

Living in the Blast Zone: Sexual Violence Piped onto Native Land by Extractive Industries

LILY GRISAFI*

Native American women around the country, and particularly those living near extractive industries, face an epidemic of sexual violence. The high rates of violence against Native women are due in large part to the lack of liability for those most responsible. Flaws in United States and tribal criminal justice systems create de facto jurisdictional gaps that allow perpetrators to commit crimes on tribal land with impunity. In particular, restrictions on tribal sovereignty and criminal jurisdiction, inadequate funding for tribal criminal justice systems, and federal apathy to crimes on tribal land deepen the pre-existing problem of violence against Native women.

This Note elucidates the realities and causes of violence against Native women, in order to find legal solutions for holding perpetrators and extractive companies liable. Part II discusses the facts and legal backdrop of this epidemic of violence. Part III then examines how laws inhibiting tribal sovereignty combined with federal prosecutorial inaction are responsible for this epidemic. Part IV puts forth available legal solutions for holding perpetrators and extractive companies accountable through United States and tribal criminal justice systems. To hold perpetrators accountable, tribes should be legally permitted to exercise enhanced criminal jurisdiction over non-native defendants, and the Federal government should provide tribes with the inter-agency support and federal funding necessary to carry out this enhanced jurisdiction effectively. For their part, extractive corporations should be held responsible through federal regulation and civil action. Federal agencies should regulate extractive companies in the context of and in correlation with their businesses' impacts on neighboring Native women's safety. When, despite proper federal regulation, these corporations engage in negligent hiring practices that lead to increased violence against Native

* Farnsworth Note Competition Winner, 2020. J.D. Candidate 2020, Columbia Law School. The author would like to thank Professor Steven McSloy for his guidance and invaluable feedback and the staff of the *Columbia Journal of Law and Social Problems* for their dedication and support throughout the publication process.

women, the corporations should be held civilly liable for public nuisance in state and tribal court.

I. INTRODUCTION

Diane Millich, a Native woman living on the Southern Ute Reservation in Colorado, faced years of domestic violence at the hands of her white male partner.¹ The Southern Ute Tribal Police could not intervene because they lack criminal jurisdiction over non-native people.² The La Plata County sheriff was equally powerless to arrest Millich's partner because the violence took place on tribal land.³ This crime fell under federal criminal jurisdiction, as do all crimes committed on tribal land that involve non-native people,⁴ but the federal government declined to intervene.⁵ On one occasion after beating Millich, her partner called the county sheriff himself to taunt Millich and prove to her that law enforcement could not protect her.⁶ Millich's partner was finally arrested after he opened fire in her office at the Bureau of Land Management; however, law enforcement first took the time to measure the distance between the barrel of the gun and the point of bullet impact to determine whether the crime occurred on land under state law enforcement jurisdiction.⁷

This jurisdictional loophole, which prevents prosecution of non-native people who commit crimes on native land, is one of the primary reasons why Native women are five times more likely to experience interracial domestic violence than white women in the United States.⁸ The dangers of this jurisdictional gap are

1. See Jonathan Weisman, *Measure to Protect Women Stuck on Tribal Land Issue*, N.Y. TIMES (Feb. 10, 2013), <https://www.nytimes.com/2013/02/11/us/politics/violence-against-women-act-held-up-by-tribal-land-issue.html> [<https://perma.cc/9QFP-UKKK>].

2. See *id.*

3. See *id.*

4. See General Crimes Act, 18 U.S.C. § 1152 (2018) (“[T]he general laws of the United States as to the punishment of offenses committed . . . shall extend to the Indian Country. This section shall not extend to offenses committed by one Indian against the person or property of another Indian[.]”).

5. See Weisman, *supra* note 1.

6. See *id.*

7. See *id.*

8. NAT'L CONG. OF AM. INDIANS POL'Y RES. CTR., RESEARCH POLICY UPDATE: VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN 2 (Feb. 2018), http://www.ncai.org/policy-research-center/research-data/prc-publications/VAWA_Data_Brief_FINAL_2_1_2018.pdf [<https://perma.cc/9V2D-LWUN>].

compounded on reservations near extractive industries,⁹ which bring with them thousands of transient, single men — who at times outnumber the women twenty to one¹⁰ — with stressful, high-paying jobs and no connection to the community.¹¹ This gap in the criminal justice system is especially problematic as, from the outset, Native women are at heightened risk of sexual violence due

9. “Extractive industries” refers to industries extracting raw materials from the earth for consumer use. Examples of extractive industries relevant to this Note include industries engaged in oil extraction, gas extraction, and mineral mining.

10. See Aryn Baker, *She Survived Sex Trafficking. Now She Wants to Show Other Women a Way Out*, TIME, (Jan. 17, 2019), <https://time.com/longform/windie-jo-lazenko-sex-trafficking-survivor/> [<https://perma.cc/MC5X-9HLE>].

11. See Jude Sheerin & Anna Bressanin, *North Dakota Oil Boom: American Dream on Ice*, BBC NEWS (Mar. 12, 2014), <https://www.bbc.com/news/magazine-25983917> [<https://perma.cc/LF7C-KA8Y>]. The social isolation, depression, heavy alcohol and drug use, and poor neighborhood cohesion often found in the temporary “man camp” settlements have all been linked to heightened risks of intimate partner violence. See CTRS. FOR DISEASE CON. AND PREVENTION, *Violence Prevention: Risk and Protective Factors*, <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/riskprotectivefactors.html> [<https://perma.cc/QVX8-8WCD>] (last visited Apr. 8, 2020); see also Lori Fox, *Man Camps’ May be a Threat to Yukon Indigenous Women and Girls, Say Advocates*, YUKON NEWS (July 4, 2019), <https://www.yukon-news.com/news/man-camps-may-be-a-threat-to-yukon-indigenous-women-and-girls-say-advocates> [<https://perma.cc/84SR-JQAZ>] (“The [Missing and Murdered Indigenous Women and Girls] report cites a document by Amnesty International on the subject which found that, ‘a highly stressful environment, physical isolation, and the drug and alcohol abuse at some camps all create an environment that can be unsafe for women.’ Secondly, the rotational work cycle often employed in mining camps disrupts normal social and family patterns.”); Gareth Bleir & Anya Zoledziowski, *Murdered and Missing Native American Women Challenge Police and Court*, CTR. FOR PUB. INTEGRITY (Aug. 27, 2018), <https://publicintegrity.org/politics/murdered-and-missing-native-american-women-challenge-police-and-courts> [<https://perma.cc/7NQ3-J3GZ>] (Oil worker Chris Martinez called the man camps “indescribable,” stating that “there are shootings, stabbings, rapes, fights, extreme amounts of drugs, alcohol.” Martinez pointed to the unique circumstances of the man camps as a source of the violence, stating that “[w]hen you work 12 to 16 hours a day and you’re away from your family, and you have all this money, and you go home, that’s when they start making those decisions and it’s bad, it’s really bad.”).

to systematic racism and misogyny,¹² inherited cultural trauma, and resulting poverty.¹³

For the Mandan, Hidatsa, and Arikara Nation of the Fort Berthold Reserve and the Assiniboine and Sioux Tribes of the Fort Peck Reserve, both of which are located on top of the oil-rich Bakken Formation,¹⁴ violence related to extractive industries has been a reality for more than a decade.¹⁵ The population in towns surrounding the Bakken Formation doubled with the oil boom,¹⁶ as temporary housing developments near reservation land filled with tens of thousands of transient workers hired without comprehensive background checks.¹⁷ Crime rates in the area similarly skyrocketed.¹⁸ For example, in the region of North Dakota that encompasses the Bakken Formation, violent crime rose by 121% after the extraction of the formation began.¹⁹ Strikingly, rates of

12. A study by Professor Cheryl Bennett of Arizona State University examined the use of racist slurs during sexual assaults of indigenous women. See Bleir & Zoledziowski, *supra* note 11. Professor Bennett concluded that these assaults should largely be considered hate crimes. *Id.*

Annita Lucchesi, a Cheyenne woman and doctoral candidate at the University of Arizona, whose work includes creating a database of over 2600 cases of missing and murdered indigenous women in North America, shared her own first-hand accounts of racially motivated sexual violence. See *id.*; Annita Lucchesi, *About Annita Lucchesi*, (2017), <https://www.annitalucchesi.com/about-1> [<https://perma.cc/YM3P-L6RE>]; Tom Kertscher, *Hearing the Whispers*, WASHINGTON STATE MAGAZINE, (last visited Apr. 19, 2020), <https://magazine.wsu.edu/2019/04/28/hearing-the-whispers/> [<https://perma.cc/J26N-KVPR>].

Lucchesi shared that she was raped by a non-native man who compared her to Pocahontas. See Bleir & Zoledziowski, *supra* note 11. A different non-native man followed Lucchesi and her Native female friend, insisting that they have sex with him for fifty dollars. See *id.* Lucchesi said that the man screamed at the women that fifty dollars is “a lot for Indian girls, you’re not even worth that much.” *Id.* The women were only able to escape this man because Lucchesi’s friend had a baseball bat in her car. See *id.*

Lucchesi attributes these instances of sexual violence in part to living “in a society where portrayals of indigenous women are often as victims of violence or hypersexualized, . . . [so] it’s easy to see us in real life as women who are easy to victimize.” *Id.*

13. See Alexia Fernández Campbell, *How America’s Past Shapes Native Americans’ Present*, ATLANTIC (Oct. 12, 2016), <https://www.theatlantic.com/business/archive/2016/10/native-americans-minneapolis/503441> [<https://perma.cc/B7P9-E3Q3>].

14. The Bakken Formation is a 200,000 square mile region straddling the Montana-North Dakota state line. See Bleir & Zoledziowski, *supra* note 11.

15. *Id.*

16. The oil boom took place from 2006 to 2014. See Fox, *supra* note 11; see also Bleir & Zoledziowski, *supra* note 11; John Mcchesney, *Oil Boom Puts Strain on North Dakota Towns*, NPR, (Dec. 2, 2011), <https://www.npr.org/2011/12/02/142695152/oil-boom-puts-strain-on-north-dakota-towns> [<https://perma.cc/GAV6-SB94>].

17. See Bleir & Zoledziowski, *supra* note 11.

18. See Rick Ruddell et al., *Drilling Down: An Examination of the Boom-Crime Relationship in Resource Based Boom Counties*, 15 W. CRIMINOLOGY REV. 3, 5 (2014).

19. Sari Horwitz, *Dark Side of the Boom*, WASH. POST (Sept. 28, 2014), https://www.washingtonpost.com/sf/national/2014/09/28/dark-side-of-the-boom/?utm_term=.97993f2944ad [<https://perma.cc/DH22-ZAVX>].

violence and rape against Native women tripled with the influx of non-native workers.²⁰ During this time women's shelters in the area quickly filled beyond capacity, and women and children were forced to sleep on couches and in makeshift bunkrooms.²¹

This Note investigates the facts and causes of the epidemic of violence against Native women, especially those living near extractive industries, with the aim of finding legal solutions for better holding perpetrators and extractive companies accountable. Part II of this Note further elucidates the realities of violence against Native women around the country and discusses the legal backdrop that makes this level of violence possible. Part III then examines how, in addition to a culture of racial animus and misogyny,²² violence against Native women can be attributed to federal prosecutorial inaction and the disempowerment of tribal law enforcement authorities. Part IV posits ways to address these issues and offers additional legal methods for protecting the Native women of the Fort Berthold Reservation, Fort Peck Reservation, and other reservations near future extraction sites. The Part IV solutions require greater federal support of tribal criminal justice systems and holding extraction companies accountable for the harms their employees cause to Native communities. Should the United States and tribal governments implement these solutions, sexual perpetrators and energy companies could be held responsible in court and Native American women could at last receive real protections and remedies through the law.

20. Bleir & Zoledziowski, *supra* note 11. In 2018, Lissa Yellow Bird Chase and the Sahnish Scouts of North Dakota, her nonprofit organization dedicated to finding and sharing the stories of missing Native women, found the murdered body of Olivia Lonebear in a lake on the Fort Berthold Reservation. Sara Hylton, *A Well of Grief: The Relatives of Murdered Native Women Speak Out*, *GUARDIAN* (Jan. 13, 2020), <https://www.theguardian.com/us-news/2020/jan/13/a-well-of-grief-the-relatives-of-murdered-native-women-speak-out> [<https://perma.cc/MY9J-S8EU>]. Lonebear, a 32-year-old mother of five, was last seen nine months earlier in a small oil-boom city on the edge of the reservation. *Id.* Lonebear's cousin, Heather Belgrade, learned of her cousin's disappearance as she was grieving the recent loss of her best friend Savanna LaFontaine-Greywind, a member of the Spirit Lake Tribe in North Dakota. *Id.* Greywind was brutally murdered in 2017 by a white couple who cut her living daughter out from her womb. Jenni Monet, *A Native American Woman's Brutal Murder Could Lead to a Life-saving Law*, *GUARDIAN* (May 2, 2019), <https://www.theguardian.com/us-news/2019/may/01/savanna-act-native-women-missing-murdered> [<https://perma.cc/3E85-T2FS>].

21. See Jack Healy, *As Oil Floods Plains Towns, Crime Pours In*, *N.Y. TIMES* (Nov. 30, 2013), <https://www.nytimes.com/2013/12/01/us/as-oil-floods-plains-towns-crime-pours-in.html> [<https://perma.cc/VR2S-JTFF>].

22. See Bleir & Zoledziowski, *supra* note 11.

II. VIOLENCE IN A COMPLEX JURISDICTIONAL LANDSCAPE

The epidemic of violence against Native women in the United States is due in part to the complicated and flawed laws governing criminal jurisdiction on tribal land. Part II.A of this Note addresses the state of rampant violence against Native women in the United States with a particular emphasis on the violence perpetrated against those Native women living near extractive industries. Part II.B provides a legal framework for this epidemic with an outline of the law most relevant to the issue. First, Part II.B.1 provides a chronological overview of the laws that obstruct the safety and justice of Native women, including the lack of tribal jurisdiction over non-natives set forth in *Oliphant v. Squamish* and the tribal court sentencing limits imposed by the Indian Civil Rights Act (ICRA). Then, Part II.B.2 examines current reforms and legal protections, including the Tribal Law and Order Act (TLOA) and the Violence Against Women Act (VAWA) and illustrates why these developments are incomplete.

A. THE HEIGHTENED RISK OF VIOLENCE FACING NATIVE WOMEN

It is well documented that Native American women throughout the United States face heightened rates of violence²³ and that these rates increase in areas located near extractive industries.²⁴ Research from the National Congress of American Indians shows that four in five American Indian and Alaska Native women have experienced violence in their lifetime and that fifty-six percent of American Indian and Alaska Native women have experienced sexual violence.²⁵ In some counties, Native women are murdered at more than ten times the national average.²⁶ As a whole, Native women are almost twice as likely to be raped and three times more likely to be murdered than white women.²⁷ Significantly, ninety-six percent of Native female survivors of sexual violence experience violence by non-native perpetrators, and Native women are five times more likely to experience interracial domestic violence than white

23. See NAT'L CONG. OF AM. INDIANS POL'Y RES. CTR., *supra* note 8, at 1.

24. See Bleir & Zoledziowski, *supra* note 11; see also Ruddell et al., *supra* note 18.

25. See NAT'L CONG. OF AM. INDIANS POL'Y RES. CTR., *supra* note 8, at 1.

26. See *id.* at 2.

27. See *id.*

women.²⁸ In fact, sixty-seven percent of all perpetrators of sexual violence against Native women are non-native.²⁹

Danger of sexual violence further increases for Native women living near extractive industries.³⁰ A National Institute of Justice study of the Fort Peck Reservation, the Fort Berthold Reservation, the Trenton Indian Service Area, and three neighboring state counties found that during the region's Bakken Formation oil boom, dating violence³¹ in the area increased by seventy-two percent and domestic violence increased by forty-seven percent.³² This data does not include increases in stranger rape, stalking, and sex trafficking by transient workers with no ties to the surrounding communities. On the Fort Berthold Reservation, sexual assaults on the female population increased by seventy-five percent during the oil boom.³³

Data from Alaska shows another disturbing example of this trend. Alaska, the state with the largest oil field in North America³⁴ and the highest percentage Native population, is also the

28. *See id.*

29. *See* Bleir & Zoledziowski, *supra* note 11.

30. *See id.*; *see also* Ruddell, *supra* note 18.

31. The term "dating violence" refers to cases of abuse within intimate relationships outside the context of a romantic partnership. *See Dating Violence and Abuse*, U.S. DEP'T OF HEALTH & HUM. SERV., OFF. OF WOMEN'S HEALTH, <https://www.womenshealth.gov/relationships-and-safety/other-types/dating-violence-and-abuse> [<https://perma.cc/HJ7L-7VUU>] (last visited Mar. 21, 2020).

32. *See* Melissa Krause, *Oil Boom Generated 'Perfect Storm' for Sexual Violence*, WILLISTON HERALD (Oct. 21, 2016), https://www.willistonherald.com/community/oil-boom-generated-perfect-storm-for-sexual-violence/article_35800e84-9729-11e6-b03c-2feafe5fa382.html [<https://perma.cc/VC3N-TDGK>].

33. *See* Damon Buckley, *Firsthand Account of Man Camp in North Dakota from Local Tribal Cop*, LAKOTA TIMES (May 22, 2014), <https://www.lakotatimes.com/articles/firsthand-account-of-man-camp-in-north-dakota-from-local-tribal-cop/> [<https://perma.cc/YND8-BYST>].

34. The Prudhoe Bay Oil Field on Alaska's North Slope, covers 213,542 acres and originally contained approximately 25 billion barrels of oil, making it the continent's biggest oil field by far. *See Prudhoe Bay Fact Sheet*, BP, (March 26, 2009), https://web.archive.org/web/20090326112358/http://www.bp.com/liveassets/bp_internet/us/bp_us_english/STAGING/local_assets/downloads/a/A03_prudhoe_bay_fact_sheet.pdf [<https://perma.cc/WY49-Y49T>]; *see also* Elizabeth Harball, *Alaska's 40 Years of Oil Riches Almost Never Was*, NAT'L PUB. RADIO (June 24, 2017), <https://www.npr.org/2017/06/24/533798430/alaskas-40-years-of-oil-riches-almost-never-was> [<https://perma.cc/JE5H-FTEN>].

Alaskan Native women, like Native women residing near any oil boom, may soon face a surge in incidents of violence and sexual assault. Industry research indicates that crude oil output from Alaska's North Slope could increase by forty percent in the next eight years. *See* Haley Zaremba, *Alaska is Witnessing an Oil Renaissance*, BUS. INSIDER (Aug. 25, 2018), <https://www.businessinsider.com/alaska-is-witnessing-an-oil-renaissance-2018-8> [<https://perma.cc/7ZLH-GQJV>]. This rise in the rate of oil extraction will likely require an influx of transient workers needed to meet rising demand.

state with the highest rate of women murdered by men.³⁵ In 2013, the Indian Law and Order Commission reported that Alaska Native women suffer domestic violence at ten times the rate of women in any other state and that Alaska Native women constitute almost half of all reported Alaskan rape victims.³⁶

Despite the staggering statistics of violence against Native women, “the great majority of stories remain untold.”³⁷ An Amnesty International report found that “fear of breaches in confidentiality, fear of retaliation and a lack of confidence that reports would be taken seriously and result in perpetrators being brought to justice,” along with “historical relations with federal and state government agencies” lead to larger than average numbers of sexual assaults against Native women going unreported.³⁸ Moreover, tribal crime reporting is generally voluntary and many tribes lack access to national criminal databases.³⁹

Tribal crime data is further skewed due to lack of data from rural Indian Country.⁴⁰ Although the state of Alaska has the highest reported rate of violence against Native women, this violence is still underreported due to lack of data from rural villages. In a 2017 report, the Department of Justice admitted that Alaska Native villages currently rely on inadequate state law enforcement that may take hours or even days to respond.⁴¹ A 2013 report found

35. See Rebecca Palsha, *Report: Homicide Rate Against Native Women and Girls in Alaska Three Times National Average*, KTUU (Sept. 19, 2018), <https://www.ktuu.com/content/news/homicide-rate-against-women-in-Alaska-three-times-national-average-493758751.html> [<https://perma.cc/4QFJ-KVTD>].

36. See Cecily Hilleary, *Alaska Natives to Congress: Expand Violence Against Women Act*, VOA NEWS (Oct. 12, 2018), <https://www.voanews.com/a/alaska-natives-to-congress-expand-violence-against-women-act/4609353.html> [<https://perma.cc/9E7T-8AZG>]. Alaska Natives as a whole make up sixty-one percent of reported rape victims in the state, despite comprising less than fifteen percent of Alaskan residents. See Erin Fuchs, *Why Rape is Much More Common in Alaska*, BUS. INSIDER (Sep. 26, 2013), <https://www.businessinsider.com/why-does-alaska-have-such-a-high-rate-rape-2013-9> [<https://perma.cc/92CE-K54A>]; see also *Decennial Census of Population and Housing: By Decade*, U.S. CENSUS BUR., <https://www.census.gov/programs-surveys/decennial-census/decade.html> [<https://perma.cc/CKR9-29YV>] (last visited Mar. 21, 2020).

37. AMNESTY INT’L, *MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 16* (2007), <https://www.amnestyusa.org/pdfs/mazeofinjustice.pdf> [<https://perma.cc/LBC8-SQXJ>].

38. *Id.*

39. See Associated Press, *Native American Women Still Facing High Rates of Crime*, N.Y. POST (Sept. 5, 2018), <https://nypost.com/2018/09/05/native-american-women-still-facing-high-rates-of-crime> [<https://perma.cc/HSU9-DCCN>].

40. See AMNESTY INT’L, *supra* note 37.

41. See U.S. DEPT’ OF JUSTICE OFF. ON VIOLENCE AGAINST WOMEN, 2017 TRIBAL CONSULTATION REPORT 6, 45 (Oct. 3, 2017), <http://files.constantcontact.com/5212f69f401/54330ca7-eff9-4c9d-b5ec-bdb60c8964f8.pdf> [<https://perma.cc/2NDQ-CG2C>].

that at least seventy-five Alaska Native communities had no law enforcement at all.⁴² Alaska Native women living in inaccessible towns are forced to take boats or planes to urban area for forensic exams if they hope to have their sexual assault claims prosecuted by law enforcement.⁴³ It is likely that many Alaska Native women are unable to overcome these overwhelming obstacles to report sexual assault.

B. THE RELEVANT LEGAL LANDSCAPE

The federal government has imposed legal obstacles to the protection of Native women starting with the Major Crimes Act of 1885,⁴⁴ continuing with ICRA,⁴⁵ and culminating in the 1987 Supreme Court decision in *Oliphant v. Suquamish Indian Tribe*,⁴⁶ the most substantial legal hurdle for prosecuting this violence. The 2013 reauthorization of VAWA and the 2010 TLOA compose the entirety of legal reform attempting to address the criminal justice system's failure to protect Native women, and they are inadequate.

1. *Legal Impediments to Justice*

As ninety-six percent of Native female sexual assault survivors report suffering violence by non-native perpetrators,⁴⁷ the largest barrier between Native women and access to justice through the court system is *Oliphant v. Suquamish Indian Tribe*, which held that tribal governments could not exercise criminal jurisdictions over non-natives.⁴⁸ Writing for the majority in *Oliphant*, Judge

42. See Associated Press, *supra* note 39.

43. *Id.*

44. See Major Crimes Act, 18 U.S.C. § 1153 (2018).

45. See Indian Civil Rights Act, 25 U.S.C. § 1302 (2018).

46. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

47. See NAT'L CONG. OF AM. INDIANS POL'Y RES. CTR., *supra* note 8.

48. See *Oliphant*, 435 U.S. at 208. In 1973, Mark David Oliphant, a non-Indian permanent resident of the Port Madison Indian Reservation, assaulted a tribal police officer at a crowded public gathering. *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976). Tribal law enforcement arrested Oliphant and charged him with assaulting an officer and resisting arrest. See *Oliphant*, 435 U.S. at 194. Oliphant subsequently applied for a writ of habeas corpus in federal court to contest tribal criminal jurisdiction over non-natives like himself. See *id.*

The Ninth Circuit upheld the conviction on the ground of respecting tribal sovereignty, as no treaty or congressional act had removed tribes' sovereign power to exercise complete criminal jurisdiction. 544 F.2d at 1010–12. The Ninth Circuit emphasized that a tribe's ability to uphold law and order is of paramount importance to tribal sovereignty. See *id.* at 1009.

Rehnquist stated that allowing tribes to exercise criminal jurisdictions over non-Indians would be “inconsistent with their [domestic dependent]⁴⁹ status.”⁵⁰ By divesting tribal governments of criminal jurisdiction over non-natives, *Oliphant* destroyed tribes’ ability to effectuate law and order on tribal land. As Congress has not generally granted state governments jurisdiction over crimes involving Native Americans on tribal land, *Oliphant* left the prosecution of crimes committed by non-natives against Native Americans on tribal land under the sole jurisdiction of the federal government.⁵¹ Unfortunately, federal government agents decline to prosecute nearly half of all crimes on tribal land under their jurisdiction.⁵²

While the *Oliphant* decision only applies to cases involving non-native defendants, the Major Crimes Act, together with ICRA, hinder tribal governments from prosecuting cases involving Native defendants. The Major Crimes Act gave the federal government

The Supreme Court reversed the Ninth Circuit’s decision, holding more broadly that tribes cannot exercise power “expressly terminated by Congress” nor “inconsistent with their status” as domestic dependent nations. See *Oliphant*, 435 U.S. at 208–09, 212. In this case, the Court found that criminal jurisdiction over non-natives fell into the latter prohibitive category. See *id.*

Justice Thurgood Marshall wrote a dissenting opinion, joined by Chief Justice Warren E. Burger, in which Justice Marshall stated that he agreed with the Ninth Circuit opinion that “the power to preserve order on the reservation . . . is a *sine qua non* of the sovereignty that the Suquamish originally possessed.” See *id.* at 212 (quoting *Oliphant*, 544 F.2d at 1009). Justice Marshall continued, “[i]n the absence of affirmative withdrawal by treaty or statute, I am of the view that Indian tribes enjoy as a necessary aspect of their retained sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation.” See *id.*

49. In 1831, the Supreme Court in *Cherokee Nation v. Georgia* found that native nations are neither states nor foreign nations but instead *sui generis*, unique in their legal status as “domestic dependent nations.” 30 U.S. 1, 17 (1831). The Court held that native nations could not be considered foreign nations because they remained “in a state of pupilage” as wards of the United States. *Id.* Claiming to be a foreign nation, the Cherokee brought this case to the Supreme Court, suing the State of Georgia for laws infringing on their nation’s sovereignty. *Id.* at 15. The Supreme Court refused to rule on the merits of the case, instead holding that the Cherokee Nation was a domestic dependent nation that lacks standing to sue as an independent foreign nation. *Id.* at 20.

50. *Oliphant*, 435 U.S. at 208.

51. Created to aid in the termination of federally recognized tribes, Public Law 280 relinquished federal jurisdiction over crimes in the Major Crimes Act to state governments in Alaska, Oregon, California, Nebraska, Minnesota, and Wisconsin. These states were given jurisdiction without tribal consent and without increasing state resources to manage the new responsibility. See SARAH DEER, *THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA* 37–38 (2015).

52. See OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, *REVIEW OF THE DEPARTMENT’S TRIBAL LAW ENFORCEMENT EFFORTS PURSUANT TO THE TRIBAL LAW AND ORDER ACT OF 2010* 10–11 (Dec. 2017), <https://oig.justice.gov/reports/2017/e1801.pdf> [<https://perma.cc/68N8-FTBM>].

concurrent jurisdiction over a list of major crimes, such as rape, which were previously under sole tribal jurisdiction when committed by Native Americans on tribal land.⁵³ Though the Major Crimes Act does not facially prevent tribes from exercising jurisdiction over Native Americans for crimes listed in the Act, sentencing restrictions imposed on tribal courts by ICRA dissuade tribal governments from exercising concurrent jurisdiction over these crimes.⁵⁴

ICRA was created to protect the civil rights of defendants in tribal courts⁵⁵ not controlled by the Bill of Rights,⁵⁶ and indicates the federal government's apprehension about tribal courts prosecuting major crimes. Originally, ICRA limited tribal courts' ability to effectively prosecute any crime more serious than a misdemeanor by restricting tribal courts' sentences to incarcerations up to six months and fines up to five hundred dollars.⁵⁷ These sentencing limits dissuade tribes from prosecuting major crimes for fear that imposition of inadequate tribal remedies may discourage appropriate action from the federal government.⁵⁸ Tribes instead rely on the Federal Bureau of Investigation (FBI), the Bureau of Indian Affairs, and the United States Attorney's Office, agencies not bound by tribal sentencing limitations, to prosecute rape on reservations.⁵⁹ The Major Crimes Act and ICRA allow Native defendants to evade prosecution in tribal courts, and together with

53. See DEER, *supra* note 51, at 36; see also U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL, <https://www.justice.gov/archives/jm/criminal-resource-manual-679-major-crimes-act-18-usc-1153> [<https://perma.cc/LEE2-UP2D>] (last visited May, 25, 2020) ("Prior to 1885, such offenses were tried in tribal courts. See *ex parte* Crow Dog, 109 U.S. 556 (1883) (federal court had no jurisdiction to try an Indian for the murder of another Indian) . . . The Major Crimes Act was passed in reaction to the holding of *Crow Dog*, see *Keeble v. United States*, 412 U.S. 205, 209–12 (1973) and *United States v. Kagama*, 118 U.S. 375, 383 (1886).").

54. See DEER, *supra* note 51.

55. The Indian Civil Rights Act was passed to ensure that tribal courts would respect the civil rights set forth in the First, Fourth, Fifth, Sixth, and Eighth Amendments of the U.S. Constitution. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978) ("We note at the outset that a central purpose of ICRA and in particular of Title I was to 'secur[e] for the American Indian the broad constitutional rights afforded to other Americans,' and thereby to 'protect individual Indians from arbitrary and unjust actions of tribal governments.'") (quoting S. REP. NO. 841-90, at 5–6 (1967)). See generally THE INDIAN CIVIL RIGHTS ACT AT FORTY (Kristen A. Carpenter et al. eds., 2012).

56. In *Talton v. Mayes*, the Supreme Court held that the constitutional rights protections that limit the federal government do not apply to tribal governments. 163 U.S. 376, 384 (1896).

57. See Civil Rights Act of 1968, Pub. L. No. 90-284, § 202(7), 82 Stat. 73, 77 (1968) (codified as amended as 25 U.S.C. § 1302(a)(7) (2018)).

58. See DEER, *supra* note 51, at 40–41.

59. See *id.*

Oliphant, which completely bars tribal prosecution of non-natives, create an insurmountable barrier for Native woman seeking justice in tribal courts.

2. *Incomplete Reform*

Title XI, the “Tribal Title,” of the 2013 reauthorization of VAWA is often referred to as a “partial *Oliphant* fix,” because it attempts to restore some part of the tribal sovereignty lost in *Oliphant*.⁶⁰ This 2013 reauthorization gives eligible tribes — those that can guarantee to uphold due process requirements for defendants⁶¹ — “special domestic violence criminal jurisdiction” over non-natives who commit crimes on tribal land.⁶² This special domestic violence jurisdiction allows tribes to prosecute non-natives with sufficient ties to the community who commit domestic violence, dating violence, or violate a protective order on tribal land.⁶³

For cases involving Native defendants, TLOA comprises the whole of the legal reform in support of promoting prosecutions in tribal courts. TLOA lessened the severity of restrictions on tribal court sentencing imposed by ICRA.⁶⁴ Under TLOA, tribal courts that meet certain due process requirements can punish rapists with up to three consecutive sentences of three years of incarceration and fines up to \$15,000,⁶⁵ lifting the effective misdemeanor limitation on tribal courts imposed by the ICRA. The Indian Law and Order Commission stated that the purposes of TLOA are to give tribes more control over tribal justice systems and to enhance cooperation between tribes, states, and federal law enforcement.⁶⁶

60. *See id.* at 102.

61. These protections include: the right to effective assistance of counsel at least to the extent guaranteed by the United States Constitution; published criminal laws, rules of evidence, and rules of procedure; and judges with sufficient legal training who are licensed to practice law in any jurisdiction in the United States. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 204, 127 Stat. 54, 122 (2018) (codified as amended as 25 U.S.C. § 1304(d)).

62. *See id.* § 1304(b)(1) (2018).

63. *See id.* § 1304(c).

64. *See id.* § 1302(a).

65. *See id.*

66. *See* TROY A. EID, INDIAN LAW & ORDER COMM’N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT AND CONGRESS OF THE UNITED STATES (2015), <https://www.aisc.ucla.edu/iloc/report/files/Roadmap%20For%20Making%20Native%20America%20Safer%20-%20Washington%20DC%20May%202015.pdf> [https://perma.cc/W6U4-2EYY]. For the Commission’s full report (discussed in the previously cited presentation), see INDIAN LAW & ORDER COMM’N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES

Ultimately, neither VAWA nor TLOA provide sufficient relief for the harms caused by the legal barriers impeding justice for Native women.

III. THE LEGAL, FINANCIAL, AND CULTURAL FACTORS PLACING NATIVE WOMEN AT RISK

Understanding the real dangers of violence facing Native women and the legal background relevant to this issue, it is possible to isolate the factors most responsible for facilitating this rampant violence. Part III.A discusses how the *Oliphant* decision, the Major Crimes Act, and ICRA weaken protections for Native women by creating a de facto jurisdictional gap. Part III.B then examines why inadequate funding, cultural barriers, and statutory limitations make present legal solutions to this problem untenable and insufficient.

A. THE SOURCE OF THE DE FACTO JURISDICTIONAL GAP: FEDERAL PROSECUTORIAL INACTION

Oliphant and tribal sentencing limits place justice in the hands of federal law enforcement, yet non-native sexual predators, racists, and misogynists see some tribal communities as sanctuaries where crimes can be perpetrated with impunity. The reason for this emboldened criminality on tribal land is a de facto gap in jurisdiction that arises from the federal government's failure to prosecute a large percentage of violent crimes on tribal land that fall under federal jurisdiction.⁶⁷ A 2016 report from the United States Government Accountability Office stated that United States Attorneys declined to prosecute forty-six percent of crimes on reservations.⁶⁸ These declinations include more than 550 cases of domestic violence, assault, and sexual assault, which constitute the

(2013), https://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf [<https://perma.cc/5ZWD-V4JC>].

67. See OFF. OF THE INSPECTOR GEN., *supra* note 52 at 11-12: (In 2010, the U.S. Government Accountability Office “found that USAOs declined to prosecute 50 percent of the 9,000 matters received, with violent crime cases declined at a higher rate than nonviolent crime cases”).

68. See Mary Hudetz, *Despite Past Reforms, Native Women Face High Rates of Crime*, ASSOCIATED PRESS, Sep. 5, 2018), <https://apnews.com/316529000f3c44988969ab22acfb34d7/Despite-past-reforms,-Native-women-face-high-rates-of-crime> [<https://perma.cc/BH3T-D6L7>].

highest percentages of declinations by crime.⁶⁹ The federal government made one such declination when tribal police referred Taryn Minthorn's case to federal law enforcement.⁷⁰ Minthorn was physically and verbally abused by her former partner and said that she felt "seriously let down" by the federal government's refusal to prosecute.⁷¹ Minthorn feared that lack of federal response meant that her former partner "could do all the crime in the world" and receive only "a slap on the hand."⁷²

Insufficient evidence was overwhelming cited as the reason for these declinations.⁷³ A 2010 report by the United States Government Accountability Office found that of the 2,594 sexual abuse-related cases tribal governments referred to United States Attorneys' offices over the previous four years, United States Attorneys declined to prosecute sixty-seven percent of the cases due to insufficient admissible evidence.⁷⁴ Insufficient evidence in these cases should not be assumed to indicate the nonexistence of such evidence, but instead highlights the ineffectiveness of law enforcement response to violence against Native women. In cases of sexual violence, evidence is often time-sensitive and challenging to gather.⁷⁵ The FBI cannot expediently gather evidence from all cases of violence against Native women because the agency's entire Indian Country program consists of only about 140 agents in thirty-six field offices.⁷⁶ In 2017, when Ashley Loring HeavyRunner went missing from the Blackfeet Reservation in Montana, the FBI took nine months to get involved.⁷⁷ Moreover, the uncertain jurisdictional boundaries delay local law enforcement responses, and as a consequence, vital evidence is irreversibly lost.

69. *See id.*

70. *See* Brittney Bennett, *Law Was Meant to Let American Indians Prosecute Violence; Is It Working?*, USA TODAY (Mar. 25, 2017), <https://www.usatoday.com/story/news/2017/03/25/american-indian-women-violence/99538182> [<https://perma.cc/REQ3-LL47>].

71. *Id.*

72. *Id.*

73. *See* OFF. OF THE INSPECTOR GEN., *supra* note 52.

74. *See* Bennett, *supra* note 70.

75. *See* *Forensic Medical Exam*, W. VA. FOUND. FOR RAPE INFO. & SERV., <https://www.fris.org/SANEs/WhatisExam.html> [<https://perma.cc/8X9P-XBNQ>] (last visited Mar. 27, 2020).

76. *See* *Missing and Murdered: Confronting the Silent Crisis in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 115th Cong. 13 (2018) (statement of Robert Johnson, Assistant Dir., Criminal Investigations Div., Fed. Bureau of Investigation, U.S. Dep't of Justice).

77. *See* Bleir & Zoledziowski, *supra* note 11.

When the federal government declines to prosecute cases of violence against Native women, United States law enforcement practices hinder tribal law enforcement from stepping in to prosecute. A General Accounting Office report showed that when the federal government declines to prosecute a crime on tribal land, the federal entities usually do not share even the most vital admissible evidence with tribal law enforcement agencies, thus preventing the tribe from prosecuting the case.⁷⁸ This failure to divulge evidence to tribal law enforcement is especially problematic for tribes attempting to prosecute sexual assaults declined by United States Attorneys. In these cases, federal officials often refuse to send tribes back rape kits that contain crucial DNA evidence that cannot be replicated in subsequent tribal investigations.⁷⁹ Overall, federal criminal procedure on tribal land, including the high rate of prosecutorial declinations, turns tribal land into a safe haven for violent sexual criminals.

B. WEAKNESSES IN CURRENT LEGISLATIVE REMEDIES

The tribal special domestic violence jurisdiction available through VAWA and the enhanced tribal sentencing in TLOA provide Native women with the most effective legal protection currently available, however, these provisions are far from a complete solution. Financial and cultural barriers prevent many tribes from enacting special domestic violence jurisdiction and enhanced sentencing. Even when tribes can access these tools, their protections are incomplete and difficult to implement.

1. *Barriers to Adoption of Legislative Remedies*

Many tribes find it financially impracticable to meet the due process requirements necessary to enact special domestic violence jurisdiction under VAWA and enhanced sentencing under TLOA. In order to employ enhanced sentencing and special domestic violence criminal jurisdiction, tribes must guarantee defendants' due process rights as required by the United States Constitution.⁸⁰ These protections include: the right to effective assistance of

78. See Sarah Deer, *Bystander No More? Improving the Federal Response to Sexual Violence in Indian Country*, 4 UTAH L. REV. 771, 780 (2017).

79. See *id.*

80. See 25 U.S.C. §§ 1302(c)(1), 1304(d)(4) (2018).

counsel by a licensed attorney; the right of indigent defendants to an attorney funded by the tribe; the right to a presiding judge who is licensed to practice law; the right to published criminal laws and rules of evidences and procedure; and the right to publicly maintained records of criminal proceedings.⁸¹ Ensuring these due process rights is an expensive undertaking, and as most tribal courts receive only about six percent of their estimated funding needs, guaranteeing these rights is unaffordable for many tribes.⁸² As a result, only about twenty Native American tribes, less than 3.5% of all federally recognized tribes, exercise special domestic violence jurisdiction under VAWA.⁸³ The majority of tribes are ineligible to enact these laws because they cannot afford the costs of guaranteeing the requisite due process rights through their criminal justice systems.⁸⁴

Tribes that are financially capable of guaranteeing most of the due process rights required by VAWA and TLOA may be unwilling or otherwise unable to ensure the right to a jury of one's peers. VAWA requires tribes to ensure the right to a jury trial, with a jury selected from a "fair cross-section" of the public, meaning that eligible tribes cannot exclude non-natives from their juries. While some tribes have allowed non-native to sit on juries even prior to 2013, other tribes have been hesitant to change tribal laws to allow for non-native jurors.⁸⁵ Tribes may refuse to allow non-native jurors because they wish to avoid further assimilation with the

81. *See id.*

82. A 2015 report by the Bureau of Indian Affairs found that funding for most tribal courts met only six percent of estimated need. *See* NAT'L CONG. OF AM. INDIANS, FISCAL YEAR 2018 INDIAN COUNTRY BUDGET REQUEST: INVESTING IN INDIAN COUNTRY FOR A STRONGER AMERICA 31 (2017), <http://www.ncai.org/FY2018-NCAI-Budget-Request2.pdf> [<https://perma.cc/D9DB-FHJ3>] ("It is well-documented that tribal courts have been historically underfunded by the federal government, and that this underfunding negatively impacts their law enforcement operations.").

83. *See* Matthew Fletcher, *GTB Press Release: "Grand Traverse Band of Ottawa and Chippewa Indians Implements Authority to Prosecute All Persons, Including Non-Indians for Domestic Violence"*, TURTLE TALK (Nov. 1, 2018), <https://turtletalk.wordpress.com/2018/11/01/gtb-press-release-grand-traverse-band-of-ottawa-and-chippewa-indians-implements-authority-to-prosecute-all-persons-including-non-indians-for-domestic-violence> [<https://perma.cc/6J96-MN9B>]; *see also* *Frequently Asked Questions*, U.S. DEP'T OF THE INTERIOR INDIAN AFF., <https://www.bia.gov/frequently-asked-questions> [<https://perma.cc/RA3X-Q3RU>] (last visited Apr. 19, 2020) ("At present, there are 573 federally recognized American Indian and Alaska Native tribes and villages.").

84. *See* Sarah Deer, *Native People and Violent Crime: Gender Violence and Tribal Jurisdiction*, 15 DU BOIS REV. 89, 101 (2018).

85. *See* Bennett, *supra* note 70 (quoting Chrissi Nimmo, assistant attorney general to the Cherokee Nation: "How do we, as an Indian tribe, want to open up our court system to non-Indians? It's always been Cherokees. How do we carve out this special seating?").

United States criminal justice system.⁸⁶ Even if a tribe is willing to allow non-native jurors, it is unclear whether tribes have the authority to subpoena nonmembers to sit on tribal juries.⁸⁷

2. *Inadequate Means for Implementation of Legislative Remedies*

For tribes that are willing and able to uphold the due process rights required to implement protections under VAWA and TLOA, it is not a given that these tribes also have the resources to effectively utilize the protections available through these statutes. Many tribes do not have the means to properly staff tribal law enforcement.⁸⁸ For example, the Fort Berthold Reserve, which covers an area larger than Rhode Island, employs only twenty tribal law enforcement officers.⁸⁹ At times, only two tribal officers are on duty throughout the entire Fort Berthold Reserve.⁹⁰ Tribal Police Chief Chad Johnson acknowledged that Fort Berthold tribal law enforcement needs at least fifty more officers.⁹¹ Overextended law enforcement means that cases regarding missing Native women rarely move past a missing person's report.⁹²

Inadequate law enforcement is exceptionally problematic for Alaska Natives. Since Congress enacted Public Law 280, which enabled certain states to appropriate federal criminal jurisdiction over crimes on native land, Alaska Natives must rely solely on the protection of state law enforcement with FBI intervention only in extraordinary cases.⁹³ Despite encompassing a territory one-fifth the size of the lower forty-eight continental states and, as

86. *See id.*

87. *See* DEER, *supra* note 51, at 103.

88. *See* Horwitz, *supra* note 19; *see also* Bloomberg Editors, *Commentary: Confront Violence Against Native American Women*, HERALD NET, (Feb. 17, 2019), <https://www.herald-net.com/opinion/commentary-confront-violence-against-native-american-women/> [<https://perma.cc/LLH7-NW57>].

89. *See* Horwitz, *supra* note 19. By contrast, Rhode Island employs over 3,000 police officers. *See* Brian A. Reaves, *Census of State and Local Law Enforcement Agencies, 2008*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STAT. 15 (2011), <https://www.bjs.gov/content/pub/pdf/cs1lea08.pdf> [<https://perma.cc/RT2D-WJ85>].

90. *See* Horwitz, *supra* note 19.

91. *See id.*

92. *See* Lucy Anna Gray, *Forgotten Women: The Conversation of Murdered and Missing Native Women is Not One North America Wants to Have — But It Must*, INDEPENDENT (Aug. 14, 2018), https://www.independent.co.uk/news/long_reads/native-american-women-missing-murder-mmiw-inquiry-canada-us-violence-indigenous-a8487976.html [<https://perma.cc/AN9R-GUM7>].

93. *See* Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953); 28 C.F.R. § 50.25(a) (2019).

previously noted, maintaining the highest rate of women murdered by men,⁹⁴ Alaska employs only about 300 state troopers.⁹⁵ Overextended Alaskan state law enforcement agencies have been accused of knowingly classifying homicides of Native women as suicides.⁹⁶ Though racial and sex discrimination play a role in the mismanagement of these cases, it is also relevant that Alaskan law enforcement is the most understaffed by territorial size.

Law enforcement agencies protecting tribal communities are inadequate not only in the quantity of available officers, but also in the quality of officer training programs and response protocols. Particularly, these law enforcement agencies provide insufficient training for navigating the complicated jurisdictional boundaries.⁹⁷ As a result, officers unsure of their rights and obligations often refuse to intervene in cases of emergency.⁹⁸ The issues caused by this lack of clarity about jurisdictional boundaries are compounded by the strict segregation between tribal and state law enforcement agencies.⁹⁹ Without proper communication, both state and tribal law enforcement may hesitate to act and leave Native families and communities to search for their missing and murdered women on their own.¹⁰⁰ Law enforcement's unresponsiveness can be interpreted as apathy and disrespect and ultimately discourages Native women from reporting sexual and domestic violence.¹⁰¹

Deficient training and the lack of inter-agency collaboration also increases the risk that tribal law enforcement may not utilize the limited available federal funding in keeping with federal standards. Recently, the tribal police force of the Fort Peck Reservation, which is awaiting the arrival of man camps for the construction of the Keystone XL pipeline,¹⁰² received a penalty for misusing

94. See Palsha *supra* note 35.

95. See Hilleary, *supra* note 36.

96. See Hudetz, *supra* note 68.

97. See Rebecca A. Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CALIF. L. REV. 185, 209 (2008).

98. See *id.* at 231.

99. See *id.*

100. See *id.*

101. See Alleen Brown, *A New Film Examines Sexual Violence as a Feature of the Bakken Oil Boom*, INTERCEPT (July 1, 2018), <https://theintercept.com/2018/07/01/nuuca-bakken-oil-boom-sexual-violence> [<https://perma.cc/TTY9-9NKR>].

102. See Kayla Desroches, *Tribes Worry Keystone Pipeline 'Man Camps' Will Further Spread Coronavirus*, MONT. PUB. RADIO, (Apr. 3, 2020), <https://www.mtpr.org/post/tribes->

federal funds and failing to conduct background checks on officers.¹⁰³ Without properly trained or integrated police forces patrolling tribal land, Native women have no reliable authority to turn to after falling victim to violent crime.

3. *Statutory Limitations of Legislative Remedies*

Even if tribes are able to overcome the legal, cultural, and financial barriers to adoption and implementation of legislative remedies, these remedies merely provide security for Native women in limited situations. In cases with Native defendants, TLOA only allows tribes to employ enhanced sentencing if the defendant was previously convicted of the same or a comparable offense or if the prosecutor is seeking a charge punishable by more than one-year of imprisonment in the United States.¹⁰⁴ First time offenders committing lower penalty crimes are free from the enhanced sentencing of TLOA.¹⁰⁵

In cases involving non-native defendants, VAWA similarly fails to protect against much of the sexual violence on reservations, because it limits tribal jurisdiction to specific crimes, perpetrated by specific defendants, against specific victims.¹⁰⁶ Tribes with special domestic violence jurisdiction under VAWA can only prosecute non-natives for domestic violence, dating violence, and violating protective orders,¹⁰⁷ all of which require prior relationship between the victim and the defendant.¹⁰⁸ Sexual assaults that occur outside the context of a prior relationship between the parties do not fall under this extended tribal jurisdiction.¹⁰⁹ This means the Act provides no protections against stranger rape, sexual assault that occurs during a casual sexual encounter, sex trafficking and sex slavery by strangers, or any other situation in which the defendant and

worry-keystone-pipeline-man-camps-will-further-spread-coronavirus [https://perma.cc/S6GT-LTWF].

103. See Associated Press, *Federal Agencies Penalize Fort Peck Tribal Law Enforcement*, U.S. NEWS & WORLD REP. (Apr. 2, 2018), <https://www.usnews.com/news/best-states/montana/articles/2018-04-02/federal-agencies-penalize-fort-peck-tribal-law-enforcement> [https://perma.cc/K3FP-TKZU] (discussing how the penalty prevented the tribe from receiving federal policing grants for three years).

104. See 25 U.S.C. § 1302(b) (2018).

105. See *id.*

106. See *id.* § 1304.

107. See *id.* § 1304(c).

108. See *id.* § 1304(a).

109. See *id.*

victim have no prior relationship.¹¹⁰ VAWA further limits this special domestic violence jurisdiction to cases in which the defendants have sufficient ties to the community.¹¹¹ The requisite sufficient ties are established by the defendant's residence on the reservation, employment on the reservation, or relationship with a tribal member or Indian resident.¹¹²

Restricting special domestic violence jurisdiction to cases where the defendant has sufficient ties to the tribe and a preexisting relationship with the victim prevents tribes from addressing the issue of habitual sexual predators traveling to tribal land for the purpose of committing crimes. A report on violence against Native women on reservations in upstate Minnesota found an increase in the number of rape cases during hunting season when non-native men more frequently make the short trip to tribal land from neighboring cities.¹¹³ Though these men do not have prior relationships with their victims and would not be considered to have sufficient ties to the tribes under VAWA, these men have such easy access to tribal land that they can travel to a reservation and commit a violent sexual crime and still make it back home within five hours.¹¹⁴

The statutory limitations of VAWA hold similar significance for Native women living on tribal land near extractive industries, where the influx of transient workers means Native women are less likely to have a prior relationship with their attackers and their attackers are less likely to have sufficient ties with the tribe. It is these considerable weaknesses in current legislative remedies for the de facto jurisdictional gap on tribal land that leave Native women living near extractive industries especially vulnerable to assault.

IV. CLOSING THE JURISDICTIONAL GAP AND HOLDING EXTRACTIVE INDUSTRIES ACCOUNTABLE

The complex and interrelated causes of violence against Native women must be met with a multifaceted solution that addresses the flaws in federal, state, and tribal law enforcement responses

110. *See id.*

111. *See id.* § 1304(b)(4)(B).

112. *See id.*

113. *See* Louise Erdrich, *Rape on the Reservation*, N.Y. TIMES (Feb. 26, 2013), <https://www.nytimes.com/2013/02/27/opinion/native-americans-and-the-violence-against-women-act.html> [<https://perma.cc/3ZE2-SX7E>].

114. *See id.*

and holds extractive industries accountable for the harms their employees cause to tribal communities. This Part of the Note first explores the ways in which criminal justice systems can more effectively hold accountable the perpetrators of violence against Native women. The methods for increasing accountability discussed in this Note are expanding tribal criminal jurisdiction and federal funding for tribal criminal justice systems and promoting collaboration between tribal and United States law enforcement. This Part of the Note then examines methods of holding extractive industries responsible for violence against Native women in neighboring communities through federal agency regulation and through civil liability in state and tribal courts.

A. HOLDING PERPETRATORS ACCOUNTABLE THROUGH THE CRIMINAL JUSTICE SYSTEM

Native women will only be safe from violence if the people who harm them are held accountable, which will require closing the de facto jurisdictional gap and ensuring that law enforcement agencies have the necessary funding and labor force to uphold legal protections. To close the jurisdictional gap, tribal law enforcement should be allowed to exercise full criminal jurisdiction over all crimes committed on tribal land and should be guaranteed the funding to do so effectively. Where jurisdictional boundaries remain unclear, tribal and United States law enforcement agencies should collaborate and cross-deputize agents¹¹⁵ so that law enforcement will not hesitate to respond quickly in the event of an emergency.

Perpetrators cannot be effectively held accountable for violence against Native women unless tribal law enforcement is legally permitted and financially able to arrest and prosecute criminals regardless of race or tribal affiliation. The legal support for Congress's decision to vest tribes with special domestic violence criminal jurisdiction under VAWA can and should be use in favor of allowing tribes to exercise criminal jurisdiction over all crimes on

115. Cross-deputation gives law enforcement officers the power to act in another criminal jurisdiction. See Hart, *supra* note 97, at 231. A cross-deputation agreement would allow tribal, federal, and state law enforcement officers to exercise the power to arrest both Native Americans and non-natives on state, federal, and tribal land. *Id.*

tribal land.¹¹⁶ The partial *Oliphant* fix available through VAWA was created as a compromise between those members of Congress primarily concerned with protecting Native communities from violence and those members primarily concerned with protecting the civil rights of the accused. During Senate floor debates over the 2013 reauthorization of VAWA, Texas Republican Senator John Cornyn claimed that the reauthorization of the Act was “being held hostage by a single provision . . . in order to satisfy the unconstitutional demands of special interests,”¹¹⁷ with Native Americans’ and women’s rights advocates being the supposed “special interest” groups. VAWA’s Tribal Title survived these accusations of unconstitutionality because the Act includes civil rights assurances that preserve the due process rights of the accused.¹¹⁸ The reauthorization of the Act is evidence that Congress can vest tribes with criminal jurisdiction and still ensure the rights of the accused through civil rights assurances. Therefore, permitting tribes that meet civil rights requirements to exercise complete criminal jurisdiction would not be inconsistent with tribal status as “domestic dependent nations.”¹¹⁹

At the time of the 2013 reauthorization of VAWA, restoration of tribal criminal jurisdiction over domestic violence was seen as the “first step” in addressing the dangers of *Oliphant*.¹²⁰ Though this was a timely first step in the face of the epidemic of violence against Native women, the solution should continue to progress with expanded criminal jurisdiction. VAWA itself proves that Congress has the power to effect legislation altering the impact of the *Oliphant* decision. Congress should utilize this power to enact legislation expanding tribal criminal jurisdiction to include all crimes on tribal land.¹²¹ Again, using VAWA as a roadmap, this new legislation could ensure the civil rights of defendants by requiring

116. The Constitution grants Congress “plenary and exclusive authority” over Native tribes. *United States v. Lara*, 541 U.S. 193, 200 (2004). In *U.S. v. Lara*, the Supreme Court confirmed this power and reiterated that “Congress does possess the constitutional power to lift the restrictions on the tribes’ criminal jurisdiction.” *Id.*

117. See Weisman, *supra* note 1.

118. See 25 U.S.C. § 1304(d) (2018).

119. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978).

120. See *Deer*, *supra* note 84.

121. In Public Law 280 states, federal solutions will not address inaction by state law enforcement, but Public Law 280 states can take steps towards recognizing tribal sovereignty by retroceding criminal jurisdiction to tribes. Public Law 280 states can protect the civil rights of defendants by retroceding jurisdiction contingent upon the tribe’s assurance of civil rights or retroceding only limited jurisdiction until the tribe can provide such an assurance. See Hart, *supra* note 97, at 229.

tribes to guarantee these civil rights in order to be eligible to exercise the expanded criminal jurisdiction. This legislation would authorize tribal law enforcement to respond quickly to violence against not only Native women, but also children, the elderly, non-native women, and all women who are assaulted by strangers, without apprehension that the matter lies outside of tribal jurisdiction.

In addition to extending tribal criminal jurisdiction, the federal government should increase funding for tribal criminal justice systems. In fact, the federal government must provide tribes with the additional funding necessary to successfully implement the extended jurisdiction. The United States is under international obligation to ensure that Native women's right to life is respected, and thus must guarantee that tribes have access to the funds necessary to effectively protect Native women. When the United States ratified the International Convention on Civil and Political Rights, the United States undertook to "ensure"¹²² the right to life¹²³ and the right to be free from cruel, inhuman, or degrading treatment¹²⁴ to all individuals within its territory and subject to its jurisdiction.¹²⁵ The word "ensure" places a positive obligation on the United States to fulfill these rights for all people without distinction based on race, sex, or national origin.¹²⁶ In the case of violence against Native women, increased federal funding is necessary to fulfill this positive obligation. This funding should be used to strengthen tribal criminal justice systems and to promote data collection and organization. Extensive and well-organized data would help to further illuminate the realities of the epidemic of violence against Native women. In bringing these facts to light, the data would allow the federal government to better comply with its international obligations by informing the creation of tribe-specific solutions and funding allocations.

Properly funding tribal criminal justice systems is not only an international obligation but also a constitutional requirement. The Federal Indian Trust Responsibility is a legally enforceable fiduciary duty, which has been repeatedly upheld by the Supreme

122. International Covenant on Civil and Political Rights art. 2.1, Dec. 16, 1966, 999 U.N.T.S. 171.

123. *Id.* art. 6.

124. *Id.* art. 7.

125. *Id.*

126. *Id.*

Court, and requires the federal government to uphold any fiduciary duties that it undertakes with respect to Native tribes.¹²⁷ This Trust Responsibility has been interpreted as a duty to protect.¹²⁸ As the federal government has “charged itself with moral obligations”¹²⁹ to fund tribal criminal justice systems, it must do so as necessary to protect the lives and safety of Native people.¹³⁰

In September 2018, the United States Justice Department announced awards of up to \$246 million in grants to improve safety in Native communities, with \$133 million allocated to supporting survivors of violence.¹³¹ This amount doubles federal funding promoting safety in Native communities.¹³² However, considering the enormity of the issues threatening the safety of Native women, Juana Majel-Dixon, co-chair of the National Congress of American Indians task force addressing violence against Native women and girls, is confident that the increased amount will not be enough.¹³³

Many tribes will require additional funding to be able to guarantee the civil rights protections necessary for eligibility and successful implementation of extended criminal jurisdiction. In 2017, the Bureau of Indian Affairs determined that basic law

127. See *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942) (citing *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831)).

128. See *United States v. Kagama*, 118 U.S. 375, 384 (1886) (“From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection[.]”). While the language of the Court indicates that the trust doctrine originates from a paternalistic manifestation of white supremacy, it has since been invoked for the benefit of Native people. STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES: THE AUTHORITATIVE ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS* 33 (3d. ed. 2004).

A 1977 Senate report of the American Indian Policy Review Commission stated that “the purpose behind the trust doctrine is and always has been to ensure the survival and welfare of Indian tribes and people. This includes an obligation to provide those services required to protect and enhance tribal lands, resources, and self-government, and also includes those economic and social programs which are necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society.” See *id.*

129. *Seminole Nation*, 316 U.S. at 297.

130. See *id.* (indicating that the conduct of the federal government in its deals with the Native Americans should be “judged by the most exacting fiduciary standards”).

131. See Press Release, Office of Pub. Affairs, U.S. Dep’t of Justice, Justice Department Will Award Up to \$246 Million in Grants to Improve Public Safety in American Indian and Alaska Native Communities (Sept. 19, 2018), <https://www.justice.gov/opa/pr/justice-department-will-award-246-million-grants-improve-public-safety-american-indian-and> [<https://perma.cc/QX6L-RVAF>].

132. See Chantal Da Silva, *DOJ Doubles Funding to Combat Violence Against Indigenous Women, Amid Staggering Deaths and Disappearances*, NEWSWEEK (Sept. 20, 2018), <https://www.newsweek.com/doj-doubles-funding-combat-violence-against-indigenous-women-amid-staggering-1130449> [<https://perma.cc/9S8F-73UC>].

133. See *id.*

enforcement and detention services on tribal land would require a total of \$1 billion in funding to meet the due process requirements set forth in TLOA.¹³⁴ Notably, the due process requirements under TLOA provide fewer protections than those under VAWA.¹³⁵ This indicates that to ensure the more robust due process protections provided by VAWA, tribal courts would likely need over \$1 billion in total funding.

Fully funded tribal criminal justice systems, with the legal authority to prosecute all crimes of tribal land, would be more capable not only of protecting the civil rights of the accused but also of protecting the safety of Native women. Increased funding would help law enforcement agencies better protect Native women by affording the agencies the ability to undertake more comprehensive law enforcement training that prioritize interagency collaboration. As the United States Attorney General has acknowledged, prosecuting sexual assaults on tribal land requires collaborative investigation by the FBI, tribal police, and the Bureau of Indian Affairs.¹³⁶

One example of effective collaboration between federal, state, and tribal law enforcement is cross-deputation. Cross-deputation allows agents from any of these enforcement bodies to swiftly arrest suspects and obtain time-sensitive evidence without concern that the crime lies outside the agency's jurisdiction due to the precise location of the crime or the tribal affiliation of those involved.¹³⁷ The 2002 Bureau of Justice Statistics Census of Tribal Justice Agencies offers evidence of precedent for such cross-deputations, recording as many as eighty-four tribal law enforcement agencies in cross-deputation agreements with non-tribal

134. *American Indian and Alaska Native Public Witness: Hearing Before the Subcomm. on Interior, Env't, and Related Agencies of the H. Appropriations Comm.*, 116th Cong. (2019) (Written Testimony of the National Congress of American Indians), <https://www.congress.gov/116/meeting/house/109008/witnesses/HHRG-116-AP06-Wstate-KeelJ-20190307.pdf> [<https://perma.cc/9JNX-K3D8>].

135. VAWA requires tribal courts to provide defendants with the right to trial by an impartial jury, selected from a jury pool that reflects a fair cross section of the community and does not systematically exclude any distinctive group in the community. VAWA also requires tribal courts to ensure that defendants and detainees are timely notified of their rights and responsibilities, including the right to file a petition for a writ of habeas corpus in a court of the United States. TLOA does not impose any of these due process requirements of tribal courts. *See* 25 U.S.C. § 1304(b) (2018); *see also id.* § 1302(c).

136. *See* Memorandum from David W. Ogden, Deputy Attorney Gen., U.S. Dep't of Justice, for United States Attorneys with Districts Containing Indian Country (Jan. 11, 2010), <https://www.justice.gov/archives/dag/memorandum-untied-states-attorneys-districts-containing-indian-country> [<https://perma.cc/J3Z9-C3DQ>].

137. *See* Hart, *supra* note 97, at 231.

authorities.¹³⁸ Additionally, while outside the scope of this Note, it is important to consider how racially biased policing affects these communities of color and to develop new law enforcement trainings with these effects in mind.¹³⁹ Without the support of properly

138. *See id.*

139. Though outside the scope of this Note, it is important to address the risks involved in expanding the role of law enforcement on native land. To effectively protect Native women and promote the wellbeing of Native communities more generally, growing police activity on tribal land needs to be accompanied by a growing focus on eliminating racially biased policing. It would be irresponsible to increase the presence of law enforcement on tribal land without addressing the fraught relationship between Native communities and the police.

Mass incarceration and high rates of police brutality afflict Native communities across the country. The American Civil Liberties Union released a report in August of 2019 which found that Native Americans in North Dakota are imprisoned at a rate six times higher than white North Dakotans. *See* Tess Williams, *ACLU Report Highlights Ways to Reduce Mass Incarceration in North Dakota*, GRAND FORKS HERALD (Aug. 23, 2019), <https://www.grandforksherald.com/news/crime-and-courts/4627430-ACLU-report-highlights-ways-to-decrease-mass-incarceration-in-North-Dakota> [https://perma.cc/B7B9-YUF4]. Though Native Americans account for only four percent of the population in North Dakota, Native Americans make up nineteen percent of the state's prison population. *See id.*

Demographics of women's prisons show even higher percentages of Native Americans inmates. In Montana, a state with a population comprised of approximately 6.5% Native Americans, Native women account for thirty-four percent of the women's state prison population. *See* Sarah Mehta & SK Rossi, *Why Are So Many Indigenous People in Montana Incarcerated*, ACLU (Sept. 11, 2018), <https://www.aclu.org/blog/smart-justice/parole-and-release/why-are-so-many-indigenous-people-montana-incarcerated> [https://perma.cc/TJL3-HP5B].

Similarly, disturbing data from the Center for Disease Control and Prevention found that Native Americans are killed by the police at a higher rate than any other racial or ethnic group in the United States. *See* Elise Hansen, *The Forgotten Minority in Police Shootings*, CNN (Nov. 13, 2017), <https://edition.cnn.com/2017/11/10/us/native-lives-matter/index.html> [https://perma.cc/QQN5-SW29].

The reasons for this racially biased policing are not uniform, with some police departments taking an explicitly biased us-versus-them approach and others operating from a place of unconscious racial bias. *See* Kirsten Weir, *Policing in Black and White*, 47 MONITORS ON PSYCHOL. 36 (2016). Social psychologist John Dovidio, who studies prejudice at Yale University, explains that "many police departments and officers take a paramilitary approach to law and order, and . . . [t]here can be a lot of dehumanization that occurs, and that's explicit [bias]." *See id.*

Dovidio further explains that many white Americans, including police officers, have implicit racial biases. *See id.* In response to public pressure to address police violence against people of color, some law enforcement offices have begun to implement additional trainings aimed at eradicating unconscious racial bias. *See id.* Unfortunately, implicit bias training alone cannot end police brutality. Psychologist Calvin K. Lai and his colleagues at Harvard University conducted studies finding that implicit bias trainings offer only superficial solutions capable of reducing bias for a few days at most. *See id.*

Dovidio believes that changing police protocol may be a more feasible way to protect communities of color. *See id.* Additional procedure could make policing more formulaic and make racial bias, implicit or otherwise, a less significant part of police officers' decision-making processes. *See id.* Though additional procedure is unlikely to eliminate a police officer's racial bias, protocol can help overcome tendencies to act on that bias. *See id.*

trained and fully-funded tribal law enforcement agencies with the authority to arrest all perpetrators regardless of tribal affiliation, the United States cannot secure safety for Native women living near extractive industries.

B. HOLDING EXTRACTIVE INDUSTRIES ACCOUNTABLE FOR HARM TO NATIVE WOMEN

As oil and gas companies financially benefit from their fast and loose hiring practices, which allow for rapid intake of laborers during extraction booms, these companies should also be held responsible for the high cost these practices place on Native women.¹⁴⁰ To begin, the Environmental Protection Agency (EPA) should hold energy companies responsible for violence against Native women by predicating project approval on a review of the project's potential impacts on the safety of local Native women. Under the Clean Air Act, the EPA must review an Environmental Impact Statement by a federal oversight agency before approving any major extractive industry project.¹⁴¹ Environmental Impact Statements must include social impacts on the "human environment" when "social and natural . . . effects are interrelated."¹⁴² The Environmental Impact Statement for extraction of the Bakken Formation, a 639-page document, did not address impacts on the safety of Native women from nearby tribal communities and instead only addressed the economic impacts of the project.¹⁴³ The EPA should not ignore the evidence that extractive industry ventures lead to an increase of violence against local Native women and should instead require Environmental Impact Statements to properly address the

An example of bias-mitigating procedure is implementation of detailed standard protocol checklists to be followed in most situations. *See id.* Step-by-step checklists could force police officers to abide by protocol with more uniformity regardless of the race of the individuals with whom they interact. *See id.* These detailed checklists could help protect Native Americans from racially biased policing and also ensure that police respond to violence against Native women in a consistently thorough manner.

140. When oil prices are on the rise, extractive companies can be in immediate need of more employees and rapidly bring in "quantity over quality," hiring anywhere from fifty to one hundred men at a time. *See* Bleir & Zoledziowski, *supra* note 11.

141. *See* 42 U.S.C. § 7609 (2018) ("The Administrator shall review . . . the environmental impact of any . . . newly authorized Federal projects for construction and any major Federal agency action[.]").

142. *See* 40 C.F.R. § 1508.14 (2019).

143. *See* BUREAU OF INDIAN AFF., FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE MANDAN, HIDATSA, AND ARIKARA NATION'S PROPOSED CLEAN FUEL REFINERY PROJECT (2009).

impacts on the safety of Native women before approving a proposed project.

Civil suits provide another avenue through which to hold extractive companies accountable for the consequences of their negligent hiring processes. Based on analogous suits against firearm manufacturers, tribal governments could sue fossil fuel producers under state common law public nuisance for the negligent hiring practices¹⁴⁴ that lead to spikes in violence against Native women.¹⁴⁵ In the early 2000s, state and local governments brought public nuisance claims against firearm manufactures for negligently contributing to an illegal black market for firearms and interfering with the public right to be free from unwanted injury.¹⁴⁶ Though firearm manufacturing is a highly regulated industry, some courts upheld these public nuisance claims and allowed local and state governments to recover the increased municipal cost of adapting to and combating gun violence.¹⁴⁷ Communities near extractive industries could make the analogous argument that fossil

144. The doctrine of negligent hiring allows plaintiffs to hold an employer liable for harms inflicted by an employee, if the employer knew or should have known of the risk that the employee could cause harm, or if this risk was discoverable through reasonable investigative measures. See 1 Business Torts § 5.01 (2019). Federal and state courts in nearly every state have recognized the cause of action for negligent hiring. See *id.* Standards of liability and requirements for foreseeability vary. See *id.* at § 5.10. Thorough and reliable background checks are generally considered to be reasonable investigative measures. See *id.* at § 5.39. The doctrine of negligent hiring has been applied to cases in which the employer created a situation where a sexual predator had access to vulnerable people, like families living in a trailer park. See [Name Redacted — Victim/Plaintiff] v. City of Bos., 13 Mass. L. Rep. 4, 2001 Mass. Super. LEXIS 154, at *21–23 (Sup. Ct. Jan. 24, 2001) (citing *Bonnie W. v. Commonwealth*, 419 Mass. 122 (1994)).

145. See *Brown*, *supra* note 101 (“As of 2015, nearly 20 percent of convicted sex offenders living on the Fort Berthold Indian Reservation had failed to register, compared to between 4 and 5 percent for the rest of North Dakota.”).

146. See, e.g., *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1227 (Ind. 2003); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1142 (Ohio 2002); *White v. Smith & Wesson Corp.*, 97 F. Supp. 2d 816, 829 (N.D. Ohio 2000).

147. See, e.g., *City of Gary*, 801 N.E.2d at 1227 (Ind. 2003) (upholding the City of Gary’s public nuisance claim); *City of Cincinnati*, 768 N.E.2d at 1142 (upholding the City’s public nuisance claim, maintaining that public nuisance claims can be sustained even in the absence of injury to real property and even if the defendant had no control over the product when the public harm occurred); *White*, 97 F. Supp. 2d at 829 (N.D. Ohio 2000) (finding that the City’s public nuisance claim would be allowed if the City could prove that the defendants were negligent in creating the conditions of the nuisance). Cf. *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98 (Conn. 2001) (finding that the city could not recover because the alleged injuries were remote and indirect); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001) (holding that lawfully selling non-defective products is not a public nuisance under state law and even if the court did expand the definition of public nuisance, it would not do so in this case because the gun manufacturers did not have control over the actions of the third party criminals).

fuel producers' hiring practices are negligent and that the resulting rise in crime is a public nuisance interfering with public safety.¹⁴⁸

Extractive companies should also be held civilly liable in tribal court. Tribes can use the ruling in *Montana v. United States*, confirming tribes' ability to exercise civil jurisdiction over nonmembers in voluntary relationship with the tribe, to hear suits against fossil fuel producers operating on tribal land.¹⁴⁹ In *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, the U.S. District Court held that the tribal court had the jurisdiction to hear a civil case against a non-native defendant operating a business on tribal land through a consensual relationship with the tribe.¹⁵⁰ Notably, the tribal case concerned a plaintiff seeking to hold a corporation with negligent hiring practices liable for a sexual assault perpetrated by an employee.¹⁵¹ The defendant corporations tried to dismiss the case, claiming that the tribal court did not have jurisdiction over non-natives.¹⁵² The Choctaw Supreme Court upheld the tribal court's exercise of civil jurisdiction based on the ruling in *Montana v. United States*.¹⁵³ *Dolgencorp, Inc.* then sued the tribe in United States District Court. The District Court agreed with the Choctaw Supreme Court ruling and found that *Dolgencorp, Inc.* was in a consensual relationship with the tribe and was subject to tribal civil jurisdiction.¹⁵⁴

Tribal courts can use this civil jurisdiction under the *Montana* exception to hear suits against fossil fuel producers with extraction sites, pipelines, or man camps on reservation land.¹⁵⁵ The Ninth

148. Fossil fuel producers fail to conduct comprehensive background checks. These companies may be negligently hiring violent sexual criminals and housing them near Native communities at particular risk of sexual violence. See Bleir & Zoledziowski, *supra* note 11.

149. See *Montana v. United States*, 450 U.S. 544, 565 (1981). Non-Indians are considered to be in voluntary relationship with the tribe after entering into consensual relationships, such as "commercial dealing[s], contracts, leases, or other arrangements," with the tribe or tribal members. See *id.*

150. See *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 169 (5th Cir. 2014).

151. See *id.*

152. See *id.*

153. See *Montana*, 450 U.S. at 566.

154. See *Dolgencorp*, 746 F.3d at 169.

155. The violence against Native women living near extractive industries is so pervasive and destructive that tribes could argue the applicability of the second *Montana* exception, which gives tribal courts civil jurisdiction over nonmembers whose "conduct threatens . . . the health or wellness of the tribe." 450 U.S. at 566. However, courts have read the second *Montana* exception narrowly. See *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 341 (2008) ("The conduct must do more than injure the tribe, it must

Circuit held that establishing a consensual relationship and applying the *Montana* exception is especially straightforward in cases where relevant conduct occurred on tribal land.¹⁵⁶ Using the *Montana* exception, tribal courts could hear suits against energy companies for public nuisance and for vicarious liability for sexual assaults perpetrated by negligently hired employees. This civil liability, as well as full compliance with obligations under the Clean Air Act, would force extractive companies to reconcile with the human toll of their industry.

V. CONCLUSION

Legislative and federal common law restrictions on tribal sovereignty and criminal jurisdiction have left Native women, especially those living near oil and gas booms, at risk of sexual violence. While VAWA and TLOA have begun to address the risks for Native women near extractive industries, practical and cultural barriers make these solutions insufficient, and there is still considerably more to be done.

To hold perpetrators accountable, tribes should be permitted to exercise full criminal jurisdiction over crimes on tribal land. Reinstatement of tribal criminal jurisdiction should come with the necessary federal funding to maintain an effective tribal criminal justice system. Federal and state law enforcement agencies with concurrent jurisdiction over crimes on tribal land should collaborate with tribal governments to implement guidelines for swift and appropriate sexual assault responses.

Furthermore, the EPA should hold extractors responsible by regulating future extractive sites based on a comprehensive analysis of all impacts of extraction on the “human environment,” including impacts on the health and safety of Native women and not just on impacts to the local economy. Thoughtful and thorough regulation will reduce the effects of fossil fuel extraction on Native

‘imperil the subsistence’ of the tribal community.”). In *Strate v. A-1 Contractors, Inc.*, Justice Ginsburg clarified that the second *Montana* exception only applies in cases where adjudicatory authority is “needed to preserve ‘the right of reservation Indians to make their own laws and be ruled by them.’” 520 U.S. 438, 459 (1997) (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)). Based on these subsequent limiting readings, the second *Montana* exception is likely less applicable than the first exception to cases of violence against Native women.

156. See *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 804 (9th Cir. 2011).

communities, but when harms do occur, fossil fuel producers should be held accountable in court. Tribal communities can sue energy companies in state courts for public nuisance interfering with the public right to be free from unwanted injury. The *Montana* decision, which states that tribes can exercise civil jurisdiction over nonmembers in voluntary relationship with the tribe, reaffirms tribal civil jurisdiction over cases seeking to hold energy producers vicariously liable for the harms occurring on tribal land at the hands of negligently hired employees.

Increased tribal criminal jurisdiction, along with state and federal law enforcement collaboration, will close the de facto jurisdictional gap, allowing those who harm Native women to be brought to justice. Federal regulation and civil liability will hold energy companies responsible for their contribution to violence against Native women and encourage them to reform their dangerous hiring practices. Together these solutions will place liability for the ongoing epidemic of violence against Native women on those most responsible and in doing so, will allow Native women to finally feel the sense of security and liberty necessary for Native communities to heal.