

# LEGAL OBSTACLES IN THE EPIDEMIC OF MISSING AND MURDERED INDIGENOUS WOMEN IN THE UNITED STATES

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I.	INTRODUCTION.....	165
II.	THE JURISDICTIONAL NIGHTMARE OF PROSECUTING TRIBAL CRIMES .....	167
III.	THE LINK BETWEEN MURDER AND HUMAN TRAFFICKING .....	171
IV.	RECENT CONGRESSIONAL ACTS .....	174
V.	HOW THE FEDERAL GOVERNMENT HAS FAILED.....	175
VI.	HOW TRIBAL COURTS HAVE SUCCEEDED .....	178
VII.	CONCLUSION .....	180

## I. INTRODUCTION

I want to start this Article by screaming. The frustration of watching your sisters, cousins, aunties, mothers, and grandmothers disappear into a fray without consequence is a devastation that does not translate to words but rather the sound of frustration in screams. In 1999, the rate of violent crime against Native American women was 50% higher than that reported by black males ages twelve and older.<sup>1</sup> This epidemic of violent crimes against Native American women has been known and ignored for far, far too long.

On some reservations, Indigenous women are murdered at more than ten times the national average.<sup>2</sup> However, *which reservations* this statistic is referring to, are not reported.<sup>3</sup> This statistic has been repeated consistently for at least ten years.<sup>4</sup> Presumably, the numbers today are much higher.<sup>5</sup> It is impossible to cite any reliable numbers that can point to exactly how many

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1. Lawrence A. Greenfeld & Steven K. Smith, *American Indians and Crime*, U.S. DEP'T OF JUST.: BUREAU OF CRIME STAT. (Feb. 1999), <https://bjs.ojp.gov/content/pub/pdf/aic.pdf>.

2. *Protecting Native American and Alaska Native Women from Violence: November is Native American Heritage Month*, U.S. DEP'T OF JUST. ARCHIVES: OFF. ON VIOLENCE AGAINST WOMEN (OVM) (Nov. 29, 2012), <https://www.justice.gov/archives/ovw/blog/protecting-native-american-and-alaska-native-women-violence-november-native-american>.

3. *See id.*

4. *See id.*; *see also* Royale Da, *Native American Women Face Murder Rates 10x More than the National Average*, KOAT, <https://www.koat.com/article/native-american-women-murder-rates/381269668> (last updated Nov. 1, 2021, 6:21 PM) (repeating this statistic).

5. *See generally* U.S. DEP'T OF JUST. ARCHIVES: OFF. ON VIOLENCE AGAINST WOMEN (OVM), *supra* note 2 (discussing the “need for more and better data”).

Indigenous women are missing or murdered.<sup>6</sup> So many victims were discarded, not found, not reported, not looked for, not investigated, or were trafficked until they could never be discovered—the data is just not there.<sup>7</sup>

In 2017, the Urban Indian Health Institute conducted an investigative report to the best of its ability.<sup>8</sup> Based on the information available in the report, the states that include reservations where women are most likely to die are Washington, New Mexico, and Alaska.<sup>9</sup> Murder is the third leading cause of death for non-Hispanic Native American women according to the Centers for Disease Control and Prevention.<sup>10</sup> However, we cannot talk about the rates of murder without also referring to the massive amounts of assault, violence, sexual assault, and rape that women suffer. In referring to these facts, it is important to remember that “[w]hile the majority of rapes and sexual assaults against other women were intra-racial, victimizations against American Indian and Alaska Native women were more likely to be interracial.”<sup>11</sup>

Alaska Native women continue to suffer the highest rate of forceable sexual assault and have reported rates of domestic violence up to ten-times higher than in the rest of the United States.<sup>12</sup> At this time, no research has been conducted on the rates of violence against Native American women who live in urban areas, despite 71% of them living there.<sup>13</sup> Native American women are targeted for two systemic reasons.<sup>14</sup> One is that Native American women experience violence as “a legacy of impunity for past atrocities,” as reported to Amnesty International.<sup>15</sup> The other is that the legal systems in place in the United States allow it to happen. In 2016, 5,712 Indigenous

6. See generally *id.*

7. See *Missing and Murdered Indigenous Women*, NATIVE HOPE, <https://www.nativehope.org/en-us/understanding-the-issue-of-missing-and-murdered-indigenous-women> (last visited Feb. 1, 2022).

8. *Missing and Murdered Indigenous Women & Girls*, URB. INDIAN HEALTH INST., <https://www.uihi.org/missing-and-murdered-indigenous-women-girls/2/> (last visited Feb. 1, 2022).

9. *Id.*

10. *Leading Causes of Death—Females—Non-Hispanic American Indian or Alaska Native—United States, 2016*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/women/lcod/2016/nonhispanic-native/index.htm> (last visited Feb. 1, 2022) (referencing to Table Two: Female by Age Group, ages 1–19 years).

11. RONET BACHMAN ET AL., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN 38 (2008), <https://www.ojp.gov/pdffiles1/nij/grants/223691.pdf>.

12. *Ending Violence Against Native Women*, INDIAN L. RES. CTR., <https://indianlaw.org/issue/ending-violence-against-native-women> (last visited Feb. 1, 2022).

13. *Inadequate Data on Missing, Murdered Indigenous Women and Girls*, NAT’L INDIAN COUNCIL ON AGING (Jan. 21, 2019), <https://www.nicoa.org/inadequate-data-on-missing-murdered-indigenous-women-and-girls/>.

14. There is growing evidence to support that this problem is among two-spirited and transgendered-identifying Native Americans, but for the purposes of this Article, the violence that I will be citing concerns those identifying as female gendered. *Id.*

15. See generally AMNESTY INT’L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2007), <https://www.amnestyusa.org/pdfs/mazeofinjustice.pdf>.

women were reported missing, but only 116 of them were recorded into the FBI's missing persons database.<sup>16</sup> When a crime is committed, such as rape or murder, three elements must be taken into consideration if the victim has the ability to report the crime at all: the person who committed the crime, the place where the crime took place, and the type of crime that happened—creating a matrix of confusion.<sup>17</sup> If information or a body does come to light, the games begin.

## II. THE JURISDICTIONAL NIGHTMARE OF PROSECUTING TRIBAL CRIMES

Before manifest destiny in the 1800s, before the Mayflower in the 1600s, and before Columbus in the 1400s, Native Americans relied on traditional ways to solve strife among their people.<sup>18</sup> There was an understanding established, and people knew what was expected of them if they were able to abide by the creator's way and what would happen if they did not.<sup>19</sup> As colonizers began their westward expansion and brought conflict to Indigenous people of North America, they brought their own ideas of justice and began to impose their own laws.<sup>20</sup> As those laws fell into place, tribal sovereignty fell away piece by piece, leaving tribal lands and Indigenous people in a position to fall victim to crime with no means to defend themselves.<sup>21</sup> However, Ward Churchill tells us:

[A]ll nations are legally construed as being imbued with a sovereignty which is inherent and consequently inalienable. While the sovereign rights of any nation can be violated—its territory can be occupied through encroachment or military conquest, its government usurped or deposed altogether, its laws deformed or supplanted, and so forth—it is never extinguished by such actions.<sup>22</sup>

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16. URBAN WEALTH INST., MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS 2 (2018), <https://uihi.org/wp-content/uploads/2018/11/missing-and-murdered-indigenous-women-and-girls-report.pdf>.

17. See Gareth Bleir et al., *Murdered and Missing Native American Women Challenge Police and Courts*, CTR. FOR PUB. INTEGRITY (Aug. 27, 2018), <https://publicintegrity.org/politics/murdered-and-missing-native-american-women-challenge-police-and-courts/>.

18. *Id.*

19. See William Christie MacLeod, *Police and Punishment Among Native Americans of the Plains*, 28 J. CRIM. L. & CRIMINOLOGY 181, 191 (1937) (discussing how a tribal member's resistance to police led to further punishment and how cooperation was rewarded).

20. See VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 6–8 (1983) (detailing the “Trail of Tears” and the politics that led to it).

21. *Cherokee Nation v. Georgia*, 30 U.S. 1, 14 (1831) (recognizing the Native Americans as “domestic dependent nations”); *id.* at 20 (denying the Cherokees the right to seek redress in the United States' courts).

22. Ward Churchill, *The Tragedy and the Travesty: The Subversion of Indigenous Sovereignty in North America*, 22 AM. INDIAN CULTURE & RSCH. J. 1, 3–4 (1998).

In the United States, tribes are sovereign nations.<sup>23</sup> In 1831, the case of *Cherokee Nation v. Georgia*<sup>24</sup> was filed, in which the Cherokee Nation argued that the State of Georgia had infringed on the nation's sovereign right to govern themselves. Ultimately, the Court decided that the Cherokee Nation were merely "domestic dependent[s],"<sup>25</sup> giving the United States the opportunity to try to legislate their tribal government into oblivion. Immediately afterward in 1832, the Tribe tried again in *Worcester v. Georgia*.<sup>26</sup> The ruling was in favor of the Tribe, holding that states did not have the right to enforce their laws within the boundaries of the Cherokee Nation.<sup>27</sup>

Unfortunately, that did not stop President Andrew Jackson from removing the Cherokee from their land along with 100,000 Indigenous people and relocating them farther west in an act of violence and murder known as the "Trail of Tears."<sup>28</sup> A Cherokee leader, Junaluska, after saving Andrew Jackson's life in the Battle of Horseshoe Bend, traveled to Washington, D.C. to dissuade Jackson from the heinous act but was ultimately unsuccessful.<sup>29</sup>

In 1883, *Ex parte Crow Dog* decided the fate of millions of future crimes on Indian territories.<sup>30</sup> A Native American Sioux man killed another Native American Sioux man on Indian Country.<sup>31</sup> It is important to note that the murder occurred on Indian Country defined as:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.<sup>32</sup>

Both men, Crow Dog and Spotted Tail, were well respected in the Lakota Tribe and the cause of the dispute is still unknown.<sup>33</sup> However, after

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23. *Id.* at 4.

24. *Cherokee Nation*, 30 U.S. at 2–3.

25. *Id.* at 14.

26. *Worcester v. Georgia*, 31 U.S. 515, 529 (1832).

27. *Id.* at 520.

28. See DELORIA, JR. & LYTLE, *supra* note 20.

29. *Trail of Tears*, CHEROKEE HIST. ASS'N, <https://cherokeehistorical.org/learn-more-about-the-cherokee-indian-removal-and-the-tragic-trail-of-tears/> (last visited Feb. 1, 2022).

30. See generally *Ex parte Crow Dog*, 109 U.S. 556 (1883).

31. *Id.* at 557.

32. 18 U.S.C. § 1151.

33. See David J. Wishart, *Ex Parte Crow Dog*, ENCYCLOPEDIA OF THE GREAT PLAINS, <http://plains-humanities.unl.edu/encyclopedia/doc/egp.law.016> (last visited Feb. 1, 2022).

the death of Spotted Tail, Crow Dog was sentenced accordingly as the Lakota laws dictated, and peacemakers were sent to both families to restore harmony among the people.<sup>34</sup> The families agreed to a payment of \$600 and gifts of eight horses and one blanket.<sup>35</sup> By all accounts, the Tribe handled the case, but the Territory of Dakota decided the sentence was inadequate and heard the case for themselves.<sup>36</sup> Crow Dog was sentenced to hang for murder.<sup>37</sup>

The indictment is framed upon section 5339 of the Revised Statutes. That section is found in title 70, on the subject of crimes against the United States, and in chapter 3, which treats crimes of arising within the maritime and territorial jurisdiction of the United States. It provides that “Every person who commits murder, . . . within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States, . . . shall suffer death.”<sup>38</sup>

The Supreme Court of the United States rejected the prosecuting argument and Crow Dog returned to his reservation.<sup>39</sup> However, “*Ex parte Crow Dog* was tainted by racism. Its concluding language referred to Native Americans living a ‘savage life’ and having a ‘savage nature’, and it described Native American law as the ‘red man's revenge’.”<sup>40</sup> This played into the hands of the Bureau of Indian Affairs and the Interior Department, “which had since the late 1870s urged Congress to pass a statute extending federal law to Indian-on-Indian crimes within Indian Country.”<sup>41</sup>

The image of the “dangerous” and “savage” Indian became widely spread and added fuel to the fire of racism, getting the Major Crimes Act of 1885 passed shortly afterward.<sup>42</sup> This new Act granted jurisdiction to federal courts over Native Americans who commit any of *fifteen* major acts, regardless of whether the victim is Indian or non-Indian.<sup>43</sup> These crimes include murder, manslaughter, kidnapping, maiming, felony sexual abuse, incest, felony assault (including assault with intent to commit murder and assault with a dangerous weapon), assault against an individual who has not yet attained the age of sixteen, felony child abuse or neglect, arson, burglary, robbery, and felony theft.<sup>44</sup> Today, the acts of violence so commonly

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34. *Id.*

35. *Id.*

36. See *Crow Dog Case (1883)*, UNIV. OF ALA. FAIRBANKS: FED. INDIAN L. FOR ALA. TRIBES, [https://www.uaf.edu/tribal/112/unit\\_1/crowdogcase.php](https://www.uaf.edu/tribal/112/unit_1/crowdogcase.php) (last visited Feb. 1, 2022).

37. *Id.*

38. *Ex Parte Crow Dog*, 109 U.S. 556, 557–58 (1883) (describing that maritime law was the closest resource to governing federal Indian Law at that time).

39. *Id.* at 572.

40. See Wishart, *supra* note 33.

41. *Id.*

42. Major Crimes Act, Ch. 394, § 9, 23 Stat. 385 (1885) (codified at 18 U.S.C. § 1153), <https://www.justice.gov/archives/jm/criminal-resource-manual-679-major-crimes-act-18-usc-1153>.

43. *Id.*

44. *Id.*; see, e.g., James Worth, *What are the Major Crimes Act of 1885?*, YOUTUBE (July 20, 2020),

committed against Native Americans must be prosecuted by the federal government, essentially bypassing tribal jurisdiction, making it impossible for states to prosecute and instead relying on the FBI to prosecute.<sup>45</sup>

Next, Public Law 280 (PL 280) was enacted in 1953.<sup>46</sup> PL 280 expanded state criminal and sometimes civil jurisdiction of Indian Country to the government of six states, including Washington, California, Arizona, Minnesota, Nebraska, and Wisconsin.<sup>47</sup> In these states, PL 280 created a concurrent jurisdiction with the state governments and allowed tribal jurisdictions to prosecute most crimes except those covered in the Major Crimes Act.<sup>48</sup> State jurisdictions were expanded, and federal jurisdiction was expanded, but tribal jurisdiction did not change.<sup>49</sup>

Currently, the FBI is called upon to pursue felony crimes, but with the enactment of PL 280 the following problems arise: an increased role for state criminal justice systems in Indian Country, a virtual elimination of the special federal criminal justice role, numerous developmental obstacles to the individual nation, and an increased and confusing state role in civil matters.<sup>50</sup> So now we have a problem. If a major crime occurs, as defined by the Major Crimes Act, and the perpetrator or the victim is Native American, it falls under federal jurisdiction. If a woman is raped, trafficked, or murdered, it must be handled by federal jurisdiction.<sup>51</sup> If it is a minor crime and the perpetrator or the victim is Native American, it can be handled by tribal authorities.<sup>52</sup> However, if the crime occurs in a state where PL 280 applies, there is no federal jurisdiction, and the perpetrator must be prosecuted by a state jurisdiction, a tribal jurisdiction, or a combination of both.<sup>53</sup>

Finally in 1978, *Oliphant v. Suquamish* stripped tribes of the right to arrest and prosecute non-Indians on tribal territory.<sup>54</sup> “The Census . . . reports that non-Indians now comprise 76% of the population on Tribal lands and

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<https://www.youtube.com/watch?v=gZII3GRISTY&t=39s>.

45. See generally S. Lee. Martin, *Indian Rights and the Constitutional Implications of the Major Crimes Act*, 52 NOTRE DAME L. REV. 109 (1976).

46. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162).

47. *What is Public Law 280*, PL280, <https://pl280.com/learning-modules/what-is-public-law-280/> (last visited Feb. 1, 2022).

48. *What is PL280? Module Final June 2018*, YOUTUBE (June 25, 2018), <https://www.youtube.com/watch?v=VMAHy9ISFPY>.

49. *Frequently Asked Questions About Public Law 83-280*, U.S. ATT’Y OFF. DIST. OF MINN. (May 1, 2015), <https://www.justice.gov/usao-mn/Public-Law%2083-280>.

50. Jerry Gardner & Ada Pecos Melton, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, TRIBAL CT. CLEARINGHOUSE, <http://www.tribal-institute.org/articles/gardner1.htm> (last visited Feb. 1, 2022).

51. *General Guide to Criminal Jurisdiction in Indian Country*, TRIBAL CT. CLEARINGHOUSE, <https://www.tribal-institute.org/lists/jurisdiction.htm> (last visited Feb. 1, 2022).

52. *Id.*

53. *Id.*

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

68% of the population in Alaska Native villages.”<sup>55</sup> Because of laws like this, if a woman marries a non-Indian and they live on tribal territory (which is a more enticing choice for tribal members, where they will have access to housing, healthcare, and their relatives), the spouse can commit any form of violence against her and the tribe cannot prosecute him.<sup>56</sup>

### III. THE LINK BETWEEN MURDER AND HUMAN TRAFFICKING

It only took about a decade after *Oliphant v. Suquamish* for crime rates on tribal lands to skyrocket.<sup>57</sup> According to the Department of Justice, 97% of Native American women, who have experienced at least one act of violence, had perpetrators who were non-Native.<sup>58</sup> The U.S. Government has created an environment that is perfect for accelerating gender-based violence against Native American women without consequence and fostering the circumstances where Native American women will either be murdered or trafficked until they are murdered.<sup>59</sup> Today, crime rates on reservations are much higher than average for nearly every serious offense, in part, because of the Major Crimes Act.<sup>60</sup> Lisa Heth, an executive director of the Wiconi Wawokiya (Helping Families) shelter in Fort Thompson, South Dakota on the Crow Creek Reservation, helps explain the link between unprotected tribal lands and the tribes losing their young Native American women to sex trafficking,

We’re also seeing traffickers coming into the reservation and selling drugs,” Heth explained. “Sometimes they get these young women to sell for them, and then if they end up owing these guys money, then the guys traffic them out for sex to get money back from them. If the girls resist, the perpetrator will beat them up, threaten them or their families, rape them, or in some cases, have them gang raped.<sup>61</sup>

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55. INDIAN L. RES. CTR., *supra* note 12.

56. *Id.*

57. Brittney Bennett, *Law Was Meant to Let American Indians Prosecute Violence; Is It Working?*, USA TODAY (Mar. 25, 2017, 10:24 AM), <https://www.usatoday.com/story/news/2017/03/25/american-indian-women-violence/99538182/>.

58. *Five Things About Violence Against American Indian and Alaska Native Women and Men*, NAT’L INST. OF JUST. (Nov. 30, 2016), <https://nij.ojp.gov/topics/articles/five-things-about-violence-against-american-indian-and-alaska-native-women-and-men>.

59. *See id.*

60. David Heska Wanbli Weiden, *This 19th-Century Law Helps Shape Criminal Justice in Indian Country*, N.Y. TIMES (July 19, 2020), <https://www.nytimes.com/2020/07/19/opinion/mcgirt-native-reservation-implications.html#:~:text=The%20Major%20Crimes%20Act%20gives,nation%2C%20the%20Rosebud%20Sioux%20Tribe>.

61. Cecily Hilleary, *Sex Traffickers Targeting Native American Women*, VOA (Nov. 18, 2015, 11:41 AM), <https://www.voanews.com/a/sex-traffickers-targeting-native-american-women/3063457.html>.

As of 2015, 40% of women involved in sex trafficking identified as American Indian, Alaska Native, or First Nation.<sup>62</sup> It is important to note that not all sex workers are being trafficked and not all victims of trafficking will identify as victims.<sup>63</sup> However, no matter why women participate in sex work, men are typically viewed as the victims who are “too inept to obtain sex conventionally,” while women are viewed as the instigators, despite the fact that they may be working in slavery.<sup>64</sup> Based on that information, keep in mind:

In Hennepin County, Minnesota, roughly 25 percent of the women arrested for prostitution identified as American Indian while American Indians comprise 2.2 percent of the total population. In Anchorage, Alaska, 33 percent of the women arrested for prostitution were Alaska Native, but Alaska Native make up only 7.9 percent of the population.<sup>65</sup>

Some of the highest statistics come out of Alaska. In a 2015 survey, 84.3% of Alaska Native and American Indian people had experienced violence in their lifetime.<sup>66</sup> Additionally, from 2014 to 2016, Loyola University conducted a study on homeless youth and human trafficking.<sup>67</sup> Ten cities in North America were surveyed including Anchorage, Atlanta, Los Angeles, Oakland, Detroit, Fort Lauderdale, New Orleans, St. Louis, Toronto, and Vancouver, British Columbia.<sup>68</sup> Of the cities surveyed, Anchorage had the highest rate of trafficking, where one in four girls and one in five boys at the Covenant House Alaska had reported being victims of sex trafficking.<sup>69</sup> Of course, those are just statistics from within the city of Anchorage, and at least a third of Alaska Native villages that are not accessible by road have no law enforcement available.<sup>70</sup>

Arguably, besides the gaps in jurisdiction, Native American women are physically perfect victims. Valaura Imus Nahsonhoya, a Hopi expert on

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62. NAT'L CONG. OF AM. INDIANS POL'Y RSCH. CTR., HUMAN & SEX TRAFFICKING: TRENDS AND RESPONSES ACROSS INDIAN COUNTRY 5 (2016), <https://www.ncai.org/policy-research-center/research-data/prec-publications/TraffickingBrief.pdf>.

63. Victoria Sweet, *Trafficking in Native Communities*, INDIAN COUNTRY TODAY (Sept. 13, 2018), <https://indiancountrytoday.com/archive/trafficking-in-native-communities>.

64. MICHAEL SHIVELY ET AL., A NATIONAL OVERVIEW OF PROSTITUTION AND SEX TRAFFICKING DEMAND REDUCTION EFFORTS 79 (2012), <https://www.ojp.gov/pdffiles1/nij/grants/238796.pdf>.

65. Sweet, *supra* note 63.

66. *Crisis of Public Safety in Alaska*, NATIVE MOVEMENT (Oct. 23, 2020), <https://www.nativemovement.org/nm-blog/2020/10/23/crisis-of-public-safety-in-alaska>.

67. *See generally* LAURA T. MURPHY, LOYOLA UNIV. NEW ORLEANS, LABOR AND SEX TRAFFICKING AMONG HOMELESS YOUTH (2016), <https://oag.ca.gov/sites/all/files/agweb/pdfs/ht/murphy-labor-sex-trafficking-homeless-youth.pdf>.

68. *Id.*

69. Melody Schreiber, *Why Human Trafficking is a Serious — but Mostly Invisible — Problem in Alaska*, ARCTIC TODAY (Nov. 27, 2019), <https://www.arctictoday.com/why-human-trafficking-is-a-serious-but-mostly-invisible-problem-in-alaska/>.

70. *Id.*



human trafficking in Indian Country said, “[Native American women are] ‘associated with fetishes,’ such as long hair, exotic looks that sex patrons perceive as Asian or Hispanic. . . . [Native American women can]’ look like anything.”<sup>71</sup>

Racism also plays a big part in Native American women becoming the perfect victims.<sup>72</sup> In the historical review, advocates’ “round table discussions, Canadian studies of prostituted Native women and youth, and the listening session with community leaders and elders, racism was consistently identified as a key factor in sexual violence against Native women and girls and in extreme physical and sexual violence against prostituted Native women and youth.”<sup>73</sup> MacArthur Genius award recipient and advocate for Native American women, Sarah Deer frames this issue here.<sup>74</sup>

Racism is ever-present in the lives of Native American women. You ask an average American to name a Native woman. They’re going to say Pocahontas. Sacajewea. So when you think about those iconic images of Sacajewea, Pocahontas, those stories are very much about those women’s roles for men. Right? At the service of men. So that’s what the average American thinks of. They don’t think of independent Native women. They think of subservient Native women, they think of drunk Native women, they think of, you know, hottie Native women. But they don’t really think of an independent person with the self-determination and the honor to be just a person. Because I think Native women are so highly sexualized and stereotyped. Predators are attracted to them. They see her and they think, ‘safe victim.’ I can attack this person because no system really values their life or their experience.<sup>75</sup>

Additionally, Walter Lamar<sup>76</sup> had this to say about the link between trafficked victims and an increased rate of mortality:<sup>77</sup>

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71. Debra Krol, *Identifying, Tracking and Preventing Human Trafficking in Indian Country*, NAVAJO-HOPI OBSERVER (Mar. 19, 2019, 9:45 AM), <https://www.nhoneews.com/news/2019/mar/19/identifying-tracking-and-preventing-human-traffick/>.

72. See ALEXANDRA (SANDI) PIERCE, UNIV. OF NEB.-LINCOLN, SHATTERED HEARTS (FULL REPORT): THE COMMERCIAL SEXUAL EXPLOITATION OF AMERICAN INDIAN WOMEN AND GIRLS IN MINNESOTA 5 (2009), <http://digitalcommons.unl.edu/humtraffconf/26>.

73. *Id.*

74. Sarah Deer, *Macarthur Fellows Program*, MACARTHUR FOUND., <https://www.macfound.org/fellows/class-of-2014/sarah-deer> (last visited Feb. 1, 2022) (discussing the restriction placed on tribes by the U.S. federal government which limit their power to prosecute traffickers).

75. *Representation of Native Women—Sisters Rising Excerpt #3*, FACEBOOK (Apr. 15, 2021), <https://www.facebook.com/watch/?v=1123344381501261>.

76. Walter Lamar, *Native School Girls Should Not be for Sale on the Street*, INDIAN COUNTRY TODAY (Sept. 24, 2018), <https://indiancountrytoday.com/archive/native-school-girls-should-not-be-for-sale-on-the-street>. (Walter’s decades-long experience with hunting down murders of young women stems from his time as an FBI agent assigned to the “Green River Killer”).

77. Lee Allen, *The Enforcer: Former FBI Agent Walter Lamar Builds Communities*, INDIAN COUNTRY TODAY (Sept. 13, 2018), <https://indiancountrytoday.com/archive/the-enforcer-former-fbi>.

Predators seek out runaway or homeless children, and about a third of runaways are forced into sex within days of hitting the streets. Once ensnared in this life, it's hard to leave. Homelessness, addiction, financial and emotional dependence all combine[d] with fear of being arrested tend to make trafficking victims reluctant to report their abusers, although most dream of escape. Prostitutes are regularly threatened and physically abused, both by pimps and by their customers. The level of violence is such that victims of human trafficking are 40 percent more likely to die of violent causes than other groups.<sup>78</sup>

Finally, the Human Rights Commission of Thailand conducted a study in 2003 following 100 male fishermen who were trafficked into sex slavery. After three years of exploitation, 39 of those 100 men were dead.<sup>79</sup> Returning to the State of Alaska, in 2005 a medical examiner who was responsible for examining the deceased bodies of victims of rape and murder reported to Amnesty International there were 41 known victims between the years of 1991 and 2005. Of those 41 women, 32 were Alaska Native women.<sup>80</sup> Generally, between the years of 1976–2002, the racial group that represented the most female homicides were Native American and Alaska Native women.<sup>81</sup>

#### IV. RECENT CONGRESSIONAL ACTS

In response to the epidemic, several acts of legislation have been passed that do nothing to aid in the fight against those who have disappeared through trafficking or have been murdered. In 1994, the original Violence Against Women Act was passed.<sup>82</sup> The Act's intent, despite several modifications, was to address violent crime by granting funding to state, tribal, and local governments, non-profit organizations, and universities to expand programs through the Department of Justice and Health and Human Services.<sup>83</sup> Then in 2010, the Tribal Law and Order Act was passed with the intention of clarifying the responsibilities of federal, state, tribal, and local governments when addressing crime in Indian Country.<sup>84</sup> Before 2010, tribes were

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agent-walter-lamar-builds-communities.

78. Lamar, *supra* note 76.

79. OFF. OF DRUGS AND CRIME, U.N., AN INTRODUCTION TO HUMAN TRAFFICKING: VULNERABILITY, IMPACT AND ACTION 82 (2008), [https://www.unodc.org/documents/human-trafficking/An\\_Introduction\\_to\\_Human\\_Trafficking\\_-\\_Background\\_Paper.pdf](https://www.unodc.org/documents/human-trafficking/An_Introduction_to_Human_Trafficking_-_Background_Paper.pdf).

80. AMNESTY INTERNAT'L, *supra* note 15.

81. See generally JAMES ALAN FOX, INTER-UNIV. CONSORTIUM FOR POL. & SOC. RSCH., UNIFORM CRIME REPORTS [UNITED STATES]: SUPPLEMENTARY HOMICIDE REPORTS, 1976–2002 (2006), <https://www.icpsr.umich.edu/web/NACJD/studies/4179#>.

82. Violence Against Women Act, 42 U.S.C. §§ 13925–14045.

83. See, e.g., LISA N. SACCO, CONG. RSCH. SERVS., THE VIOLENCE AGAINST WOMEN ACT: OVERVIEW, LEGISLATION, AND FEDERAL FUNDING 1 (2015), <https://fas.org/sgp/crs/misc/R42499.pdf>.

84. Tribal Law and Order Act, Pub. L. No. 111-211, § 202(a)(1), 124 Stat. 2261, 2262 (2010)

restricted to sentences of up to one year in prison, a fine of \$5,000, or both.<sup>85</sup> That is because when Tribal courts are allowed to prosecute crime, they have been developed as strictly misdemeanor courts.<sup>86</sup> The Tribal Law and Order Act has expanded that sentence to three years imprisonment, a fine of \$15,000, or both for qualifying crimes that meet several strict guidelines including: the defendant is provided effective assistance of counsel at least equal to that under the U.S. Constitution, and at the expense of the tribes for indigent defendants, and has either been already convicted of the same or comparable offense by the United States or is being prosecuted for an offense comparable to an offense that would be punishable by more than one year of imprisonment if prosecuted by the United States or any of the states.<sup>87</sup>

In 2013, Congress passed the Violence Against Women Reauthorization Act which reauthorized the programs of the original act from 1994, as well as giving Indian tribes the authorization to enforce domestic violence laws and related crimes against non-Indian individuals.<sup>88</sup> Congresswoman Gwen Moore of Wisconsin spoke to the Senate at that time, illuminating why the authorization was so dire: “We talk about constitutional rights.”<sup>89</sup> “[Do not] women on tribal lands deserve the constitutional right of equal protection, and not to be raped and battered and beaten and dragged back on to native lands because they know they can be raped with impunity?”<sup>90</sup>

Despite the extensive efforts made to allow prosecution, the fact remains that longer sentences are only available to those prone to recidivism.<sup>91</sup> Essentially the federal government has made expansions to prosecuting perpetrators, secure in the knowledge that the assailant will continue to beat his victim and not, instead, kill her, because God forbid he does, and the case is handed over to the FBI.

## V. HOW THE FEDERAL GOVERNMENT HAS FAILED

Perhaps the gaps in protection can be most notably found in oil country. In 2008, the Bakken oil boom hit North Dakota, creating grave danger and

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(discussing the purpose for the Act).

85. MICHELLE RIVARD PARKS, TRIBAL LAW AND ORDER ACT: ENHANCED SENTENCING AUTHORITY 2 (2015), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/TLOESAQuickReferenceChecklist.pdf>.

86. Kevin K. Washburn, *Tribal Courts in Federal Sentencing*, 36 ARIZ. ST. L. J. 403, 410 (2004).

87. 25 U.S.C. § 1302.

88. *See generally*, Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, §§ 901–908, 127 Stat. 54 (2013).

89. Ailsa Chang, *House Passes Expansion of Violence Against Women Act*, NPR (Feb. 28, 2013, 3:00 PM), <https://www.npr.org/2013/02/28/173181449/house-passes-expansion-of-violence-against-women-act>.

90. *Id.*

91. *See* 25 U.S.C. § 1302(b)(1) (stating that sentences longer than one year are available only to those who have been convicted of the same or similar offense).

risk for Fort Berthold, the reservation at its center.<sup>92</sup> After the Tribal Law and Order Act was passed, several more special assistants were hired in the U.S. Attorney's office to boost prosecution rates, and federal case filings rose 70%.<sup>93</sup> Tim Purdon, the U.S. Attorney in North Dakota, noticed that a growing number of his cases were non-Indian on Indian violence.<sup>94</sup>

With the sudden influx of oil rig workers more than doubling the population, by 2012 the Fort Berthold "tribal police department reported more murders, fatal accidents, sexual assaults, domestic disputes, drug busts, gun threats, and human trafficking cases than in any year before."<sup>95</sup> Yet, officers are frequently told by non-Indians, "[y]ou can't do anything to me."<sup>96</sup>

The rise in crime on the reservation should be considered a new genocide at this point because the increase in crimes leads directly to an increase in murders, and the FBI is too overwhelmed to deal with it.<sup>97</sup> In 2016, Mark Fox, tribal chairman of the Mandan, Hidatsa, and Arikara Nations, was quoted as saying, "[w]e've been struggling with an increase in crime at Fort Berthold over the last seven or eight years, and we're actually getting a little bit desperate . . . . The illegal activity here is literally killing our people and tearing us apart."<sup>98</sup> The same tribal officer, interviewed in 2013 about the crisis, is still looking for bodies eight years later.<sup>99</sup>

The obstacles of actually accessing prosecution are great even for the tribal police. Officer Sanchez, one of Fort Berthold's most senior members, admitted that most times it was easier for his officers to just escort non-Indian drunk drivers home rather than make an arrest and deliver them to the proper jurisdiction county jails which were often full and far away.<sup>100</sup> He was also quoted saying he had just recently come on duty when he stopped a man for reckless driving.<sup>101</sup> "Come to find out, this guy is one of those sex offenders that kills his victims after."<sup>102</sup>

If a case can be prosecuted under the new federal laws, one of the requirements is that non-Indian offenders be subject to a "jury of their peers," subject to the Constitution.<sup>103</sup> Which means, for some tribes, changing

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92. Sierra Crane-Murdoch, *On Indian Land, Criminals Can Get Away with Almost Anything*, THE ATLANTIC (Feb. 22, 2013), <https://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391/>.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *See id.*

98. *Oil and Crime in Indian Country*, FBI (June 7, 2016), <https://www.fbi.gov/news/stories/fbi-director-visits-reservation-in-north-dakota-to-discuss-rising-threat>.

99. Sophie Haigney, *Amidst North Dakota's Fracking Boom, People Keep Disappearing*, HIGH COUNTRY NEWS (Apr. 22, 2020), <https://www.hcn.org/issues/52.5/ideas-books-amidst-north-dakotas-fracking-boom-people-keep-disappearing>.

100. Crane-Murdoch, *supra* note 92.

101. *Id.*

102. *Id.*

103. Camille Fenton, *A Jury of Someone Else's Peers: The Severe Underrepresentation of American*

legislation to include non-Indians on the jury.<sup>104</sup> As of 2019, fewer than thirty of the nations out of the United States' 310 reservations were able to absorb the cost and tribal legislature to prosecute under the Violence Against Women Act.<sup>105</sup>

If a case does actually get reported and correctly referred to the federal jurisdiction, even larger problems ensue.<sup>106</sup> Federal authorities have a right to decline prosecutions on Native lands, usually for lack of evidence which is up to the determination of the bureau.<sup>107</sup> In 2010, tribes referred 2,922 assault related cases, 46% of which were declined for prosecution, reporting "weak or insufficient admissible evidence, no federal offense evidence and witness problems."<sup>108</sup> In 2011, 52% of cases were declined.<sup>109</sup> In 2018, after legislative changes with the newest Violence Against Women Act, federal authorities denied 39% of all referred crimes.<sup>110</sup>

That is, if there is a reason cited at all, which there often is not.<sup>111</sup> This leads to the general mistrust of the FBI's capability of handling the case.<sup>112</sup> Jerry Gardner of the Tribal Law and Policy Institute said: "The federal system takes a long time to make a decision, and when it comes to something like a child sexual assault, the community gets the message that nothing is being done."<sup>113</sup>

The U.S. Government has a long history of abusing the trust of Native Americans, which has created an inherent mistrust within Native communities.<sup>114</sup> Because of the unlikelihood of prosecution and this mistrust, many Native women do not even bother to report the violence against

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*Indians from the Western Division of South Dakota's Jury-Selection Process*, 24 TEX. J. ON C. L. & C. R. 119, 119 (2018).

104. See Alana Paris, *An Unfair Cross Section: Federal Jurisdiction for Indian Country Crimes Dismantles Jury Community Conscience*, 16 NW. J. L. & SOC. POL'Y 92, 107 (2020).

105. 3) *Implementation Revealed Serious Limitations in the Law*, NAT'L CONG. OF AM. INDIANS SDVCJ TODAY, <https://www.ncai.org/tribal-vawa/the-first-five-years/findings/implementation-revealed-serious-limitations-in-the-law> (last visited Feb. 1, 2022); see also *Oversight Hearing "Restoring Justice: Addressing the Violence in Native Communities Through VAWA Title IX Special Jurisdiction Before the United States Senate Comm. on Indian Affairs"*, U.S. SENATE COMM. ON INDIAN AFF. (2021), [https://www.indian.senate.gov/sites/default/files/Professor%20Reese\\_Dec%208%20Tribal%20VAWA%20Hearing%20Testimony.pdf](https://www.indian.senate.gov/sites/default/files/Professor%20Reese_Dec%208%20Tribal%20VAWA%20Hearing%20Testimony.pdf) (testimony of Professor Elizabeth A. Reese, Yunpovi Assistant Professor of Law, Stanford law School).

106. Bennett, *supra* note 57.

107. *Id.*

108. *Id.* (quoting a 2010 report by the U.S. Government Accountability Office).

109. Timothy Williams, *Higher Crime, Fewer Charges on Indian Land*, N.Y. TIMES (Feb. 20, 2012), <https://www.nytimes.com/2012/02/21/us/on-indian-reservations-higher-crime-and-fewer-prosecutions.html>.

110. Weiden, *supra* note 60.

111. Williams, *supra* note 109.

112. *See id.*

113. *Id.*

114. *See id.*

them.<sup>115</sup> “FBI figures show that Oklahoma had the 12th highest incidence of ‘forcible rapes’ of women of any [U.S.] state in 2005.”<sup>116</sup> “Although available statistics indicate a high incidence of sexual violence against Native American women in Oklahoma, they may significantly [underrepresent] the true scale of the problem.”<sup>117</sup> “One support worker told Amnesty International that of her 77 active cases of sexual and domestic violence involving Native American women, only three women had reported their cases to the police.”<sup>118</sup>

Also, despite changes in the law, many women have reason to believe nothing has changed.<sup>119</sup> In a report by Amnesty International, a mother spoke “of her concerns about reporting [a] rape because of her experience in 1993 when her older daughter, who was 14 at the time, was raped on the Blackfeet Reservation in Montana.”<sup>120</sup>

Tribal police were unwilling to take on the case and told her to contact the FBI in Great Falls, about 125 miles away. She said that although FBI agents met with her daughter several times, she felt they were not serious about pursuing the case; they never brought the suspect in for questioning and did not search his home for evidence for over a month. When she questioned the FBI about the case, she was told: “This case isn’t on the top of our list.”<sup>121</sup>

## VI. HOW TRIBAL COURTS HAVE SUCCEEDED

Tribes need the ability to prosecute assault, battery, and murder in their lands. Native Americans have been handed a death sentence without it.<sup>122</sup> Tribal attorney of the Confederated Tribes of the Umatilla Indian Reservation said, “Governments have a moral obligation to ensure the safety of their citizens and residents. . . . Tribal nations are no different. However, a government cannot ensure public safety if it is forced to be dependent on foreign governments to prosecute crimes.”<sup>123</sup>

Native American culture has always had a long-standing tradition of peacekeeping and restorative justice.<sup>124</sup> An offense against the tribe made it

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115. See Kavitha Chekura, *Sexual Violence Scars Native American Women*, ALJAZEERA (Mar. 6, 2013), <https://www.aljazeera.com/features/2013/3/6/sexual-violence-scars-native-american-women#:~:text=New%20law%20aims%20to%20protect,sexual%20assault%20and%20offender%20impunity>.

116. AMNESTY INT’L, *supra* note 15, at 33.

117. *Id.*

118. *See id.* at 64.

119. *Id.*

120. *Id.*

121. *Id.*

122. *See id.* at 62 (discussing how issues of jurisdiction make it difficult to prosecute crimes that take place on tribal land).

123. Bennett, *supra* note 57.

124. CARRIE E. GARROW & SARAH DEER, *TRIBAL CRIMINAL LAW AND PROCEDURE* 20 (2d ed. 2015).

incomplete, and it was up to the leaders to make the community whole again.<sup>125</sup> Traditionally,

The Blackfeet used a combination of mechanisms for enforcing laws . . . . Men's Societies served partly to preserve order among the camps, on marches, and on hunting parties. When an individual was killed, the victim's relatives possessed the authority to avenge the murder by killing the murderer or the first member of the murderer's family whom the victim's family met.<sup>126</sup>

This could be avoided with a payment of great value.<sup>127</sup>

Two hundred years later, tribes are still finding ways to combine their traditional ways with American criminal justice courts. In Klamath, California, criminal court looks a little different.<sup>128</sup> Judge Abby Abinanti works on ensuring the two pillars of the Yurok culture—personal responsibility and renewal—are present in every part of the courtroom.<sup>129</sup> Incarceration has largely been replaced with a supervised release, which is part of the wellness program—a treatment involving Yurok cultural immersion.<sup>130</sup> Instead of spending time in a prison cell, offenders return home to carve earrings from redwood and make purses of elkhorn to sell.<sup>131</sup>

Like many tribal nations, the Yurok people are a community. Before colonization, the people were interdependent, so much so that removing one of them would damage the society as a whole.<sup>132</sup> Instead, “[t]hey had to face consequences, but also become responsible, productive community members again.”<sup>133</sup> If a tribal member cannot pay a fine, they might be asked to donate fish to the next tribal dance.<sup>134</sup> This is what tribal justice looks like.<sup>135</sup>

In the early 1990s, in Alaska, the Organized Village of Kake initiated the use of “circle sentencing.”<sup>136</sup> Embedded in the Tlingit tradition, the process of circle peacemaking brings together individuals and groups who are affected by the infraction.<sup>137</sup> Victims, the offender, families, friends, church groups, community members, police, substance abuse counselors, and

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125. *Id.*

126. *Id.*

127. *Id.*

128. Henry Gass, *Native Justice: How Tribal Values Shape Judge Abby's Court*, CHRISTIAN SCI. MONITOR (Mar. 27, 2019), <https://www.csmonitor.com/USA/Justice/2019/0327/Native-justice-How-tribal-values-shape-Judge-Abby-s-court>.

129. *Id.*

130. *See id.*

131. *See id.*

132. *See id.*

133. *Id.*

134. *See id.*

135. *See id.*

136. *Organized Village of Kake Circle Peacemaking*, TRIBAL ACCESS TO JUST. INNOVATION, <https://tribaljustice.org/places/traditional-practices/circle-peacemaking/> (last visited Feb. 1, 2022).

137. *See id.*

social workers make up a group of people that can number from six to sixty.<sup>138</sup> Participants discuss what's best for the community and what is an appropriate sentencing. Families and their resources are taken into consideration.<sup>139</sup>

The support of the circle does not just stop at sentencing though. Circle participants are responsible for ensuring that the sentencing is carried out.<sup>140</sup> Sentences such as meeting with elders to talk about their past struggles with similar issues.<sup>141</sup> The interest and success of the program was evident in its first four years of operation.<sup>142</sup> Of the eighty offenders sentenced, only two rejected the circle's sentencing and returned to state court for a different sentence.<sup>143</sup> Of the twenty-four juveniles that were sentenced for underage drinking, all of them successfully completed the terms of their sentencing.<sup>144</sup> Neil Nesheim, court administrator of the First Judicial District in Juneau Alaska nailed it in his article:

For peacemaking cultures that utilize Circles and resolve disputes by talking things out, the concept of law is based on healing. In order for healing to occur, the problem must be dealt with in its entirety. This means that for the victim to be healed, the victim and the offender's inter-personal relationship must be healed.<sup>145</sup>

## VII. CONCLUSION

The failures of the federal system's support to Native Americans are great. The sovereignty of the tribal nations needs to be honored and respected. Native Americans have had a long-standing tradition of being able to solve conflict internally and with much lower recidivism rates than the U.S. criminal justice system.<sup>146</sup> Until we return the right to prosecute those who rape, assault, and murder Native American women to the tribes and support the systems necessary to do it, the epidemic of missing and murdered Native American women will never stop. The problem is rooted in inherent racism and colonialism.<sup>147</sup> More women will disappear, more young girls will be

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138. *See id.*

139. *See id.*

140. *Id.*

141. HARV. PROJECT ON AM. INDIAN ECON. DEV., KAKE CIRCLE PEACEMAKING 2 (2003), <https://www.hpaied.org/sites/default/files/publications/Kake%20Circle%20Peacemaking.pdf>.

142. *See id.* at 3.

143. *See id.* at 2.

144. *Id.*

145. Neil Nesheim, *The Indigenous Practice That Is Transforming the Adversarial Process*, 55 JUDGES' J. 1,16 (2016), <https://www.washtenaw.org/DocumentCenter/View/4058/The-Indigenous-Practice-That-Is-Transforming-the-Adversarial-Process-PDF?bidId=>.

146. TRIBAL ACCESS TO JUST. INNOVATION, *supra* note 136.

147. *See* PIERCE, *supra* note 72; Jacqueline Agtuca, et al., *MMIW: Understanding the Missing and Murdered Indigenous Women Crisis Beyond Individual Acts of Violence*, NAT'L INDIGENOUS WOMEN'S



sold into human trafficking, more women's bodies will be found discarded and left for dead. The United States has crippled tribal nations by making it dependent on the federal government, essentially handing Native American women a death sentence. And I for one, am tired of living in this country knowing the top three most likely causes of my death will be cancer, heart disease, or murder.