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GENERATIONS OF ABUSE: EXPLORING THE SEXUAL ASSAULT EPIDEMIC ON NATIVE LAND

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*“My Mom Tells Me To Wear Two Pairs Of Jeans At Night To Slow
Him Down”*²

I. INTRODUCTION

Terrible abuse of women is pervasive on every Indian reservation in the United States.³ More than four out of five Native⁴ women have experienced some type of domestic violence in their lifetime.⁵ Indigenous women experience rape

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² *Victims of Terrain: Alaska Native Women, MISSING & MURDERED INDIGENOUS WOMAN*, <https://edspace.american.edu/mmiwlawsandlegacies/victims-of-terrain-alaskan-native-women/> (last visited Sept. 1, 2023).

³ *United States v. Deegan*, 605 F.3d 625, 662 (8th Cir. 2010).

⁴ *See United States v. Stymiest*, 581 F.3d 759, 764 (8th Cir. 2009).

⁵ *See* PATRICIA TJADEN & NANCY THOENNES, U.S. DEP’T OF JUST., FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE

and sexual assault at a rate two and a half times higher than any other ethnicity.⁶ Specifically, Native women living on reservations face the highest rates of sexual assault in the nation with one in three being raped during their lifetime.⁷ Prejudice, institutionalized racism, improper data collection, lack of prosecution, and lack of resources are all factors that contribute to the high rates of abuse faced by Indigenous women in America.⁸ Many victims' voices are never heard "because they have no confidence that justice will be done."⁹ Today, there is a lack of law enforcement presence able to investigate these crimes on Native land.¹⁰ In the few instances when law enforcement does arrive, more problems occur.¹¹ After experiencing sexual violence, Native American women lack access to needed trauma services.¹² Medical care is one of the most common needs of women who experience this type of violence.¹³ However, only 38 percent of American Indian female victims received these services due to a lack of funding, staff, and limited physical access to medical facilities.¹⁴

AGAINST WOMEN SURVEY 22 (2000) (showing American Indian and Alaska Native women are significantly more likely to report rapes than other racial groups).

⁶ Lyndsey Gilpin, *Native American Women Still Have the Highest Rates of Rape and Assault*, HIGH COUNTRY NEWS (Jun. 7, 2016), <https://www.hcn.org/articles/tribal-affairs-why-native-american-women-still-have-the-highest-rates-of-rape-and-assault/>.

⁷ AMY L. CASSELMAN, INJUSTICE IN INDIAN COUNTRY: JURISDICTION, AMERICAN LAW, AND SEXUAL VIOLENCE AGAINST NATIVE WOMEN 56 (2015).

⁸ ANNITA LUCCHESI, URBAN INDIAN HEALTH INST., MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS 3 (2018).

⁹ AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2007).

¹⁰ Adam Creppelle et al., *Community Policing on American Indian Reservations: A Preliminary Investigation*, 18 J. OF INST. ECONS. 843, 846 (2022).

¹¹ AMNESTY INT'L, *supra* note 9, at 41-42.

¹² André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, 277 NAT'L INST. OF JUST. J. 38, 43 (2016).

¹³ *Id.*

¹⁴ *Id.*

Additional barriers to prosecution include fear of retaliation,¹⁵ shoddy evidence preservation,¹⁶ and a justice system that is fraught with anti-indigenous discrimination.¹⁷

Over the past few years, the Missing and Murdered Indigenous Women Movement gained national recognition because of the federal and state governments work to increase awareness.¹⁸ This note is a call to action to bring positive change for a group of people the government has historically marginalized.

II. LAW ENFORCEMENT INADEQUACIES

A. HISTORY OF POLICING ON NATIVE LAND

Prior to America's influence in the 1800s, American Indians relied on their own traditional methods of policing on their land.¹⁹ These methods included enforcing laws based on personal or collective responsibility passed down as customs and enforced by tribes.²⁰ Beginning in the early 1800s, Native tribes began replacing these traditional methods with more European methods of community safety regulations such as electing law enforcement officers.²¹ After the American Civil War, the federal government asserted its authority over reservations, which forced Indians to accept white European

¹⁵ Felicia Pohl & Autumn Scott, *Native American Women Are Scared To Speak Out About Their Abuse*, N.M. News Port, <https://newmexiconewsport.com/native-american-women-scared-speak-abuse/> (last visited Nov. 1, 2023).

¹⁶ U.S. DEPT. OF JUST., INDIAN COUNTRY INVESTIGATIONS AND PROSECUTIONS, TRIBAL LAW AND ORDER ACT REPORT (2020).

¹⁷ Hillary N. Weaver, *The Colonial Context of Violence: Reflections on Violence in the Lives of Native American Women*, 24 J. OF INT'L VIOLENCE 1552, 1552 (2008).

¹⁸ *Missing and Murdered Indigenous Women: An Action Plan for Alaska Native Communities*, ALASKA NATIVE WOMEN'S RES. CTR., https://www.aknwrc.org/wp-content/uploads/2021/05/aknwrc_mmiw_toolkit_final_approved.pdf (last visited Oct.12, 2023).

¹⁹ Adam Crepelle et al., *supra* note 10, at 845.

²⁰ *Id.*

²¹ *Id.*

culture.²² In 1878, Congress approved the establishment of the federal Indian police.²³ This police force was staffed with Natives, but members of the force were expected to advance “non-Native ways of life.”²⁴ By the 1920s, most reservations only had one or two officers,²⁵ and in the late 1940s, the federal budget allowed for only forty-five total federal Indian police officers in the United States.²⁶ The lack of funding shifted police efforts towards tribe autonomy by taking over certain enforcement functions “in house” from the Bureau of Indian Affairs (BIA).²⁷

Today, there are three different policing schemes throughout Indian Country: federal policing, state policing, and tribal policing.²⁸ Under federal policing, crimes are investigated by either the BIA or the FBI.²⁹ The FBI has jurisdiction over all crimes listed in the Major Crimes Act of 1885, but there is frequent overlap between the FBI and the BIA.³⁰ BIA officers, who are funded by Congress, are sent to reservations and are responsible for criminal investigations.³¹ Their authority is derived from the Major Crimes Act of 1885,³² in which the

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ U.S. DEPT. OF JUST., NAT’L INST. OF JUST., POLICING ON AMERICAN INDIAN RESERVATIONS REPORT (2001).

²⁶ Adam Crepelle et al., *supra* note 10, at 846.

²⁷ Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5301 et seq.; see generally *Menominee Indian Tribe v. United States*, 577 U.S. 250, 252-53 (2016).

²⁸ Adam Crepelle et al., *supra* note 10, at 846.

²⁹ Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 718-20 (2006).

³⁰ See U.S. DEPT. OF JUST., U.S. ATT’YS MANUAL: TITLE 9, *Crim. Res. Manual* § 675-76, (setting forth authority for federal law enforcement in Indian Country within the memorandum of understanding between the United States Department of the Interior, the Bureau of Indian Affairs, the United States Department of Justice, and the Federal Bureau of Investigation in November 1993).

³¹ Indian Law Enforcement Reform: Law Enforcement Authority, 25 U.S.C. § 2803.

³² *United States v. Danley*, No. CR 11-10029, 2011 U.S. Dist. LEXIS 149855, at *2 (D.S.D. Dec. 30, 2011).

government federalized prosecutions of a variety of serious crimes between Indians on reservations.³³ Up until 1885, this power rested solely with the tribes.³⁴ Post-1885, tribes had little to no role in the criminal investigation process until the last few decades.³⁵ States, on the other hand, typically have jurisdiction over crimes on reservations if both the victim and the offender are non-Indians.³⁶ Under tribal policing, tribal governments now have the power to make executive decisions regarding how to govern their police force.³⁷ Tribes are responsible for hiring officers, deciding the rules that will govern the force, and firing officers that do not conform to their rules.³⁸ Funding for tribal police forces occurs either through grants from the federal government or by the tribes themselves.³⁹ Tribes that fund their own police have the greatest degree of sovereignty, but this includes less than five reservations.⁴⁰ No matter their degree of sovereignty, all tribal governments lack inherent power to exercise criminal jurisdiction over non-Indians.⁴¹ Tribes may investigate a crime that involves a non-Native, but they lack the ability to officially press charges.⁴² This is a power that is vested only with the state or federal government.⁴³

A. DEFICIENT POLICE PRESENCE

³³ Major Crimes Act, 18 U.S.C. § 1153 (murder, assault resulting in serious bodily injury, rape, most sexual offenses, etc.).

³⁴ *Ex parte Crow Dog*, 109 U.S. 556, 568 (1883).

³⁵ Adam Crepelle et al., *supra* note 10, at 846.

³⁶ U.S. GOV'T ACCOUNTABILITY OFF., CONTINUED EFFORTS NEEDED TO HELP STRENGTHEN RESPONSE TO SEXUAL ASSAULTS AND DOMESTIC VIOLENCE, CONGR. COMM. REP. (2011).

³⁷ Adam Crepelle et al., *supra* note 10, at 846.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 212 (1978).

⁴² Mikaela Koski, *Tying a Tribal Officer's Hands: Tribal Law Enforcement Authority Under United States v. Cooley*, 126 PENN. ST. L. REV 275, 295-303 (2022).

⁴³ *Id.*

The need for more law enforcement officers is one of the most discussed issues among tribal police chiefs.⁴⁴ The Pine Ridge Indian Reservation is the largest reservation in South Dakota,⁴⁵ spreading over three million acres and home to over 18,000 people.⁴⁶ In 2014, there were more than 16,000 emergency calls placed on the reservation, but only five law enforcement officers were assigned to patrol the area and respond – an area which happens to be four times the size of Los Angeles.⁴⁷ The lack of adequate police patrol has led to devastating outcomes for the Native community. For example, Logan Warrior Goings, a six-year-old boy who lived on the Pine Ridge reservation, was shot in the head while running to his grandfather as a barrage of bullets entered his home.⁴⁸ It took police over fifteen minutes to respond to his family's call, resulting in the suspect escaping and Logan passing away.⁴⁹

The Northern Cheyenne Indian Reservation is roughly 444,000 acres and home to approximately 5,000 people.⁵⁰ John

⁴⁴ Tracy Abiaka, *Tribal Police Agencies Struggle to Attract, Maintain Officers*, Panel Told, CRONKITE NEWS (May 19, 2022), <https://cronkitenews.azpbs.org/2022/05/19/tribal-police-agencies-struggle-to-attract-maintain-officers-panel-told/>.

⁴⁵ Hollie Golden, *'Everybody's tired': South Dakota Tribe Sues US Over Crime*, ASSOCIATED PRESS (Feb. 10, 2023, 12:30 PM), <https://apnews.com/article/drug-crimes-sd-state-wire-south-dakota-crime-law-enforcement-307069e11354966bbec6ce9625246237>.

⁴⁶ *About the Pine Ridge Reservation*, RE-MEMBER, <https://www.re-member.org/pine-ridge-reservation> (last visited Oct6, 2023).

⁴⁷ Naomi Schaefer Riley, *Storm Clouds Gather over Law Enforcement*, AM. ENTER. INST. (Sep. 10, 2020), <https://www.aei.org/op-eds/on-indian-reservations-storm-clouds-gather-over-law-enforcement/> (Pine Ridge's 3.4 million acres is slightly larger than Connecticut's 3.2 million acres). See 2019 CEQ Annual Report, CONN.'S OFF. STATE WEBSITE, https://portal.ct.gov/ceq/ar-19-gold/2019-ceq-annual-report-ebook/land-preserved_land (last visited Apr. 12, 2024).

⁴⁸ Golden, *supra* note 45.

⁴⁹ *Id.*

⁵⁰ Paul Hamby, *Northern Cheyenne Takes Steps to Assume Law Enforcement Responsibility*, BILLINGS GAZETTE (Sept. 10, 2023), https://billingsgazette.com/news/local/crime-courts/northern-cheyenne-reservation-indian-law-enforcement-indigenous-people-mmip/article_f516aa3e-4297-11ee-baf8-5338bda9bdf8.html.

Grinsell, a BIA patrolman on the reservation, reported that one of the major deficiencies of law enforcement is the distance that one patrolman may be responsible for patrolling.⁵¹ He stated, “[w]e have five outlying districts, the furthest one being 22 miles out, so you get a call out there, and if you’re the only one, that means your backup could also be as far as 22 miles away.”⁵² In fact, the first call that Grinsell ever received as a patrolman on the reservation was for an assault and he had no radio or backup.⁵³ Additionally, officers on the Standing Rock Sioux Reservation were reportedly too overwhelmed and overworked to investigate all of the rape and sexual assault cases that get reported each week.⁵⁴

In a study conducted by the National Institute of Justice, forty of the sixty-seven largest Indian tribes in the United States reported statistics on their police departments.⁵⁵ The statistics offer an example of a typical police department that serves Indian Country.⁵⁶ The typical Tribal police department consists of sixteen police officers to serve a reservation of approximately 500,000 acres with approximately 10,000 tribal members.⁵⁷ The typical department budget is approximately \$1,000,000, which is less than its rural non-reservation counterparts.⁵⁸ This study illustrates the lack of resources that police departments have on reservations.⁵⁹

This phenomenon has led to tribal areas becoming lawless.⁶⁰ Delayed response times impact sexual assault and rape cases in particular due to the increased risk of spoliation of

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Laura Sullivan, *Rape Cases on Indian Lands Go Uninvestigated*, NAT’L PUB. RADIO (July 25, 2007), <https://www.npr.org/2007/07/25/12203114/rape-cases-on-indian-lands-go-uninvestigated>.

⁵⁵ STEWART WAKELING ET AL., U.S. DEP’T OF JUST., *POLICING ON AMERICAN INDIAN RESERVATIONS: A REPORT TO THE NATIONAL INSTITUTE OF JUSTICE* 9 (2001).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Golden, *supra* note 45.

evidence.⁶¹ The slower the police response, the harder it is for them to collect the evidence needed to prosecute sexual offenses.⁶² After experiencing rape or sexual assault, showering and changing clothes is almost instinctual.⁶³ This is because rape leads to victims feeling “dirty” or “contaminated” and unable to take control of their body back.⁶⁴ However, showering or changing clothes can be detrimental to the prosecution of the case.⁶⁵

B. INADEQUATE CREDENTIALS

The mission of the Office of Justice Services (“OJS”) is to “uphold Tribal sovereignty and provide for the safety of Indian communities by ensuring the protection of life and property, enforcing laws, and maintaining justice and order.”⁶⁶ One of the several responsibilities of the OJS is the development and supervision of law enforcement training.⁶⁷ This includes training on interviewing victims of sexual violence as well as collecting and preserving evidence.⁶⁸ Even with these regulations in place, unqualified officers are still hired to police Indian land.⁶⁹

⁶¹ *What You Can Expect When Reporting a Sexual Assault*, EDMONTON POLICE SERV., <https://www.edmontonpolice.ca/CommunityPolicing/PersonalPropertyCrimes/SexualAssault/ReportingSexualAssault> (last visited Oct. 19, 2023).

⁶² *Id.*

⁶³ *Get Help After Sexual Assault*, N.Y. OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, <https://opdv.ny.gov/what-you-need-know-after-youve-been-sexually-assaulted> (last visited Oct. 9, 2023).

⁶⁴ *Common Reactions to Sexual Assault*, LOYOLA UNIV. COUNSELING CTR., <https://www.loyola.edu/department/counseling-center/services/students/concerns/sexual-assault/reactions> (last visited Oct. 10, 2023).

⁶⁵ *What You Can Expect When Reporting a Sexual Assault*, *supra* note 61.

⁶⁶ U.S. Dep’t of the Interior Indian Affairs, *Office of Justice Services*, <https://www.bia.gov/bia/ojs> (last visited Mar. 2, 2024).

⁶⁷ Indian Law Enforcement Reform: Indian Law Enforcement Responsibilities, 25 U.S.C. § 2802 *et seq.*

⁶⁸ *Id.*

⁶⁹ *Victims of Terrain: Alaska Native Women*, *supra* note 2.

Bill Mercer, former United States (“U.S.”) Attorney in Montana, observed, “there are simply not ‘enough people who are interested in being police officers that have the requisite education and who can pass a drug test.’”⁷⁰ In fact, there are at least fourteen cities on Alaskan reservations that have employed Tribal police officers with criminal records, including tribal officers who have previous convictions of domestic violence and various other sex crimes.⁷¹ Melanie Bahnke, a board member of the Alaska Federation of Natives, stated, “[i]t’s outrageous that we have a situation where we have such a lack of public safety that communities are resorting to hiring people who have the propensity for violence”⁷² These officers’ criminal records would prevent them from being hired by non-reservation police departments and private security companies nearly anywhere in the United States.⁷³

Reporting a sexual assault is already a dreadful task for most women.⁷⁴ When one couples that with the fact that some of the officers investigating the assault have a history of such assaults themselves, women run the risk of being victimized a second time.⁷⁵ Sadly, victims are sometimes surrounded by predators throughout the entire Tribal police investigative process.⁷⁶

III. INEFFICIENT HEALTH AND FORENSIC SERVICES

A. BACKGROUND

⁷⁰ Riley, *supra* note 47.

⁷¹ *Victims of Terrain: Alaska Native Women*, *supra* note 2.

⁷² *Id.*

⁷³ *Report: At Least 14 Alaska Cities Have Officers with Records*, ASSOCIATED PRESS (July 21, 2019, 11:17 PM), <https://apnews.com/article/b08e9fac28bd4c0ea9cd00d85b29f3d4>.

⁷⁴ *Reporting a Sexual Assault to the Police*, CHICAGO ALLIANCE AGAINST SEXUAL EXPLOITATION, <https://www.caase.org/what-happens-report-sexual-assault-to-police/> (last visited Oct. 14, 2023).

⁷⁵ *Id.*

⁷⁶ *Id.*

The United States has long been intertwined in the Indian healthcare system.⁷⁷ The Indian Health Service (“IHS”) is the agency responsible for providing federal health services to approximately 2.6 million Native Americans.⁷⁸ IHS is consistently underfunded and understaffed.⁷⁹ IHS falls under the Department of Health and Human Services, and in 2023, Congress allotted them a budget of 9.3 billion dollars.⁸⁰ To put this number into perspective, Congress would need to double the IHS budget to match the healthcare standard for 158,000 incarcerated federal prisoners.⁸¹ Anyone who is a member of one of the 574 federally recognized Indian Tribes is eligible for the services provided by the IHS.⁸² IHS is also responsible for the construction and maintenance of IHS hospitals and the recruiting of competent staff.⁸³

The Indian Health Care Improvement Act (“IHCA”) is the predominant authorizing legislation for the IHS.⁸⁴ The IHCA went into effect when President Obama signed the Patient Protection and Affordable Care Act of 2010.⁸⁵ While various editions of the bill existed prior to 2010, the IHCA that

⁷⁷ *Indian Health Service (IHS): An Overview*, CONG. RSCH. SERV. (Jan. 12, 2016), <https://crsreports.congress.gov/product/pdf/R/R43330>.

⁷⁸ U.S. Dep’t of the Interior Indian Affairs, *supra* note 66.

⁷⁹ Mary Smith, *Native Americans: A Crisis in Health Equity*, A.B.A., https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/native-american-crisis-in-health-equity/ (last visited Oct. 31, 2023).

⁸⁰ U.S. Dep’t. of Health and Human Serv., *Indian Health Services, Annual Budget (2023)*.

⁸¹ Smith, *supra* note 79; U.S. Gov’t Accountability Off., *Federal Prison System*, <https://www.gao.gov/federal-prison-system> (last visited Mar. 2, 2024).

⁸² Ctrs. for Medicare and Medicaid Servs., *Assisting American Indian and Alaska Native Consumers* (Aug. 2020), <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/Assist-American-Indian-Alaska-Native-Consumers.pdf>.

⁸³ *Indian Health Service (IHS): An Overview*, *supra* note 77.

⁸⁴ Indian Health Serv., *Indian Health Care Improvement Act*, <https://www.ihs.gov/ihsca/> (last visited Mar. 3, 2024).

⁸⁵ *Id.*

passed in 2010 with no expiration date.⁸⁶ Additionally, the Snyder Act gives Congress the power to appropriate care and assistance to Native Americans throughout the United States.⁸⁷ It reads, “[t]he Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such monies as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States”⁸⁸

There are five types of IHS facilities: hospitals, health centers, youth treatment centers, health stations, and Alaskan village clinics.⁸⁹ The entire IHS system consists of only forty-six hospitals with limited resources.⁹⁰ Consequently, there is a lack of consistency among IHS facilities and many cannot properly treat victims of sexual abuse.⁹¹ Therefore, women who make the difficult decision to report a rape or sexual assault will likely be deprived treatment that non-Native victims receive.⁹²

B. INADEQUATE FACILITIES, INADEQUATE STAFF

Native women facing sexual assault or rape struggle to find IHS facilities that can address their needs.⁹³ For example, women who have been raped on the Standing Rock Sioux Reservation have reported traveling over an hour to get to the nearest IHS hospital located in Fort Yates, North Dakota.⁹⁴ Once arriving at the hospital, many victims were then sent to the IHS facility in Bismarck, North Dakota due to a lack of resources and trained professionals at the Fort Yates facility.⁹⁵ The facility in Bismarck is an additional eighty miles away, so as a result,

⁸⁶ *Id.*

⁸⁷ The Snyder Act, 25 U.S.C. § 13.

⁸⁸ *Id.*

⁸⁹ *Indian Health Service (IHS): An Overview*, *supra* note 77.

⁹⁰ *Id.*

⁹¹ *Rape of Native Women*, AMNESTY INT’L, https://bidenhumanrightspriorities.amnestyusa.org/wp-content/uploads/2020/11/Gender-Equality_Strengthening-Human-Rights-For-All-in-2021_110620-3.pdf (last visited Oct. 31, 2023).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ AMNESTY INT’L, *supra* note 9, at 55-57.

⁹⁵ *Id.*

many women avoid the journey.⁹⁶ Victims are not even guaranteed an examination.⁹⁷ Only one-third of the women referred from Fort Yates to the medical facility in Bismarck receive an examination.⁹⁸

Once arriving at the facility, more problems arise for victims of sexual assault.⁹⁹ A sexual assault evidence kit, commonly referred to as a “rape kit,” provides key evidence for the prosecution when it is performed correctly and in a timely manner.¹⁰⁰ Hospitals under IHS control often do not have trained staff on-site to administer rape kits, consistently provide rape kits, or adequately track data on sexual assault services provided.¹⁰¹ IHS has developed a set of protocols for when a victim of sexual comes into a medical facility.¹⁰² The protocols include having nurses trained in sexual assault examination, referring medical and behavioral health follow-up care to victims, ensuring chain of custody procedures are outlined for handling forensic evidence, and making sure victims are treated with dignity and respect.¹⁰³ These protocols, however, are not mandatory in IHS facilities.¹⁰⁴ A 2004 survey found that thirty percent of responding facilities did not have a plan in place to address a sexual violence case.¹⁰⁵

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Rape of Native Women*, *supra* note 91, at 6.

¹⁰⁰ *End Rape Against Native Women*, AMNESTY INT’L (2021), https://www.amnestyusa.org/wp-content/uploads/2019/10/EndRape_JointFlyer_2019_Final.pdf.

¹⁰¹ Nat’l Congress of American Indians, Resolution #KAN-18-005, Healthcare & Justice for Sexual Assault Survivors through the Tribal Law and Order Act (June 2018).

¹⁰² U.S. Dep’t of Just., Off. On Violence Against Women, *A National Protocol for Sexual Assault Medical Forensic Examinations* (Apr. 2013).

¹⁰³ *Id.*

¹⁰⁴ Native American Women’s Health Ed. Res. Ctr., *Indigenous Women’s Reproductive Justice: A Survey of Sexual Assault Policies and Protocols within Indian Health Service Emergency Rooms* (Dec. 2004), <https://www.nativeshop.org/images/stories/media/pdfs/SurveyofSexualAssaultPoliciesRepoWithinIHS2004.pdf>.

¹⁰⁵ *Id.* at 6.

In 2011, IHS established the forensic healthcare program to address the sexual violence epidemic that runs rampant throughout Indian Country.¹⁰⁶ According to Indian Health Services, victims of violence and sexual abuse require care from health professionals who are trained to identify and treat trauma patients.¹⁰⁷ With this being said, forty-four percent of IHS facilities lack personnel trained to provide emergency services in the event of sexual violence.¹⁰⁸ A Sexual Assault Nurse Examiner (“SANE”) is a nurse with special training in forensic examination of victims of sexual violence.¹⁰⁹ While needed by Indigenous women victims, SANE positions have not been prioritized by the IHS.¹¹⁰ For example, Oklahoma is home to thirty-nine Tribal organizations¹¹¹ and over 16 percent of Oklahoma’s population identifies as American Indian.¹¹² Yet, not one facility in all of Oklahoma has a SANE program in place.¹¹³

Unfortunately, access to a medical facility and receiving the correct treatment is a luxury that most Native victims of sexual abuse do not receive.¹¹⁴ Experiencing trauma and making the decision to report it is difficult enough, but having one’s chances of vindication through a prosecution hampered because of a faulty medical system does not promote “justice.”¹¹⁵ The current system does not encourage women in

¹⁰⁶ U.S. Dep’t. of Health and Human Serv., *Forensic Healthcare*, INDIAN HEALTH SERV., <https://www.ihs.gov/forensichealthcare/> (last visited Mar. 2, 2024).

¹⁰⁷ *Id.*

¹⁰⁸ AMNESTY INT’L, *supra* note 9, at 56.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ U.S. Dep’t. of Health and Human Serv., *Oklahoma City Area*, INDIAN HEALTH SERV., <https://www.ihs.gov/oklahomacity/> (last visited Mar. 2, 2024).

¹¹² Adriana Rezal, *Where Most Native Americans Live*, U.S. NEWS (Nov. 26, 2021), <https://www.usnews.com/news/best-states/articles/the-states-where-the-most-native-americans-live>.

¹¹³ AMNESTY INT’L, *supra* note 9, at 56-57.

¹¹⁴ Nat’l Congress of American Indians, *supra* note 101.

¹¹⁵ Madison Hunter, *Missing and Murdered: Understanding Why Indigenous Women are Murdered and Go Missing at Higher Rates Than Other Populations*, THE BARK (Nov. 3, 2021), <https://www.thebarkumd.com/voices/2021/11/3/missing-and->

Indian Country to come forward to report their abuse because there is a lack of confidence that the system will handle their cases correctly.¹¹⁶ Additionally, many facilities do not have the proper resources to provide victims of sexual abuse with mental health resources to assist them in their recovery process.¹¹⁷ Considering that sexual assault survivors are at a much higher risk for suicide and depression, Native women must have access to these services.¹¹⁸

IV. ROOT CAUSES

A. LACK OF REPORTING

There are two common reasons why sexual assaults on Indian reservations go unreported: (1) cultural barriers¹¹⁹ and (2) distrust in the government.¹²⁰ Women on Indian reservations face unique challenges beyond the inherent difficulties that all rape victims face.¹²¹ Cultural barriers prevent some Indigenous women from reporting their abusers, especially when the perpetrator and the victim belong to the same tribe.¹²² Hesitations arise when women live in small tribal communities where resources are sparse and members often

murdered-understanding-why-indigenous-women-are-murdered-and-go-missing-at-higher-rates-than-other-populations.

¹¹⁶ *Id.*

¹¹⁷ Ronet Bachman et. al., *Violence Against American Indian and Alaska Native Women and the Criminal Justice Response: What is Known*, U.S. DEP'T OF JUST. 83 (Aug. 2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf>.

¹¹⁸ *Effects of Sexual Violence*, RAINN, <https://www.rainn.org/effects-sexual-violence> (last visited Oct. 12, 2023).

¹¹⁹ Pohl & Scott, *supra* note 15.

¹²⁰ Chrystal Begay & Tinesha Zandamela, *Sexual Assault on Native American Reservations in the U.S.*, Ballard Brief 1,7 (2018).

¹²¹ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 36.

¹²² Darakshan Raja, *The Barriers American Indian Women Face In Accessing Sexual Assault Exams And Services*, URBAN INSTITUTE (May 30, 2014), <https://www.urban.org/urban-wire/barriers-american-indian-women-face-accessing-sexual-assault-exams-and-services#:~:text=Due%20to%20cultural%20norms%2C%20the,victims%20from%20making%20a%20report>.

depend on one another for survival.¹²³ As Anthony Tillman, Vice President of the National Native American Human Resources Association stated, “[i]t’s their uncles... (or) the pillar of the community that does so much, but has these secrets. You don’t want to be the one to bring that person down.”¹²⁴ On top of fearing being ostracized from their community, Indigenous women rape victims often fear retaliation from their perpetrator.¹²⁵ All of which leads to women remaining silent.¹²⁶

There is also a major distrust between the federal government and Native Indian communities.¹²⁷ Native women often do not report their abuse because they lack confidence in the justice system to properly investigate and prosecute their case.¹²⁸ Ultimately, Native victims do not believe that anything will be done.¹²⁹ Racism, isolationist feelings, and a lack of resources from law enforcement are all reasons that lead women to doubt the system.¹³⁰ These women would rather try to move forward with their lives than relive their trauma.¹³¹ Additionally, perpetrators of sexual assault and rape are charged with crimes at lesser rates, instilling in women that there is no reason to report it.¹³²

To regain the trust of Indigenous peoples, the Tribal Law and Order Act of 2010 (“TLOA”) was signed into law.¹³³ This act requires federal prosecutors to aggressively prosecute crimes reported by tribes.¹³⁴ Under TLOA, prosecutors are required to track each case and update the victims on how the

¹²³ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 36.

¹²⁴ Pohl & Scott, *supra* note 15.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Hunter, *supra* note 115.

¹²⁸ Catherine E. Burnette, *From the Ground Up: Indigenous Women’s after Violence Experiences with the Formal Service System in the United States*, 45 BRITISH J. OF SOC. WORK 1526 (2015).

¹²⁹ Deegan, 605 F.3d at 662.

¹³⁰ Burnette, *supra* note 128, at 1526.

¹³¹ Hunter, *supra* note 115.

¹³² Begay & Zandamela, *supra* note 120.

¹³³ Tribal Law and Order Act, 18 U.S.C. § 1162(d).

¹³⁴ *Id.*

case was adjudicated.¹³⁵ TLOA also gives tribal police broader authority to prosecute non-Native members and provides for training of IHS workers and tribal law enforcement on how to collect evidence in sexual assault cases.¹³⁶ Whether this effort will make a significant impact is still to be determined.¹³⁷

B. JURISDICTIONAL BARRIERS

Three key federal laws encompass the complex criminal law jurisdictional framework that exists today in Indian Country: (1) the General Crimes Act; (2) the Major Crimes Act; and (3) the Indian Civil Rights Act.¹³⁸ The General Crimes Act provides that federal laws enacted with the intent to apply in locations that have exclusive jurisdiction of the federal government apply in Indian country.¹³⁹ However, the General Crimes Act has a notable limitation: prosecution against an Indian by the federal government is available only if an Indian commits a crime against a non-Indian.¹⁴⁰ As previously mentioned, the Major Crimes Act gives federal prosecutors authority to prosecute certain crimes by Indians or against Indians.¹⁴¹ The Major Crimes Act supplanted tribal power and allowed federal attorneys to prosecute cases of “major crimes” including rape, murder, and sexual abuse that involve an Indian perpetrator and an Indian victim.¹⁴² The Indian Civil Rights Act limits federally recognized tribes to sentencing a defendant to no more than one year and a \$5,000 fine.¹⁴³ This is the case for every offense from murder to theft to every in between.¹⁴⁴ While tribal governments could technically still prosecute some offenses, these acts effectively place all serious

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976).

¹³⁹ 18 U.S.C. § 1152.

¹⁴⁰ *Id.*

¹⁴¹ Major Crimes Act, 18 U.S.C. § 1153.

¹⁴² *Id.*

¹⁴³ 25 U.S.C. § 1302(a)(7)(B).

¹⁴⁴ *Id.*

crimes, including rape and sexual assault, in the hands of the federal government.¹⁴⁵

Additionally, the reauthorization of the Violence Against Women Act of 2013 (VAWA) restored tribal jurisdiction over non-Natives, but there were drawbacks.¹⁴⁶ VAWA only applied to crimes of domestic and dating violence, sexual violence, and stalking.¹⁴⁷ It also required the Native individual's tribe to comply with certain federal requirements as a prerequisite.¹⁴⁸ VAWA was reauthorized again in 2022 and further gave Tribes criminal jurisdiction over new crimes such as assault of tribal justice personnel, child violence, and sex trafficking.¹⁴⁹ VAWA 2022 also authorized programs to establish regional SANE training to expand access to SANE nurses across Indian land.¹⁵⁰

Statistically, rape victims are predominately racially homogenous with their perpetrators.¹⁵¹ Indigenous women, however, are more likely to be raped or sexually assaulted by a race other than their own, with over 70 percent of the perpetrators being white.¹⁵² Confusing jurisdictional schemes and a lack of communication between agencies encourages non-Indigenous predators to sexually assault Native women and expect "to get away with it."¹⁵³ Non-native sexual predators have referred to Indian reservation as a "free-for-all," meaning a place to rape a Native woman without recourse.¹⁵⁴ "Perps" created chat rooms and internet forums devoted to

¹⁴⁵ *Id.*

¹⁴⁶ 34 U.S.C. § 12291 *et seq.*; see Julia Stern, *Missing and Murdered Indigenous Women: The Colonizing Nature of Law*, IMMIGR. & HUM. RTS. L. REV. (2021).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*; see CONG. RSCH. SERV., THE 2022 VIOLENCE AGAINST WOMEN ACT (VAWA) REAUTHORIZATION (2023).

¹⁵¹ Sarah Deer, *Beyond Prosecution: Sexual Assault Victim's Rights in Theory and Practice Symposium: Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 SUFFOLK U. L. REV. 455, 455 (2005).

¹⁵² *Id.*

¹⁵³ Casselman, *supra* note at 7.

¹⁵⁴ *Id.*

targeting Native women on reservations.¹⁵⁵ While there is no definitive reason as to why non-Native men disproportionately commit these crimes, jurisdictional loopholes do not help.¹⁵⁶

C. PROSECUTORIAL CHALLENGES

Once a crime has been reported and investigated, the first step in a federal major crimes case is to review the evidence and determine whether or not to prosecute.¹⁵⁷ Prosecutors are tasked with making high-stakes determinations regarding the amount of evidence presented and whether or not to go forward with each case.¹⁵⁸ Even where there is evidence proving each element of a crime, the U.S. Attorney's Office may decline to prosecute even if they believe the case can be proven beyond a reasonable doubt.¹⁵⁹ This is called prosecutorial discretion.¹⁶⁰ The U.S. Attorney's Office declined to prosecute almost seventy percent of cases involving sexual assault and rape on Indian territory from 2005 to 2009.¹⁶¹ Insufficient evidence is the most cited reason for why a federal prosecutor chooses to not move forward with a case from Indian country.¹⁶² Insufficient evidence includes situations where there is a lack of criminal intent, witness issues, or weak evidence.¹⁶³

¹⁵⁵ *Slouching Towards Autonomy: Reenvisioning Tribal Jurisdiction, Native American Autonomy, and Violence Against Women in Indian Country*, 111 J. CRIM. L. & CRIMINOLOGY 313, 315 (2021).

¹⁵⁶ Begay & Zandamela, *supra* note 120.

¹⁵⁷ Washburn, *supra* note 29, at 725.

¹⁵⁸ See, e.g., *Newman v. United States*, 382 F.2d 479, 481-82 (D.C. Cir. 1967) (stating that

the prosecutor must consider “[m]yriad factors” and “no court has any jurisdiction to inquire into or review his decision”).

¹⁵⁹ Washburn, *supra* note 29, at 725.

¹⁶⁰ See *In re Wild*, 994 F.2d 1244, 1260 (11th Cir. 2021) (citing *U.S. v. Nixon*, 418 U.S. 683, 693 (1974) for a discussion of prosecutorial discretion.

¹⁶¹ Hunter, *supra* note 115.

¹⁶² U.S. Dept. of Just., *Indian Country Investigations and Prosecutions*, 31 (2021), https://www.justice.gov/d9/2023-08/2021_-_indian_country_investigations_and_prosecutions_report.pdf.

¹⁶³ *Id.*

In recent years, almost sixty percent of declined Indian Country cases involved physical and sexual assaults or sexual exploitation.¹⁶⁴

All United States Attorney's Office ("USAO") with an Indian reservation in its district are required to engage and consult with the Tribes.¹⁶⁵ This means that every new United States Attorney in these districts must meet with the Tribes in their district and develop a joint operational plan.¹⁶⁶ An operational plan provides communication between federal and Tribal partners, coordination among law enforcement entities, law enforcement training, victim advocacy, and resources on federal accountability regarding tribal prosecutions.¹⁶⁷ The subject matter of these operational plans vary from district to district, depending on each tribe's unique characteristics.¹⁶⁸ While these methods better connect the USAO with the tribe, challenges still arise.¹⁶⁹ Many federal prosecutors with an Indian reservation in their district live hundreds of miles away from the Reservation and do not speak the Native language.¹⁷⁰ This creates an inherent distrust between the prosecutor and the tribal people because the prosecutor is unable to fully grasp the morals and ideals of the Native community.¹⁷¹ Additionally, prosecutors are often seen as "outsiders" to the Tribe.¹⁷² Tribal members often do not feel that they can be fully open with prosecutors due to prosecutors representing the government that has oppressed them for so many years.¹⁷³ However, there are many federal prosecutors who overcome these challenges and undertake extreme measures to get to know the tribal communities that they serve.¹⁷⁴

¹⁶⁴ *Id.* at 35.

¹⁶⁵ *Id.* at 39.

¹⁶⁶ *Id.* at 18.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Washburn, *supra* note 29, at 725.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Larry EchoHawk, *Child Sexual Abuse in Indian Country: Is the Guardian Keeping in Mind the Seventh Generation?*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 83, 99 (2001).

¹⁷⁴ Washburn, *supra* note 29, at 731.

Accordingly, there have been recent sexual abuse cases that were successfully prosecuted.¹⁷⁵ In 2020, a member of the Eastern Band of Cherokee Indians was charged with sexually abusing a female minor in his care.¹⁷⁶ The defendant confessed to assaulting the victim and pleaded guilty to two counts of sexual contact with a child.¹⁷⁷ He was sentenced to 144 months in prison, a lifetime of supervised release, and required to register as a sex offender upon his release.¹⁷⁸ Mandrell Ray Roberts was charged with two counts of abusive sexual contact on an Indian reservation for intentionally touching the breasts of two females under the age of twelve.¹⁷⁹ He was sentenced to 120 months in prison, five years of supervised release, mandatory sex offender registration, and a restriction mandating that he cannot live with or be around children under 18.¹⁸⁰

D. PERSONAL RECOMMENDATIONS

This note urges Congress to address the Missing and Murdered Indigenous Women Movement by appropriating money to programs already in place and authorizing more services to help these Native victims. Congress has the power to address this terrible and pervasive issue in a number of ways.¹⁸¹ For one, Congress can appropriate more funds to programs already established under VAWA that would aid Native victims after they have experienced sexual abuse.¹⁸²

¹⁷⁵ U.S. Dept. of Just., *supra* note 162, at 24.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Okmulgee Man Sentenced to 120 Months for Two Counts of Abusive Sexual Contact in Indian Country*, U.S. ATTY.'S OFF. E. DIST. OF OKLA. (July 6, 2020), <https://www.justice.gov/usao-edok/pr/okmulgee-man-sentenced-120-months-two-counts-abusive-sexual-contact-indian-country>.

¹⁸⁰ *Id.*

¹⁸¹ CONG. RSCH. SERV., *THE 2022 VIOLENCE AGAINST WOMEN ACT (VAWA) REAUTHORIZATION* (2023).

¹⁸² *Id.*

Funds must be allotted in order for change to begin.¹⁸³ To date, Congress has appropriated no money to the SANE programs that were established under VAWA 2022.¹⁸⁴ Change will not be possible until Congress makes changes to these allocations.

Congress must also call for more oversight over the federal Indian law enforcement and health care systems.¹⁸⁵ More reporting should be conducted, but it should not stop there.¹⁸⁶ In order for reporting to be effective, Congress needs to take note of the findings and readjust their efforts if needed in order to properly instill change.¹⁸⁷

V. CONCLUSION

The United States government has put Native women on the back burner for centuries, but now it has a chance to fix its failures.¹⁸⁸ How many more Native women will have to suffer from these heinous acts before they are recognized?¹⁸⁹ How many more will have to be revictimized by the systematic failures the federal government fails to address?¹⁹⁰ Achieving justice is not easy. However, injustice must never be allowed to persist.¹⁹¹

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Peyton Cross, *Governmental Inadequacies Concerning Missing and Murdered Native American Women in the United States*, 10 LINCOLN MEM. UNIV L. REV. 2, 20 (2022).

¹⁸⁹ *Id.*

¹⁹⁰ Indian Law Resource Center, *Ending Violence Against Native Women*, <https://indianlaw.org/issue/ending-violence-against-native-women> (last visited Nov. 15, 2023).

¹⁹¹ Melanie McGruder, *Missing and Murdered: Finding a Solution to Address the Epidemic of Missing and Murdered Indigenous Women in Canada and Classifying it as a "Canadian Genocide"*, 46 AM. INDIAN LAW R. 115, 153 (2022).