation in Alaska); Rebecca Nagle, *The Violence Against Women Act Doesn’t Include the Majority of Alaska Native Women*, TEEN VOGUE (Nov. 29, 2018), <https://www.teenvogue.com/story/violence-against-women-act-doesnt-include-alaska-native-women> (quoting Michelle Demmert, member of the Central Council of the Tlingit and Haida Indian Tribes of Alaska and chief justice on their Supreme Court saying “Congress created the problem” by excluding Alaska Native tribes, “[a]nd Congress can fix the

VAWA 2022 finally included the first recognition for Alaska Natives' right to implement SDVCJ in tribal courts.²⁰

In the wake of VAWA 2022's passage, this Article outlines the legal and practical issues surrounding Alaska Native tribes' implementation of SDVCJ, including an overview of tribal jurisdiction under VAWA, Alaska Native tribes' inclusion in VAWA 2022, lessons from the implementing tribes, and considerations based on Alaska's ongoing public safety and domestic violence crisis, community needs and standards, and unique tribal law enforcement context. Keeping in mind the paradox of tribal criminal law jurisdiction, this Article then considers how Alaskan tribes moving towards implementing SDVCJ in their courts may create Native-led, trauma-informed judicial processes for domestic violence survivors and communities. Attempting to reconcile the paradox of tribal criminal law jurisdiction, this Article then considers how Alaskan tribes moving towards implementing SDVCJ in their courts may create Native-led, trauma-informed judicial processes for domestic violence survivors and communities.

II. TRIBAL JURISDICTION AND AUTHORITY IN THE VIOLENCE AGAINST WOMEN ACT (VAWA)

VAWA, enacted in 1994, marked the first time federal legislation acknowledged domestic violence and sexual assault as crimes.²¹ When enacted, the Act was intended to allocate "federal resources to encourage community-coordinated responses to combating violence against women."²² Today, VAWA has been widely expanded to include numerous protections for vulnerable populations such as college students, immigrants, the LGBTQ+ community, and – most relevant to this Article – Native women.²³

problem").

20. Desiree Hagen, *New Provision of Violence Against Women Act Empowers Tribal Jurisdiction*, ALASKA PUB. MEDIA (March 28, 2022), <https://alaskapublic.org/2022/03/28/new-provision-of-violence-against-women-act-empowers-tribal-jurisdiction/>. VAWA 2022 uses the term "special Tribal criminal jurisdiction" instead of "special domestic violence criminal jurisdiction." Compare 25 U.S.C. § 1304(a)(14), with 25 U.S.C. § 1304(a)(6) (2013). For simplicity, this Article uses "special domestic violence criminal jurisdiction" or SDVCJ regardless of which form of VAWA is cited.

21. *Violence Against Women Act*, NAT'L NETWORK TO END DOMESTIC VIOLENCE, <https://nnedv.org/content/violence-against-women-act/> (last visited Apr. 25, 2023).

22. *Id.*

23. *Id.* VAWA is up for renewal every five years, providing Congress the ability to continually bolster protections and better address survivors' needs. *Id.* Since 2005, VAWA has required the federal government to engage in formal

Specifically in the Native context, VAWA is of grave importance because it grants tribal entities jurisdictional power over criminal cases involving violence against women, a power previously removed from tribal courts. To explore the jurisdictional power granted by VAWA, this Part outlines the history of tribal authority, beginning before VAWA's enactment and proceeding to discuss important changes made under the 2013 VAWA reauthorization.

A. Pre-VAWA: Tribal Jurisdiction and Authority

In the 1978 case *Oliphant v. Suquamish Indian Tribe*,²⁴ the U.S. Supreme Court stripped tribal governments of their authority to prosecute criminal offenses committed by non-Natives.²⁵ The Court reasoned that tribes had “submit[ted] to the overriding sovereignty of the United States”²⁶ and that this “implicit divestiture” removed the tribes’ power to enact justice for crimes committed on their lands by non-Natives.²⁷ Therefore, for nearly forty years, tribes were powerless to formally investigate and prosecute crimes committed by non-Natives against their members and on their lands.²⁸

Oliphant had grave consequences for the Alaska’s tribal courts. Alaska’s tribal courts are organized into twelve regions,²⁹ encompassing the state’s entire 665,400 square miles.³⁰ The tribal courts have sovereign authority to hear cases involving their own citizens, including cases

annual consultations with tribes, which influence changes made to the Act. See JACQUELINE AGTUCA, SAFETY FOR NATIVE WOMEN: VAWA AND AMERICAN INDIAN TRIBES 57–58 (Dorma Sahneyeh ed., 2015) (discussing how amendments in 2013 to VAWA’s consultation requirement affirmed the significance of meeting with women in Native communities). The importance of this relationship can also be seen in 2000 in President Clinton’s Executive Order 1175 “Consultation and Coordination with Indian Tribal Governments” and in 2005 in President Obama’s Memorandum on Consultation pronouncing tribal consultations “a critical ingredient of a sound and productive federal-tribal relationship.” *Id.* at 57.

24. 435 U.S. 191 (1978).

25. See *id.* at 212 (concluding that “Indian tribes do not have inherent jurisdiction to try and to punish non-Indians”).

26. *Id.* at 210.

27. See Joshua B. Gurney, Note, *An “SDVCJ Fix” – Paths Forward in Tribal Domestic Violence Jurisdiction*, 70 HASTINGS L.J. 887, 897 (2019) (referring to the Court’s reasoning as the “implicit divestiture” doctrine”) (citation omitted).

28. *Id.*

29. See *Master Regional Map*, ALASKA LEGAL SERVS. CORP., <https://alaskalawhelp.org/resource/regional-map?ref=AKcGD> (last updated May 7, 2021) (listing twelve regions).

30. *How Big is Alaska? Surprising Comparisons to the Lower 48*, ROYAL ALASKAN MOVERS, <https://www.royalalaskanmovers.com/how-big-is-alaska-comparisons-to-lower-48/> (last updated Nov. 5, 2021).

involving tribal lands and issues of self-governance.³¹ Each of the 229 Alaskan tribes can establish additional jurisdictional authority in their own tribal Constitution or Code.³² Tribes, recognizing the damaging impact domestic violence has upon Native women and children, have passed written codes³³ governing domestic violence, family, and relationships.³⁴ However, under the *Oliphant* regime, this jurisdiction only applied in cases involving a tribe's own citizens.³⁵ Therefore, tribes held no criminal jurisdiction over non-Natives--even those who commit violence against Natives on Native land--absent a defendant's express consent.³⁶

B. VAWA 2013: Tribal Jurisdiction & Due Process Protections

Oliphant remained the primarily governing law in the domain until Congress enacted Title IX of the VAWA Reauthorization of 2013,³⁷ which recognized Native tribes' inherent sovereign authority to prosecute domestic violence crimes occurring on their lands or against their people.³⁸

In 2013, President Obama signed VAWA reauthorization into law.³⁹

31. *Jurisdiction*, ALASKA TRIBES, <https://alaskatribes.org/jurisdiction/> (last visited Apr. 25, 2023) (noting that United States recognizes tribal jurisdiction, civil and criminal, over tribe's own citizens and tribal children).

32. *Id.*

33. See ALASKA LEGAL SERVS. CORP., TRIBAL JURISDICTION IN ALASKA: CHILD PROTECTION, ADOPTION, JUVENILE JUSTICE, FAMILY VIOLENCE AND COMMUNITY SAFETY 22 n.92 (2012) (noting written domestic violence codes in Native Villages of Utqiagvik, Chinik and Tetlin, and the Sitka Tribe).

34. *Id.* at 22.

35. See *id.* at 27 ("There is a clear rule from the U.S. Supreme Court that tribal courts cannot exercise criminal jurisdiction over non-Indians, absent specific Congressional authorization.").

36. See *id.* at 23 (describing how jurisdiction can be based on tribal membership).

37. NCAI Releases Five-Year Report on Tribal Governments Exercising VAWA 2013 Special Domestic Violence Criminal Jurisdiction Over Non-Indians, NAT'L CONGRESS OF AM. INDIANS (Mar. 20, 2018), <https://www.ncai.org/news/articles/2018/03/20/ncai-releases-five-year-report-on-tribal-governments-exercising-vawa-2013-special-domestic-violence-criminal-jurisdiction-over-non-indians> ("VAWA 2013 created a framework for tribal courts to prosecute non-Indians for certain violent crimes against Indian citizens--something that has not happened in 35 years, since the U.S. Supreme Court decision in *Oliphant v. Suquamish Tribe* reversed this sovereign jurisdiction.").

38. See 25 U.S.C. § 1304(b)(1); Pilot Project for Tribal Jurisdiction over Crimes of Domestic Violence, 78 Fed. Reg. 71,645, 71,645-71,700 (Nov. 29, 2013).

39. Jodi Gillette & Charlie Galbraith, *President Signs 2013 VAWA - Empowering Tribes to Protect Native Women*, WHITE HOUSE BLOG (March 7, 2013, 7:07 PM), <https://obamawhitehouse.archives.gov/blog/2013/03/07/president-signs-2013-vawa-empowering-tribes-protect-native-women>.

VAWA 2013 further affirmed Native tribes' authority to self-govern by granting tribal jurisdiction over the prosecution of certain non-Natives who commit domestic violence, dating violence, protection order violations, and other gendered crimes against Native victims on tribal lands.⁴⁰

Under VAWA 2013, tribal jurisdiction over a non-Native offender attached only in a limited set of circumstances: (1) the victim or offender is Indian;⁴¹ (2) the crime takes place in the Indian country of the participating tribe;⁴² and (3) the non-Indian defendant has "ties to the Indian tribe."⁴³ "Ties" was defined to include defendants residing in the Indian country of the participating tribe; maintaining employment in the Indian country of the participating tribe; or being a current or former spouse, intimate partner, or dating partner of a member of the participating tribe or an Indian who resides in the Indian country of the participating tribe.⁴⁴ Thus, under VAWA 2013, the defendant must have had ties to the tribe, the victim, and the land to be subject to tribal prosecution.

VAWA 2013 also required tribal courts exercising SDVCJ to provide certain due process protections for defendants, including all rights guaranteed by the Indian Civil Rights Act,⁴⁵ all rights required of tribes in order to exercise felony jurisdiction under the Tribal Law and Order Act of 2010,⁴⁶ and two additional rights specific to VAWA 2013. The first

40. See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified as amended at 42 U.S.C. §§ 13925-14045(d)) (reauthorizing tribal jurisdiction over non-Native offenders for certain crimes against Native victims on tribal lands).

41. 25 U.S.C. § 1304(b)(4)(A)(i) (2013) (current version at 25 U.S.C. § 1304(b)(4)(A)).

42. *Id.* § 1304(c)(1) (2013) (current version at 25 U.S.C. § 1304(c)).

43. *Id.* § 1304(b)(4)(B) (2013) (this provision is absent in the current version).

44. *Id.*

45. See *id.* § 1304(d)(1) (2013) (current version at 25 U.S.C. § 1304(d)(1)) (enshrining all rights under the Indian Civil Rights Act for defendants prosecuted under VAWA 2013). The Indian Civil Rights Act enumerates rights including freedom of speech and religion; freedom from illegal or warrantless search or seizure; a prohibition on double jeopardy; the right not to be compelled to be a witness against oneself; the right to a speedy trial and to confront witnesses; the right to a jury trial; and the right not to be subjected to cruel or unusual punishment, excessive fines, or excessive bail. 25 U.S.C. § 1302. See also NAT'L CONG. OF AM. INDIANS, PILOT PROJECT REPORT, *supra* note 16, at 2-4 (providing an overview of guarantees to defendants under VAWA 2013).

46. Pub. L. No. 111-211, 124 Stat. 2261. The Tribal Law and Order Act states that tribes exercising felony jurisdiction must "provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution"; "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

VAWA 2013 specific right granted the defendant “the right to a trial by an impartial jury that is 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.”⁴⁷ The second VAWA 2013 specific right stated defendants are guaranteed “all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.”⁴⁸ These constitutional and procedural rights were tied only to the exercise of this jurisdiction, adding qualifications and proof of defendant protections that Congress had not previously required from tribal governments and their justice systems.⁴⁹

III. IMPLEMENTING VAWA 2013

While VAWA was reauthorized in 2013, the SDVCJ provision did not take effect until March 7, 2015.⁵⁰ However, as soon as the reauthorization passed, the DOJ solicited applications for an accelerated pilot project to allow selected tribes to begin exercising SDVCJ in early 2014, more than a year before the law was implemented for all tribes.⁵¹ In February 2014, three tribes in the lower 48 states—the Confederated Tribes of the Umatilla Indian Reservation, the Pascua Yaqui Tribe, and the Tulalip Tribes—received authorization as pilot programs and spent a year exercising SDVCJ before assisting other tribes in the program.⁵² The pilot program, hereinafter called the Lower 48 Tribes Accelerated Pilot Program, achieved notable success, prompting the addition of two tribes on March 6, 2015—the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation and the Sisseton-Wahpeton Oyate of the Lake

standards and effectively ensures the competence and professional responsibility of its licensed attorneys”; “require that the judge presiding over the criminal proceeding has sufficient legal training to preside over the criminal proceedings and is licensed to practice law in any jurisdiction in the United States”; make publicly available the tribe’s “criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances)” and “maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.” *Id.* § 234, 124 Stat. at 2280.

47. 25 U.S.C. § 1304(d)(3) (2013) (current version at 25 U.S.C. § 1304(d)(3)).

48. *Id.* § 1304(d)(4) (2013) (current version at 25 U.S.C. § 1304(d)(4)).

49. See Maura Douglas, *Sufficiently Criminal Ties: Expanding VAWA Criminal Jurisdiction for Indian Tribes*, Comment, 166 U. PENN. L. REV. 745, 749 (2018).

50. See NAT’L CONG. OF AM. INDIANS, *Pilot Project Overview*, <https://www.ncai.org/tribal-vaawa/for-tribes/pilot-project> (last visited Apr. 25, 2023) (summarizing the implementation of the SDVCJ provision).

51. *Id.*

52. *Id.*

Traverse Reservation—to the program.⁵³ This section explores the lower 48 implementing tribes’ successes and challenges during the pilot program period, specifically focusing on the challenges that prompted revisions to VAWA during the 2022 reauthorization.

A. Lower 48 Tribes Accelerated Pilot Program

One of the aims of the pilot program was to determine how to successfully expand SDVCJ to tribal communities.⁵⁴ To achieve this aim, the participating tribes developed an “implementation checklist” which was designed to help tribal governments create tribal codes that implemented SDVCJ in accordance with VAWA 2013.⁵⁵ The checklist outlined the defendants’ due process rights and provided considerations for tribal governments as they integrated SDVCJ into their tribal code.⁵⁶ The checklist also highlighted key areas of policy and concern for implementing tribes, including victims’ rights and services programs, mandatory arrest and gun bans, guidance, and even the idea of experimenting with a separate court or docket dedicated to domestic violence crimes.⁵⁷

In addition to the checklist, the pilot program tribes worked with the DOJ to develop tribal codes for implementing SDVCJ.⁵⁸ After the success of the pilot program, these codes became the model for tribes beginning the implementation process.⁵⁹ Representatives from the pilot project tribes also act as leaders in SDVCJ implementation and work closely with peer tribes who are considering implementation and need guidance.⁶⁰

Throughout the Lower 48 Tribes Accelerated Pilot Program, the pilot program tribes published statistics and reports on the offenders prosecuted under SDVCJ.⁶¹ These reports revealed a pattern of frequent offenders, seeming to illustrate the tribes’ narrative that SDVCJ allows Native communities to seek justice for Native women whose non-Native offenders had gone unpunished by the justice system for decades.⁶² For

53. NAT’L CONG. OF AM. INDIANS, PILOT PROJECT REPORT, *supra* note 16, at 2.

54. *Id.*

55. NAT’L CONG. OF AM. INDIANS, TRIBAL CODE DEVELOPMENT CHECKLIST FOR IMPLEMENTATION OF SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION (2014), <https://www.ncai.org/tribal-vawa/getting-started/tribal-code-development-checklist-for-implementation-aug-20142.pdf> [hereinafter NAT’L CONG. AM. INDIANS, TRIBAL CODE DEVELOPMENT CHECKLIST].

56. *Id.* at 4–6.

57. *Id.*

58. *See id.* at 1.

59. *Id.*

60. *Id.*

61. *Id.*

62. *See generally id.* (summarizing trends in criminal activity affecting Native

example, during the Lower 48 Tribes Accelerated Pilot Program period, the fifteen non-Native defendants charged in Pascua Yaqui under SDVCJ had more than eighty contacts, arrests, or reports with tribal police,⁶³ while the six non-Native defendants charged in Tulalip under SDVCJ had more than eighty-eight.⁶⁴ Overall, tribal leadership characterized the Lower 48 Tribes Accelerated Pilot Program as “incredibly successful” in allowing tribes to prosecute long-time repeat offenders who threaten the tribal community.⁶⁵

Further, the tribes from the Lower 48 Tribes Accelerated Pilot Program developed and published nine “lessons learned” from the first five years of implementation.⁶⁶ First, it was determined that non-Native domestic violence is a significant problem in tribal communities.⁶⁷ Second, most SDVCJ offenders have significant ties to tribal communities.⁶⁸ Third, children face high rates of domestic violence committed by non-Native offenders.⁶⁹ Fourth, training is critical for success.⁷⁰ Fifth, federal partners play an important role in implementing SDVCJ.⁷¹ Sixth, peer-to-peer learning is important.⁷² Seventh, SDVCJ is too narrow in its scope of offenses.⁷³ Eighth, there is confusion about the statutory definition of “domestic violence,”⁷⁴ and finally tribes need resources to implement SDVCJ.⁷⁵

B. Shortcomings Identified by the Lower 48 Tribes Accelerated Pilot Program

While VAWA 2013 represented a significant step forward for protecting tribes and Native women, it failed to fully protect Native women, tribal children, and public safety officers involved in domestic violence crime work.⁷⁶ The pilot program tribes noted three major

communities).

63. *Id.* at 6.

64. *Id.* at 10.

65. *Id.* at 25.

66. *Id.* at 30.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. See generally NAT’L INDIGENOUS WOMEN’S RES. CTR., TRIBAL CONSULTATION 2020: PRIORITY ISSUES TO ADDRESS VIOLENCE AGAINST WOMEN (2020) [hereinafter NAT’L INDIGENOUS WOMEN’S RES. CTR., TRIBAL CONSULTATION 2020] (highlighting limitations of VAWA 2013).

shortcomings of VAWA 2013, each of which will be explored in this Section. First, the scope of the program was limited.⁷⁷ Second, issues arose in implementation.⁷⁸ And crucially, third, Alaska Native tribes whose self-governance model did not include the creation of Indian country were excluded from the program.⁷⁹

1. Limited Scope

SDVCJ under VAWA 2013 was very narrow in scope. The Act covered violence between spouses, family members, or cohabitants, but offered no tribal jurisdiction for stranger rape, acquaintance rape, elder abuse, offenses against children, or any offense that commonly accompanies domestic violence, including drug, alcohol, and firearm offenses as well as witness tampering and obstruction of justice.⁸⁰ This prevented the tribal justice system from fully meeting survivors' and communities' needs and ensuring safety from outsiders.⁸¹

Further, the tightly written statute raised challenges with the definition of domestic violence.⁸² In March 2014, just one month after pilot program tribes began the implementation process,⁸³ the U.S. Supreme Court in *United States v. Castleman*⁸⁴ raised troublesome questions about VAWA's underdetermined definition of "violence" in domestic violence.⁸⁵ VAWA 2013 defined domestic violence as:

violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family-violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs.⁸⁶

In *Castleman*, the Court focused narrowly on physical force as an element essential to domestic violence, declining to comment on the complex interplay of psychological, emotional, financial, and social power and control dynamics present in domestic violence.⁸⁷ This led prosecutors to

77. See *infra* Section III.B.1.

78. See *infra* Section III.B.2.

79. See *infra* Section III.B.3.

80. See generally 25 U.S.C. § 1304 (2013) (current version at 25 U.S.C. § 1304) (establishing the scope of tribal jurisdiction under the Act).

81. See generally *id.*

82. *Id.*

83. NAT'L CONG. OF AM. INDIANS, PILOT PROJECT REPORT, *supra* note 16, at 29.

84. 572 U.S. 157 (2014).

85. *Id.* at 159.

86. 25 U.S.C. § 1304(a)(2) (2013) (current version at 25 U.S.C. § 1304(a)(7)).

87. *Castleman*, 572 U.S. at 162-63.

decline to pursue cases without a clear physical force component, including offensive touching, interfering with domestic violence reports and harassment while pleading for further clarification in the statute on domestic violence and co-occurring crimes.⁸⁸

2. Implementation Issues

Practice-oriented guides revealed more layers to the complexity of implementing SDVCJ on the ground. For instance, the Pascua Yaqui tribe created a short implementation guide which indicated that tribes' practical, on-the-ground concerns go far beyond the high-level policy reflected in the National Congress of American Indian's (NCAI) project reports.⁸⁹ The document listed dozens of probing questions tribes must ask themselves before—or while contemplating—implementing SDVCJ, from envisioning and setting success benchmarks to conducting an environmental scan for VAWA purposes to taking stock of the tribal justice system resources, the partners, and the alternative systems available at federal, state, and local levels.⁹⁰ The document notes that “it took decades to create a jurisdictional mess in Indian Country; it will take time, diligence, and patience to solve some of the problems created on our Reservations and communities.”⁹¹ The questions demonstrate just how challenging this program is and how meaningful it can be.

3. Exclusion of Alaskan Tribes

VAWA 2013 failed to include 228 tribes in Alaska as well as Indian tribes of Maine.⁹² The VAWA 2013 tribal jurisdiction provision limited SDVCJ to crimes committed by defendants who have ties to “Indian country.”⁹³ Though nearly forty-four million acres of Alaska's vast landscape is Native-governed land, only a tiny fraction is Indian country.⁹⁴ This is because almost all Alaska Natives elected to reject the

88. NAT'L CONG. OF AM. INDIANS, PILOT PROJECT REPORT, *supra* note 16, at 29.

89. *Id.*

90. PASCUA YAQUI TRIBE, VAWA IMPLEMENTATION CONSIDERATIONS 1–2 (2014), https://www.ncai.org/tribal-vawa/getting-started/VAWA_Implementation_Considerations_PYT-7-8-14.pdf.

91. *Id.* at 1. *See also* PASCUA YAQUI TRIBE, PASCUA YAQUI TRIBE VAWA IMPLEMENTATION 8 (2015), https://www.ncai.org/tribal-vawa/pilot-project-itwg/Pascua_Yaqui_VAWA_Pilot_Project_Summary_2015.pdf (highlighting the complexities in implementing the SDVCJ).

92. NAT'L INDIGENOUS WOMEN'S RES. CTR., TRIBAL CONSULTATION 2020, *supra* note 76, at 59.

93. 25 U.S.C. § 1304(b)(4)(B)(i) (2013) (current version at 25 U.S.C. § 1304(b)(4)(A)).

94. *See* Meghan Sullivan, ANCSA: A Complete or Incomplete Story of Sovereignty, INDIAN COUNTRY TODAY (Feb. 22, 2022), <https://ictnews.org/news/ancsa-a-complete-or-incomplete-story-of-sovereignty> (discussing generally the application of the term “Indian Country” under the Alaska Native Claims

reservation model, and instead formed regional and village for-profit “Native corporations” in a unique, innovative self-governance model via the Alaska Native Claims Settlement Act of 1971.⁹⁵ Since VAWA 2013 used the language “Indian country,” Alaskan land governed by Native corporations does not qualify for protection under the statute, meaning *only one* of Alaska’s 229 tribes--the small Metlakatla tribe in Southeast Alaska which choose the reservation governance model and represents just under 600 households⁹⁶--was eligible to exercise SDVCJ.⁹⁷

In 2019, U.S. Senator Lisa Murkowski from Alaska attempted to address this gap with the Alaska Tribal Public Safety Empowerment Act, S. 2616, which would have expanded the jurisdiction under VAWA 2013 to Alaska Native villages on a pilot basis.⁹⁸ The bill intended to fill the tribal jurisdiction gap and empower Alaska Native tribes to prosecute non-Natives who violate protection orders or commit domestic or dating violence against Native victims.⁹⁹ However, after Senator Murkowski introduced the bill in October 2019 and it was referred to the Committee on Indian Affairs, the bill stalled into silence.¹⁰⁰

IV. REAUTHORIZATION OF VAWA IN 2022

Given the numerous shortcomings identified by pilot program participants, Congress faced a daunting task: determining what changes should be made in the 2022 reauthorization of VAWA. The 2013 reauthorization’s sunset in 2018 allowed for an opportunity to try

Settlement Act); *see also* ANCSA REGIONAL ASSOC., *About the Alaska Native Claims Settlement Act*, <https://ancsaregional.com/about-ancsa/>.

95. *See id.* (explaining the Alaska Native Claims Settlement Act); *see generally* Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. §§ 1601–29).

96. *See generally* *Welcome to Metlakatla, Alaska: The Only Indian Reserve in the State of Alaska*, METLAKATLA INDIAN CMTY., <http://www.metlakatla.com/> (last visited Apr. 25, 2023) (discussing how Metlakatla is the only Indian Reserve in Alaska).

97. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified as amended at 42 U.S.C. §§ 13925–14045(d)); Jerue, *supra* note 18, at 68.

98. Press Release, Lisa Murkowski, Sen., Murkowski Introduces Legislation to Address Alaska’s Rural Public Safety Crisis (Oct. 17, 2019), <https://www.murkowski.senate.gov/press/release/murkowski-introduces-legislation-to-address-alaskas-rural-public-safety-crisis->.

99. *Id.*

100. Alaska Tribal Public Safety Empowerment Act, S. 2616, 116th Cong. (2019) (introduced in Senate).

again.¹⁰¹ After a brief reauthorization for less than a month in 2019,¹⁰² Congress had to reckon with the issues that implementing tribes and observers were pointing to.¹⁰³ Guided by tribal voices, Congress prioritized the inclusion of Alaska Native tribes and other important expansions to VAWA 2013. This Section further explores the voices instrumental in implementing changes to the Act and then discusses the specific improvements made in VAWA 2022.

A. Tribal Leadership's Prioritization of Alaska Natives

Since the 2005 VAWA reauthorization, VAWA has required the federal government to engage in formal annual consultations with tribes in accordance with growing recognition of consultation's important role in tribal self-governance.¹⁰⁴ Specifically, VAWA requires that the DOJ, Department of Health and Human Services, and Department of the Interior (DOI) consult tribes to help the federal government understand the concerns that impact Indigenous women and seek the tribes' recommendations for law and policy.¹⁰⁵ This interaction, conducted annually on a nation-to-nation basis, allows tribal governments and national representatives to convene, set agendas for future reauthorizations, and create numerous comprehensive annual reports to guide the next iteration of VAWA.¹⁰⁶

101. See Jenny Gathright, *Violence Against Women Act Expires Because Of Government Shutdown*, NPR, <https://www.npr.org/2018/12/24/679838115/violence-against-women-act-expires-because-of-government-shutdown/>.

102. *Violence Against Women Act Reauthorization Threatened*, AM. BAR ASS'N (May 16, 2019), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/may2019/vawa_update/.

103. See *supra* Section III.B.

104. See AGTUCA, *supra* note 23, at 57–61. Two instances of this federal recognition are President Clinton's 2000 Executive Order 13175 "Consultation and Coordination with Indian Tribal Governments" and President Obama's 2009 Memorandum on Consultation pronouncing tribal consultations "a critical ingredient of a sound and productive federal-tribal relationship." Exec. Order No. 13175, 675 Fed. Reg. 67249 (Nov. 9, 2000); Presidential Memorandum on Tribal Consultation, 2009 DAILY COMP. PRES. DOC. (Nov. 5, 2009).

105. See *Preparation for the VAWA Tribal Consultation*, NAT'L INDIGENOUS WOMEN'S RES. CTR. (July 21, 2021), <https://www.niwrc.org/resources/webinars/preparation-vawa-tribal-consultation> (noting that VAWA 2005 requires the listed agencies to consult with tribes).

106. See, e.g., *DOJ OWW Tribal Consultation Reports 2009–2019*, NAT'L INDIGENOUS WOMEN'S RES. CTR. (May 20, 2020), <https://www.niwrc.org/resources/report/doj-ovw-tribal-consultation-reports-2009-2019> (providing the tribal consultation reports for ten years); OFF. ON VIOLENCE AGAINST WOMEN, U.S. DEP'T OF JUST., ANNUAL REPORT OF PROCEEDINGS:

In June 2020, at the annual consultation leading up to the 2022 VAWA reauthorization, the National Indigenous Women’s Resource Center (NIWRC) issued a report entitled “Tribal Consultation 2020: Priority Issues to Address Violence Against Indian Women” (hereinafter NIWRC Tribal Consultation 2020).¹⁰⁷ Like many of these annual reports, NIWRC Tribal Consultation 2020 presented a vast array of recommendations, statements, law and policy proposals, concerns, and priority issues.¹⁰⁸ The report was guided by a variety of Indigenous voices and leadership and included unanimously passed tribal resolutions, issues monitored on an ongoing basis by the NCAI Task Force on Violence Against Women, and annual consultations with tribes from 2006 to 2019.¹⁰⁹

Notably, the NIWRC Tribal Consultation 2020 report identified VAWA 2013’s exclusion of Alaska Natives as a key issue.¹¹⁰ A special section on tribal recommendations for VAWA 2022, entitled “Recommendations to DOJ and DOI to Support the Following as provided by the VAWA Reauthorization Act,” offered reflections on VAWA 2013’s shortcomings and established key targets for the federal government for the upcoming reauthorization.¹¹¹ Related benchmark concerns included, among other things, building Native women’s representation and interests in VAWA and addressing the federal response to the crisis of Missing and Murdered Indigenous Women (MMIW).¹¹² Chief among the concerns particular to Alaska Natives were first, including the 228 Alaska Native communities as tribes eligible to utilize SDVCJ and second, creating an “Alaska pilot project under which Tribal criminal jurisdiction over non-Native perpetrators of domestic violence, sexual assault, dating violence, stalking, and sex trafficking can be implemented within any Alaska Native village.”¹¹³

One year later, when the Sixteenth Annual Government-to-Government Tribal Consultation convened virtually from August 17 to

16TH ANNUAL GOVERNMENT-TO-GOVERNMENT VIOLENCE AGAINST WOMEN TRIBAL CONSULTATION (2022); *Tribal Consultation Reports: 2016–2022*, U.S. DEP’T OF JUST., <https://www.justice.gov/ovw/tribal-consultation> (last visited Apr. 25, 2023) (linking to previous reports).

107. See NAT’L INDIGENOUS WOMEN’S RES. CTR., TRIBAL CONSULTATION 2020, *supra* note 76.

108. *Id.*

109. *Id.*

110. See *id.* (raising the issues surrounding VAWA 2013).

111. *Id.*

112. *Id.* Missing and Murdered Indigenous Women are also called Missing and Murdered Indigenous Women and Girls (MMIWG) and Missing and Murdered Indigenous People (MMIP). *Id.*

113. *Id.*

20, 2021, the 2022 VAWA reauthorization loomed large.¹¹⁴ Alaska Native and Indian leaders unilaterally censured VAWA 2013's exclusion of Alaska Native women and raised the issue as a critical priority for VAWA 2022.¹¹⁵ Tribal Leader Gloria O'Neill, President and Chief Executive Officer of Alaska Native Justice Center (ANJC) decried the 2013 VAWA language as "allow[ing] the perpetuation of disproportionate violence against Alaska Native women" who were "categorically excluded" by the 2013 approach.¹¹⁶ The Sovereign Tribal Leaders of the NCAI Task Force on Violence Against Women also spoke out against the exclusion of Alaska Native women in VAWA 2013's SDVCJ provision, raising as the Task Force's very first priority issue that "the 2013 reauthorization failed to make the changes needed for tribal nations to fully protect [American Indian and Alaska Native] women from abusers, rapists, traffickers, and predators [and] failed to include 229 tribal nations in Alaska and Maine."¹¹⁷ The Task Force urged the creation of "an Alaska pilot project under which tribal SDVCJ will extend over non-Indian perpetrators that commit domestic violence, sexual assault, dating violence, stalking, and sex trafficking on all lands within any Alaska Native village. This would allow all 229 Alaska Native communities to become eligible to fully exercise SDVCJ after the Alaska pilot program ends."¹¹⁸ It also recommended that DOJ restore Alaska Native Villages' tribal authority to prosecute non-Indians via the Alaska Tribal Public Safety Empowerment Act, which would revive the changes tailored to rural Alaska Native villages' unique law enforcement challenges put forth two years earlier in Senator Lisa Murkowski's languishing bill.¹¹⁹

B. Improvements Made in VAWA 2022

In 2022, Congress reauthorized VAWA, extending all current VAWA grant programs until 2027 and expanding key provisions regarding Native self-governance.¹²⁰ Specifically, the Act expanded special criminal jurisdiction of Tribal courts to include jurisdiction over non-Native perpetrators of sexual assault, child abuse, stalking, sex trafficking, and assaults on tribal law enforcement officers when those

114. See generally OFF. ON VIOLENCE AGAINST WOMEN, *supra* note 106.

115. *Id.*

116. *Id.* at 21-22.

117. *Id.* at 12-13.

118. *Id.*

119. *Id.*

120. *Fact Sheet: Reauthorization of the Violence Against Women Act (VAWA)*, WHITE HOUSE BLOG (Mar. 16, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/16/fact-sheet-reauthorization-of-the-violence-against-women-act-vawa/>.

incidents occur on tribal lands.¹²¹ It also extended SDVCJ and the accelerated pilot program initiated in 2013 to Alaska Native tribes for the first time.¹²²

1. *Expanded Scope*

VAWA 2022 expanded the statute's range slightly to cover sexual assault, child abuse, stalking, sex trafficking, and assaults on tribal law enforcement officers on tribal lands.¹²³ The Act also established a federal civil cause of action for revenge porn and non-consensual sexual images, and supported state, tribal, and local government efforts to prevent and prosecute cybercrimes, including cyberstalking and nonconsensual distribution of intimate images.¹²⁴ VAWA 2022 also enacted the National Instant Criminal Background Check System Denial Notification Act to help state law enforcement investigate and prosecute cases against individuals legally prohibited from purchasing firearms who try to do so.¹²⁵

2. *Filling the Jurisdictional Gap*

In March 2022, President Biden signed into law the \$1.5 trillion omnibus spending package that reauthorized VAWA, including a provision expanding the VAWA Tribal Title to allow Alaska Native governments to exercise SDVCJ and introducing a pilot program to allow five tribes—or groups of tribes applying as a consortium—to facilitate tribal courts beginning to prosecute offenders.¹²⁶ Crucially, VAWA 2022 clarified that Alaska tribes have criminal authority over non-Natives who commit domestic violence crimes on tribal land, *without creating any Indian country in Alaska* (beyond the small fraction already designated by the Metlakatla tribe), and incorporated Senator Murkowski's bill, now captioned the "Alaska Tribal Public Safety Empowerment Subtitle" within VAWA's Tribal Title.¹²⁷ VAWA 2022 allocated five million dollars for the Bureau of Indian Affairs to address MMIW and set forth an additional three million dollars for training and supporting tribal

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. See Desiree Hagen, *New Provision of Violence Against Women Act Empowers Tribal Jurisdiction*, ALASKA PUB. MEDIA (Mar. 28, 2022), <https://www.alaskapublic.org/2022/03/28/new-provision-of-violence-against-women-act-empowers-tribal-jurisdiction/> (explaining the changes to jurisdiction from VAWA 2022).

127. See *id.* ("The law makes it clear that Alaska tribes can act to protect women at risk in their communities.").

courts.¹²⁸ The DOJ was charged with supporting the tribal court expansion, with a special directive to prioritize tribal villages where the population is predominantly American Indian or Alaska Native and that lack a permanent law enforcement presence, as well as to ensure that tribal legal processes adequately safeguard defendants' rights.¹²⁹ To support tribal courts, VAWA 2022 also enhances access to national crime databases for tribal governments, improves existing grant programs, and permanently authorizes the Bureau of Prisons' Tribal Law and Order program.¹³⁰

Finally, VAWA 2022 sets forth that Alaskan tribes exercising SDVCJ will hold jurisdiction on a concurrent basis with the State of Alaska.¹³¹ It does not repeal Public Law 280, a 1953 congressional act which granted six states (Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin) criminal jurisdiction over tribal members and other people living on reservations.¹³² Thus, the State of Alaska continues to be empowered to prosecute domestic violence alongside tribal justice systems.

V. ALASKA: ISSUES AND PERSPECTIVES ON PROSPECTIVE IMPLEMENTATION

As Alaska's tribal courts and the DOJ work towards implementing SDVCJ in Alaska Native communities, the Lower 48 Tribes Accelerated Pilot Program provides valuable groundwork for the implementation challenges ahead. However, Alaska's Native communities present unique concerns: distinct communities, a vast landscape that presents geographic challenges, and a staggering crisis in public safety due to quantity and quality issues relating to tribal law enforcement officers. These concerns mean that SDVCJ implementation in Alaska must involve a tailored

128. *Id.*

129. *Id.*

130. See Press Release, Lisa Murkowski, Sen., Violence Against Women Act Reauthorization Passes Congress, Heads to President's Desk (March 11, 2022), https://www.murkowski.senate.gov/press/release/-violence-against-women-act-reauthorization_passes-congress-heads-to-presidents-desk-#:~:text=The%20Violence%20Against%20Women%20Act,to%20be%20signed%20into%20law (announcing VAWA 2022's passage and explaining its key provisions).

131. *Id.*

132. See U.S. Dep't of Just., *Tribal Crime and Justice: Public Law 280*, NAT'L INSTIT. OF JUST. (May 19, 2008), <https://nij.ojp.gov/topics/articles/tribal-crime-and-justice-public-law-280> (explaining Public Law 280). Public Law 280 is highly criticized for its negative consequences for tribes, including violating tribal sovereignty and granting nontribal law enforcement significant authority on tribal lands. *Id.*

approach.

A. Perspectives on Implementing SDVCJ in Alaska

VAWA 2022 brings SDVCJ to Alaska's rural Native communities, a critical step in addressing a dire and dangerous law enforcement context. This change came about after years of tireless and unmitigated advocacy from Alaska's tribal, state, and federal leadership. Tami Truett Jerue, Executive Director of Alaska Native Women's Resource Center—the powerhouse tribal nonprofit organization that testified before Congress advocating for Alaska Native women's representation in VAWA 2022—announced in an opinion letter that “nearly every Alaska Native organization and dozens of individual tribes” wrote in support of VAWA 2022.¹³³ Further, she explained that “women and children are integral parts of our tribal communities. Women are revered as life bringers and healers and our children embody our future. . . . Women and children are to be respected and protected. [The VAWA bill] recognizes this Alaskan value.”¹³⁴

Federal and state leaders also acknowledged the Act's critical role. In a joint opinion letter urging the passage of VAWA 2022 with the inclusion of Alaska in SDVCJ, the former state Attorney General and U.S. Attorney for Alaska wrote that traditional governmental tools are insufficient to address domestic violence and community safety problems in Alaska.¹³⁵ Further, they urged that “the VAWA pilot program promises to be a powerful tool that will allow the Alaska Native residents of rural Alaska, through their tribes, to actively work to solve the problem in their own communities.”¹³⁶

The late U.S. Congressman for Alaska Don Young, a leading congressional advocate for Native rights, spearheaded the effort in the U.S. House of Representatives to bring SDVCJ to five Alaska tribal governments in the VAWA reauthorization.¹³⁷ Young argued that

133. Tamra Truett Jerue, *Congress Has Heard from Alaskans. They Support the Violence Against Women Act.*, ANCHORAGE DAILY NEWS (March 5, 2022), <https://www.adn.com/opinions/2022/03/05/congress-has-heard-from-alaskans-they-support-the-violence-against-women-act/>.

134. *Id.*

135. See Bryan Schroder & Jahna Lindemuth, *The Violence Against Women Act is Important to Alaska*, ANCHORAGE DAILY NEWS (Mar. 5, 2022), <https://www.adn.com/opinions/2022/03/05/opinion-the-violence-against-women-act-is-important-to-alaska/> (supporting greater tribal autonomy in prosecuting domestic violence).

136. *Id.*

137. See Alex DeMarban, *House Approves Young's Proposal Giving 5 Tribes Criminal Jurisdiction in Violence Against Women Act*, ANCHORAGE DAILY NEWS (Apr. 5, 2019), <https://www.adn.com/alaska-news/rural-alaska/2019/04/06/house->

Congress had “a duty [to] keep the promises made under VAWA” and that the amendment would support “critical programs that benefit women and survivors of violence.”¹³⁸ When the U.S. House voted in April 2019, it approved the amendment unanimously.¹³⁹ And while Native leaders voiced strong support, some saw the need for continued growth.¹⁴⁰ For example, Bristol Bay Native Corporation’s chief executive officer Jason Metrokin in particular envisioned a revision to add five tribes every year, building capacity for many tribes to implement jurisdiction rapidly and expand implementation in practice beyond the initial group of tribes establishing their implementation systems.¹⁴¹

B. Roadmap for Implementation in Alaska

The NCAI’s nine “lessons learned” give Alaska tribes the opportunity to do better from the beginning.¹⁴² The pilot project reports transparently on the successes and challenges encountered, with key issues that Alaska tribes may focus on. Additionally, the shortcomings of the pilot project offer opportunities for Alaska to improve upon the program and ensure success within the state.

1. Peer-to-Peer Learning

Peer-to-peer learning has been critically important, productive, and useful for the pilot project tribes and tribes have established ongoing communication through resource-sharing organizations.¹⁴³ Specifically, the National Congress of American Indians’ Resource Center is an ever-growing bank that includes resources for tribes considering or beginning to implement SDVCJ.¹⁴⁴ Perhaps its most robust resources include materials on developing tribal codes, beginning with its Tribal Code Library showing how tribes have revised codes to include SDVCJ.¹⁴⁵

approves-youngs-proposal-giving-5-tribes-criminal-jurisdiction-in-violence-against-women-act/ (reporting that Rep. Young introduced an amendment to give five tribal governments the power to prosecute certain crimes).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. See NAT’L CONG. AM. INDIANS, PILOT PROJECT REPORT, *supra* note 16, at 30 (listing the nine lessons).

143. *Id.*

144. See *Resources*, NAT’L CONG. AM. INDIANS, <https://www.ncai.org/tribal-vawa/resources/sdvcj-resource-center> (last visited Apr. 25, 2023) (providing resources for tribal implementation of SDVCJ).

145. See *Code Development*, NAT’L CONG. AM. INDIANS, <https://www.ncai.org/tribal-vawa/resources/code-development> (last visited Feb. 2, 2023) (outlining an introduction on SDVCJ and including resources for development of SDVCJ provisions).

There, the NCAI's Inter-Tribal Working Group created a Tribal Code Development Checklist that represents a flexible approach to code drafting that can be tailored to a tribe's unique needs, including example provisions from several existing tribal codes.¹⁴⁶

There is also valuable guidance on best practices for selecting juries that represent the community but do not systematically exclude non-Indians and for safeguarding defendants' and victims' rights.¹⁴⁷ The Resource Center further provides guidance for how to obtain grants from the DOJ and how best to utilize judicial and law enforcement resources.¹⁴⁸ It also includes several practical resources from the initial implementing tribes that could be key to Alaska tribes establishing their initial systems, like its comparison of the first eighteen implementing tribes' rules and requirements for judges who can preside over SDVCJ cases.¹⁴⁹ Another resource provides transparency on the DOJ Office on Violence Against Women grant process, including information about available funding, the Office's current solicitations and aims on SDVCJ, and several years of transparent fee reporting on grants the Office awarded to implementing tribes.¹⁵⁰

2. Federal Partnership

The tribes also highlight that federal partners have an important collaborative role to play: all implementing tribes "worked closely with their local U.S. Attorney's Offices to make decisions about which jurisdiction is most appropriate to prosecute a particular case."¹⁵¹ The DOJ has also funded technical assistance with operations and communication between tribes for resource-sharing.¹⁵² And the Bureau of Indian Affairs is authorized to house non-Indian SDVCJ offenders in tribal detention facilities and even pay for associated costs with dedicated tribal contract funding.¹⁵³

146. See generally NAT'L CONG. AM. INDIANS, TRIBAL CODE DEVELOPMENT CHECKLIST, *supra* note 55.

147. *Resources*, *supra* note 144.

148. *Id.*

149. See, e.g., *Contrasting the First 18 Implementing Tribes on Judicial Requirements*, NAT'L CONG. AM. INDIANS, <https://www.ncai.org/tribal-vawa/resources/code-development/judicial-court-resources/judicial-requirements/contrasting> (last visited Apr. 25, 2023) (contrasting the judicial requirements imposed by the implementing tribes and linking to their enacted SDVCJ provisions).

150. *DOJ Grants for SDVCJ*, NAT'L CONG. AM. INDIANS, [ncai.org/tribal-vawa/resources/doj-grants-for-sdvcj](https://www.ncai.org/tribal-vawa/resources/doj-grants-for-sdvcj) (last visited Apr. 25, 2023).

151. See NAT'L CONG. AM. INDIANS, PILOT PROJECT REPORT, *supra* note 16, at 27.

152. See *id.* at 21.

153. *Id.*

3. *Civil Resources and Organizations*

Notably, nowhere in the “lessons learned” do the implementing tribes address or consider involving civil resources and organizations that might be a source of strength to reflect pre-existing tribal responses to domestic violence in Native communities. For example, centers like the Alaska Family Justice Center demonstrate a braided approach to domestic violence and sexual assault that offers resources that might support Alaska tribes in tandem with the criminal approach.¹⁵⁴ The Center offers legal assistance associated with the criminal justice system, including services like assistance applying to the Violent Crime Compensation Board (VCCB) to cover crime-related expenses, and education about the criminal justice system.¹⁵⁵ But it also focuses on resources associated with wraparound services including emotional support and safety planning, court accompaniment, and referrals for services and resources providing housing, health care, substance misuse recovery services, unemployment, and connecting with additional legal service providers from public defenders to landlord-tenant dispute representatives.¹⁵⁶ The Center also has expertise in resource development including Alaska-specific victim-centered model codes,¹⁵⁷ a critical gap that needs to be filled as Alaskan tribes create their codes and approaches. Integrating these organizations’ services and expertise as Alaska tribes begin creating systems of SDVCJ may better support survivors.

But Alaska also may learn from the implementing tribes to tailor its approach to the unique landscape of Alaska Native tribal systems. Criminal systems must be able to function well in Alaska’s sparse and challenging law enforcement context with uneven policing across the vast geography of the state. And too, Alaska’s systems should work beyond the resources already existing to ensure that their systems are in alignment with the existing Native-led civil law approaches.

154. *See Services: Domestic Violence and Sexual Assault Victims and Survivors*, ALASKA NATIVE FAM. JUST. CTR., <https://anjc.org/services/domestic-violence-sexual-assault-victims/> (last visited Apr. 25, 2023) (briefly describing its services for victims and survivors of domestic violence and sexual assault).

155. *See id.*

156. *Id.*

157. *See Tribal Justice Support*, ALASKA NATIVE JUST. CTR., <https://anjc.org/services/tribal-justice-support/> (last visited Apr. 25, 2023) (outlining process for assisting Alaska Tribes in developing and strengthening tribal justice systems to implement VAWA).

C. Remaining Concerns for Implementation

In the complex nation-to-nation power struggles between tribes and the U.S. government, SDVCJ was one of the few issues upon which tribal and federal leadership stood in relative unanimity.¹⁵⁸ In fact, in the years and months of intense discussion leading up to VAWA 2022, few voices emerged—if any—opposed to the extension of SDVCJ and the pilot program.¹⁵⁹ Yet, beyond just acknowledging the challenges of expanding implementation to Alaska’s tribal communities and their numerous court systems, critical practical concerns remain, specifically how to overcome the state’s geographic challenges as it relates to police enforcement and worries that VAWA 2022’s scope is still not large enough to properly protect Native women.

1. Law Enforcement Challenges

Federal prosecutors historically reject a large number of cases involving Indian country and a large number of cases of sexual violence against Native women, due to deficiencies in evidence.¹⁶⁰ Alaska may face even further challenges on this front. One in three Alaska communities has no local police or public safety program of any kind.¹⁶¹ Rural law enforcement (which may include state troopers, city police officers, and tribal “village public safety officers” or VPSOs) presents a harrowing picture in Alaska’s small, primarily Native communities. With a dearth of state troopers and a vast landscape, dozens of villages are policed by city officers and VPSOs with extensive criminal records—including dozens with domestic violence or sex crime records—who would never have

158. See, e.g., Susan Davis, *House Renews Violence Against Women Act, But Senate Hurdles Remain*, NPR (Mar. 17, 2021, updated 7:13 PM), <https://www.npr.org/2021/03/17/977842441/house-renews-violence-against-women-act-but-senate-hurdles-remain> (discussing federal debate over several issues in VAWA 2022 but not mentioning SDVCJ); Central Council of Tlingit and Haida Indian Tribes of Alaska, *Tlingit & Haida Issues Support for Violence Against Women Act Reauthorization*, ALASKA NATIVE NEWS (Feb. 13, 2022), <https://alaska-native-news.com/tlingit-haida-issues-support-for-violence-against-women-act-reauthorization/60120/> (describing Alaska Native tribal support for VAWA measures).

159. See, e.g., Susan Davis, *supra* note 158 (noting multiple federal legislator objections to VAWA 2022, but none directed at extending SDVCJ or the proposed pilot programs).

160. See Ashleigh Lussenden, *Reimagining the Violence Against Women Act for Tribes in 2022*, 1 BERKELEY J. CRIM. L. 27 (2022), <https://lawcat.berkeley.edu/record/1236040> (citing Hannah Bobee et al., *Criminal Jurisdiction In Indian Country: The Solution Of Cross-Deputization*, MICH. STATE UNIV. COLL. OF L. INDIGENOUS L. & POL’Y CTR. (2008)).

161. Kyle Hopkins, *Lawless*, PROPUBLICA (May 16, 2019), <https://features.propublica.org/local-reporting-network-alaska/alaska-sexual-violence-village-police>.

been granted a badge in a larger community.¹⁶² One village's *entire* public safety force had pleaded guilty to domestic violence.¹⁶³ In June 2019, U.S. Attorney General William Barr declared a "law enforcement emergency" in rural Alaska, dedicating vast amounts of federal funding to support – and often create – village public safety officers.¹⁶⁴

But even with funding, village safety is an uphill battle: the most affected communities present some of the highest rates of poverty, sexual assault, and suicide in the United States.¹⁶⁵ Extremely geographically isolated, the majority of these small communities can be reached only by plane, boat, all-terrain vehicle, or snowmachine (depending on the season), rendering emergency help hours or even days away.¹⁶⁶ And the rural relationship with law enforcement is complicated; while rural law enforcement officers' domestic violence records are a safety threat in and of itself, villages with VPSOs and city officers with records say that even some law enforcement is better than none at all, and Alaska communities off the road system with no law enforcement have nearly *four times* as many sex offenders, per capita, than the national average.¹⁶⁷ Further, many of these unpoliced communities are located in western Alaska, where sex crime rates are double the statewide average, which is itself nearly three times that of the national average.¹⁶⁸

2. Gaps in the Statutory Scheme

The Lower 48 Tribes Accelerated Pilot Program report emphasizes the importance of expanding SDVCJ's narrow scope of crimes to those co-occurring crimes that would commonly be prosecuted in association with domestic violence.¹⁶⁹ As discussed earlier, the U.S. Supreme Court suggested in *Castleman* that physical force is an element essential to domestic violence.¹⁷⁰ Therefore, domestic violence-related acts such as "offensive touching, harassment, or interference with domestic violence

162. See Kyle Hopkins, *The Village Where Every Cop Has Been Convicted of Domestic Violence*, PROPUBLICA (July 18, 2019, 11:30 A.M.), <https://www.propublica.org/article/stebbins-alaska-cops-criminal-records-domestic-violence> (reporting on the ease of convicted domestic abusers becoming law enforcement in rural Alaska).

163. *Id.*

164. *Id.*

165. Hopkins, *supra* note 157.

166. *Id.*

167. *Id.*

168. *Id.*

169. See discussion *supra* Section III.A.

170. See *United States v. Castleman*, 572 U.S. 157, 165 (2014) ("DOMESTIC VIOLENCE' is not merely a type of 'violence'; it is a term of art encompassing acts that one might characterize as 'violent' in a nondomestic context.") (internal citations omitted).

reporting” that do not amount to physical force may remain crimes under tribal code, but are not enforceable against non-Natives under VAWA 2022.¹⁷¹

Under VAWA 2022, a woman whose highly intoxicated non-Native partner attempted to punch her, but missed due to his intoxication, would be unable to have her attacker prosecuted for his crime.¹⁷² Only after the abusive partner physically assaults the woman, instead of failing in an attempt, will he be arrested.¹⁷³ Tribes suggest that SDVCJ might be more effective if the statute is amended to include “the types of offenses that often occur in the cycle of domestic abuse that might not qualify as ‘violence’ in isolation” while reaffirming tribal jurisdiction over co-occurrent crimes and all crimes of violence that occur in families, including child abuse.¹⁷⁴

Relatedly, another area of major concern is how SDVCJ covers only a narrow class of crimes that does not include a broader list of “attendant crimes” that frequently co-occur with domestic violence and may be crucial in preventing violence.¹⁷⁵ For example, offenders may also commit drug or alcohol offenses or property crimes that co-occur with domestic violence. Or, violent offenders may interfere with the criminal system by resisting arrest, assaulting an officer, tampering with witnesses and intimidating jurors, or otherwise obstructing justice. The pilot project tribes reported real concerns with being unable to respond to “the full range of criminal conduct” encountered in responding to domestic violence.¹⁷⁶ Moreover, the uncertainty in what is jurisdictionally covered led to serious deficits in providing training for key stakeholders like tribal law enforcement officers, prosecutors, and judges.¹⁷⁷ Implementing tribes have also been unable to prosecute crimes against children, which is critical because all three pilot project tribes reported that the majority of all SDVCJ incidents they handled “involved children who were at home during the domestic violence that occurred,” “usually involved as victims or witnesses.”¹⁷⁸

Most prominently, beyond recognition of civil remedies for

171. See NAT’L CONG. AM. INDIANS, PILOT PROJECT REPORT, *supra* note 16, at 29 (explaining the discrepancy between tribal domestic violence protections and federal law after *Castleman*).

172. See *id.* (noting that pilot program tribes have declined to prosecute offenses which would be considered domestic violence under tribal law, but which lacks an element of “offensive touching”).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 28.

177. *Id.* at 26–27.

178. *Id.* at 26.

cybercrimes like revenge porn,¹⁷⁹ VAWA 2022 largely ignores civil remedies for domestic violence, focusing heavily on criminal punishment for physical violence. For example, the guiding questions issued by the Pascua Yaqui tribe deal almost exclusively with prosecution as the sole remedy and focus heavily on criminal systems, law enforcement measures, and investigative resources.¹⁸⁰ Victims experiencing an array of consequences from the systemic power and control dynamics of domestic violence could be empowered by a tribal court prepared to offer civil remedies developed alongside the criminal approaches. This could allow victims to bring their own cases and tell their own stories in seeking protective orders or lawsuits pursuing the establishment of physical boundaries, regaining financial control, and even recovering damages for psychological or emotional injury.¹⁸¹

VI. CONCLUSION

Alaskan tribes moving towards implementing SDVCJ in their courts face the challenge and the opportunity to create sustainable, Native-led, judicial processes for domestic violence survivors and communities. The lessons from the Lower 48 Tribes Accelerated Pilot Program show clear paths forward, but also reveal critical gaps: integrating existing civil approaches that can guide the court's process with contributions of survivor-centered, community-oriented resources. As Alaska tribes and tribal justice systems build capacity to implement criminal jurisdiction over domestic violence, the path forward includes taking stock of local, state, and federal resources and partnerships, assessing the applicability of lessons learned from Lower 48 tribes, and considering integration of existing civil approaches to begin to remedy the challenges not addressed by criminal jurisdiction alone.

179. Melissa Wright, *Congress Reauthorizes the Violence Against Women Act, Adds More Protections*, HARV. CIV. RTS. & CIV. LIBERTIES L. REV. AMICUS BLOG (Mar. 24, 2022), <https://harvardcrcl.org/congress-reauthorizes-the-violence-against-women-act-adds-more-protections/>.

180. See PASCUA YAQUI TRIBE, VAWA IMPLEMENTATION CONSIDERATIONS, *supra* note 91.

181. See, e.g., Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1149 (2008).