THE NEVER-ENDING MAZE

CONTINUED FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA

AMNESTY INTERNATIONAL

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EXECUTIVE SUMMARY

“WHILE THERE ARE OVER 560 FEDERALLY RECOGNIZED TRIBES IN THIS COUNTRY, EACH WITH A UNIQUE HISTORY, CULTURE, AND LANGUAGE, THE CONSTANT FOR ALL NATIVE PEOPLE IS THE INEVITABILITY OF RAPE.”

Dr. Sarah Deer, “How do Race, Ethnicity, and Religion Intersect with Sexual Violence?”, public event held at Brandeis University, 3 November 2017

Sexual violence against American Indian and Alaska Native (AI/AN) women is at epidemic proportions in the USA and survivors are frequently denied justice. Despite piecemeal efforts to address this, the USA is failing in its obligation to protect AI/AN women from sexual violence and is actively restricting tribal governments from doing so. The high rates of violence faced by AI/AN women have been compounded by the USA’s steady erosion of tribal government authority and refusal to untangle

the complex jurisdictional maze that survivors face. Further, the federal government has exacerbated matters by chronically under-resourcing law enforcement agencies and Indigenous health service providers.

The USA's failure to fulfill its human rights obligations towards Indigenous women is informed and conditioned by a legacy of widespread and egregious human rights violations and abuses against Indigenous peoples, who face deeply entrenched marginalization as a result of a long history of systemic and pervasive abuse and persecution.

Available data shows a stark picture: more than half (56.1%) of AI/AN women have experienced sexual violence. Nearly 1 in 3 AI/AN women (29.5%) have experienced rape in their lifetime; they are over twice as likely to be raped than non-Hispanic white women in the USA. Yet rates of sexual violence are likely even higher as the USA fails to collect adequate and consistent data on violence against AI/AN women, which is intimately tied to the failed response of authorities to prevent and respond to such violence.

Amnesty International first reported on the crisis of sexual violence against AI/AN women in 2007, with the publication of a report entitled *Maze of Injustice: The failure to protect Indigenous women from sexual violence in the USA*. Nearly 15 years later, there has been no significant decrease in sexual violence against AI/AN women.

THE JURISDICTIONAL MAZE

The USA has formed a complex interrelation between federal, state and tribal jurisdictions that undermines tribal authority and allows perpetrators of violence against AI/AN women to evade justice. Tribal governments are hampered by a complex set of laws and regulations that undermine their authority and make it difficult, if not impossible, to respond to sexual violence in an effective manner. Women who come forward to report sexual violence are caught in a jurisdictional maze that often results in significant delays while police, lawyers and courts establish if jurisdiction is tribal, state or federal, sometimes resulting in such confusion and uncertainty that no one intervenes and survivors of sexual violence are denied access to justice.

With the passage of the 2010 Tribal Law and Order Act (TLOA) and the 2013 reauthorization of the Violence Against Women Act (VAWA), certain tribal governments have been able to restore limited criminal jurisdiction and punishment authority in specific circumstances and this has resulted in some improvement in women's safety. However, the requirements to implement either TLOA or VAWA are onerous, and there are still severe limitations on tribal authority. Moreover, under the 2013 reauthorization of VAWA, tribes were not able to respond to sexual violence committed by non-Native perpetrators. These limitations have meant progress represented in this legislation has not resulted in any significant decrease in rates of sexual violence against AI/AN women. The 2022 reauthorization of VAWA, which was signed into law March 2022, addresses some of these limitations, but major barriers remain for tribes whose authority and ability to prevent and respond to sexual violence is still severely curtailed.

POLICING

Police response to sexual violence against AI/AN women is inadequate and serves as a major barrier to justice for survivors. A lack of resources for tribal police, poor interagency coordination and insufficient investigative responses have all had negative impacts on police response to sexual violence against AI/AN women.

Law enforcement presence in Native communities is significantly lower than in non-Native communities; survivors in rural areas in particular are far less likely to have access to timely law enforcement response. Coordination between federal, state and tribal law enforcement remains inadequate; levels of cooperation vary and survivors of sexual violence are frequently passed off to different agencies. Many tribal law enforcement agencies, like other services for Indigenous peoples, continue to be underfunded and at the mercy of annual or other short-term funding.

HEALTHCARE AND SUPPORT SERVICES

AI/AN women who survive sexual violence are not guaranteed to receive adequate and timely sexual assault forensic examinations (including a rape kit), which are vital for a successful prosecution. This failure is caused in part by the federal government's severe underfunding of the Indian Health Service (IHS), IHS understaffing, a lack of clarity within the IHS on the availability of rape kits or trained professionals who can administer the exam, and policies resulting in major geographical gaps in post-rape care.

For survivors, the nearest IHS facility may be closed when they need care, it may not have a rape kit, or it may not have a qualified staff present to administer the exam. Additionally, IHS policy on sexual assault response protocols means survivors may be forced to travel long distances. These barriers result in many survivors being overwhelmed by the emotional and logistical difficulties involved in accessing post-rape care, often giving up when faced with needing to go to a second hospital or clinic after being unable to access care at the closest IHS facility. Survivors who must seek treatment at non-Native health facilities also face non-culturally sensitive care and, at times, discriminatory treatment.

PROSECUTIONS

The federal, state and tribal justice systems in the USA are not responding adequately to AI/AN survivors of sexual violence. US tribal justice systems are unable to effectively respond to crimes on their own as they have been underfunded and restricted in their capacity by federal limitations on tribal authority.

The restricted nature of a tribal nation's ability to prosecute a crime means there is a need for heightened response from federal and state prosecutors for crimes of sexual violence against AI/AN women. Yet, while the federal government continues to restrict tribal authority except for narrow exceptions, it simultaneously declines to prosecute a high number of cases and underfunds federal prosecutorial efforts, creating a scenario where tribes are often left so that they cannot prosecute cases, while the federal government will not prosecute them.

Since 2013, both the total funding for US Attorney's Offices in Indian country and the number of attorneys responsible for Indian country prosecutions has decreased by 40%. Additionally, the most recent available data shows US Attorney's Offices declined to prosecute 46% of sexual assaults and 67% of sexual abuse cases in Indian country. When federal prosecutors decline to prosecute cases involving non-Native perpetrators, there is often no further recourse for Indigenous survivors under criminal law within the USA and perpetrators can continue to perpetrate crimes with impunity.

RECOMMENDATIONS

The crisis of sexual violence against AI/AN women and the failure of the US government to adequately prevent or respond to this violence is not simply a public health or criminal justice issue but a serious human rights issue that the US government has an obligation to address under international human rights law and standards.

Governments have a responsibility to ensure that women are able to enjoy their right to freedom from sexual violence. As citizens of particular tribal nations, the welfare and safety of AI/AN women are directly linked to the authority and capacity of their nations to address such violence.

The US federal government has an obligation under binding international treaties and the trust responsibility between tribal nations and the federal government to ensure the rights and well-being of AI/AN peoples are protected. Amnesty International is calling on the US government to take the following steps to end sexual violence against AI/AN women.

- The US Congress should recognize the inherent concurrent jurisdiction of tribal authorities over all crimes committed on tribal land, regardless of the tribal citizenship of the accused, including by legislatively overriding the US Supreme Court's decision in *Oliphant v Suquamish*.
- All law enforcement officials should ensure that reports of sexual violence are responded to promptly, that effective steps are taken to protect survivors from further violence and that impartial and thorough investigations are undertaken.
- The IHS and other health service providers should ensure that all AI/AN survivors of sexual violence have access to adequate, timely and comprehensive sexual and reproductive health care, including sexual assault forensic examinations, without charge to the survivor and at a facility within a reasonable distance.
- Prosecutors should thoroughly and impartially prosecute cases of sexual violence against Indigenous women and should be sufficiently resourced to ensure that the cases are treated with urgency and processed without undue delay.
- Congress and federal and state authorities must make available long-term, predictable and adequate funding for tribal law enforcement and justice services, for IHS and tribes that administer their own health services and for culturally appropriate support services.
- Congress should fund data collection, analysis and research on crimes of sexual violence against AI/AN women.

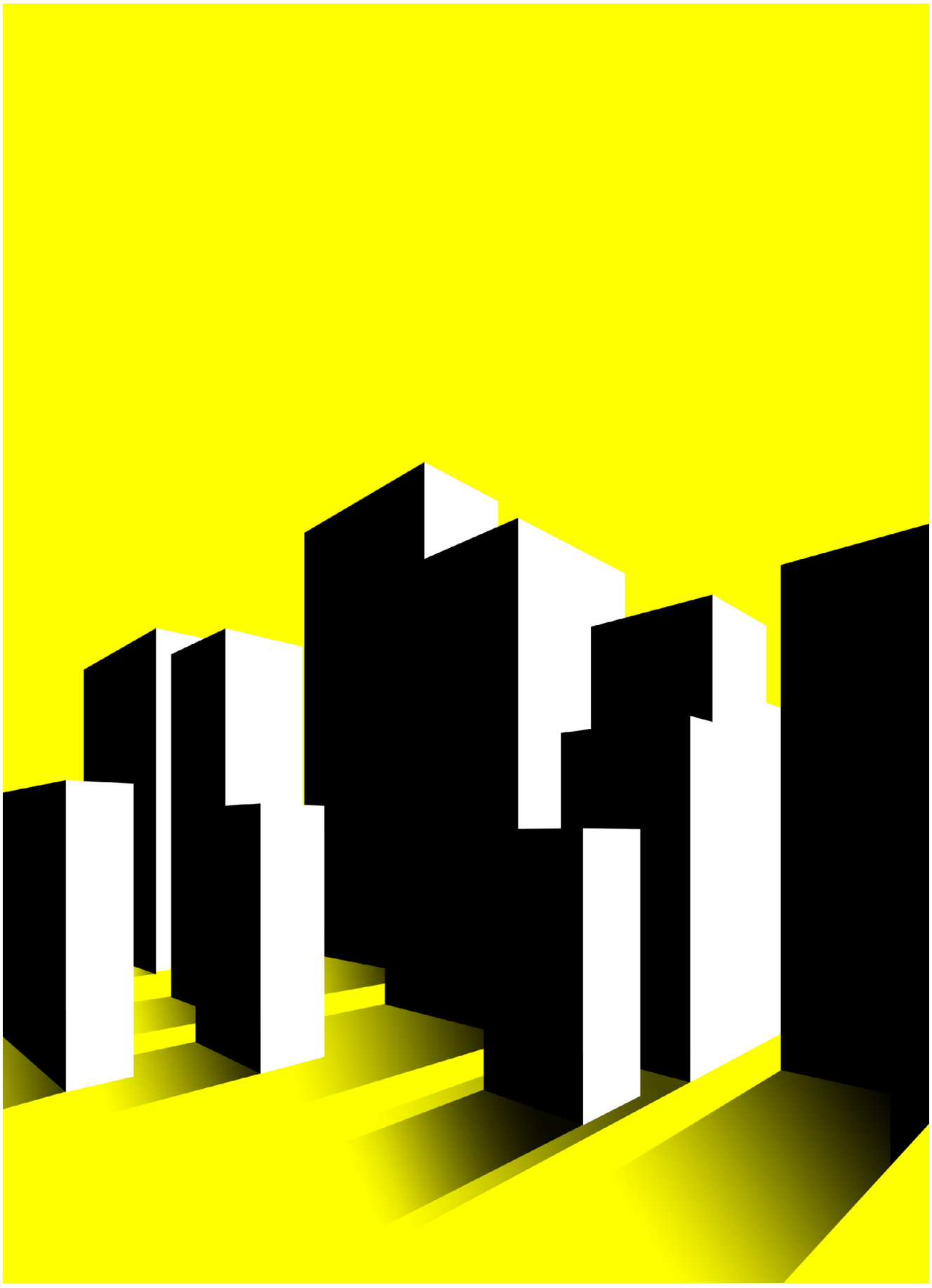
A full list of recommendations can be found at the end of this report.

TERMINOLOGY

Amnesty International strives to use terminology that respects the wishes of the peoples concerned. It recognizes that this report cannot portray the experiences and diversity of Indigenous peoples in the USA. There are more than 570 federally recognized American Indian and Alaska Native tribes in the USA; however, not all Indigenous peoples within the USA and its overseas territories have been accorded this status, including the Indigenous peoples of Hawaii, Puerto Rico, Guam, America Samoa and the Mariana Islands. Some peoples are recognized by states but not the federal government. Individuals may identify as Indigenous even if they are not recognized as tribal members by federal or state authorities.

It is important to note that no single term is universally accepted by all Indigenous peoples in the USA. Various terms are used throughout the report where they seem most suited to the context. However, these choices are in no way intended to minimize or ignore the great diversity of Indigenous cultures, languages and nationalities that exist within the USA, nor to generalize their experiences. The decisions on terminology in this report have been guided by a number of factors, including the need to ensure that the report is as accessible as possible to diverse audiences both within the USA and around the world.

The terms American Indian, Native American and Alaska Native are widely used within the USA itself, as are the terms tribe, tribal, tribal nation and Alaska Native village. These have been retained in this report to refer to Indigenous peoples and institutions. Certain terms such as Indian, Indian country and tribal member are used in legal and other discourses in the USA and have been retained in this report where this seems most appropriate. The term Native should be read as referring to American Indian and Alaska Native unless the legal context or parameters of a particular study indicate otherwise. While some terms may have specific legal meanings, it must also be acknowledged that many may be used in a broader political or cultural context.



LIST OF TERMS/ ABBREVIATIONS

AI/AN	American Indian and Alaska Native
ANCSA	Alaska Native Claims Settlement Act
AUSA	Assistant United States Attorney
BIA	The Bureau of Indian Affairs, federal government agency charged with implementing federal laws related to American Indians and Alaska Natives, managing land held in trust for Indian tribes, and providing services on tribal lands including supporting tribal police forces, courts and governments
District Attorney	A state prosecutor
DOJ	Department of Justice
FBI	Federal Bureau of Investigation
GAO	Government Accountability Office
ILOC	Indian Law and Order Commission
Indian country	Federal law defines Indian country as: "All land within the limits of any Indian reservation", "all dependent Indian communities within the borders of the United States" and "all Indian allotments, the titles to which have not been extinguished."
IHS	Indian Health Service, part of the US Department of Health and Human Services, operates health facilities for American Indian and Alaska Native peoples

MMIWG	Missing and murdered Indigenous women and girls
OVW	Office on Violence Against Women
Public Law 280	Transferred legal authority (jurisdiction) from the federal government to certain state governments
SANE	Sexual assault nurse examiner
SAUSA	Special Assistant United States Attorney
SDVCJ	Special Domestic Violence Criminal Jurisdiction, provision included in the Violence Against Women Reauthorization Act of 2013 that affirms sovereign authority of tribal courts to exercise criminal jurisdiction over certain cases involving non-Native perpetrators who commit acts of domestic violence or dating violence within Indian country
State police	Used to include state, city and local law enforcement agencies
TLOA	Tribal Law and Order Act, includes provisions meant to improve criminal justice in Indian country
Trust responsibility	The legal relationship that exists between the US federal government and tribes that places a unique legal obligation on the US government to ensure the protection of the rights and wellbeing of American Indian and Alaska Native peoples.
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
USAO	US Attorney's Offices
VAWA	Violence Against Women Act; collection of funding programs, initiatives and actions designed to improve criminal justice and community-based responses to violence against women; VAWA must be reauthorized every five years

LIMITATIONS

There are over 570 federally recognized unique and self-governing tribal nations.[1] It would be inaccurate to speak as if each story and statistic resonates equally with each nation or survivor. However, the federal trust responsibility of the US government to tribes is shared across nations and often the federal government's failure to uphold that trust responsibility has created barriers to accessing justice for American Indian and Alaska Native (AI/AN) survivors of sexual violence. Amnesty International focused on this trust responsibility in drawing up the recommendations for this report, but the applicability of each recommendation will not look the same for all tribes or survivors. Further, each tribe has the right to decide its relationship with federal, state and other tribal governments.

Amnesty International has focused its research on the response to crimes of sexual violence against AI/AN women on tribal lands and in neighboring areas; the experiences of other survivors, including AI/AN women living outside of tribal lands are not reflected in this report. Nearly 70% of AI/AN peoples live outside tribal lands.[2] The available information points to high rates of sexual violence and a lack of culturally appropriate services in towns and cities. This is of sufficient concern to merit urgent further research. The US federal government's trust responsibilities extend beyond reservation boundaries and Amnesty International calls on the USA to protect all AI/AN women from violence and to ensure justice for and provide culturally appropriate services to those who have been victimized.[3]

METHODOLOGY

This update is based on research carried out in 2021 by Amnesty International in consultation with American Indian and Alaska Native (AI/AN) organizations and individuals to document what progress has been made in reducing rates of sexual violence against Indigenous women. Amnesty International conducted a review of existing government and non-governmental reports, including studies conducted by Native-led organizations, the US Department of Justice, and the US Government Accountability Office, as well as law review articles and media reports of sexual violence against AI/AN women. It also reviewed federal and state case law and legislation. Additionally, Amnesty International spoke to activists, support workers, service providers and healthcare workers in addition to officials across the USA, including tribal, state and federal law enforcement officials as well as tribal judges.

Despite historic and continued oppression, AI/AN women shared stories with Amnesty International that highlighted Indigenous strength and resilience. The long history of abuse cannot be erased, but Indigenous women all over the USA are working with determination and hope for a future where their right to dignity and security is respected. Drawing on their work and experience, this report concludes with a series of recommendations calling on the authorities to fulfill their obligation to investigate, prosecute and punish those responsible for sexual violence and to promote the rights of Indigenous women.

LACK OF RELIABLE DATA

The US federal government does not consistently collect data on sexual violence against American Indian and Alaska Native (AI/AN) women or the services available to survivors. Government reports on crime in Indian country often rely on decades-old data. Fragments of information are scattered across reports compiled by different agencies with very little consistency in reporting, making it difficult to determine the full extent of violence against AI/AN women.

"We know that GBV [gender-based violence] affects Native communities at staggeringly high rates… serious gaps in data collection systems impede the ability of government agencies at all levels to adequately support Native communities."

National Indigenous Women's Resource Center, Restoration of Native Sovereignty and Safety for Native Women Magazine, Volume 18, Issue 1, February 2021

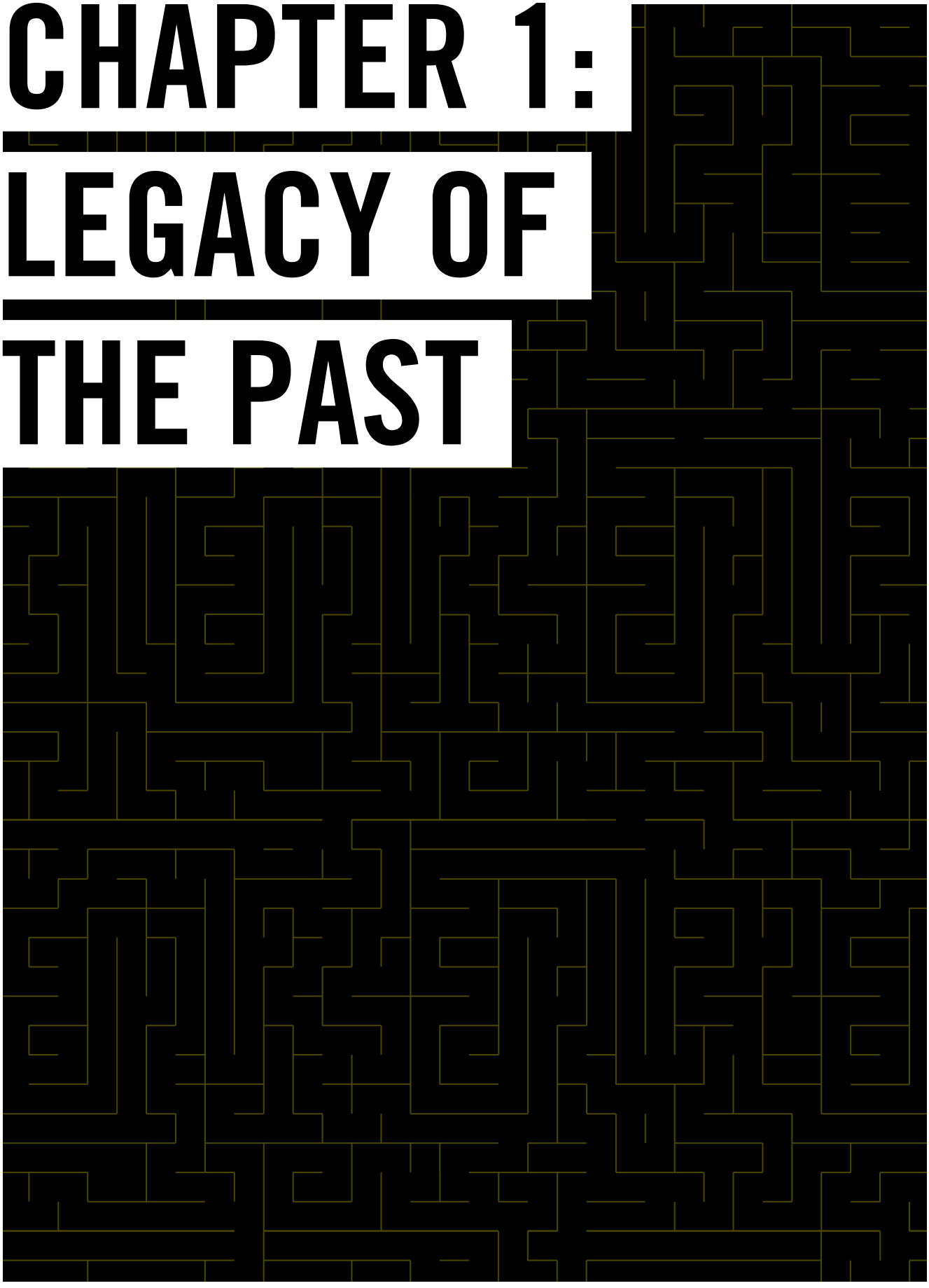
Research and data collection efforts by government agencies charged with documenting the crisis of sexual violence in Indian country are delayed and uncoordinated. The 2005 reauthorization of the Violence Against Women Act included a directive[4] for the National Institute of Justice, within the Department of Justice (DOJ), to conduct a national baseline study on the prevalence of violence against women in Indian country; as of 2022, no results have been published.

Non-governmental organizations and researchers have sought to fill the gaps left by government agencies, but they face barriers in ensuring comprehensive data collection and analysis. While the available data does not comprehensively portray the extent of sexual violence against AI/AN women, it does indicate that AI/AN women are particularly at risk of sexual violence and experience the highest rates of sexual assault in the country.

The Tribal Law and Order Act (TLOA), requires the Bureau of Justice Statistics (BJS) to establish a tribal crime data collection system, consult with tribes to implement this system, and report annually to Congress on the data collected and analyzed in accordance with TLOA.[5] However, most BJS data collection projects have been pending since TLOA was passed in 2010 and a 2017 DOJ report found that "crime data in Indian country remains unreliable and incomplete, limiting the Department's ability to engage in performance-based management of its efforts to implement its TLOA responsibilities."[6]

Without accurate and consistently updated data it is impossible to understand the full extent to which AI/AN women have been impacted by sexual violence. Progress cannot be properly measured without an accurate baseline. It is vital that the US government regularly update data on sexual violence again AI/AN women to address the severity of this human rights crisis.

CHAPTER 1: LEGACY OF THE PAST



“Any work on this topic must acknowledge that the problem of sexual violence is part of a history and continued reality of systemic violence against Indigenous Peoples.”

Interview with Yolanda Francisco-Nez, Executive Director, Restoring Ancestral Winds, May 2021

Sexual violence against American Indian and Alaska Native (AI/AN) women is at epidemic proportions in the USA. Available data shows that 56.1% of AI/AN women have experienced sexual violence in their lifetime. Approximately 1 in 3 AI/AN women (29.5%) have experienced rape in their lifetime, meaning AI/AN women are 2.2 times more likely to be raped than non-Hispanic white women in the USA.[7] In some states, the disproportionate rate of violence is even higher:[8] in Alaska, Alaska Native women are 3.2 times more likely to experience sexual violence than non-Native women;[9] in South Dakota, Native Americans are 3.6 times more likely to be victims of rape than non-Natives.[10] As shocking as these figures are, it is widely believed that available data does not accurately portray the extent of sexual violence against AI/AN women in the USA.

Amnesty International first reported on this issue in 2007, with the publication of a report entitled *Maze of Injustice: The failure to protect Indigenous women from sexual violence in the USA*,[11] but sexual violence against Native women is not a new phenomenon. From European colonization to the present day, Native women have experienced high rates of violence.

“SETTLER-COLONIAL PRACTICES AND POLICIES STILL IMPACT US NOW. I ALWAYS THINK ABOUT HOW MUCH HURT WE ENDURE, HOW MUCH PAIN WE ENDURE, AND HOW MUCH WE BOUNCE BACK THROUGH OUR RESILIENCE, OUR STRENGTH. WE CONTINUE TO THINK ABOUT THE PEOPLE IN OUR COMMUNITIES, THE CHILDREN, THE FUTURE GENERATIONS – BUT ALSO ABOUT ALL LIFE OUT THERE IN THE WORLD, BECAUSE THAT’S WHO WE ARE.”

Interview with Dr Peggy Bird, Co-founder of the Coalition to Stop Violence Against Native Women & Indigenous Women’s Human Rights Collective, Tribal Court Judge, April 2021

European/US colonizers forcibly relocated many Indigenous peoples from their land, committing widespread atrocities in the process. Killings on a massive scale, as well as disease and starvation, devastated the Indigenous peoples of North America. Gender-based violence against women by settlers was used as part of conquest and colonization. It is widely held by Indigenous people in the USA, supported by many scholars, that these and other historical acts amount to genocide. Historically, the US federal government has made a series of attempts to compel Indigenous peoples to assimilate into non-Indigenous society. In the late 19th and early 20th centuries, several policies designed to promote assimilation contributed to the breaking up of tribal societies.

This violence is not confined to distant history. The US policy of forced boarding schools, for example, removed children as young as five from

their families and compelled them to attend these schools,[12] where the US government has admitted to "brutalizing them emotionally, psychologically, physically, and spiritually."[13] Some survivors of boarding schools are themselves now advocates for ending further violence against Native women:

"When I first came to my senses [when I was born], I lived in a fish camp, and we had to move into a large village where they were establishing BIA [Bureau of Indian Affairs] schools, and we had to go to a school, or they would take us away from our families. So, my family moved us to the village of Emmonak. When I came to school, English was my second language. Yu'pik, my Native language, is my first language. It was hard to understand what was happening in school. The BIA teachers were really mean to students; they used to pull hair and slap us with rulers. One time, a teacher pulled me by my hair because I wasn't pronouncing the English word properly. So I stayed silent for a long time, because that was the safest way to be in school. We weren't taught anything about sovereignty, about our inherent rights, or jurisdiction. We had to learn about the 50 states, about the state capitals, but not about our people. From the books, we learned that the Indians were bad people, and the cowboys were good people, like in the movies."

Interview with Lenora "Lynn" Hootch, Executive Director, Yup'ik Women's Coalition, May 2021

Additionally, survivors of mass forced and coerced sterilization performed through the Indian Health Service (IHS)[14] spoke to Amnesty International about the continued impact of that violence in their communities. As in the case of forced sterilization and boarding schools, violence was oftentimes carried out with explicit intent by the US government.[15] Other times, such violence was allowed to happen because of gross neglect by the US government. One such example is the case of a former IHS physician who sexually abused minors at IHS facilities where he was "allowed... to treat and victimize children for more than two decades" from 1992 to 2016.[16] Failures of protection and accountability fuel a continued general distrust of US interventions and services for many Indigenous advocates who spoke to Amnesty International.

MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS AND EXTRACTIVE INDUSTRIES

"The murder rate of Native women is more than ten times the national average on some reservations. These disappearances or murders are often connected to domestic violence, dating violence, sexual assault, stalking, and sex trafficking. The intersection of gender-based violence and MMIWG [missing and murdered Indigenous women and girls] is heavily intertwined."

National Indigenous Women's Resource Center, Missing and Murdered Indigenous Women and Girls[17]

High rates of violence against Indigenous women fueled by settler-colonialism persist. On some reservations, the rate of killings of AI/AN women is more than 10 times the national average.[18] In 2017, the Centers for Disease Control reported homicide as one of the leading causes of death among AI/AN women and girls.[19]

These statistics likely understate the scale of violence against AI/AN women given that Native victims are often classified as Hispanic or "other" in reporting data, depending on the responding law enforcement agency.

> **“WE HAVE FOUND AGENCIES EITHER DON’T RECORD RACE AND ETHNICITY AT ALL OR LUMP NATIVE-IDENTIFIED INDIVIDUALS INTO AN ‘OTHER’ CATEGORY WITH OTHER RACES MAKING IT DIFFICULT TO DISAGGREGATE THE DATA. BECAUSE OF THESE ISSUES, THE CRISES OF GBV [GENDER-BASED VIOLENCE] AND MMIWG AFFECTING NATIVE PEOPLE ‘DISAPPEAR’ INTO THE DATA. THE COMMUNITIES KNOW WHAT IS HAPPENING TO THEM – THEY ARE LIVING IT – BUT THEY CAN’T ‘PROVE IT’ TO DECISION-MAKERS OR AGENCIES.”**

National Indigenous Women’s Resource Center, Restoration of Native Sovereignty and Safety for Native Women Magazine, Volume 18, Issue 1, February 2021

Continued violence has also been fueled by workers from extractive industries living near reservations. Extractive industries often bring an influx of transient male workers to rural areas bordering reservations and house them in “man camps”.[20] Numerous UN agencies, offices and programs, along with the Special Rapporteur on the Rights of Indigenous Peoples, have found that extractive industries pose substantial health and safety risks to populations living in nearby areas. Risks include an increase in gender-based violence, sexually transmitted infections and human trafficking.[21] The UN Special Rapporteur on the Rights of Indigenous Peoples noted in 2011 that extractive industries operating in or near Indigenous communities can have a negative “even catastrophic” impact on Indigenous peoples’ social, cultural, and political rights.[22]

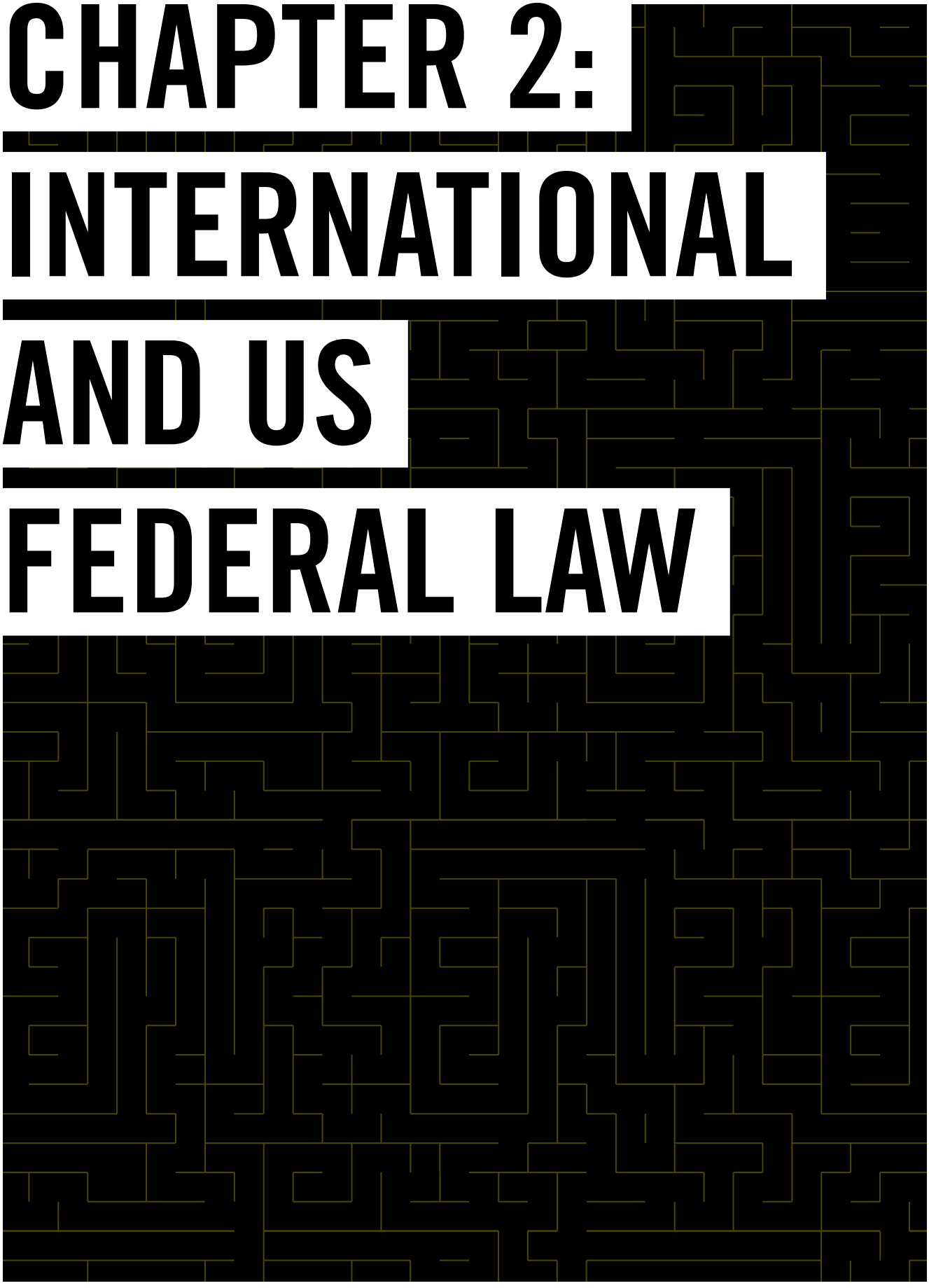
“When you bring in large groups of men working away from home with money in their pockets and time on their hands you are going to see an increase in sexual assault, sex trafficking, domestic violence, and drug use… Standing Rock wasn’t just about water; it was about the true exploitation of Native people. 200 rape kits went missing, so it didn’t do any good to file the report when the evidence goes missing. There are still 26 women missing from Standing Rock. Women would go to the store and not come back.”

Sheila Lamb, MN350 co-chair and Minnesota MMIW Task Force and Steering Committee member, Extractive Industries and Sex Trafficking of Native Women and Youth Webinar, April 2021[23]

These and other historic and continued injustices committed against Indigenous peoples help fuel the high rates of sexual violence perpetrated against Native women and the high levels of impunity enjoyed by their attackers. Discrimination and racist attitudes toward Indigenous peoples inherent in such violence, including language discrimination and negative and dehumanizing stereotypes, contribute to ongoing levels of violence against Native women and to the lackluster response by the US government to prevent or respond to such violence. Any study of sexual violence against AI/AN women must be understood against the backdrop of this historical and present-day violence against Native peoples.

NATIVE WOMEN ARE 2.2 TIMES MORE LIKELY TO BE RAPED THAN NON-HISPANIC WHITE WOMEN

CHAPTER 2: INTERNATIONAL AND US FEDERAL LAW



INTERNATIONAL LAW

"As indigenous peoples have become actively engaged in the human rights movement around the world, the sphere of international law, once deployed as a tool of imperial power and conquest, has begun to change shape. International human rights law now serves as a basis for indigenous peoples' claims against states and even influences indigenous groups' internal processes of revitalization. Empowered by a growing body of human rights instruments, some as embryonic as the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), indigenous peoples are increasingly recognized in international human rights law as possessing the 'right to have rights'."

Angela Riley and Kristen Carpenter, Indigenous Peoples and the Jurisgenerative Moment in Human Rights, 2014 [24]

International law obliges governments to use their power to respect, protect and fulfill human rights. This includes not only ensuring that their own officials comply with human rights law and standards but also acting with due diligence to address abuses committed by private individuals (non-state actors). When states know, or ought to know, about violations of human rights and fail to take appropriate steps to prevent or address them, they, as well as the perpetrators, bear responsibility. The principle of due diligence includes obligations to prevent human rights violations, investigate and punish perpetrators when violations occur, and provide compensation and support services for victims.[25] This report demonstrates that US authorities continue to fail in exercising due diligence when it comes to sexual violence against American Indian and Alaska Native (AI/AN) women.

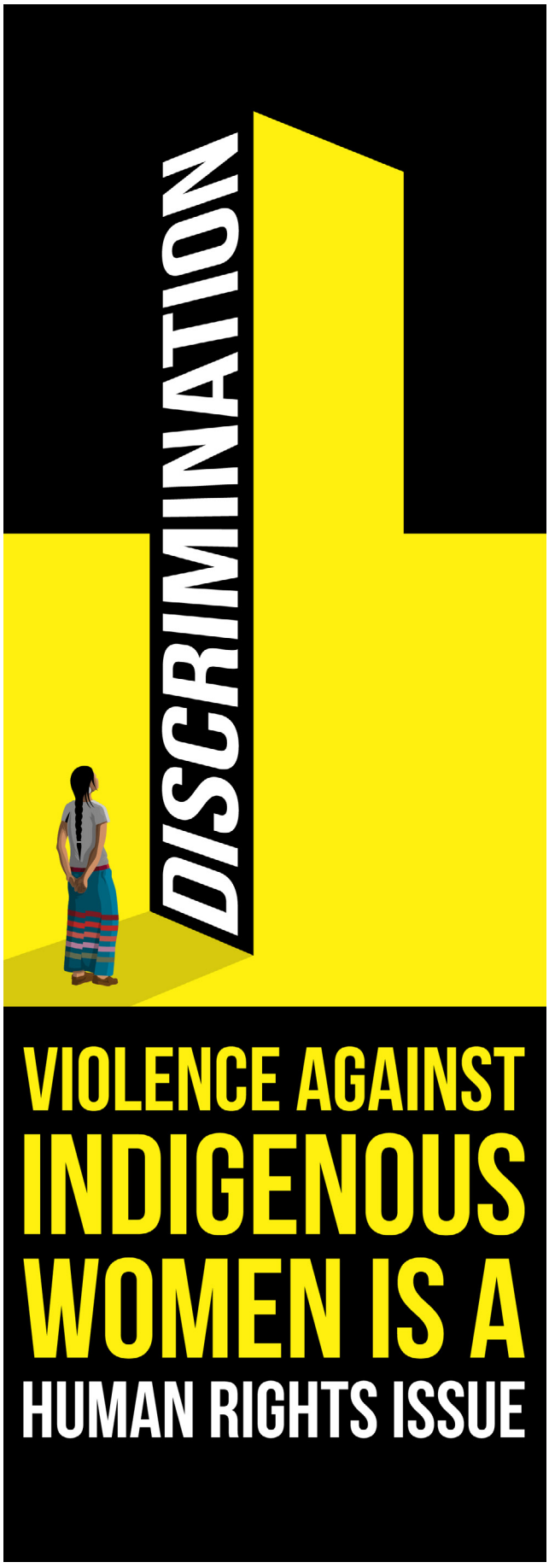
Violence against Indigenous women is a human rights issue. The concept of human rights is based on the recognition of the inherent dignity and worth of every human being. Through ratification of binding international human rights treaties, and through the adoption of declarations by intergovernmental bodies such as the UN and the Organization of American States (OAS), governments have committed themselves to ensuring that all people can enjoy certain universal rights and freedoms.

Besides being a human rights violation itself, sexual violence against women also results in violations of a variety of human rights.[26] These include: the right not to be subjected to torture or other ill-treatment;[27] the right to liberty and security of the person;[28] and the right to the highest attainable standard of physical and mental health.[29] Additionally, the erosion of tribal governmental authority and resources to protect Indigenous women from crimes of sexual violence is inconsistent with international human rights standards, including international standards on the rights of Indigenous peoples.

HUMAN RIGHTS OF WOMEN

The human rights of women are an inalienable, integral and indivisible part of universal human rights. These rights specifically acknowledge that the human experience of women is different from that of men due to their perceived sex and gender and that a woman's experience of human rights violations is unique. Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women… on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."[30]

Sexual and gender-based violence is a form of discrimination against women[31] and, in the case of AI/AN women, who are disproportionately victims of sexual violence, it is also a form



of discrimination on the basis of Indigenous identity.[32] When a state fails to act with due diligence in responding to sexual violence against women – by using the criminal justice system and providing reparation – this often violates women's right to non-discrimination and equality before the law.[33] The USA has ratified several of the key human rights treaties that guarantee these human rights, including the International Covenant on Civil and Political Rights; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the International Convention on the Elimination of All Forms of Racial Discrimination.

> **"Indigenous women experience a broad, multifaceted and complex spectrum of mutually reinforcing human rights abuses. That spectrum is influenced by multiple and intersecting forms of vulnerability, including patriarchal power structures; multiple forms of discrimination and marginalization, based on gender, class, ethnic origin and socioeconomic circumstances; and historical and current violations of the right to self-determination and control of resources."**
>
> *Victoria Tauli-Corpuz, United Nations Special Rapporteur on the Rights of Indigenous Peoples, Rights of Indigenous Women and Girls, August 2015* [34]

HUMAN RIGHTS OF INDIGENOUS PEOPLES

Over the past few decades, international human rights law has become more responsive to the values, needs and aspirations of Indigenous peoples as distinct and often persecuted cultures. Human rights standards specific to Indigenous peoples include the 1989 International Labour Organization (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169) and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Specific rights of Indigenous peoples have also been

affirmed by the expert bodies charged with the interpretation of state obligations under key human rights treaties in the UN and OAS. These evolving norms and standards are consistent in recognizing that Indigenous peoples have the right to maintain their distinct collective identities and, towards that end, must determine their own lives and futures.

UNDRIP, adopted by the UN General Assembly in 2007, recognizes the right of Indigenous peoples "to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, where they exist, juridical systems or customs, in accordance with international human rights standards." (Article 34)

Provisions of the Declaration include:

- Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. (Article 3)
- Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions. (Article 4)
- Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions. (Article 5)
- States shall take measures, in conjunction with Indigenous peoples, to ensure that Indigenous women... enjoy the full protection and guarantees against all forms of violence and discrimination. (Article 22(2))
- Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right. (Article 24(2))

In 2010, the USA declared its support for UNDRIP and the then president, Barack Obama, stated that the "aspirations" affirmed in UNDRIP were ones that the US must "always seek to fulfill".[35] While not legally binding, the USA has noted that UNDRIP has both "moral and political force".[36]

In 2010, the USA declared its support for UNDRIP; then president Barak Obama stated that: "Indigenous law and legal systems shall be recognized and respected by national, regional and international legal systems." (Article XXII)

Similarly, ILO Convention 169 calls for the recognition and maintenance of tribal justice systems "where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights." The USA has not ratified ILO Convention 169, although the Committee on the Elimination of Racial Discrimination has encouraged the USA to abide by the Convention's terms.

HUMAN RIGHTS TO NON-DISCRIMINATION AND HEALTH

The UN Committee on the Elimination of Racial Discrimination monitors states' compliance with the International Convention on the Elimination of All Forms of Racial Discrimination, which the USA ratified in 1994. In its General Recommendation 23, the Committee calls on states to "ensure that members of Indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent." The Committee has raised specific concerns with the USA regarding "the denial of Indigenous women to access justice and to obtain adequate reparation or satisfaction for damages suffered" has called on the USA to "intensify its efforts to prevent and combat violence against women, particularly against American Indian and Alaska Native women."[37]

The right to the highest attainable standard of physical and mental health, including sexual and reproductive health, is relevant both to protecting women's right to be free from violence and to responding to violence against women. These rights are found in a number of international human rights treaties and standards, most explicitly in the International Covenant on Economic, Social and Cultural Rights, which the USA has signed but not ratified. In addition, the UN Committee on the Elimination of Discrimination against Women has recognized that intersecting forms of discrimination can adversely affect access to health services and it has urged that special attention be given to the health needs and rights of Indigenous women.[38]

TRIBAL SELF-DETERMINATION AND FEDERAL TRUST RESPONSIBILITY IN US FEDERAL LAW

"[T]he infrastructure to really develop a comprehensive anti-rape strategy for tribal nations has to be paired with the power to actually exercise authority in the cases of rape. Tribal sovereignty is integral to ending rape and at the same time, ending rape is integral to tribal sovereignty."

Dr. Sarah Deer, Professor of Women, Gender and Sexuality Studies at the University of Kansas[39]

Historic treaties, the US Constitution and federal law affirm a unique political and legal relationship between federally recognized tribal nations and the USA. The US federal government's policy toward Indigenous peoples has changed often and dramatically. Nevertheless, it remains the US federal government's responsibility to recognize, affirm and protect tribal sovereignty.

Tribal governments exercise their political and legal sovereignty by making and enforcing their own laws on tribal land through tribal law enforcement agencies and courts. In carrying out these functions, tribal governments play an essential role in ensuring that their citizens can enjoy their human rights. They also assume a responsibility for ensuring that these rights are protected. However, the capacity of tribal governments to uphold the rights of their citizens is constrained by legal limitations on their jurisdiction imposed by federal law and, in many cases, by the fact that the funds for the services they deliver are controlled by federal agencies.

“THE FEDERAL GOVERNMENT SEEMS TO THINK THAT THIS [FEDERAL TRUST] RESPONSIBILITY IS VOLUNTARY. THIS RESPONSIBILITY IS OBLIGATORY, AND THE FEDERAL GOVERNMENT MIGHT NEED A REMINDER. THE TRUST RESPONSIBILITY IS WHAT TRIBES DECIDED IN EXCHANGE FOR LAND. THE DEPARTMENT OF JUSTICE DOES NOT TAKE THIS DUTY OF PROTECTION SERIOUSLY.”

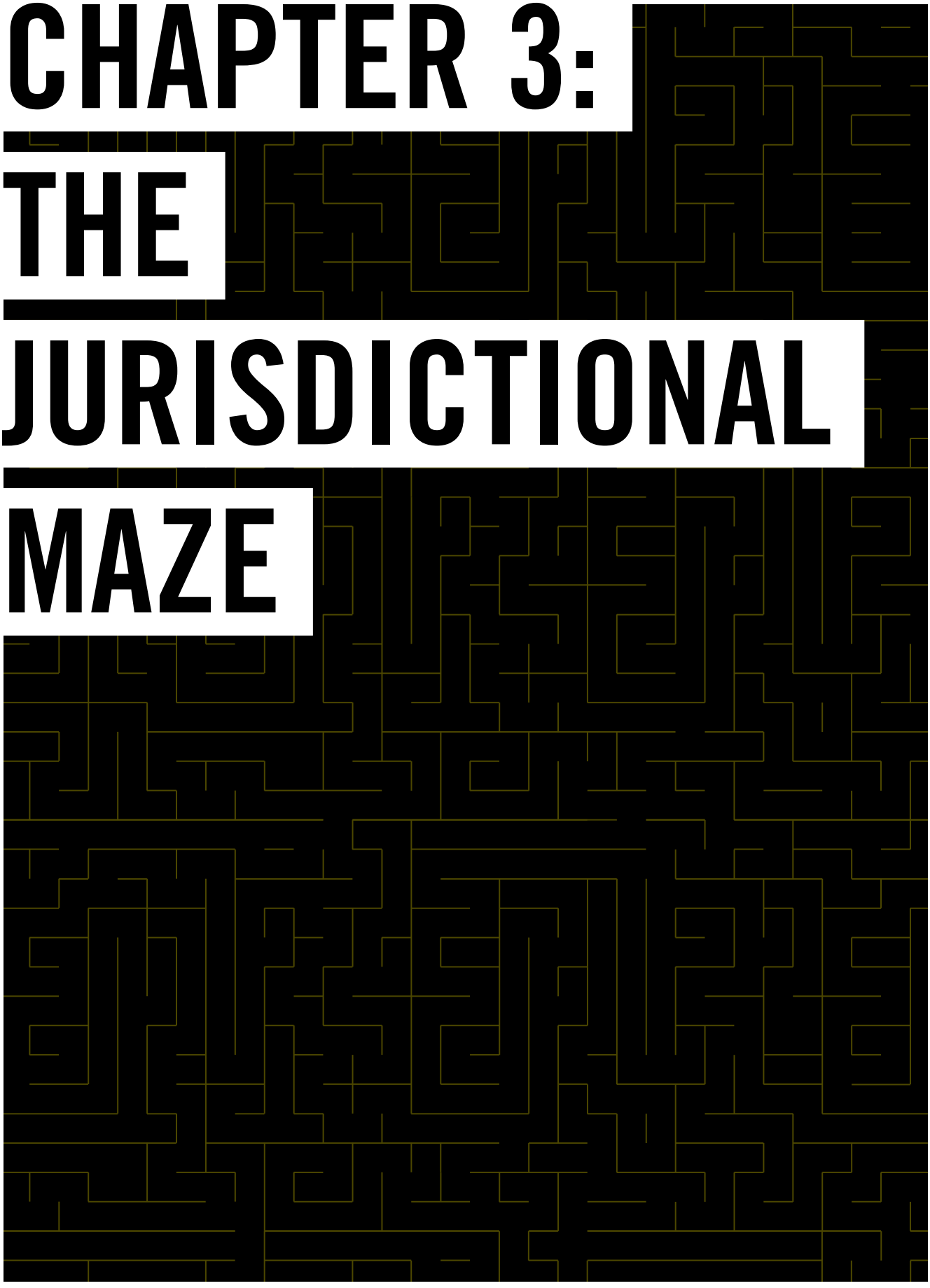
Interview with Matthew Fletcher, Professor of Law and Director of the Indigenous Law and Policy Center, Michigan State University, March 2021

The legal relationship that exists between the US federal government and tribes, the trust responsibility, places on the US government a unique legal obligation to ensure the protection of the rights and well-being of AI/AN peoples. This federal trust responsibility is set out in treaties between tribal nations and the federal government, further solidified in federal law, federal court decisions and policy, and it includes the protection of the sovereignty of each tribal government.[40] All federal agencies are required to fulfill this trust responsibility. However, the federal government does not fully honor this trust responsibility as tribes continue to have limited tribal criminal jurisdiction and tribal law enforcement agencies, healthcare systems and justice systems remain chronically underfunded.

In its 2018 report, the US Commission on Civil Rights found federal funding for tribal programs to be “grossly inadequate to meet the most basic needs the federal government is obligated to provide.” The Commission also noted that tribal program budgets remain a “barely perceptible and decreasing percentage of agency budgets.”[41]

Recent US Supreme Court decisions have also embraced the concept of tribal self-determination regarding policing and criminal jurisdiction. In the 2021 *US v. Cooley* Supreme Court ruling, the court reaffirmed the authority of tribal police officers to search and temporarily detain non-Indians suspected of breaking federal or state laws within reservations. Earlier, in the 2004 *US v. Lara* ruling, the Supreme Court held that Congress can “recognize and affirm” an inherent tribal power over criminal matters within Indian country and acknowledged the existence of tribal sovereignty but left the logistical matters up to Congress.[43]

CHAPTER 3: THE JURISDICTIONAL MAZE



“When Congress and the Administration ask why the crime rate is so high in Indian country, they need look no further than the archaic system in place, in which Federal and State authority displaces Tribal authority and often makes Tribal law enforcement meaningless... The Commission has concluded that criminal jurisdiction in Indian country is an indefensible morass of complex, conflicting, and illogical commands, layered in over decades via congressional policies and court decisions and without the consent of Tribal nations.”

Indian Law and Order Commission, A Roadmap for Making Native America Safer: Report to the President & Congress of the United States, November 2013

Complicated jurisdictional issues can significantly delay the process of investigating and prosecuting crimes of sexual violence. Three main factors determine where jurisdictional authority lies when prosecuting these crimes: whether the victim is recognized as an Indian under federal law; whether the accused is recognized as an Indian under federal law; and whether the alleged offense took place in Indian country. These factors determine whether a crime should be investigated by tribal, federal or state police; whether it should be prosecuted by a tribal prosecutor, a state prosecutor (District Attorney) or a federal prosecutor (US Attorney); and whether it should be tried at the tribal, state or federal level. Lastly, this determination dictates the body of law to be applied to the case: tribal, state and/or federal.

Congress has produced centuries of contradictory laws and policies that are in dire need of complete reform. The USA has continually failed to respect federal policies on tribal self-governance and consequently failed to meet its federal trust responsibility.[45] Solutions based on minor legislative amendments with complex caveats do not fix the drastic rates of violence against American Indian and Alaska Native (AI/AN) women in Indian country. Instead of untangling the jurisdictional maze that federal Indian law has created, the USA has only incrementally chipped away at this issue. Piecemeal legislation, even with good intentions, cannot begin to protect AI/AN women from violence until the jurisdictional complexities within Indian country are resolved.

CONGRESS HAS PRODUCED CENTURIES OF CONTRADICTORY LAWS AND POLICIES THAT ARE IN DIRE NEED OF COMPLETE REFORM

LEGAL BACKGROUND AND GOVERNMENT INITIATIVES SINCE 2007

There are approximately 400 tribal justice systems recognized by the federal government across the USA.[46] However, crime involving violence against AI/AN women can fall within the jurisdiction of tribal, state and/or federal courts depending on several factors, creating a complex jurisdictional maze.[47]

"I had a case where a woman called the police because her partner was beating her up and assaulting her, and as an advocate I was called along. When we got outside the door, all the various agencies were standing outside arguing about whose jurisdiction it wasn't. They didn't even want to take her in for a rape kit because it was her boyfriend. What? Because it's his right? And that was their attitude. We did get her a rape kit, but she didn't want to pursue the case, and I don't blame her."

Interview with Juskwa Burnett, Advocacy for Tribal Families, March 2021

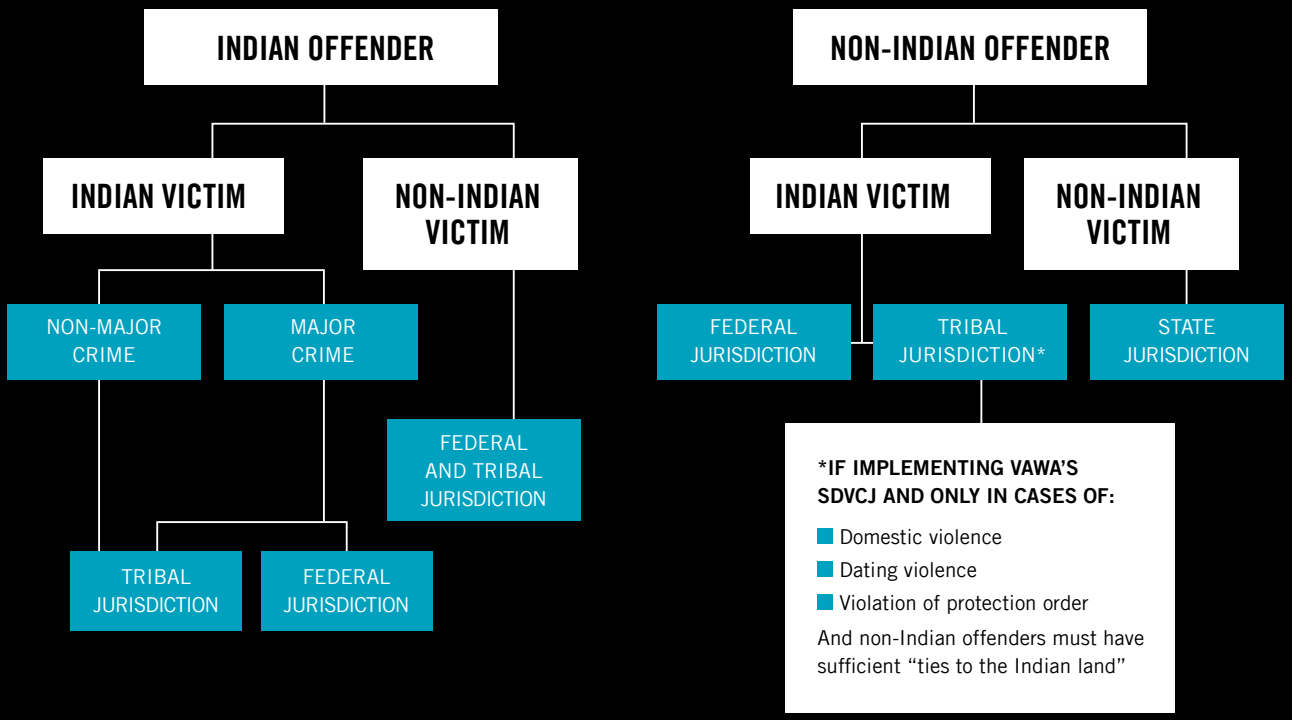
As with most courts, tribal courts initially determine whether the crime occurred in the tribe's territory before confirming that they have jurisdiction. However, even if the crime scene is on tribal land, tribal courts must then decipher US statutory requirements to ensure that this jurisdiction is not limited by federal law. In most cases, that requires determining the tribal citizenship of the defendant and victim. For tribes implementing Special Domestic Violence Criminal Jurisdiction (SDVCJ), the tribe must also examine the relationship between the victim and defendant as well as the nature of the crime committed. Further, tribal, state and federal jurisdiction often overlap, resulting in confusion and uncertainty. The more complex and confusing a case becomes, the more likely it is that no authority intervenes, leaving survivors without legal protection or redress and creating impunity for perpetrators of sexual violence.

"AMERICAN INDIAN AND ALASKA NATIVE WOMEN ARE DENIED MEANINGFUL ACCESS TO JUSTICE AND ARE LESS PROTECTED FROM VIOLENCE THAN OTHER WOMEN IN THE UNITED STATES JUST BECAUSE THEY ARE INDIGENOUS AND ARE ASSAULTED IN INDIAN COUNTRY OR ON ALASKA NATIVE LANDS."

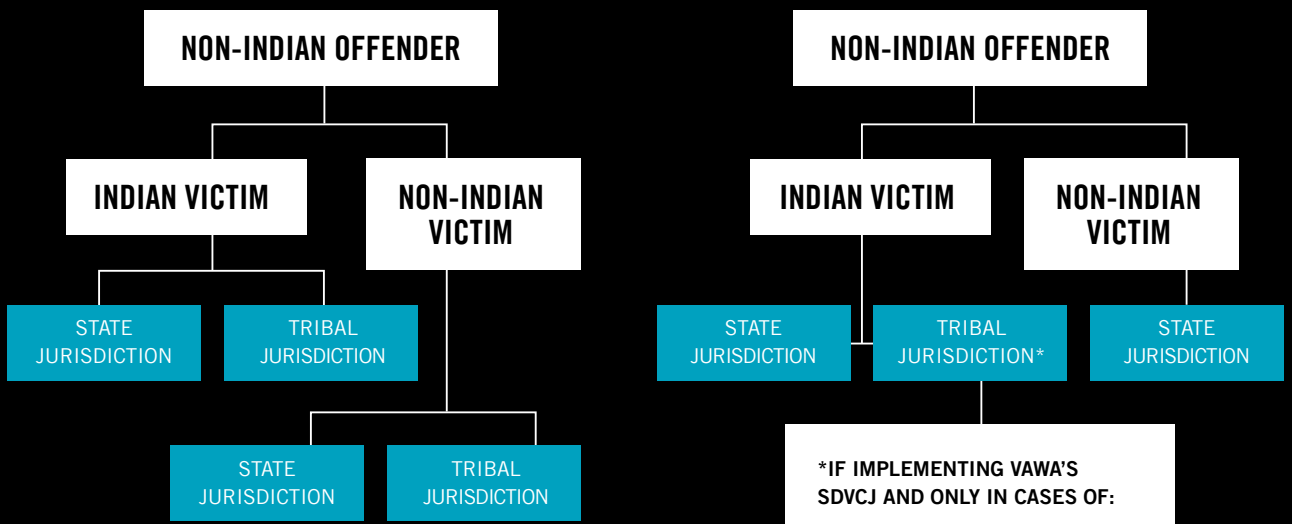
Jana L. Walker, Senior Attorney, Indian Law Resource Center[48]

The below figures display the complexity of the determination of jurisdiction, but only after a determination of whether the alleged offense took place in Indian country is made:

NON-PUBLIC LAW 83-280 STATES



PUBLIC LAW 83-280 STATES



*Starting October 2022, this determination will change with the implementation of "special Tribal criminal jurisdiction" under VAWA 2022. See Violence Against Women Act section on page 42.

“Who can respond to what crime? Tribal communities are a checkerboard with our state communities – in some places you can run across the street and be in a different jurisdiction.”

Interview with Krista Heeren-Graber, Executive Director, South Dakota Network Against Family Violence and Sexual Assault, May 2021

With dual jurisdiction, there is a constant need for interagency cooperation; however, the Department of Justice has itself admitted to lacking a “coordinated approach” to overseeing crime within Indian country.[49] Additionally, a series of federal laws and US Supreme Court decisions, detailed below, restrict tribal jurisdiction over crimes committed on tribal land, undermining tribal authority by requiring federal authority to address serious crimes.[50]

- **The Major Crimes Act:**
  The Major Crimes Act (1885) granted federal authorities jurisdiction over certain serious crimes, including rape and murder, committed in Indian country. There is a widespread misconception that under the Act only federal officials have the authority to prosecute major crimes. In fact, tribal authorities retain concurrent jurisdiction over Indigenous perpetrators, although their sentencing authority has been limited under the Indian Civil rights Act since 1968 (see below). Although the Act did not technically bar tribal courts from prosecuting offenses within Indian country, the sentencing limitations effectively made these major crimes misdemeanors. It also added several considerations that ultimately complicated the process and sparked confusion among the federal and tribal prosecutors. The impact of the Act in practice is that victims of major crimes in Indian country are largely reliant on the federal government for justice.

- **Public Law 280:**
  Public Law 280 (1953) transferred federal criminal jurisdiction over all offenses involving American Indians (and later Alaska Natives) in Indian country to state governments in some states. The US Congress gave these states – California, Minnesota, Nebraska, Oregon, Wisconsin and Alaska upon statehood – extensive criminal and civil jurisdiction over Indian country. Public Law 280 also permitted certain additional states – Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah and Washington – to acquire jurisdiction if they wished and, while a number of states originally opted to do so, most have retroceded jurisdiction back to the federal government. Where Public Law 280 is applied, both tribal and state authorities have concurrent jurisdiction over many crimes committed on tribal land by AI/AN individuals. Public Law 280 is seen by many Indigenous peoples as an affront to tribal sovereignty, not least because states have the option to assume and to relinquish jurisdiction, a power not extended to the tribes affected.

  In addition to disregarding tribal sovereignty, Congress has failed to provide additional funds to Public Law 280 states that assumed jurisdiction. These actions have led to a situation where the US federal government devolved its jurisdictional responsibilities onto tribal and state authorities who lack sufficient funds to adequately assume these new obligations.[51] In 2013, the Indian Law and Order Commission (a federal commission charged with conducting a comprehensive study of law enforcement and criminal justice in tribal communities) found jurisdictional problems to be even more prevalent where tribes are subject to Public Law 280. The Commission also found that

some state and local governments failed to provide public safety services (such as policing and emergency response) and actively prevented tribal nations from advancing their own capabilities.[52]

- **The Indian Civil Rights Act:**
  The Indian Civil Rights Act (1968) limits the penalty that can be imposed by tribal courts for any offense – including murder and rape — to a maximum of one year's imprisonment and a fine of US$5,000. The Tribal Law and Order Act of 2010 amended the Indian Civil Rights Act to allow for a sentence of up to three years' imprisonment and a US$15,000 fine if the tribe meets certain requirements related to due process.[53] As a result of this limitation on their custodial sentencing powers, some tribal courts are less likely to prosecute serious crimes, such as sexual violence, leaving victims to seek recourse through federal or state prosecution, both of which generally lack the resources or motivation to try such crimes in Indian country.

- ***Oliphant v. Suquamish*:**
  In 1978, the US Supreme Court ruled that tribal courts could not exercise criminal jurisdiction over "non-Indian" US citizens. This ruling in the case of *Oliphant v. Suquamish* effectively strips tribal authorities of the power to prosecute crimes of sexual violence committed by non-Native perpetrators on tribal land. It also denies victims due process and the equal protection of the law. Jurisdictional distinctions based on the tribal citizenship of the accused, such as the jurisdictional limitation here, have the effect in many cases of depriving victims of access to justice, in violation of international law and US constitutional guarantees.

  This ruling is particularly concerning given the number of reported crimes of sexual violence against Native survivors involving non-Native perpetrators. According to a National Institute of Justice survey, of the AI/AN women who have experienced sexual violence in their lifetime, 96% have experienced sexual violence by at least one non-Native perpetrator.[54] State and federal authorities often do not prosecute those cases of sexual violence that arise on tribal land and fall within their exclusive jurisdiction.

- ***McGirt v. Oklahoma*:**
  In McGirt v. Oklahoma (2020), the Supreme Court held that the Muscogee Reservation in eastern Oklahoma remains in existence today. The ruling means that prosecution of crimes by Native Americans on these lands falls under the jurisdiction of the tribal courts and federal judiciary under the Major Crimes Act, rather than Oklahoma's courts, and that most crimes of sexual violence by non-Indian perpetrators against AI/AN women spanning reservation land will be left to the federal government's exclusive jurisdiction.[55] The ruling was seen as a victory for tribal nations in eastern Oklahoma, but with *Oliphant v. Suquamish* still in place, tribes are still restricted jurisdictionally.

Since the publication of Amnesty International's *Maze of Injustice* report in 2007, the US federal government has slightly expanded its recognition of criminal jurisdiction in limited circumstances to tribes that meet specific criteria. The two major legislative vehicles that have been implemented that address this affirmation of tribal authority are the Tribal Law and Order Act (TLOA) of 2010 and the Violence Against Women Reauthorization Act of 2013 (VAWA 2013). The limited data provided by the US government shows that the victimization rates against AI/AN women have not significantly changed despite these efforts.[56] In the weeks before this report went to press, the next reauthorization of the Violence Against Women Act (VAWA 2022) was signed into law after the legislation had been allowed to lapse in 2018. VAWA 2022 has yet to be implemented.

TRIBAL LAW AND ORDER ACT

"[W]hen Indian tribes prosecute major crimes, such as murder, but are only allowed to sentence the defendant to one year in prison… tribal members lose faith in criminal justice at the tribal as well as the federal level. As a result, victims stop reporting crimes, refuse to participate in the criminal justice system, and opt out of community policing or local control altogether. This, in turn, means that more perpetrators commit repeat offenses that are never reported, thus starting the cycle over again."

Angela Riley, Director, Native Nations Law and Policy Center, UCLA [57]

The Tribal Law and Order Act (TLOA) of 2010 contains several provisions meant to improve criminal justice in Indian country and ultimately protect AI/AN women from sexual violence. Some of TLOA's essential contributions include the enhancement of tribal sentencing authority, a transparency requirement from the Department of Justice (DOJ) regarding declination rates (the rate at which federal prosecutors decline to take up a case), and the creation of the Indian Law and Order Commission (ILOC), whose report was presented to Congress in November 2013.

TLOA's amendment to the Indian Civil Rights Act allows tribal nations to impose sentences of up to three years' imprisonment and/or a US $15,000 fine per offense, or a maximum sentence of nine years imprisonment per criminal proceeding.[58] The implementation of TLOA is financially burdensome for many tribes, who are not adequately resourced to do so.

"The majority of tribes are very poor and don't have the resources to support the implementation of the laws. They don't have enough law enforcement. They don't have enough jail space. They don't have enough court personnel. They don't have enough probation offices. They may not even have a probation officer. Tribes need resources to make this happen."

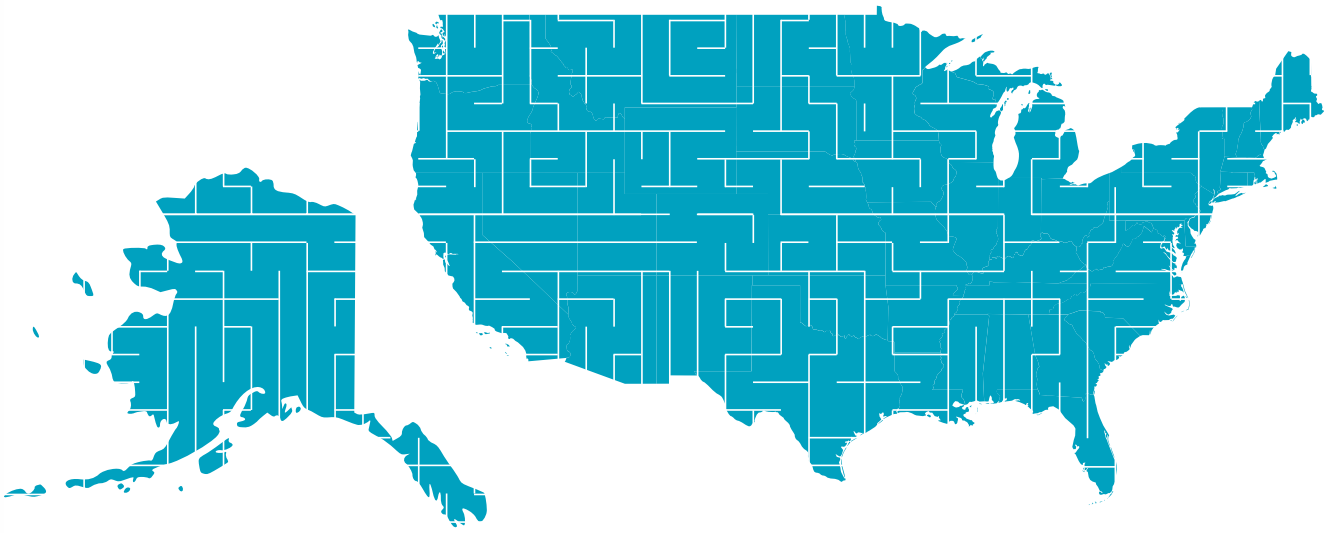
Interview with Bonnie Clairmont, Victim Advocacy Specialist, Tribal Law and Policy Institute, April 2021

Additionally, TLOA placed several mandates on the DOJ in the areas of legal assistance, investigative training and data collection to enhance law enforcement within Indian country. For example, the DOJ is required to release its own data on declination rates. However, the DOJ Office of Inspector General found in 2017 that the DOJ and its components: "still lack a coordinated approach to overseeing the assistance it provides in Indian country… has not prioritized [legal and investigative] assistance to Indian country at the level consistent with its public statements or annual reports to Congress…[and] needs to do more to ensure it provides all of the training TLOA requires" and continues to use crime data that is "unreliable and incomplete."[59]

“IT IS THE DEPARTMENT’S POSITION THAT PRIORITIZATION OF INITIATIVES IN INDIAN COUNTRY, INCLUDING THE EFFORT TO BUILD CAPACITY IN TRIBAL COURTS, WILL LEAD TO ENHANCED PUBLIC SAFETY FOR NATIVE AMERICANS.”

Department of Justice, Indian Country Investigations and Prosecutions, 2018

Despite the promise to prioritize crime within Indian country, DOJ funding and resources dedicated to Indian country have decreased since TLOA’s implementation. Since 2013, both total funding for the US Attorney’s Office resources in Indian country and the number of attorneys responsible for Indian country prosecutions decreased by 40%.[60]



VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2013 AND SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION

“THE RESTORATION OF TRIBAL JURISDICTION HAS SAVED LIVES.”

Interview with Mary Kathryn Nagle, Partner at Pipestem and Nagle, March 2021

The Violence Against Women Act (VAWA), originally passed by Congress in 1994, is a collection of funding programs, initiatives and actions designed to improve criminal justice and community-based responses to violence against women in the USA; it must be reauthorized every five years. The most recent reauthorization of VAWA was signed into law 16 March 2022, but at publication of this report, it has not yet been implemented. Detailed below is the current implementation of VAWA from 2013. In the “Impact and Remaining Challenges” section, we note where the 2022 reauthorization may address some of the deficits in VAWA and where challenges will remain.

VAWA 2013 affirms the inherent sovereign authority of tribal courts to exercise Special Domestic Violence Criminal Jurisdiction (SDVCJ) over cases involving non-Indian perpetrators who commit acts of domestic violence or dating violence in Indian country. It also provides an expansion of grants to tribal governments and coalitions to enhance best practices for responding to crimes against AI/AN women.[61]

To comply with VAWA 2013, tribes must, among other things, provide many of the same rights required for enhanced sentencing under TLOA. This often requires amending tribal laws and, in some cases, constitutions. It also imposes a requirement that non-Indians must be included in tribal jury pools, the reverse of which is not required when Native defendants are prosecuted in a US federal court.[62]

Despite an extensive list of requirements, the scope of the SDVCJ is limited. It applies only in cases of protection order violations, domestic violence and dating violence (violence, including sexual violence, committed by someone in an intimate or romantic partnership or relationship).[63] It does not apply to other crimes of violence against women, including sexual assault by a stranger or acquaintance, stalking, or sex trafficking. Further, SDVCJ does not currently cover crimes against children, drug and alcohol crimes, or crimes that occur within the criminal justice process. Thus, if a defendant has a combination of charges that do not all fall within the scope of SDVCJ, the tribal court is unable to prosecute those crimes that co-occur with domestic violence, which “interferes with the tribe’s ability to prosecute their SDVCJ cases effectively [and] leaves them unable to hold offenders accountable for criminal conduct not covered by SDVCJ.”[64] Additionally, the defendant must have “ties to the Indian tribe” by either residence or employment in the Indian country of the participating tribe or through an intimate relationship with a member of the tribe, thus excluding sexual assault by a stranger.[65]

“Not including all crimes of sexual violence is a significant shortcoming of [2013 reauthorization] VAWA legislation. It makes it extremely difficult for Native victims to receive justice for some of the most horrific acts that occur in Indian country.”

Interview with Angela Riley, Director, Native Nations Law and Policy Center, UCLA, May 2021

Additionally, VAWA 2013 excluded Native survivors in Maine and all but one tribe in Alaska.[66]

IMPACT AND REMAINING CHALLENGES

With TLOA and VAWA 2013, certain tribal governments have been able to restore limited criminal jurisdiction and punishment authority in specific circumstances and have seen an improvement in safety and security because of it.[67] However, TLOA’s limited sentencing enhancements and the restricted scope of VAWA 2013 have undermined the legislation’s potential to alleviate the sexual violence epidemic in Indian country. While tribes that have enacted VAWA 2013 have been able to prosecute repeat offenders that threatened the safety of tribal communities, multiple barriers remain for tribes to be able to adequately protect Indigenous women from sexual violence.

“THE INABILITY OF TRIBES TO PROSECUTE SEXUAL ASSAULTS COMMITTED BY NON-INTIMATE PARTNERS WHO ARE NOT INDIAN LEAVES TRIBES UNABLE TO KEEP THEIR COMMUNITIES SAFE.”

Letter to Amnesty International, US Department of Justice, 17 June 2021

Both VAWA 2013 and TLOA allow for only a limited restoration of jurisdiction for tribes, and there are numerous requirements imposed on tribes to be eligible for such restored jurisdiction. The 2022 reauthorization of VAWA included a partial fix for one the main barriers facing tribes in preventing and responding to sexual violence against Indigenous women: the inability of tribes to prosecute non-Indian perpetrators of such violence. VAWA 2022 will allow for tribes participating in “special Tribal criminal jurisdiction” to prosecute non-Indian offenders for sexual violence; this also applies to tribes in Maine and a pilot project for a limited number of tribal communities in Alaska. This is a critical step forward in ending impunity for perpetrators of sexual violence against Indigenous women.

Despite the progress VAWA 2022 signifies in restored jurisdiction, major barriers remain, including that many tribes lack adequate funding to meet the requirements of TLOA and VAWA.

“So many of these communities have so little; there’s no real capacity to implement laws like that [TLOA/VAWA 2013]. Small tribes don’t have the capacity to meet those regulatory requirements. Without resources, without helping to build capacity and without sustained, noncompetitive funding, it’s going to be hard to make any real sustainable change.”

Interview with Michelle Demmert, former Chief Justice for the Central Council Tlingit and Haida Indian Tribes of Alaska, September 2021

Despite the option for increased sentencing authority, few tribes have opted into TLOA. As of October of 2021, only 16 tribes were exercising TLOA’s enhanced sentencing authority.[68] Amnesty International heard from several tribal judges and attorneys that TLOA requirements were too financially burdensome. A 2016 law review article noted of TLOA that “the poorest, most vulnerable tribes will largely go unprotected by these statutory changes.”[69] It is an exhaustive and expensive process that, for some, may not be worth the limited increase in sentencing authority from one to three years.

“TLOA PASSED AS PART OF AN ADMINISTRATION THAT WAS REALLY OPEN TO HELPING TRIBAL COMMUNITIES BECOME MORE ABLE TO HANDLE THE NEEDS OF THEIR COMMUNITY. WE WANT TO SOLVE THE PROBLEMS OURSELVES, BUT WE HAVE TO HAVE THE RESOURCES THAT HAVE NOT BEEN MADE AVAILABLE TO DO THAT. YOU CANNOT EXPECT US TO SOLVE THE PROBLEM WITHOUT HAVING THE RESOURCES.”

Interview with Tami Truett Jerue, Executive Director, Alaska Native Women’s Resource Center, March 2021

Similarly, the cost of SDVCJ implementation under VAWA 2013 is also burdensome, and the 2022 reauthorization of VAWA does not alleviate this burden. The funding has a fixed cap regardless of the size of the tribe, and after the initial three-year grant, tribes must re-apply for funding every two years—and it is not guaranteed.[70] Thus, a tribal government can invest in the implementation of the SDVCJ by amending tribal codes and hiring court staff, judges and prosecutors, but it has no guarantee of future funding. Without a reliable source of funding, most tribes have been unwilling to take the risk.[71]

"When Congress identifies a problem, it tells state and local governments to cooperate with tribes without explaining how, and it funnels money into competitive grant programs which is not the appropriate way to run a government. You don't run governments through grants."

Interview with Matthew Fletcher, Professor of Law and Director of the Indigenous Law and Policy Center, Michigan State University, March 2021

Additionally, the grant-making process itself is complicated and confusing and many tribal governments do not have grant writers or the staff to navigate the complex federal process. Under VAWA 2013, the federal government must consult annually with tribal governments on how best to assist them with this process and in combating crimes of sexual violence.[72] These consultations have generally been conducted by the Office on Violence Against Women (OVW). Tribal advocates Amnesty International interviewed raised concerns that OVW reporting during this annual consultation documented tribes' concerns but did not provide coordinated analysis that would help direct tribes to meaningful solutions.[73] Some Native advocates have proposed moving to block funding for tribal nations; this would allow the federal government to provide a set amount of money to tribes without requiring complex proposal processes and could allow more tribal control over which programs are implemented and funded.[74]

"The grant process is unbelievably confusing. I've never seen anyone in 21 years of working with state courts have to jump through all these hoops [applied to tribal governments]."

Interview with Patti McClure, Domestic Violence Victim Advocate, Nottawaseppi Huron Band of the Potawatomi Tribes, April 2021

Following the 2013 VAWA reauthorization, a pilot project commenced in 2014 including five tribes that were certified to implement the SDVCJ. Even with the extensive restrictions imposed on tribes and minimal funding, data from the pilot project showed improvement in criminal justice within Indian country for the selected tribes.[75] These tribes were able to effectively prosecute defendants who had committed domestic violence crimes for years with impunity.[76]

"The VAWA (2013) pilot project data shows us that tribal courts are not only capable of handling cases brought against non-Native defendants; they are incredibly successful in doing so."

Interview with Angela Riley, Director, Native Nations Law and Policy Center, UCLA, May 2021

Data collected on 25 SDVCJ implementing tribes as of June 2019 showed arrests of 237 non-Native abusers, which led to 95 convictions.[77]

"Many of the implementing tribes have reported that the decision to implement SDVCJ has led to improved communication with the local U.S. Attorney's office [USAO], leading to greater accountability in non-SDVCJ cases. [...] Some of the SDVCJ exercising tribes also have Tribal SAUSAs [Special Assistant U.S. Attorneys], which has resulted in improved communication and coordination as well."

Letter to Amnesty International, US Department of Justice, 17 June 2021.

There was also a sharp increase in reports of domestic violence for tribes implementing the SDVCJ, which may suggest an increase in trust in the tribal criminal justice system.[78] A 2019 study following the Tulalip Tribe's implementation (in Washington state) of the SDVCJ showed increased tribal leadership, protection from domestic violence, healing and accountability.[79]

"As tribal governmental powers have increased and tribes have entered contracts to perform more federal functions, tribal governments have proven more institutionally competent than the federal government in serving Indian people."

Kevin Washburn, Professor of Law, University of Iowa College of Law[80]

Despite the success of the program, major barriers such as the immense cost of implementation mean that as of February of 2021, only 27 of the 574 federally recognized tribes had implemented this special jurisdiction.[81]

"DOJ supports expansion of SDVCJ to include additional crimes, which would increase offender accountability and enhance tribal sovereignty, both of which are critical to responding to violence against women in tribal communities. The inability of tribes to prosecute crimes related to the SDVCJ crimes, such as when a child is a victim or when law enforcement officers or tribal employees are assaulted as a result of responding to the incident, leaves Tribes unable to fully hold offenders accountable."

Letter to Amnesty International, US Department of Justice, 17 June 2021

It is noteworthy that there was US Congressional opposition to the VAWA 2013 tribal provisions and that the reauthorization of VAWA was delayed for over two years. Arguments against VAWA 2013 were often explicitly based on racist assumptions about the competency of tribal courts, despite the fact that "there's no reason to believe that tribal courts are any less fair or competent than their federal and state counterparts."[82] VAWA was then allowed to lapse in 2018 until its most recent reauthorization in 2022, stalled in part by similarly unsubstantiated arguments rooted in the country's colonial history.

The USA has created a complex interrelation between tribal, state and federal jurisdictions that undermines equality before the law and allows perpetrators to evade justice. Non-Native perpetrators often know of these jurisdictional complexities and openly flaunt the law without fear of criminal prosecution. In one example, a non-Native man reported himself to tribal police after beating his Native girlfriend and taunted tribal authorities, stating "[you] can't do anything to me anyway."[83]

“THEY [NON-NATIVES] COME ON HERE AND THEY LOOK FOR US AND THEY TAKE US OFF THE RESERVATION, WHETHER THEIR INTENT IS TO TRAFFIC, OR SEXUALLY ASSAULT, OR DITCH THE BODY – THAT WHOLE SITUATION HAS REALLY ESCALATED.”

Interview with Charon Asetoyer, Executive Director, Native American Women’s Health Education Resource Center, February 2021

Regardless of the tribal citizenship of the perpetrator, tribal courts can only sentence them to a maximum of three years’ imprisonment for serious crimes of sexual violence, compared to the average maximum prison sentence for sexual assault handed down by state courts (eight years) or federal courts (14 years).[84]

Tribal nations are sovereign nation states, and they have the authority under US law to establish their own tribal justice systems. Many tribes are unable to implement these justice systems because of poor funding and lack of the infrastructure needed to provide justice to AI/AN survivors of sexual assault. The jurisdictional complexities that exist within the USA further impede tribes’ ability to address sexual violence and the USA has repeatedly failed to untangle the maze that survivors of sexual violence must navigate.

ALASKA JURISDICTION

Alaska is excluded from most federal policymaking focused on ending violence against Native women. There are 229 federally recognized tribes in Alaska, roughly 40% of all federally recognized tribes in the USA.[85] Alaska Natives make up less than 16% of the population of Alaska, but Alaska Native women experience the highest sexual violence rates of any gender or racial group and made up 42% of all reported victims in 2017.[86] The SDVCJ provision of VAWA (2013) is limited to just one Alaskan tribe and TLOA explicitly excludes Alaskan tribes from the limited jurisdictional restoration it introduces. Given the drastic rates of violence against Alaska Native women, the ILOC described this provision in VAWA (2013) as "add[ing] insult to injury."[87]

"I remember when VAWA first passed in 2013, we were at a conference out in the lower 48 [states], and everyone was really excited, but I was really confused. Folks in the lower 48 were celebrating but we weren't included."

Interview with Lenora "Lynn" Hootch, Executive Director, Yup'ik Women's Coalition, May 2021

Upon statehood, Alaska was included as one of the original Public Law 280 states, giving the state (in place of federal authorities) concurrent criminal jurisdiction with tribes to prosecute crimes committed by and against Alaska Natives on tribal land throughout much of Alaska. However, Alaska took the position that statehood extinguished the Alaska Native villages' criminal law enforcement authority and reportedly threatened village councils with criminal prosecution "should they attempt to enforce their village laws."[88]

The situation in Alaska is further complicated because of issues around how tribal lands are designated. A combination of federal

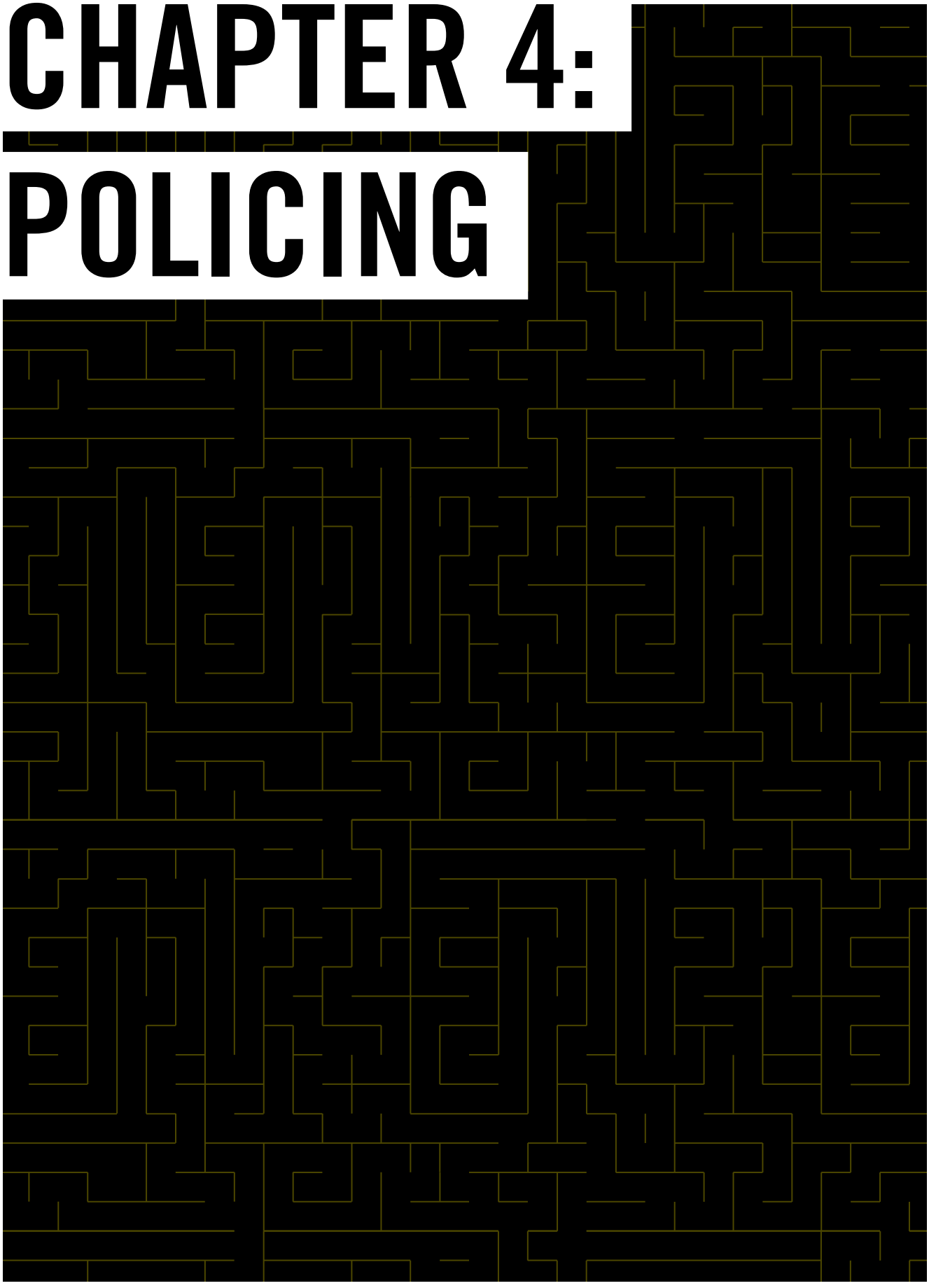
legislation along with state and US Supreme Court decisions about the definition and status of tribal lands has resulted in considerable confusion and debate over the right of Alaska Native peoples to maintain tribal police and court systems. While the State of Alaska recognizes that tribal authorities have some concurrent jurisdiction in civil cases, it has been reluctant to acknowledge that tribes have criminal jurisdiction. The rationale given for this position is that tribes have no land base that would provide the physical limits of criminal jurisdiction. This debate arises from the unique way in which Indigenous land claims in Alaska were settled.

Under the terms of the Alaska Native Claims Settlement Act (ANCSA),[89] passed by the US Congress in 1971, Indigenous claims to much of Alaska were extinguished in exchange for Indigenous title to approximately 11% of the land in Alaska as well as financial compensation. ANCSA land is not held in trust or under federal protection (ANCSA revoked all but one of the existing Native reserves).[90] It is held by Alaska Native corporations created by the ANCSA. In 1998, the US Supreme Court ruled in *Alaska v. Native Village of Venetie Tribal Government (Venetie)* that ANCSA lands were not Indian country. However, it is important to note that the Court also found that ANCSA did not intend to terminate tribal sovereignty but that it left Alaska tribes "sovereigns without territorial reach."[91]

In addition to the jurisdictional confusion, ANCSA effectively means that law and policy applied to Indian country does not apply to Alaska, save for one tribe, leaving Alaska Native communities excluded from most federal policymaking focused on ending violence against Native women. The 2022 reauthorization of VAWA addresses some of these jurisdictional issues in a limited way by including a pilot project for up to five Alaska Native communities per year to exercise special Tribal criminal jurisdiction.

To address the full crisis of jurisdiction caused by ANCSA, the ILOC recommended in 2013 that the US Congress overturn the Venetie decision and amend ANCSA to allow transferred lands to be put into trust and included within the definition of Indian country; to date, no action has been taken.[92]

CHAPTER 4: POLICING



“Someone goes missing, you go to the BIA, but they say ‘oh she was living down in town, you have to go to the city police’. So you go to the city police and they say ‘oh she is actually living out at her cousin’s in another county, you have to go there.’ And you go there, but she’s tribally enrolled, and the town says ‘oh she’s tribally enrolled, that’s a tribe issue.’ So now you have three half-finished reports on a missing girl, when every minute counts.”

Interview with Juskwa Burnett, Advocacy for Tribal Families, March 2021

A number of factors have a significant impact on police responses to sexual violence against American Indian and Alaska Native (AI/AN) women. These include a lack of resources for policing on tribal lands, poor interagency coordination and inappropriate investigative responses to crimes due to a lack of training for officials at the federal, state and tribal levels. These issues were discussed in the original *Maze of Injustice* report; 15 years later these problems persist. Tribal law enforcement agencies in many areas still do not have adequate training to be effective and there are jurisdictional and systemic policing issues that impede AI/AN survivors of sexual violence from obtaining justice.

Many tribal law enforcement agencies, like other services for Indigenous peoples, continue to be at the mercy of annual or other short-term funding. This has a negative impact on the provision of essential law enforcement services and on long-term strategic planning to address basic needs. A 2013 report found that with Bureau of Indians Affairs (BIA) and tribal police combined, the ratio for Indian country law enforcement is approximately 1.91 officers per 1,000 residents, whereas the national average is 3.5 officers per 1,000 residents.[93] A lack of adequate funding means that many Indigenous communities are without the law enforcement presence they may require. Because of these deficits, law enforcement and public safety departments in Indigenous communities often do not have the capacity and flexibility needed to implement the strategies that will ultimately protect AI/AN women from violence.

GOVERNMENT RESPONSE AND INITIATIVES SINCE 2007

The Tribal Law and Order Act (TLOA) requires improved federal data collection on crime in Indian country and better coordination and sharing with tribal authorities. Unfortunately, some federal agencies have yet to adjust to these requirements. The Indian Law and Order Commission (ILOC) "repeatedly received detailed reports that the FBI [Federal Bureau of Investigation], OJS [Office of Justice Services, within the BIA], and US Attorney's Offices are either reluctant to provide federal criminal investigative information to appropriately certified tribal prosecutors or refuse to do so entirely."[94] FBI cooperation with tribal prosecutors' offices is often non-existent.

The Violence Against Women Act (2005, 2013) requires improved tribal access to crime data, but programs created to help with tribal access to crime information face their own challenges. The Tribal Access Program for National Crime Information, launched in 2015, is meant to increase cooperation by providing federally recognized tribes access to national crime information databases for both civil and criminal purposes. However, the program lacks permanent funding.

Also, under TLOA, the US Drug Enforcement Administration (DEA) and FBI must coordinate with the BIA to establish new training programs to ensure that BIA and tribal law enforcement have access to training. Neither the FBI nor DEA consistently track, administer or report on this training. This is also true for federal agents working in Indian country. DEA and FBI agents receive little to no training in the cultural, jurisdictional or geographical complexities within Indian country.[96]

Instead of coordinating with each other, the BIA and Department of Justice (DOJ) support tribal initiatives in a fragmented and ineffective manner.[97] In other instances, the BIA and DOJ inadvertently duplicate training or support for tribes which ultimately results in a waste of funds and time.[98]

IMPACT AND REMAINING CHALLENGES

INTERAGENCY COOPERATION

According to the ILOC, "great promise has been shown in those States where intergovernmental recognition of arrest authority occurs… and wherever intergovernmental cooperation has become the rule, not the exception, that arrests get made, interdiction of crime occurs, and confidence in public safety improves."[99] But the level of cooperation varies and survivors of sexual violence are frequently passed on to different agencies. Amnesty International heard multiple reports of a continuing attitude of "passing the buck" between law enforcement agencies that meant victims did not receive timely or adequate support and that cases were not fully investigated, adding to victims' lack of confidence that their reports would be taken seriously or addressed.

A 2011 Government Accountability Office (GAO) report stated that six of the 12 tribes it studied indicated: "[W]hen criminal matters are declined, federal entities generally do not share evidence and other pertinent information that will allow the tribe to build its case for prosecution in tribal court. This can be especially challenging for prosecuting offenses such as sexual assault where rape kits cannot be replicated should the tribe conduct its own investigation following [the US Attorney's Office's declination]."[100]

Many tribal nations do not have formal agreements with federal law enforcement entities regarding who is responsible for investigating crimes involving sexual violence.[101] When law enforcement reporting structures are not clear, federal and tribal law enforcement responders

may not properly respond to the scene, investigate the crime or share information with their law enforcement counterparts.[102]

“Control and accountability directed by local Tribes is critical for improving public safety.”

Indian Law and Order Commission, A Roadmap for Making Native America Safer: Report to the President & Congress of the United States, November 2013

Cross-deputization agreements that allow tribal officers to enforce state or federal law or that allow tribal or state officers to cross jurisdictional borders are the most common coordination agreements, where such agreements exist. Amnesty International found that for some communities, cross-deputization has built stronger working relationships between tribal and state law enforcement and some communities welcome these arrangements, particularly in areas where tribal law enforcement is sparse or lacks adequate training. However, cross-deputization agreements may bring heavily armed and militarized police[103] and western-style policing does not include culturally appropriate practices that encourage healing for both the victims and perpetrators of crimes, which can be a priority for many tribal communities.

“WHEN PROPERLY RESOURCED, TRIBAL SYSTEMS OF LAW ENFORCEMENT AND CRIMINAL JUSTICE WORK THE BEST.”

Interview with Carole Goldberg, Professor of Law, UCLA, March 2021

Additionally, severe mistrust between tribes and non-tribal law enforcement exists in many communities, often a result of racism by non-Indigenous local law enforcement, which makes these agreements all but impossible in some communities.

“From the perspective of many tribal nations, policing in the United States has always been problematic… Federal policy created a system that served the interest of the U.S. government and non-tribal citizens and failed to promote the ability of Indian nations to design and exert meaningful control over their own policing institutions… Militarized policing of Indian nations includes a long history of brutality, rape, and killing of Native people.”

National Indigenous Women’s Resource Center, Restoration of Native Sovereignty and Safety for Native Women Magazine, February 2021[104]

Law enforcement officers working in tribal communities must work within a human rights framework and militarized police forces entrenched in historical racism that lack culturally sensitive protocols cannot work within such a framework.

LAW ENFORCEMENT IN ALASKA

“The majority of [Alaska] villages don’t have law enforcement or if they do, they don’t get adequate training”

Interview with Lenora "Lynn" Hootch, Executive Director, Yup'ik Women's Coalition, May 2021

The State of Alaska is the largest state in the USA, covering over 586,000 square miles. In rural areas, there is a great disparity between the police protection afforded in villages accessible by road and that afforded in villages that are not. The majority of Alaska’s federally recognized tribes are villages off the road system and are only accessible by plane or boat.[105] At least 75 Native Alaska villages have no law enforcement presence.[106]

“If an Alaska Native girl is murdered in one of these rural villages, the body can sometimes be there for hours or days before any authority arrives, leaving the family so traumatized. Police say they can’t get there because of the weather. But we hear time and time again, if someone kills a moose or other wildlife out of season, somehow despite the resource challenges, officials are there immediately.”

Interview with Michelle Demmert, former Chief Justice for the Central Council Tlingit and Haida Indian Tribes of Alaska, September 2021

For the Alaskan communities that do have law enforcement, there are potentially several forms of personnel. State troopers are charged with enforcing all criminal laws and investigating crimes within urban and rural posts across the state. Law enforcement efforts can rely heavily on air travel to reach isolated villages, which is both costly and at times difficult to coordinate.

There are also village public safety officers, village police officers and tribal police officers, who have basic law enforcement duties throughout rural villages and tribes.[107] A study released in 2018 found that these paraprofessionals "contribute to enhancing the criminal justice response to sexual violence."[108] However, there are still several issues when it comes to maintaining dependable law enforcement in rural areas. For example, village public safety officers may serve multiple communities and alternate between locations. Additionally, while they are paid by Alaska Native Corporations and work under Alaska State Trooper oversight, they are not directly accountable to Alaska Native communities.[109] Village public safety officers, village police officers and tribal police officers also often lack adequate support and can face high burnout rates and funding for positions may be inconsistent or quickly expended. Many tribes lack the resources to support paraprofessional officers and, ultimately, many villages still lack reliable and consistent law enforcement.

"Tribal police officers could be effective but it's one of those programs that hasn't been supported in Alaska, but if BIA was backing it in terms of the training, background checks, support and things like that, the officers could be an effective method of law enforcement of the community. It goes back to the question of capacity and infrastructure."

Interview with Tami Truett Jerue, Executive Director, Alaska Native Women's Resources Center, March 2021

In June of 2019, the then Attorney General, William Barr, declared a law enforcement emergency in rural Alaska under the Emergency Federal Law Enforcement Assistance Program. This program promised to fund 20 officer positions from the Office of Community Oriented Policing Services, along with equipment and training, to Alaska Native grantees.[110] The program includes US$6 million in funding for rural public safety facility projects.[111] Additionally, the Attorney General announced the Rural Alaska Anti-Violence Enforcement Working Group, which was created in July of 2020. The impact of these programs or funding is yet unclear.

“VERY RARELY DO THEY REPORT IT TO THE POLICE BECAUSE OF THE APATHY [THEY EXPERIENCE FROM LAW ENFORCEMENT] AND THE LACK OF JUSTICE.”

Interview with Abigail Echo-Hawk, Urban Indian Health Institute, May 2021

One fundamental challenge for AI/AN survivors of sexual violence in pursuing justice and safety is a widespread lack of trust in the criminal justice system. Across all sectors of society in the USA, just 41% of all violent crimes are reported to the police, along with only 34% of rapes and sexual assaults.[112] The percentage of unreported assaults is likely higher for AI/AN survivors. Advocates point to survivors’ fear of lack of confidentiality, lack of confidence in the justice system and negative experiences with police. AI/AN populations are disproportionately affected by police violence: AI/AN men and women are significantly more likely to be killed by police than their white counterparts.[113]

Of additional concern are reports of discriminatory treatment of survivors who are suspected of drinking alcohol before they were attacked. This is particularly worrying because of the prevalent negative stereotypes that link Indigenous people with excessive drinking. A 2018 study showed that when an Alaska Native survivor of sexual assault is documented with alcohol or drugs in her system, her case is two times less likely to be referred for prosecution by Alaska State Troopers.[114] An Alaska Native advocate reported to the DOJ that in 2016, 60% of the victims of reported sexual assaults in Fairbanks were Native women and were referred to as “frequent flyers” and mocked by police officers who implied they are at fault for the assault because they had been drinking.[115]

“I CANNOT STRESS THAT ENOUGH: IT MAKES A DIFFERENCE ON THE QUALITY AND DEPTH OF AN INVESTIGATION BASED ON THE COLOR OF YOUR SKIN.”

Interview with Charon Asetoyer, Executive Director, Native American Women’s Health Education Resource Center, February 2021

Lack of training in cultural competence can also be an obstacle to officers communicating effectively and appropriately with Indigenous peoples. There is a need for all officers to receive training that enables them to ensure that their responses consider differences between tribes, which may have implications for how police approach and speak to victims, witnesses and suspects.

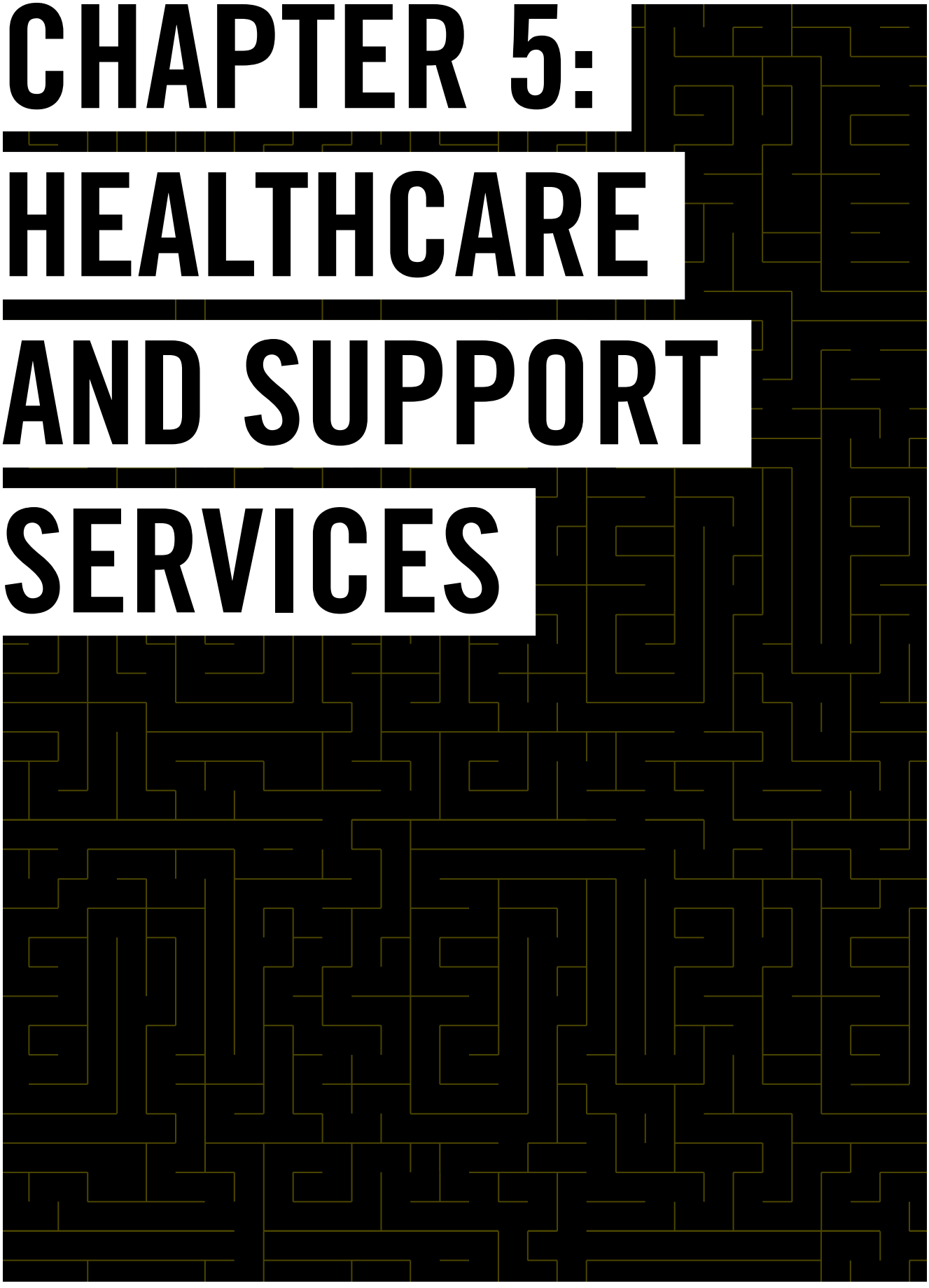
"[A]N UNDERSTANDING OF CULTURAL ASPECTS OF INDIVIDUAL TRIBES AND THE NEED FOR COOPERATION BETWEEN FEDERAL, TRIBAL, AND STATE LAW ENFORCEMENT IS KEY TO ENSURING PUBLIC SAFETY AND THE SUCCESSFUL PROSECUTION OF VIOLATIONS OCCURRING WITHIN INDIAN COUNTRY."

Letter to Amnesty International, US Department of Justice, 17 June 2021

Dysfunctional policing and lack of interagency coordination impede the effective protection of tribal communities. Native women who survive sexual violence continue to face systemic hurdles when they seek justice, including obstacles resulting from jurisdictional challenges, difficulties in the hiring and retention of tribal and state law enforcement and law enforcement officials who do not pursue their cases. Underpinning all these obstacles is the degradation of tribal sovereignty, which has led to ineffective policing in tribal communities as tribes often lack the jurisdiction to effectively protect their citizens. Federal policies that regulate policing on tribal lands reduce tribal control of their own affairs, while also diffusing accountability when issues arise.[116]

Systemic bias on the part of law enforcement officials can have a considerable impact on the fate of sexual assault investigations. One illustrative example is from a case filed by the American Civil Liberties Union against the City of Nome, Alaska, and former law enforcement officials who "displayed a systemic bias against Alaska Native women by failing to investigate hundreds of sexual assaults reported to the Nome Police Department."[117] The lawsuit details how in 2017, an Alaska Native female police dispatcher was drugged and raped while unconscious in her home. She submitted a written report and was told for months that the case was under investigation. She later discovered it was never actually initiated and she had to file a new report. She learned the following year that the second report never made it to the Alaska State Troopers and she was eventually turned away because of the staleness of the case. Through an internal audit, the Nome Police Department found that a large number of its reports between 2015 to 2018 were inadequately investigated; over 90% of the cases not pursued involved Alaska Native women.[118]

CHAPTER 5: HEALTHCARE AND SUPPORT SERVICES



“Through communication with our tribal advocacy and law enforcement partners, we learned that often American Indian/Alaska Native [AI/AN] victims first call the local IHS [Indian Health Service] clinic in search of post sexual assault care. IHS would refer them to urban locations sometimes two or more hours away. Referral facilities would commonly report being unable to conduct the exam and send the victim on to yet another facility. A lot of victims just give up. Despite being in locations with a high percentage of AI/AN populations or areas in close proximity to reservations, many facilities both on and off reservation report that AI/AN victims don’t come in for care despite the population’s alarming rate of sexual violence.”

Interview with Kim Day, Forensic Nursing Director, International Association of Forensic Nurses, April 2021

An important part of any police investigation of sexual violence involves the collection of forensic evidence, which can be vital for a successful prosecution. The evidence is gathered through a sexual assault medical-forensic examination, sometimes using tools known as a sexual assault evidence kit or a rape kit. The examination is performed by a health professional and involves examination and treatment for injury and disease, including prevention of sexually transmitted infections and pregnancy, and the collection of forensic evidence from a victim.

Evidence from sexual assault forensic examinations is crucial if a survivor wishes to pursue a criminal case against the perpetrator. The odds of a sexual assault case being accepted for prosecution increases significantly with each additional item of evidence collected[119] and “the effective collection of evidence is of paramount importance to successfully prosecuting sex offenders.”[120] All victims of sexual violence should be offered a forensic examination regardless of whether they decide to report the case to the police.

While some progress has been made to ensure access to forensic examinations for AI/AN women, there are ongoing challenges related to healthcare services for survivors and an unacceptable number of survivors still lack access to a forensic exam. Many healthcare facilities are too far away or closed when the

survivor needs care and, even if a woman can get to a facility, a rape kit may not be available or there may not be qualified staff available to administer it.[121] Of the 650 census-designated Native American lands analyzed in 2014, only 30.7% of the land was within an hour's drive of a facility offering sexual assault examination services.[122]

Additionally, there is a chronic lack of funding for IHS facilities, along with poor pay and incentives for employees, which has led to major staffing shortages. Finally, while the IHS has developed sexual assault response protocols, required by the Tribal Law and Order Act (TLOA), these protocols have not been fully implemented, and current policy leaves major geographical coverage gaps for survivors.

GOVERNMENT RESPONSE AND INITIATIVES SINCE 2007

The federal trust relationship establishes a responsibility to provide healthcare to AI/AN people. The IHS is part of the US Department of Health and Human Services and is the principal, and in some areas sole, provider of health services for AI/AN people. US federal law provides tribes the option of assuming from the IHS the administration and operation of health services in their communities; over 60% of the IHS appropriation is administered by tribes. The IHS system is comprised of 46 hospitals (24 IHS federal and 22 tribal) and 522 outpatient facilities (93 IHS federal and 429 tribal).[123]

Pursuant to TLOA, the US government issued a report from the Government Accountability Office (GAO) in 2011 concerning the IHS and tribal healthcare facilities' response to sexual assaults and domestic violence. When the GAO surveyed IHS and tribal hospitals, it found that the ability of these hospitals to collect and store medical forensic evidence in cases of sexual assault and domestic violence varied greatly.

> **"GAO's survey of IHS and tribally operated hospitals showed that the ability of these hospitals to collect and preserve medical forensic evidence in cases of sexual assault and domestic violence –that is, to offer medical forensic services – varies from hospital to hospital. Of the 45 hospitals, 26 reported that they are typically able to perform medical forensic exams on site for victims of sexual assault on site, while 19 reported that they choose to refer sexual assault victims to other facilities. The hospitals that provided services began to do so generally in response to an unmet need, not because of direction from IHS headquarters, according to hospital officials. Partly as a result, levels of available services have fluctuated over time."**
>
> *US Government Accountability Office, Continued Efforts Needed to Help Strengthen Response to Sexual Assaults and Domestic Violence, 2011*[124]

The report recommended that the IHS improve forensic exam accessibility and create sexual assault policies for both adults and children. Within these policies, the GAO also recommended that the IHS clearly outline the approval process for subpoenas and requests for IHS employees to provide testimony in federal, state and tribal courts for sexual assault cases.

TLOA also requires that the IHS develop policies and protocols for responding to a survivor of sexual assault. The resulting IHS sexual assault guidelines were issued in March 2011 and a revised policy was issued in 2013.[125] The IHS did revise its subpoena request and testimony policies.[126] However, the IHS does not oversee policy implementation in its facilities, and the self-determination contracts and self-governance compacts under which tribes operate hospitals do not generally require compliance with IHS policy.[128]

It remains unclear which staff are being trained on IHS updated policies and protocols regarding sexual assault response and whether post-rape

services are available to and reaching AI/AN survivors across the IHS. The IHS has developed an "implementation and monitoring plan" (in response to the 2011 GAO report), which was shared with Amnesty International following a 2017 Freedom of Information Act request. The monitoring plan showed that the IHS has made several efforts to improve the quality of care and trainings available to patients and medical staff, including the provision of technical assistance to IHS, tribal and urban sites on forensic healthcare, and trainings on domestic violence awareness. But the plan does not state if training on the new sexual assault policy is required for all staff or simply made available and it remains unclear how many IHS or tribal facilities have fully implemented these updated sexual assault protocols.

In 2019, the Office of Inspector General recommended that the IHS "designate a central owner in IHS headquarters to ensure clear roles and responsibilities for shared ownership in implementing patient protection policies."[129] While some oversight functions are performed at IHS headquarters, the agency continues to delegate primary responsibility for the oversight of healthcare facilities to its 12 area offices. A 2020 GAO report found that oversight of expenditures and scope of services was limited and inconsistent across these area offices, in part, due to a lack of consistent agency-wide processes.

"The limitations and inconsistencies that GAO found in IHS's oversight are driven by the lack of consistent oversight processes across the area offices. Without establishing a systematic oversight process to compare federally operated facilities' current services to population needs, and to guide the review of facilities' proposed expenditures, IHS cannot ensure that its facilities are identifying and investing in projects to meet the greatest community needs, and therefore that federal resources are being maximized to best serve the AI/AN population."

US Government Accountability Office, Actions Needed to Improve Oversight of Federal Facilities' Decision-Making About the Use of Funds, November 2020

Additionally, the IHS does not have a process to guide its oversight of key proposed expenditures, such as the purchase of medical equipment, the hiring of providers or the expansion of services. The GAO also interviewed officials from nine area offices who stated that the area offices coordinated with tribal governments when reviewing its services. However, none reported systematically reviewing the extent to which the services provided were meeting local healthcare needs.[130] Essentially, the IHS is not adequately keeping track of each facility's spending, decision making or self-assessment and it does not have data on tribal facilities, suggesting that even if there was a severe shortage of rape kits, the IHS itself might not be aware of this.

IMPACT AND REMAINING CHALLENGES

RAPE KIT ACCESS

What little government data is available, though dated, shows large gaps in the availability of rape kits for AI/AN survivors. AI/AN survivors of sexual violence have reported being turned away from IHS and tribal facilities because a rape kit was not available, no staff member trained to administer the rape kit was available or the assault took place outside the medical center's opening hours and the survivor had to decide whether they would (or could) travel to the closest non-IHS facility.

> **"IF IHS HAS THEM [RAPE KITS], THEY'RE USELESS TO US, BECAUSE MOST OF THE TIME IT'S WEEKENDS WHEN YOU NEED THEM, AND IF YOU CAN'T ACCESS THEM BECAUSE THEY'RE BEHIND LOCKED DOORS [WHEN THE FACILITIES ARE CLOSED]. SO, THEN WHAT?"**
>
> *Interview with Juskwa Burnett, Advocacy for Tribal Families, March 2021*

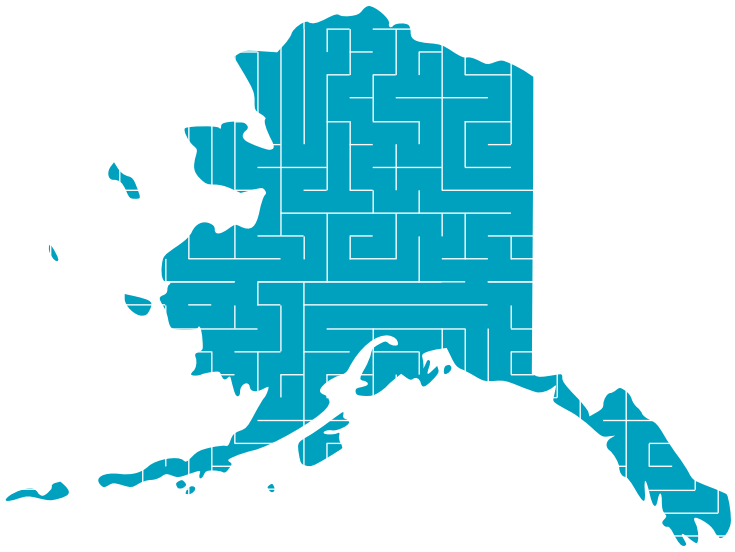
The IHS is unable to account for how many rape kits are available to survivors in IHS or tribal facilities across regions, how many forensic exams are completed (or declined by survivors), or how many survivors are turned away from a facility and referred to another facility for a forensic exam. The IHS reported to Amnesty International that they were unable to provide such data since: "The rape kits are obtained from many different vendors. Rape kits are often provided to IHS facilities by the state where they are located. This can be done by any number of vendors or companies that provide the kit to the state. All contracts of this type would fall under a contract between the vendor and the state. IHS would not be party to these contracts and could not identify any measure to these variables."[131] A former IHS official noted that the inability of the IHS to report the availability and service provision of rape kits was "not a surprise" and stemmed from a decentralized way of recording or evaluating the provision of care; the IHS "don't think of themselves as one system. There's so much autonomy within each hospital; they often don't share information or best practices."[132]

ALASKA: RAPE KITS

A 2018 Alaska-specific study showed that less than half (40.7%) of Alaska Native survivors of sexual assault and less than a 10th (9.9%) of survivors of sexual abuse of a minor were documented in case records as undergoing a forensic medical exam.[133]

For Alaska Native survivors, distance is especially acute obstacle to accessing a forensic exam as for many the closest health facility may require air travel. In response to Attorney General Barr's 2019 emergency declaration in rural Alaska,[134] the Office on Violence Against Women awarded funds to train community health aides in Alaska Native villages to perform sexual assault forensic exams and to recruit victim advocates to accompany victims throughout the process. It is unclear if these funds have changed the rate of Alaska Native survivors able to access forensic exams.

For victims who can obtain a forensic exam, receiving updated information about their exam remains a challenge. The State of Alaska is planning to launch new rape kit tracking software in the latter part of 2022.[135]



The IHS remains underfunded and understaffed, exacerbating the problem of sexual assault nurse examiners (SANE) and sexual assault response team[136] coverage, the availability of rape kits for survivors, as well as other medical care needs for AI/AN women. AI/AN women victims of physical violence by intimate partners and sexual violence are 1.5 times as likely to be physically injured and 2.3 times as likely to require medical care compared to non-Hispanic white-only women victims of physical violence by intimate partners and sexual violence. Yet more than one in three female AI/AN victims are unable to access the medical care they need after surviving such acts of violence.[137]

In 2011, the International Association of Forensic Nurses developed the Tribal Forensic Healthcare Program for the IHS to educate providers in sexual assault medical-forensic examination and treatment. This has increased the availability of forensic exams in certain areas.[138] However, there is no available data to track these providers after they are trained to know what communities have access to a trained sexual assault examiner and high staff turnover remains an issue across IHS and tribal facilities.[139]

“WE’RE TRAINING MORE SANE NURSES, AND THERE ARE MORE MEETINGS AND MORE PEOPLE PROVIDING THE SERVICE, BUT WE ARE CONTINUOUSLY HEARING THAT IN THE RURAL AREAS THAT THERE AREN’T SANE NURSES READILY AVAILABLE TO PROVIDE THIS SERVICE.”

Interview with Krista Heeren-Graber, Executive Director, South Dakota Network Against Family Violence and Sexual Assault, May 2021

FUNDING AND STAFFING

The overall IHS budget granted by Congress meets just over half of the healthcare needs of the AI/AN population.[140] Federal funding for the IHS remains static and low while the AI/AN population is steadily increasing.[141] In 2018, the US Commission on Civil Rights found that funding for the IHS is “inequitable and unequal” and that “IHS expenditures per capita remain well below other federal healthcare programs, and overall IHS funding covers only a fraction of Native American health care needs.”[142] The gap in funding has widened since that report: in 2019, IHS healthcare expenditures were US$4,078 per person compared to US$11,582 per person for federal healthcare nationwide.[143]

IN 2019, IHS HEALTH CARE EXPENDITURES WERE US$4,078 PER PERSON COMPARED TO US$11,582 FOR FEDERAL HEALTHCARE NATIONWIDE

"The fact that Congress funds IHS at a shortfall of $30 billion a year really hampers the entire system's ability to provide services and attract professionals to our communities."

Interview with Natasha Singh, Vice President of Legal, Alaska Native Tribal Health Consortium, May 2021

Staffing in IHS facilities is another central challenge to ensuring the highest quality of care for AI/AN survivors. Staff turnover is high and there is a lack of consistent staffing, particularly in rural areas. In a 2018 GAO report, data showed that there were large percentages of vacancies in eight areas where the IHS provides a substantial number of medical services.[144] As of November 2017, there was an average vacancy rate of 25% for medical care workers in these eight areas.[145] One of the root causes for this staffing issue is inadequate pay for medical staff stemming from the chronic underfunding of the IHS. Medical workers often do not want to take jobs at IHS facilities because of their remote location, limited incentives and noncompetitive pay.[146]

"We have no ingrained response to sexual assault at an institutional level; there needs to be the expectation that there will be services for sexual assault survivors as a necessary and central part of IHS care. It's not an optional 'extra'."

Interview with Katy Eagle, Executive Director, Mending the Sacred Hoop, April 2021

These challenges faced by the IHS exacerbate the problem of inadequate care for survivors of sexual violence. International law requires that healthcare services be available and affordable and it is the obligation of the US government to ensure this care is accessible and culturally appropriate.

“THE MORE ISOLATED PEOPLE ARE, THE MORE LIKELY THEY DON’T HAVE THE SERVICES THEY NEED.”

Interview with Ashley “AJ” Juraska, Co-Author of Sexual Assault Services Coverage on Native American Land, April 2021

FACILITY ACCESSIBILITY

The IHS manual states: “All facilities shall provide patients 18 and older who present with a report of sexual assault with access to a sexual assault medical forensic examination, either onsite or by referral (within a two-hour drive time, when feasible).”[147] For survivors without transportation or means to travel, this effectively means no rape kits are available to them.

Advocates spoke, too, of the discomfort Native survivors often felt with non-Native service providers, citing examples where non-Native service providers assumed the survivor was drunk because they were Native or made comments based on other racist stereotypes. The mistreatment of Native survivors by non-Native service providers can create a ripple effect of distrust in the community: “As soon as one person is mistreated, the word gets out.”[148]

“THE IHS FACILITY ISN’T OPEN 24-7, BUT NON-INDIAN HOSPITALS NEAR RESERVATIONS DON’T WANT TO BE BOTHERED; THEY ARE WORRIED ABOUT BILLING AND WHO IS GOING TO PAY FOR THE RAPE EXAM.”

Interview with Charon Asetoyer, Executive Director, Native American Women’s Health Education Resource Center, February 2021

Many survivors become overwhelmed by the emotional and logistical difficulties involved in accessing post-rape care. Advocates spoke of survivors “giving up” if they had to go to a non-Native hospital or clinic and emphasized the logistical hurdle for a survivor heading to the second hospital or clinic.[149] Further, poor internet and cellphone coverage on tribal land can create additional barriers for survivors seeking information about services.[150]

With non-IHS facilities, post-rape care costs are yet another concern for survivors. National guidelines state that survivors should not have to pay for sexual assault forensic examinations, yet for survivors living in rural areas, accessing an exam may still mean paying for transportation to the nearest facility. In Alaska, Native women may need to cover the cost of traveling by plane to reach the hospital or clinic. Although IHS services are free, if an AI/AN victim has to go to a non-IHS hospital for an examination, she may be charged by that facility. The IHS has a reimbursement policy, but it is complex and survivors may not be aware of it, meaning the financial burden falls on the AI/AN survivor.

“THERE WAS A WOMAN WHO WAS RAPED AND THOUGHT SHE WAS INJURED BUT DIDN’T WANT TO GO TO THE DOCTOR BECAUSE SHE WAS AFRAID THAT SHE COULDN’T AFFORD IT.”

Interview with Juskwa Burnett, Advocacy for Tribal Families, March 2021

Even in IHS facilities where a rape kit is available, the conditions in which the exam is carried out may be inadequate. Advocates reported an unevenness not only of availability but also quality of post-rape care, emphasizing that, despite improvements in the IHS, oftentimes survivors do not know what quality of care, if any, they can expect from IHS or tribal facilities.

“I was at an IHS hospital, and they were going to show us the room for post-rape care. We had to go all the way to the back, through this storage room with open storage shelving and they showed us the room they were going to use for SANE exams, and it wasn’t a room – there wasn’t a door, not even a curtain. There was an exam table and some chairs, and they would wheel the equipment in on a tray, but no privacy. As we were sitting there talking, two guys came into the supply room to grab supplies and said ‘oh sorry, we didn’t know anyone was in here’ as they got their supplies, because everyone had access to that space. If a survivor was on the exam table, their legs would be up in the stirrups looking right at where those two guys had just come in. They just said they had no space. This just isn’t acceptable.”

Interview with Bonnie Clairmont, Victim Advocacy Specialist, Tribal Law and Policy Institute, April 2021

INDIGENOUS SUPPORT SERVICES

“THERE IS AN ONGOING NEED FOR CULTURALLY SENSITIVE TRAINING FOR PROVIDERS WHO ARE NOT TRIBAL BUT ARE SEEING NATIVE SURVIVORS”

Interview with Krista Heeren-Graber, Executive Director, South Dakota Network Against Family Violence and Sexual Assault, May 2021

Survivors should have available to them a variety of timely culturally appropriate services, which could include holistic, victim-led and non-criminal justice avenues for healing for survivors and perpetrators. Collaboration between state and tribal victim service programs can help improve service delivery for Native survivors, particularly where there is a lack of Native-led services available. However, at present if a survivor does manage to access a forensic exam and other support services in non-IHS facilities, those services are often not culturally appropriate. The US Department of Justice reported in 2013 that the support services based on Western cultural practices were often ineffective for AI/AN survivors.[151] Culturally sensitive training for non-Native service providers is needed across service provision to ensure that Native survivors receive the care they need.

While Native-led victim support services are often preferred by victims of sexual assault, the lack of funding and complex grant application process make access to Native-led services extremely limited. If non-Native services are the only ones available, Native survivors can feel uncomfortable or unsafe accessing them as many of those services do not have culturally appropriate training or focus.

“What is most commonly recorded as what victims need from us is peer support. That’s a really telling piece for us. We have heard stories like when someone went to non-Native services and then being told ‘don’t you get your help from the reservation?’ as they were basically encouraged to leave.”

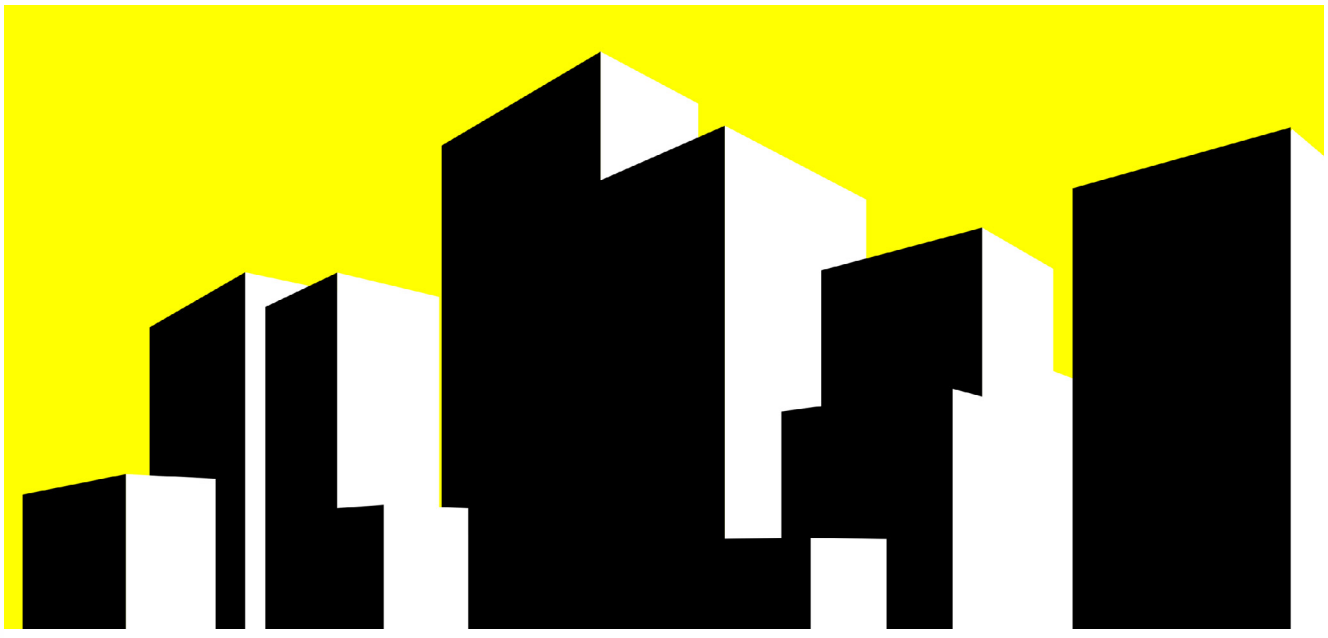
Interview with StrongHearts Native Helpline, May 2021

Native-led service providers have found that AI/AN women clearly prefer Native-centered support services. StrongHearts Native Hotline, a Native-led support hotline for Indigenous survivors of domestic and sexual violence, found that out of the 3,074 calls received in 2020, not one of the callers chose to transfer to a non-Native hotline for support during non-staffed hours and that “Native callers prefer to work with a Native-centered organization.”[152]

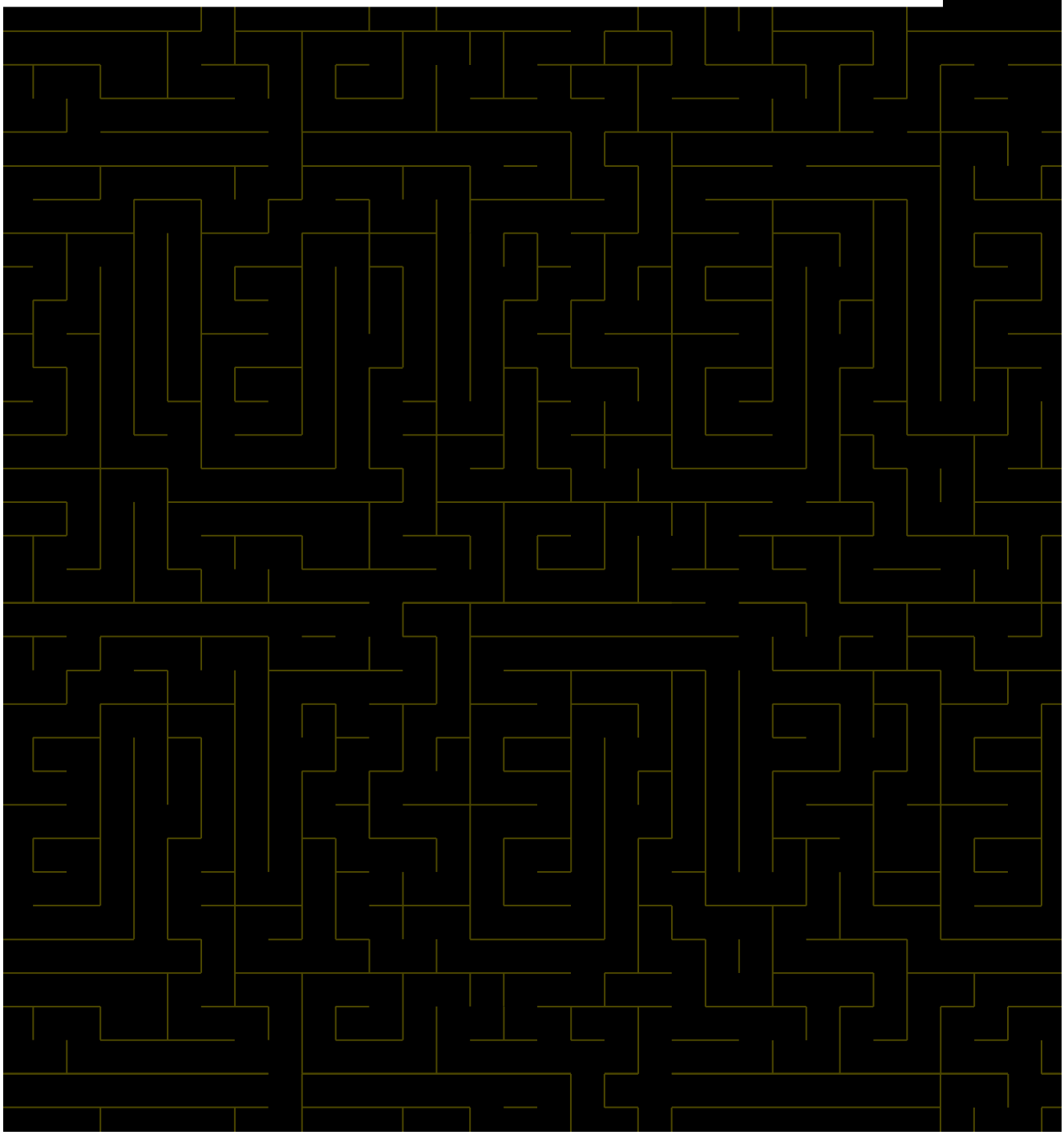
The impact of losing Native-centered services can be devastating for a community and can mean Native survivors ultimately do not get the services they need. The closure of Native-centered services can mean the next "nearest" services are functionally inaccessible for Indigenous survivors, particularly in rural communities, leaving survivors with no services for care or healing.

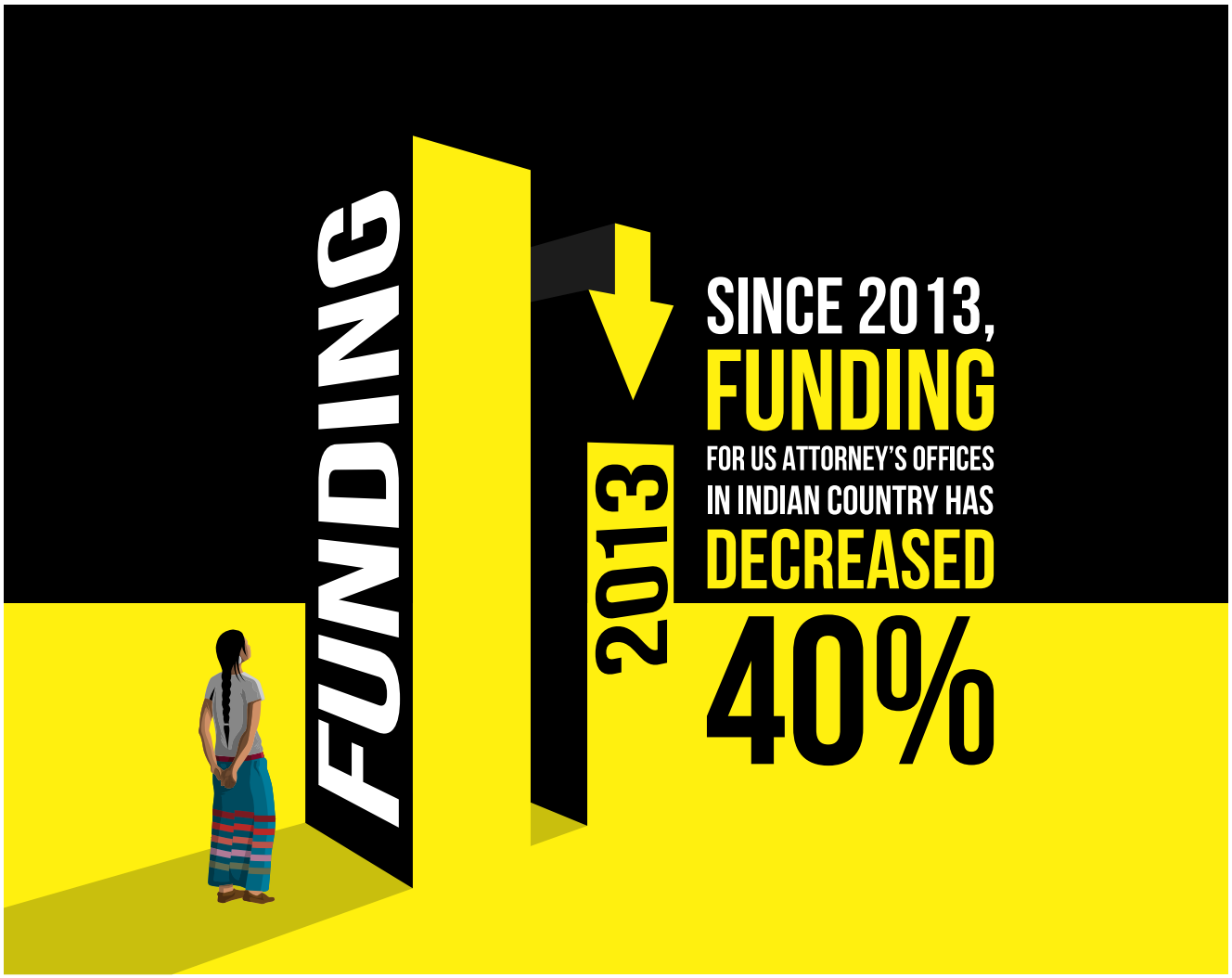
"IT WAS DEVASTATING WHEN THEY WERE DEFUNDING OUR PROGRAMS, I FELT LIKE WE GOT SHOT. WOMEN AND CHILDREN WERE SITTING OUTSIDE OUR SHELTER, WITH A PADLOCK ON THE DOOR BECAUSE WE HAD NO MONEY TO RUN IT, BUT THEY WOULD SIT AT THE BUILDING, BECAUSE THEY KNEW THAT THE SHELTER WAS A SAFETY NET. I WILL NEVER FORGET."

Interview (identity withheld), May 2021



CHAPTER 6: PROSECUTIONS





For different reasons and in different ways, none of the three justice systems – federal, state and tribal – is responding adequately to Indigenous survivors of sexual violence. The US government has interfered with the ability of tribal justice systems to respond to crimes of sexual violence through underfunding, prohibiting tribal courts from trying non-Indian suspects for most crimes of sexual violence and limiting the custodial sentences which tribal courts can impose for any one offense. This, in turn, places prosecution responsibility onto federal and state (Public Law 280) attorneys, investigators and courthouses that are often hundreds of miles from Indian country.[153]

When jurisdiction falls to federal or state authorities and cases are pursued through the federal or state court system, Amnesty International's research found that American Indian and Alaska Native (AI/AN) women are often denied access to justice. Many tribes do not have the necessary financial resources to deliver justice to sexual assault survivors. Since 2013, both the total funding for US Attorney's Offices (USAOs) in Indian country and the number of attorneys responsible for Indian country prosecutions has decreased by 40%.[154]

Additionally, US authorities have consistently declined to prosecute a considerable amount of crime within Indian country. Between 2005 and 2009, USAOs declined to prosecute 46% of sexual assaults and 67% of sexual abuse cases in Indian country.[155] When federal prosecutors decline to prosecute cases involving non-Native perpetrators, there is often no further recourse for Indigenous survivors under criminal law within the USA and perpetrators can continue to perpetrate crimes with impunity.

GOVERNMENT RESPONSE AND INITIATIVES SINCE 2007

The Tribal Law and Order Act (TLOA) requires USAOs to designate an Assistant United States Attorney (AUSA) as a "tribal liaison" to facilitate communication and oversee response to crimes of sexual violence in Indian country. As of March 2016, there were 98 tribal liaisons working in 49 districts with Indian country jurisdiction to establish relationships with tribal communities.[156]

However, this new designation as a tribal liaison does not allow AUSAs to move other priorities aside to make room for the work needed to adequately fill this role. Many carry full-time caseloads outside of their work with tribes, meaning that they have to maintain communication with tribal officials, often involving significant travel time, while continuing to fulfill their original responsibilities for the US district that they serve. Unsurprisingly, many AUSAs do not adequately communicate with tribal prosecutors, authorities or victims and victims' families.

"IN OUR REVIEW OF DECLINATION LETTERS, WE FOUND TWO CASES IN WHICH BOTH THE INVESTIGATOR AND THE AUSA HAD LEFT THEIR ASSIGNMENTS BEFORE THE INVESTIGATION WAS COMPLETE. IN BOTH CASES, WE FOUND NO RECORD OF THE USAO HAVING DECLINED THE CASE OR HAVING NOTIFIED THE TRIBES THAT THE INVESTIGATOR AND AUSA HAD LEFT."

US Department of Justice, Review of the Department's Tribal Law Enforcement Efforts Pursuant to the Tribal Law and Order Act of 2010, December 2017

Some USAOs – with consent of the tribal nation – have implemented the Department's Special Assistant US Attorney (SAUSA) program. This program allows tribal prosecutors to serve as co-counsel with federal prosecutors on felony investigations and prosecutions. TLOA "authorized and encouraged" each USAO with Indian country jurisdiction to appoint a SAUSA to prosecute crimes in Indian country.

The SAUSA program is meant to enhance communication between tribal and federal authorities as well as provide tribal prosecutors with a greater understanding of federal prosecutorial procedures. As of September 2016, there were 22 SAUSAs working in Indian country serving nine of 49 USAO districts with Indian country jurisdiction.[157] Currently, the Office on Violence Against Women (OVW) and the Bureau of Justice Assistance (BJA) are only funding 15 tribes to partner with local USAOs on SAUSA projects.[158]

"Generally, the SAUSA program has strengthened the relationship between Federal and Tribal partners by creating an opportunity for tribal prosecutors to actively engage with AUSAs in the federal prosecutions arising from their respective Tribes. Likewise, SAUSAs assist AUSAs in understanding the unique challenges facing Tribes, while identifying areas of concern that require additional attention. Tribes that currently have an OVW or BJA-funded Tribal SAUSA on board indicate that it has improved the relationship and communication between the tribe and the USAO."

Letter to Amnesty International, US Department of Justice, 17 June 2021

The Department of Justice (DOJ) reports that tribes working with SAUSAs have indicated that these partnerships have improved the relationship between their tribe and the USAO.[159] While a small number of tribes can reap the benefits of this program, SAUSA program participation will likely remain low without broader awareness, uniform guidelines and adequate funding.[160]

IMPACT AND REMAINING CHALLENGES

AI/AN women face many obstacles when seeking justice for crimes committed against them and data shows that a substantial number of sexual assault cases in Indian country are not prosecuted. While there was a 10% decrease in declination rates following the passage of TLOA,[161] several factors still hinder efforts to improve prosecution rates.

In 2019, the most common reason why the DOJ declined to prosecute criminal cases in Indian country was "insufficient evidence" (79% of cases declined),[162] which includes "circumstances involving lack of evidence of criminal intent, weak or insufficient evidence, or witness issues."[163]

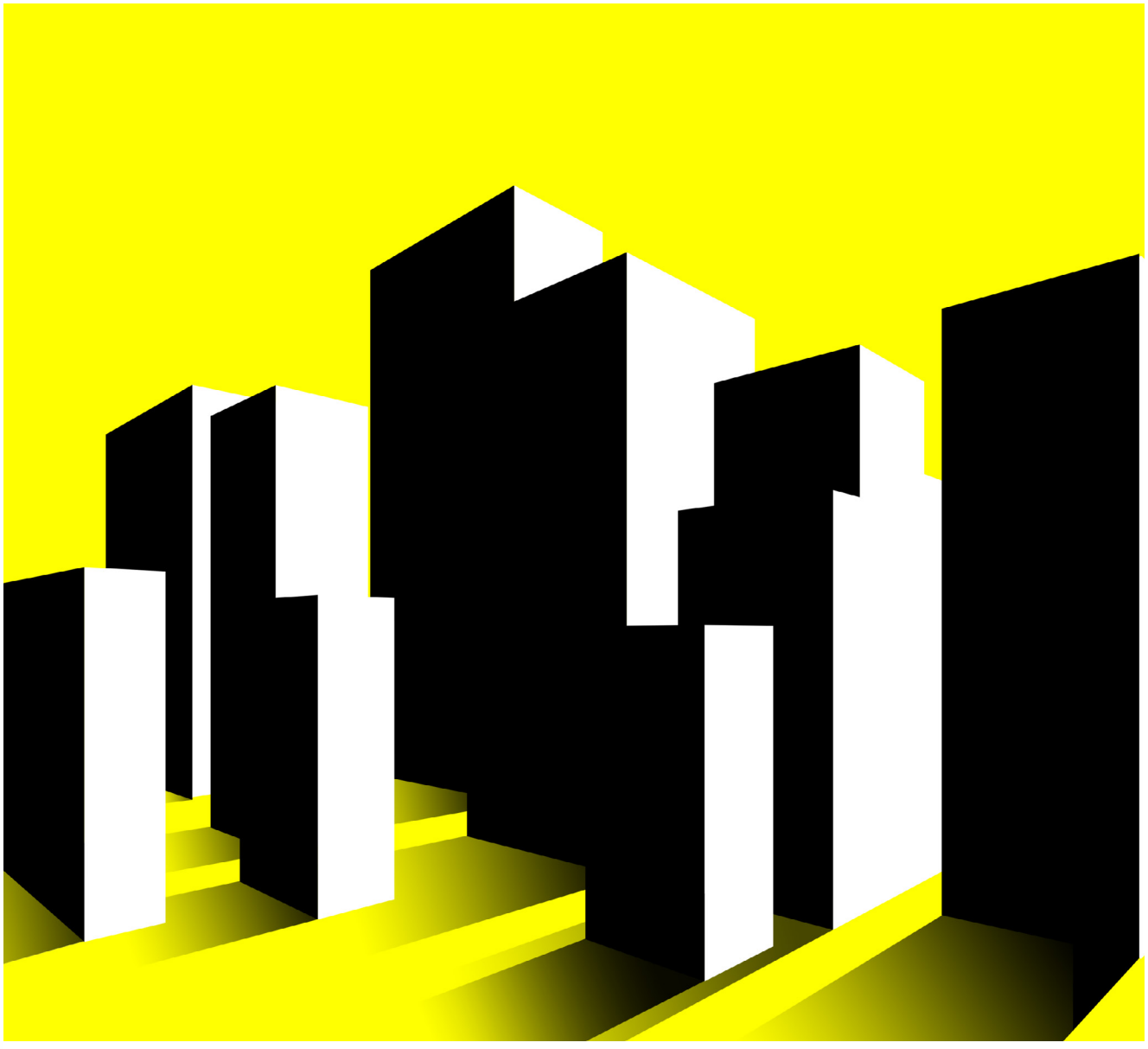
> **"UNLESS IT'S A WINNABLE CASE, PROSECUTORS ARE JUST DECLINING THEM. WHAT MESSAGE DOES THAT SEND TO A COMMUNITY THAT WANTS TO MAKE A CHANGE? [IT SAYS] YOU CAN DO THIS TO ME AND THERE WILL BE NO CONSEQUENCES. WE TELL OUR CHILDREN: JUST AVOID THAT HOUSE. WE TELL OUR WOMEN: DON'T GO OUT AFTER DARK."**

Interview with Tami Truett Jerue, Executive Director, Alaska Native Women's Resources Center, March 2021

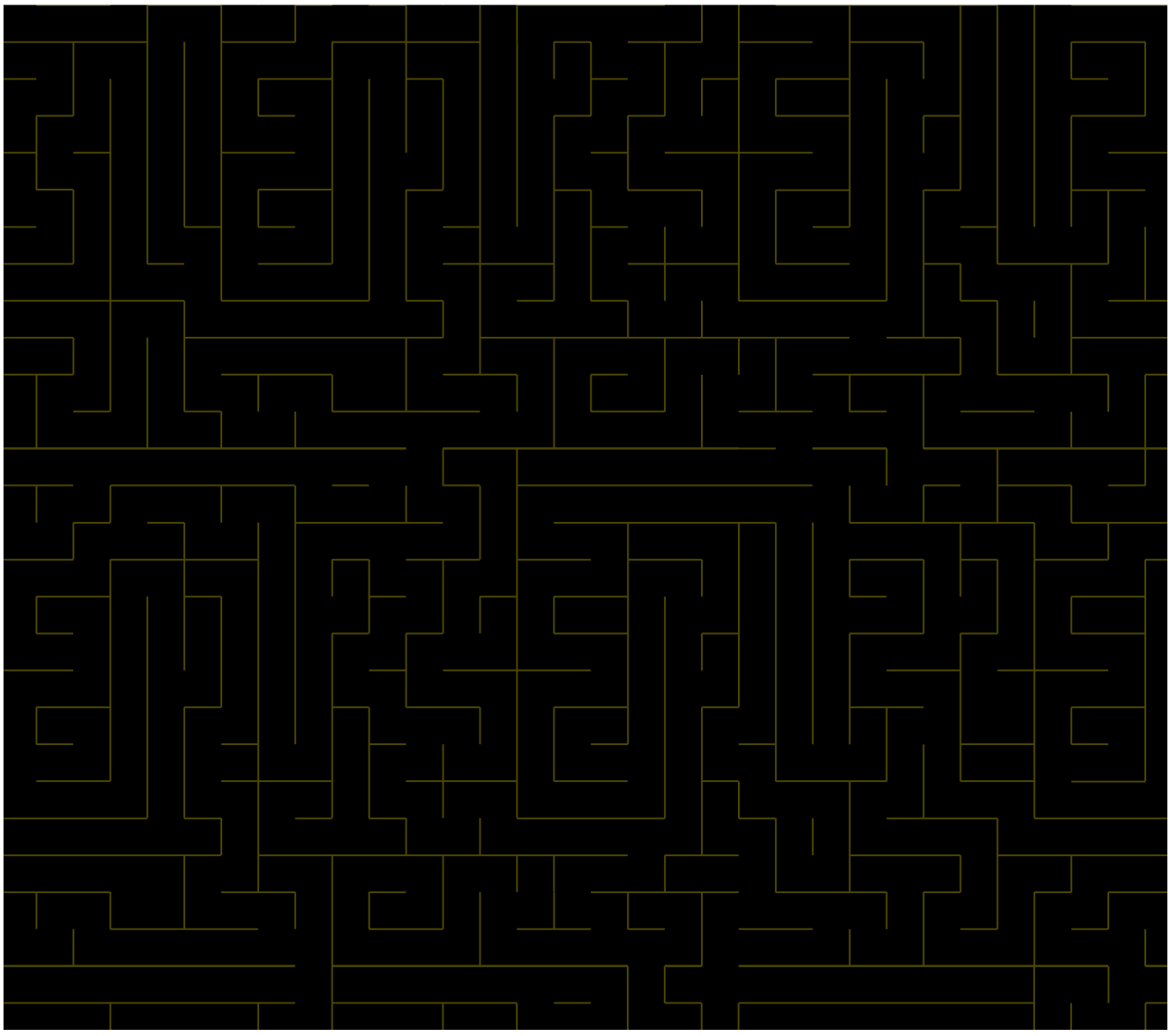
Confusion around jurisdictional boundaries means it is not always immediately clear whether a case should be prosecuted by a tribal prosecutor, a federal prosecutor or a state prosecutor. Federal trials for crimes occurring on tribal land reportedly often begin with a "mini-trial" on jurisdiction. To further confuse and delay matters, courts may take years to determine whether the land in question is tribal or not.

The restrictive nature of a tribal nation's ability to prosecute a crime under TLOA and the Violence Against Women Act (VAWA, 2013) results in a need for heightened response from federal and state prosecutors for crimes of sexual violence against AI/AN women. Yet, while the federal government continues to restrict tribal authority, save for in the narrow exceptions provided for in TLOA and VAWA (2013), it simultaneously declines a high number of sexual assault cases that are restricted to federal jurisdiction. This creates a scenario where tribes are often left unable to prosecute cases that the federal government will not prosecute.

Federal and state authorities continue to decline cases of sexual violence in Indian country, leaving survivors with no other option for redress. Instead of prioritizing Indian country cases, the DOJ continues to fall short of its promise to protect AI/AN women from violence. While, for those programs that do seem beneficial, like the SAUSA program, funding and participation remain low.



CHAPTER 7: CONCLUSION AND RECOMMENDATIONS



“TOGETHER, WE CALL FOR PRAYER AND HEALING FOR THE FAMILIES IN RESPONSE TO THIS VIOLENCE. BUT WE ALSO DEMAND MEANINGFUL LEGISLATIVE REFORMS THAT REMOVE BARRIERS TO SAFETY FOR INDIAN WOMEN BY RECOGNIZING AND STRENGTHENING THE SOVEREIGN ABILITY OF ALL TRIBAL NATIONS TO PROTECT INDIAN WOMEN AND THEIR CHILDREN.”

Lucy Simpson, Executive Director, National Indigenous Women’s Resource Center, 2021[164]

The high rates of sexual violence against Indigenous women in the USA is directly linked to the failure of authorities to bring those responsible for these crimes to justice. The erosion of tribal authority and chronic under-resourcing of tribal justice systems, law enforcement agencies and healthcare systems has perpetuated this injustice. Piecemeal attempts by authorities to address this crisis of sexual violence fall short of making meaningful changes to the high rates of sexual violence against Indigenous women.

The legal relationship that exists between the US federal government and tribes (trust responsibility) places on the US government a unique legal obligation to ensure the protection of the rights and wellbeing of American Indian and Alaska Native peoples. The federal government must honor this trust responsibility by removing the barriers to justice created by jurisdictional confusion and complexity and by putting an end to the erosion of tribal authority and the chronic under-resourcing of tribal law enforcement agencies, justice systems and healthcare systems.

Addressing sexual violence against American Indian and Alaska Native women requires a holistic and integrated approach. Amnesty International calls on authorities to recognize and respect tribal sovereignty and to protect the human rights of Indigenous women. In doing so, it draws on the legacy of groundbreaking work by American Indian and Alaska Native women in demanding justice and respect.

SUPPORTING INTERNATIONAL LAW AND US HUMAN RIGHTS LAW

1 The US government should ratify, without delay, the following international human rights treaties:

a. The Convention on the Elimination of All Forms of Discrimination against Women;
b. The International Covenant on Economic, Social and Cultural Rights;
c. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women ("Convention of Belém do Pará"); and
d. ILO Convention No. 169, concerning Indigenous and Tribal Peoples in Independent Countries.

2 The US government should include information in its reports to UN treaty bodies on the implementation of US international legal obligations to respect, protect and fulfill the individual and collective rights of Indigenous peoples, including to prevent and provide protection from sexual violence against Indigenous women.

3 Federal, state and tribal authorities should ensure that they advance public policies to eliminate all forms of discrimination and violence against Indigenous women by endorsing and implementing relevant international human rights laws and standards.

4 Federal, state and tribal legislation and judicial systems should uphold international human rights standards at all levels, including: in the definition of crimes; the response to and thorough and impartial investigation of reports of rape or other acts of sexual violence; the prosecution of those suspected of such crimes in trials that conform to international fair trial standards; the appropriate punishment of those found guilty; and the guarantee to survivors of full reparations, including restitution, satisfaction, rehabilitation and guarantees of non-repetition.

UNTANGLING THE JURISDICTIONAL MAZE

5 The US Congress should recognize the inherent concurrent jurisdiction of tribal authorities over all crimes committed on tribal land, regardless of the tribal citizenship of the accused, including by legislatively overriding the US Supreme Court's decision in *Oliphant v. Suquamish*.

IMPROVING POLICING

6 Congress and federal and state authorities must take urgent steps to make available adequate resources to police forces in Indian country and Alaska Native villages. Particular attention should be paid to improving coverage in rural areas with poor transport and communications infrastructures.

7 All law enforcement officials should ensure that reports of sexual violence receive a prompt response, that effective steps are taken to protect survivors from further violence and that impartial and thorough investigations are undertaken.

8 All law enforcement agencies should cooperate with, and expect cooperation from, neighboring law enforcement bodies based on mutual respect and genuine collaboration to ensure the protection of survivors and those at risk of sexual violence and to ensure that perpetrators are brought to justice.

9 All law enforcement agencies should work closely with Indigenous women's organizations to develop and implement appropriate and effective investigation protocols for dealing with cases of sexual violence.

10 Human rights training programs for police and other officials should include training on sexual violence against women from the perspective of Indigenous women. Towards this end, training in cultural norms and practices for police officers should be subject to independent evaluation and devised in collaboration with Indigenous peoples, particularly Indigenous women. Training should also include the role of policing in implementing international human rights standards in practice and there must be robust codes of conduct, monitoring, enforcement, appropriate consequences for violations and accessible and transparent access to justice for victims when violations occur.

11 Federal authorities should end grant-based and competitive Indian country criminal justice funding in the Department of Justice and instead pool these monies to establish a permanent, recurring base funding system for tribal law enforcement and justice services. Procedures for obtaining federal funding must not be unduly complicated.

12 Congress should fund data collection, analysis and research on crimes of violence against American Indian and Alaska Native women. The methodologies applied must be developed in full consultation with affected Indigenous peoples, particularly Indigenous women, obtaining their free, prior and informed consent.

ENSURING PROPER HEALTHCARE AND SUPPORT SERVICES

13 The Indian Health Service (IHS) and other health service providers should ensure that all American Indian and Alaska Native women survivors of sexual violence have access to adequate and timely and comprehensive sexual and reproductive healthcare, including sexual assault forensic examinations, without charge to the survivor and at a facility within a reasonable distance. Transportation should be provided at no cost to the victim.

14 The IHS and other health service providers must provide the staff, resources and expertise to ensure the accurate, sensitive and confidential collection of evidence in cases of sexual violence and the secure storage of this evidence until it is handed over to law enforcement officials.

15 The IHS and other health service providers should ensure that survivors of sexual violence are offered gender-sensitive, culturally appropriate responses, including guaranteed access to sexual and reproductive health services and supplies, planned and administered in cooperation with Indigenous peoples, taking into account Indigenous peoples' social and cultural norms and traditional preventive care, healing practices and medicines and economic and geographic conditions, ensuring the full and effective participation of Indigenous women.

16 The IHS should, in consultation with tribal communities, review current methodologies to obtain data on sexual violence against Indigenous women and the provision of post-rape care, including sexual assault forensic examinations, to ensure that the data collected is comprehensive and accurate across IHS-operated and tribal-operated facilities. Further, the IHS must improve its oversight of its IHS-operated and tribal-operated facilities as set out in the 2020 Government Accountability Office recommendations.

17 The IHS should immediately implement across all IHS-operated and tribal-operated facilities standardized policies and protocols, in consultation with Indigenous women's organizations, for handling cases of sexual violence.

18 The IHS and other health service providers, and specifically all nurses, doctors and support staff, should be trained in sexual assault protocols, including screening for sexual violence, and in culturally appropriate skills to deal sensitively with Indigenous survivors of sexual violence.

19 The federal government should permanently increase funding for the IHS and to tribes that administer their own health services and provide mandatory and advance funding so that healthcare services do not stop when Congress fails to pass a timely budget or when the federal government shuts down.

20 Federal and state authorities must support and ensure adequate funding for support services, which should provide culturally appropriate, sensitive and non-discriminatory support.

21 The IHS should report annually regarding the implementation of sexual assault protocols and oversight of its regional offices and on the provision of care for survivors of sexual violence, including the availability and completion of sexual assault forensic examinations.

DELIVERING JUSTICE THROUGH PROSECUTIONS

22 The US Congress should amend the Indian Civil Rights Act to recognize the authority of tribal courts to impose penalties proportionate to the offenses within the context of a trial and sentencing process that conforms to international fair trial standards.

23 Prosecutors should thoroughly and impartially prosecute cases of sexual violence against Indigenous women and should be sufficiently resourced to ensure that the cases are treated with urgency and processed without undue delay.

24 Prosecutors in the different jurisdictions should provide each other with information on the status of cases of sexual violence against American Indian and Alaska Native women on a regular basis.

25 Any decision not to proceed with a case, together with the rationale for the decision, should be promptly communicated to the survivor of sexual violence and to other courts and prosecutors with jurisdiction.

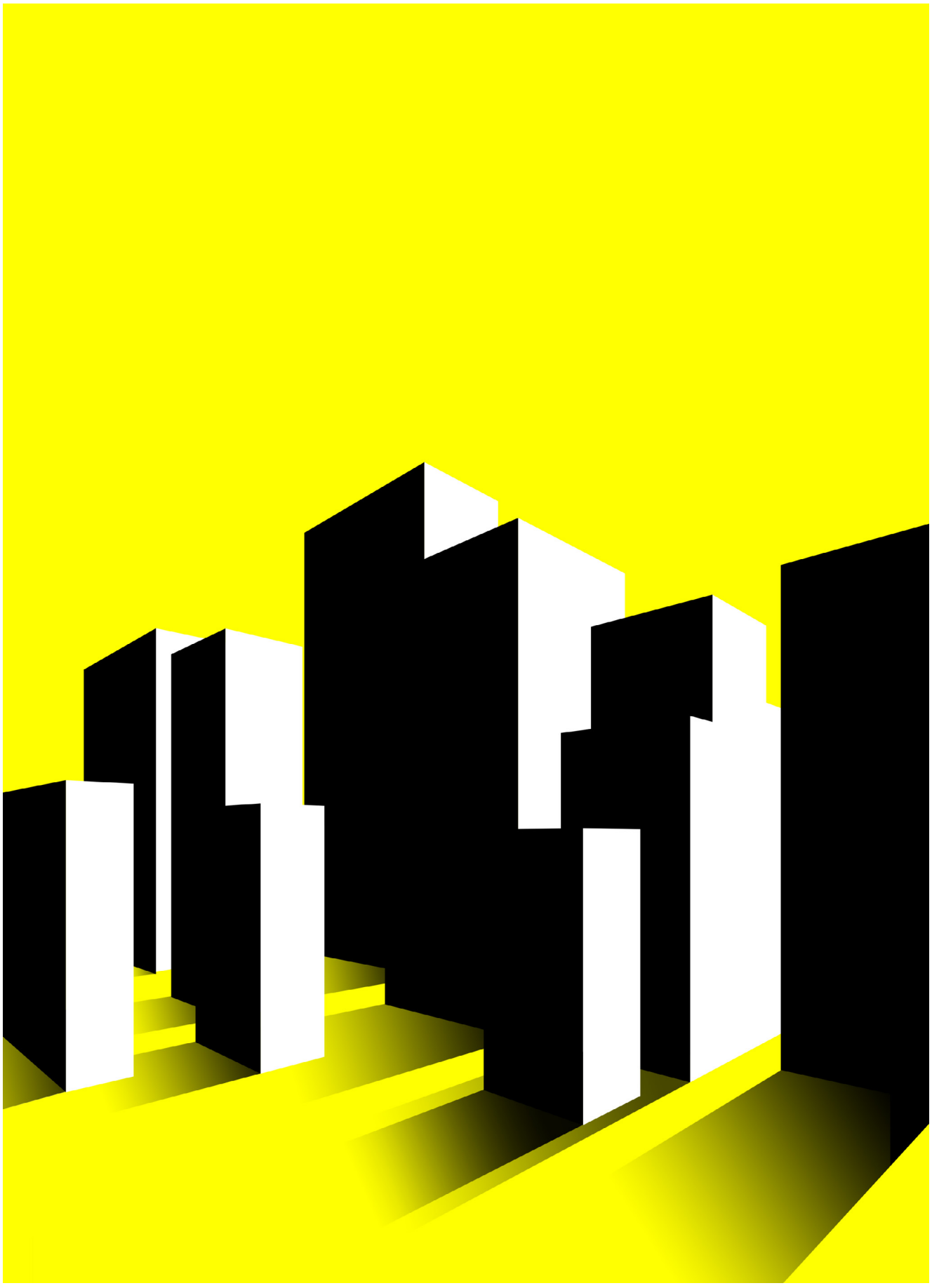
26 Federal authorities should permanently fund Special Assistant United States Attorneys to partner with tribal prosecutors for all interested tribal nations.

27 Federal and state prosecution and judicial authorities should take steps to ensure appropriate representation of Indigenous peoples, in particular women, in agencies responsible for the administration of justice in and around Indian country and Alaska Native villages.

28 Federal authorities should make available the necessary long-term, predictable funding and resources to tribal governments to develop and maintain tribal court and legal systems which comply with international human rights standards, including the right to a remedy, to non-discrimination and to fair trials, while also reflecting the cultural and social norms of their peoples.

29 The Department of Justice should keep data on cases of sexual violence against American Indian and Alaska Native women, including the Indigenous or other status or of victims and suspects and reasons why a case was declined. Tribal nations should be part of meaningful consultations to ensure proper data collection and sustained access to the data and it should be mandated that this data be shared with tribes in a timely manner.

30 The Department of Justice should report annually regarding sexual violence against American Indian and Alaska Native women and criminal justice responses.



ENDNOTES

[1] Federal Register, "Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 29 January 2021, federalregister.gov/documents/2021/01/29/2021-01606/indian-entities-recognized-by-and-eligible-to-receive-services-from-the-united-states-bureau-of

[2] US Census Bureau, The American Indian and Alaska Native Population: 2010, January 2012, census.gov/history/pdf/c2010br-10.pdf.

[3] Culturally appropriate services can include access to traditional healers, support groups or peer support, and counselling. Such longer-term support can be crucial in enabling survivors to navigate the justice system. While culturally appropriate services can take many forms, it is ultimately up to Indigenous people to define what these services look like in practice.

[4] Section 904 "[d]irects the National Institute of Justice to conduct a national baseline study to examine violence against women in Indian country. Requires the study to propose recommendations to improve the effectiveness of federal, state, tribal, and local responses to specified kinds of violence against Indian women", congress.gov/bill/109th-congress/house-bill/3402

[5] See Public Law 111-211, 124 Stat. 2258 § 251(b).

[6] US Department of Justice, Review of the Department's Tribal Law Enforcement Efforts Pursuant to the Tribal Law and Order Act of 2010, December 2017, oig.justice.gov/reports/2017/e1801.pdf

[7] National Institute of Justice, Violence Against American Indian and Alaska Native Women and Men: 2010 Findings from the National Intimate Partner and Sexual Violence Survey, May 2016, ojp.gov/pdffiles1/nij/249736.pdf

[8] Not all states record or report racially disaggregated data on sexual assault victimizations; other states not listed here may also have highly disproportionate rates of sexual violence against AI/AN women.

[9] 2017 data shows Alaska Native women made up 42% of victims of sexual violence incidents. State of Alaska Rape Prevention Education Program, Sexual Violence in Alaska Data Resources, January 2019, mcdowellgroup.net/wp-content/uploads/2019/05/sexual-violence-data.pdf, p. 9. See U.S. Census Bureau, American Community Survey, 2017 American Community Survey 5-Year Estimates, Table B05003C, generated 10 March 2022, data.census.gov/cedsci/. See also U.S. Census Bureau; American Community Survey, 2017 American Community Survey 5-Year Estimates, Table DP05, generated 10 March 2022, data.census.gov/cedsci/

[10] 2019 data shows Native Americans as 9% of the state population, but 32.5% of rape victims. See South Dakota Department of Health, Sexual Violence in South

Dakota 2019 Data Report, March 2021, doh.sd.gov/documents/Prevention/2019_SD_SexualViolenceReport.pdf

[11] Amnesty International, Maze of injustice: The failure to protect Indigenous women from sexual violence in the USA, amnestyusa.org/pdfs/mazeofinjustice.pdf

[12] Boarding schools were part of a colonial policy to eradicate Indigenous cultures, languages and communities. Reports of physical and sexual violence in boarding schools, sometimes covering decades and hundreds of victims, show patterns of abuse long allowed by the US government.

[13] Tribal Court Clearinghouse, "Remarks of Kevin Gover at the Ceremony Acknowledging the 175th Anniversary of the BIA", 8 September 2000, tribal-institute.org/lists/kevin_gover.htm

[14] See Charles R. England, "A Look at the Indian Health Service Policy of Sterilization, 1972- 1976", undated, sdcedsv.org/articles/alookattheindianhealthservicepolicyofsterilization19721976/

[15] Government Accountability Office, Investigation of Allegations Concerning Indian Health Service, 1975, gao.gov/assets/hrd-77-3.pdf

[16] US Department of Health and Human Services, Indian Health Service Has Strengthened Patient Protection Policies but Must Fully Integrate Them Into Practice and Organizational Culture, December 2019, oig.hhs.gov/oei/reports/oei-06-19-00330.pdf

[17] National Indigenous Women's Resource Center, "Action Alert: Sign On to Declare May 5th as the National Day of Awareness for Missing and Murdered Native Women and Girls", 12 March 2021, niwrc.org/news/action-alert-sign-declare-may-5th-national-day-awareness-missing-and-murdered-native-women-and

[18] US Department of Justice, "Protecting Native American and Alaska Native Women from Violence: November is Native American Heritage Month", 29 November 2019, justice.gov/archives/ovw/blog/protecting-native-american-and-alaska-native-women-violence-november-native-american

[19] Centers for Disease Control and Prevention, "Leading Causes of Death – Females – Non-Hispanic American Indian or Alaska Native - United States 2017", 20 November 2019, cdc.gov/women/lcod/2017/nonhispanic-native/index.htm

[20] For example, projects near the Bakken oil field in North Dakota, or the Enbridge Line 3 Pipeline near the Minnesota Chippewa Tribe's bands have led to the creation of man camps which have been linked to increased rates of sexual violence against Indigenous women, among other violent crimes. See Ana Condes, Man Camps and Bad Men: Litigating Violence Against American Indian Women, 116 Nw. U. L. Rev. 515, 10 October 2021, scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1474&context=nulr and Jihan Dahanayaka, The McGill International Review, "Enbridge's Line 3 Pipeline: Mixing Oil and Sexual Violence", 1 November 2021,

mironline.ca/enbridges-line-3-pipeline-mixing-oil-and-sexual-violence/

[21] See, for example, UN Interagency Framework Team for Preventative Action, Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflict-Extractive Industries and Conflict, 2012, un.org/en/land-natural-resources-conflict/pdfs/GN_Extractive.pdf and UN General Assembly, Report of the Special Rapporteur on the rights of indigenous people, James Anaya: Extractive industries operating within or near indigenous territories, 11 July 2011, ohchr.org/Documents/Issues/IPeoples/SR/A-HRC-18-35_en.pdf

[22] Statement of the Special Rapporteur to the Third Committee at the sixty-sixth session of the General Assembly, 17 October 2011, un.org/press/en/2011/gashc4013.doc.htm

[23] Available at: vimeo.com/537468230

[24] Angela Riley and Kristen Carpenter, "Indigenous Peoples and the Jurisgenerative Moment in Human Rights," Colorado Law Scholarly Commons, 2014, scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1065&context=articles

[25] Human Rights Committee, the expert committee that monitors states' implementation of the International Covenant on Civil and Political Rights, General Comment 31, refworld.org/docid/478b26ae2.html and Committee on the Elimination of Discrimination against Women, General Recommendation 19, ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf

[26] General Recommendation 19 of the Committee on the Elimination of Discrimination against Women articulates ways in which sexual violence is a violation of rights contained in treaties which have been ratified by the USA.

[27] Article 7 of the International Covenant on Civil and Political Rights. See also Article 2(1) of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[28] Article 9(1) of the International Covenant on Civil and Political Rights and Article 3 of the Universal Declaration of Human Rights.

[29] Article 12 of the International Covenant on Economic, Social and Cultural Rights, which the USA has signed but not ratified.

[30] The USA has signed the Convention on the Elimination of All Forms of Discrimination against Women but not ratified it, meaning that it is obliged to refrain from acts that would defeat the object and purpose of this treaty.

[31] Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women. See also General Recommendation 19 of the Committee on the Elimination of Discrimination against Women.

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THE NEVER-ENDING MAZE

CONTINUED FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA

More than half of all American Indian and Alaska Native women have experienced sexual violence in their lifetime; one in three have experienced rape. Since Amnesty International first reported on this issue in 2007, rates of violence against Indigenous women have not significantly changed, and the US government continues to fail to adequately prevent and respond to such violence.
This report details some of the factors that contribute the high rates of sexual violence against Indigenous women, and the barriers to justice that they continue to face. A complex jurisdictional maze, under-resourcing of law enforcement and medical services, and the inadequate response of justice systems to crimes of sexual violence are the primary obstacles survivors must navigate. This epidemic of sexual violence has been exacerbated by the US government's steady erosion of tribal authority. Sexual violence against Indigenous women violates a multitude of human rights, but it is not inevitable. The voices of Indigenous advocates throughout this report send a message of courage and hope that change can and will happen.

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