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Protecting Native Mothers and Their Children: A Feminist Lawyering Approach

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PROTECTING NATIVE MOTHERS AND THEIR CHILDREN: A FEMINIST LAWYERING APPROACH

Joanna Woolman[†] and Sarah Deer^{††}

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I. INTRODUCTION

A mother killing her child is a shocking event.¹ In the United States, our child protection system seeks to prevent this type of horror, along with countless other acts that harm children. Despite having a system designed to protect children from harm, hundreds of children are killed by their mothers each year.² Each death represents a failure of our systems and communities, and individuals within both, to protect children. The typical response to filicide tends to focus on the actions of the individual mother rather than the failures of the system. Our current criminal justice system often deals with these cases and mothers harshly, not taking into account the unique, gendered circumstances that lead a mother to this desperate act. Society is quick to place blame on the archetype of a selfish, unfeeling mother who kills a child because she feels inconvenienced by motherhood.³ Neonaticide, a subcategory of filicide, is particularly fraught with extremely negative life circumstances, including mental illness, substance abuse, and trauma.⁴ These circumstances, in many cases, could be recognized and remedied with the right intervention. We believe that holistic, feminist legal representation could achieve this intervention in some cases, possibly preventing the extreme, tragic outcome of the death of a child.

Feminist legal theories originated out of a desire to promote “equality” within our traditional legal systems by penalizing sex discrimination. However, “equality” is a relative term, and feminist scholarship has been justifiably critiqued for its narrow and privileged view of women’s issues. Sex discrimination litigation, for example, offers very little help to women who are trapped, traumatized, and isolated—factors that can lead to the death of a

1. MARGARET G. SPINELLI, *INFANTICIDE: PSYCHOSOCIAL AND LEGAL PERSPECTIVES ON MOTHERS WHO KILL*, at xv (1st ed. 2003) (describing maternal infanticide as a subject “both compelling and repulsive”).

2. Natalie K. Isser & Lita Linzer Schwartz, *Engendered Homicide*, 36 J. PSYCHIATRY & L. 577, 585–86 (2008).

3. See generally Jayne Huckerby, *Women Who Kill Their Children: Case Study and Conclusions Concerning the Differences in the Fall from Maternal Grace by Khoua Her and Andrea Yates*, 10 DUKE J. GENDER L. & POL’Y 149 (2003) (exploring “the roles of race and culture, class, marital status, and biology in the media’s treatment of two infanticidal women”).

4. Steven E. Pitt & Erin M. Bale, *Neonaticide, Infanticide, and Filicide: A Review of the Literature*, 23 BULL. AM. ACAD. PSYCHIATRY L. 375, 375–76 (1995).

child at the hands of a mother. Some feminist theories provide contextual and biological frameworks for understanding mothers who kill through a gendered lens. Within these cultural theories of difference, however, mental health, domestic violence, and poverty are not adequately addressed at either the charging or sentencing stages when mothers are charged with killing their children. In the particular instance of neonaticide (committed almost exclusively by women), a feminist inquiry must include consideration of domestic violence, poverty, and trauma. Context is critically important in considering the causes of infanticide: “The crime . . . is committed by mothers who cannot parent their child under the circumstances dictated by their *unique position in place and time*.”⁵

More importantly, the trauma that women experience prior to killing their children has usually been ongoing for years without appropriate intervention from attorneys or the child protection system. Why do these women end up in a situation where they make the fateful choice to kill or abandon their children? Are these deaths preventable? Are these women “bad mothers”? What role should lawyers play in attempting to prevent these deaths?

In this paper, we attempt to answer these questions by considering the unique vantage point of Native women and mothers.⁶ We decided to focus on Native women and their children for three reasons. First, the perspectives and stories of Native women have historically been invisible from analytical critiques of the child protection system. We consider the experiences of Native women for their intrinsic value and truth. Their stories have not been sufficiently told. Second, some of today’s Native children and their families experience harmful indicators for child poverty, child abuse, and child health in the United States. Third, the child protection system removes children from Native homes at rates much higher than other groups.⁷ Thus, an exploration of the experiences of Native women allows a magnification of the

5. CHERYL L. MEYER & MICHELLE OBERMAN, *MOTHERS WHO KILL THEIR CHILDREN: UNDERSTANDING THE ACTS OF MOMS FROM SUSAN SMITH TO THE “PROM MOM”* 2 (2001) (emphasis added).

6. For the purposes of this article, we use “Native” and “tribal” interchangeably to refer to indigenous people from the United States—also known as American Indian or Native American. In Canada, the Native population is also labeled “First Nation” or “Aboriginal.” We rely on some Canadian sources because of parallel socio-legal history.

7. See *infra* Part II.B.3.

weaknesses and failures of the American legal system, particularly how oppression and discrimination shape individual experiences.⁸ What we learn from the perspective of a Native mother can illustrate the methodology we should use to identify weaknesses and failures of the contemporary legal system. In addition, considering the distinct experiences of Native women requires us to take a hard look at the racist origins of the American child protection system, and how that racism and oppression continues to play a role in today's current system.

One avenue for critiquing current interventions for Native families comes from feminist legal theory, particularly when considering the gendered aspects of child protection. Feminist scholars have established methodology and practice principles that have seen improvements in the lives of women. However, we believe that feminist legal theory has not done enough to fully account for the factors that can lead women to desperate acts like neonaticide. Feminist legal theory has also not focused enough on the importance of representing women who have harmed or killed their children. Moreover, there is very little literature that considers how feminist legal theory intersects with the lives of Native women. Thus, this article offers another intervention that considers the role of feminist theory as applied to the lives of Native women and children. This article is ultimately designed to consider the advantages and disadvantages of applying feminist legal theory and practice to the lives of Native mothers in crisis.⁹ We begin in Part II by exploring the complex and tragic history of child protection and Native women, providing historical context for our analysis. In Part III, we consider the story of Dana Deegan, a Native woman who was convicted for the death of her newborn son on the Fort Berthold Indian Reservation in 2008. Ms. Deegan's story is a tragic account of a Native mother in crisis. It also provides an explicit example of how the child protection and legal systems failed to

8. Adrien Katherine Wing explains, "[E]xisting legal paradigms under U.S., foreign, and international law have permitted women of color to fall through the cracks—becoming literally and figuratively voiceless and invisible." GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER 2 (Adrien Katherine Wing ed., 2000).

9. By "mothers in crisis," we mean to include a variety of scenarios in which a mother may be unable to protect her children from harm and/or removal. Such scenarios include poverty, mental illness, trauma, isolation, and violence. See *infra* Part II for more descriptions.

provide protection and justice for a Native woman. In Part IV, we offer an analysis of potential legal responses to Native women in crisis, using feminist lawyering practices and holistic legal services. We conclude by examining and critiquing existing feminist theory as applied to Native mothers, and we offer potential frameworks that can address our perceived weaknesses with a traditional feminist theoretical approach.

II. BACKGROUND: NATIVE AMERICAN EXPERIENCES WITH CHILD PROTECTIVE SERVICES

In this section, we explore the intersection of the child protection system and the lives of Native women and their children in the United States. In short, traditional American child protective services (CPS) have historically been the cause of great harm to Native women and their families. Historical trauma, which emanates from the forced application of patriarchal colonial systems, has resulted in a system in which Native women are often trapped in desperate circumstances.¹⁰

Risk factors for mothers and children (domestic violence, addiction, poverty, and isolation) are significantly elevated in tribal communities. Before we can consider how feminist interventions may offer solutions for protecting Native women and their families, it is important to understand the historical and contemporary context for Native mothers in crisis. We begin with a historical perspective, considering traditional tribal conceptions of mothering and parenthood. We then consider how colonizing laws and policies of the United States and its predecessors have weakened traditional tribal systems of kinship and protection.

A. *Precolonial Native Motherhood*

Understanding the roots of Native motherhood requires a consideration of traditional gender roles. One of the biggest challenges in writing about Native women is the tendency to over-generalize and over-romanticize precolonial gender roles. It would be a mistake to say that *all* tribal nations in North America were

10. See Elizabeth Cook-Lynn, *The Big Pipe Case*, in *WHY I CAN'T READ WALLACE STEGNER AND OTHER ESSAYS: A TRIBAL VOICE* 110, 110–11 (1996) (telling the story of a Native teenager who was charged with a felony for breastfeeding her daughter under the influence of alcohol).

strictly matriarchal, matrilineal, or egalitarian.¹¹ However, when compared with typical European gendered relations, it can be argued that most Native women generally exercised more power than their European counterparts, including political and spiritual authority.¹² Moreover, many Native cultures traditionally honored the role of Native women in making their own decisions about marriage, sexual partners, and pregnancy.¹³ Pregnant women had access to community support, including medicinal interventions for health challenges.¹⁴ Generally, pregnancy and childbirth were considered to be normal, natural life events.¹⁵

The legal status of children is also an important cultural component that is under-addressed. Children establish the foundation of a tribal community. In Lakota, for example, the word for children translates into “sacred being.”¹⁶ Martin Brokenleg explains:

If one were to say “You are acting like a child” in any European language, this would be interpreted as an insult. In my Lakota tongue, this phrase would be “You

11. See, e.g., Emma LaRocque, *The Colonization of a Native Woman Scholar*, in *WOMEN OF THE FIRST NATIONS: POWER, WISDOM, AND STRENGTH* 11, 14 (Christine Miller & Patricia Chuchryk eds., 1996) (“[W]e cannot assume that all Aboriginal traditions universally respected and honoured women.”).

12. See, e.g., Carrie A. Martell & Sarah Deer, *Heeding the Voice of Native Women: Toward an Ethic of Decolonization*, 81 N.D. L. REV. 807, 814 (2005) (finding that women in egalitarian societies had more control over their relationships); Andrea Smith, *Native American Feminism, Sovereignty and Social Change*, in *MAKING SPACE FOR INDIGENOUS FEMINISM* 93, 102 (Joyce Green ed., 2007) (providing that Native women served as “spiritual, political, and military leaders”); Katherine M. Weist, *Beasts of Burden and Menial Slaves: Nineteenth Century Observations of Northern Plains Indian Women*, in *THE HIDDEN HALF: STUDIES OF PLAINS INDIAN WOMEN* 29, 41–45 (Patricia Albers & Beatrice Medicine eds., 1983) (summarizing and comparing the amount of economic control women of different tribes had).

13. See, e.g., Mona Etienne & Eleanor Leacock, *Introduction to WOMEN AND COLONIZATION: ANTHROPOLOGICAL PERSPECTIVES* 1, 13 (Mona Etienne & Eleanor Leacock eds., 1980).

14. See CAROLYN NIETHAMMER, *DAUGHTERS OF THE EARTH: THE LIVES AND LEGENDS OF AMERICAN INDIAN WOMEN* 1–6 (1977) (outlining the various community support).

15. Claudia R. Long & Mary Ann Curry, *Living in Two Worlds: Native American Women and Prenatal Care*, 19 HEALTH CARE WOMEN INT. 205, 206 (1998).

16. Martin Brokenleg, *Native Wisdom on Belonging*, in 7 RECLAIMING CHILDREN & YOUTH 130, 130 (1998).

are acting like a sacred being,” which is certainly not a put-down.¹⁷

In terms of motherhood, there is evidence to conclude that Native women have always had highly valued relationships with their children, while the nuclear family values of twentieth century white America were most certainly absent. Native cultures typically have very complicated, intricate systems of kinship. The Anglo-American distinction between “immediate” and “extended” family simply did not exist.¹⁸ Biological and marital relationships have traditionally been interwoven throughout the community, such that any particular tribal citizen has literally hundreds of “immediate” family members.¹⁹ Traditionally, children in tribal communities often had multiple “mothers,” given that a child’s aunts and other female relatives would also carry the term “mother.”²⁰ In addition, biological parents were not always the primary caregivers or teachers of their children. In some cultures, first-time parents would relinquish the day-to-day rearing of their first child to grandparents. Only after observation of parenting skills from this vantage point would biological parents be equipped with the skills needed to properly care for a child. In some cultures, primary discipline for children was delegated to aunts or uncles.²¹

Responsibility for raising children belonged to the larger community.²² There was no need for a “child welfare system”

17. *Id.*

18. In 1883 Sarah Winnemucca Hopkins, a Paiute woman, explained, “Our tenth cousin is as near to us as our first cousin.” SARAH WINNEMUCCA HOPKINS, LIFE AMONG THE PIUTES: THEIR WRONGS AND CLAIMS 45 (1883).

19. MARK ST. PIERRE & TILDA LONG SOLDIER, WALKING IN THE SACRED MANNER 64–65 (1995).

20. See Brokenleg, *supra* note 16, at 130; Charles Horejsi et al., *Reactions by Native American Parents to Child Protection Agencies: Cultural and Community Factors*, 71 CHILD WELFARE 329, 338 (1992).

21. Of Plains Indian culture, St. Pierre and Long Soldier write, “It was generally accepted that the mother’s sisters would discipline and teach their sisters’ children; their mother’s brothers performed the same role for boys.” ST. PIERRE & LONG SOLDIER, *supra* note 19, at 63. Lakota elder Lucy Swan articulated the wisdom of this practice: “[P]arents sometimes are short with their own children. The aunts and uncles could teach the children without getting upset, and that left the relationship with their mother and father a good and loving one.” *Id.*

22. Sarah Winnemucca Hopkins (Paiute) wrote, “The young [Paiute] mothers often get together and exchange their experiences about the attentions of their husbands; and inquire of each other if the fathers did their duty to the

because the kinship relationships of a child would ensure that there would be supervision, care, and nurture from members of the child's extended family.²³ If a parent were unable to provide care, another relative would assume this role immediately and transparently.²⁴ These systems of kinship and responsibilities negated the need for any unrelated third-party intervention into the life of a child.

B. *Colonization and Native Mothers*

Colonial encounter has threatened Native motherhood²⁵ in at least three different ways as explored below. Ultimately, the imposition of Euro-American parenting standards was the foundation for the erosion of traditional parenting structures in many tribal communities. Isolation and shame have replaced the cultural parenting norms, which included extensive kinship networks and child-rearing responsibilities. Native families have been targets of social workers for over a century—and, by extension, the child protection system—and the results have been devastating.

1. *Missionary Belief Systems About the Cultural Inferiority of Native Women's Mothering Skills*

European and American missionaries historically approached Native people and cultures as primitive—even subhuman.²⁶ In particular, the positive parenting practices that served as the foundation for Native kinship systems were often deemed to be inadequate, irrational, and even immoral in the eyes of foreign officials. Conversion to Christianity was often accompanied by an

children, and were careful of their wives' health." HOPKINS, *supra* note 18, at 50; *see also* WALTER LITTLEMOON, *THEY CALLED ME UNCIVILIZED: THE MEMOIR OF AN EVERYDAY LAKOTA MAN FROM WOUNDED KNEE* 4 ("[T]he whole tribe protected [children] . . . Everyone watched over them.").

23. Horejsi et al., *supra* note 20, at 335.

24. *See* ST. PIERRE & LONG SOLDIER, *supra* note 19, at 65.

25. By "motherhood" we refer to the constellation of cultural norms and practices that governs the relationship between women and children. These relationships include legal, moral, spiritual, and practical obligations.

26. *See, e.g.,* Myra Rutherford, *Revisiting Colonization Through Gender: Anglican Missionary Women in the Pacific Northwest and the Arctic, 1860–1945*, 104 *BRIT. COLUMBIAN STUD. Q.* 3, 5 (1994) (explaining that in a missionary's eyes, "natives were often reduced to the status of animals").

expectation that Native people would raise their children as the Europeans did.²⁷ This created a significant “culture clash” as the two approaches to parenting were often incompatible.

Many Native cultures, for example, forbade the use of corporal punishment as a method for disciplining children. However, failure to use physical punishment against children did not sit well with many missionaries. French Jesuit missionary Paul Le Juene wrote of the Huron people, “These Barbarians cannot bear to have their children punished, nor even scolded, not being able to refuse anything to a crying child.”²⁸ Another missionary wrote, “The Savages love their children above all things. They are like the Monkeys—they choke them by embracing them too closely.”²⁹ Thus, many missionaries challenged not only parenting practices, but also parenting philosophies. For centuries, Christian leaders encouraged the adoption of Euro-Christian child-rearing practices, which were modeled on the “nuclear” family (e.g., one husband who works outside the home, one woman who stays inside the home and provides child care). Moreover, these practices were also predicated on female subservience, introducing a form of institutionalized sexism that had no predecessor in many tribal cultures.³⁰ Slowly, the “governance of matrilineality began to fade amongst many families.”³¹ As the power of Native women decreased, the external threats to Native motherhood increased.

2. *Native Mothers and the Early American Child Protection System*

Beginning in the late nineteenth century, liberal social reformers used privilege and class to reinforce their belief that Native children would be better off without their mothers.³² These

27. See, e.g., KAREN ANDERSON, *CHAIN HER BY ONE FOOT: THE SUBJUGATION OF NATIVE WOMEN IN SEVENTEENTH-CENTURY NEW FRANCE* 21 (1991) (“Christianization . . . implied that everyone be brought under the same rules of conduct.”).

28. *Id.* at 160.

29. CAROL DEVENS, *COUNTERING COLONIZATION: NATIVE AMERICAN WOMEN AND GREAT LAKES MISSIONS, 1630–1900*, at 12 (1992).

30. See, e.g., WILMA MANKILLER & MICHAEL WALLIS, *MANKILLER: A CHIEF AND HER PEOPLE* 20 (1993) (“Sexism was borrowed from Europeans.”).

31. Denise K. Henning, *Yes, My Daughters, We Are Cherokee Women*, in *MAKING SPACE FOR INDIGENOUS FEMINISM*, *supra* note 12, at 194.

32. See Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 *EMORY L.J.* 587, 602–04 (2002); Lorie M. Graham, “*The Past Never Vanishes*”: A Contextual Critique of the

reformers usually characterized Native women as “unfit mothers whose children had to be removed from their homes and communities to be raised properly by white women within institutions.”³³ The efforts of wealthy white women to reinforce what they perceived to be appropriate femininity necessarily placed traditional Native motherhood as inferior to that of Euro-American standards. As historian Margaret Jacobs notes, white motherhood was “sacred,” while indigenous motherhood was “pathological.”³⁴

Throughout the United States, Native children were removed from tribal nations by force, fraud, or deceit to be sent to government and church-run boarding schools.³⁵ Some children were shipped thousands of miles from their home. The separation of Native women from their children was marked by violence and despair.³⁶ In some cases, children were kidnapped.³⁷ On some reservations, parents who refused to cooperate with child removal

Existing Indian Family Doctrine, 23 AM. INDIAN L. REV. 1, 2, 25–27 (1998); Ann Murray Haag, *The Indian Boarding School Era and Its Continuing Impact on Tribal Families and the Provision of Government Services*, 43 TULSA L. REV. 149, 151–54 (2007); Patrice H. Kunesh, *Transcending Frontiers: Indian Child Welfare in the United States*, 16 B.C. THIRD WORLD L.J. 17, 22–24 (1996); Ryan Seelau, *Regaining Control over the Children: Reversing the Legacy of Assimilative Policies in Education, Child Welfare, and Juvenile Justice That Targeted Native American Youth*, 37 AM. INDIAN L. REV. 63, 82–88 (2013).

33. Margaret D. Jacobs, *The Great White Mother: Maternalism and American Indian Child Removal in the American West, 1880–1940*, in ONE STEP OVER THE LINE: TOWARD A HISTORY OF WOMEN IN THE NORTH AMERICAN WESTS 191, 192 (Elizabeth Jameson & Sheila McManus eds., 2008).

34. MARGARET D. JACOBS, WHITE MOTHER TO A DARK RACE: SETTLER COLONIALISM, MATERNALISM, AND THE REMOVAL OF INDIGENOUS CHILDREN IN THE AMERICAN WEST AND AUSTRALIA, 1880–1940, at 131 (2009).

35. A good description of this era comes from *Sioux Tribe of Indians v. United States*, 7 Cl. Ct. 468, 478 (1985). See Marc Mannes, *Factors and Events Leading to the Passage of the Indian Child Welfare Act*, 74 CHILD WELFARE 264, 266 (1995).

36. In 1892 the Commissioner of Indian Affairs, Thomas J. Morgan, issued a rule providing that Indians who attempted to “prevent the attendance of children at school” were guilty of an offense and subject to imprisonment “for not less than ten days.” A subsequent offense could be punished by as much as six months incarceration. H.R. Doc. No. 52-1, at 28–31 (1892); see also AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE “FRIENDS OF THE INDIAN,” 1880–1900, at 302 (Francis Paul Prucha ed., 1973) (quoting Thomas J. Morgan’s regulations regarding rules for Indian courts).

37. See BRENDA J. CHILD, BOARDING SCHOOL SEASONS: AMERICAN INDIAN FAMILIES 1900–1940, at 13 (2000).

were threatened with starvation.³⁸ Native families resorted to desperate measures to protect their children. Historical records include documentation of Native women in the Southwest burying their children in the dirt or placing them in bushes to hide them from government agents.³⁹ The resistance was for good reason. At most of the boarding schools, Native children were stripped of cultural and spiritual identity.⁴⁰ Although a variety of different boarding school models existed, ranging from more benign reservation-based day schools to military-style institutions thousands of miles from home, the goal was the same: forced assimilation.⁴¹ Native children were essentially taught that their identity and culture were shameful and, by extension, their families and parents were also shameful.⁴² In most of these schools, children were not allowed to speak their language or practice their spiritual traditions.⁴³ The stated goal of this era was to “civilize” Native people.⁴⁴ From the vantage point of the colonial system, civilization was only possible if Native children denied their identity and heritage.⁴⁵ Another sinister aspect to the boarding school era was

38. See Act approved Mar. 3, 1893, ch. 209, 27 Stat. 612, 635 (“[T]he Secretary of the Interior may in his discretion withhold rations . . . from Indian parents or guardians who refuse or neglect to send and keep their children of proper school age in some school”); Act approved Mar. 3, 1891, ch. 543, 26 Stat. 989, 1014 (“[T]he Commissioner of Indian Affairs . . . is hereby authorized and directed to make and enforce by proper means such rules and regulations as will secure the attendance of Indian children . . . at schools”); JACOBS, *supra* note 34, at 159.

39. JACOBS, *supra* note 34, at 156–57.

40. KAREN SWIFT, MANUFACTURING “BAD MOTHERS”: A CRITICAL PERSPECTIVE ON CHILD NEGLECT 129 (1995).

41. See generally Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, reprinted in *FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT AT 30*, at 50, 51 (Matthew L.M. Fletcher et al. eds., 2009) (showing that the government embraced policies of forced assimilation).

42. See, e.g., Karen Saylor & Nalini Daliparthi, *Aiming to Balance: Native Women Healing in an Urban Behavioral Health Care Clinic*, in *HEALING AND MENTAL HEALTH FOR NATIVE AMERICANS* 169, 172 (Ethan Nebelkopf & Mary Phillips eds., 2004).

43. SWIFT, *supra* note 40, at 129.

44. ZIIBIWING CTR. OF ANISHINABE CULTURE & LIFEWAYS, *AMERICAN INDIAN BOARDING SCHOOLS* 4–5 (2011); see also Barbara Perry, *From Ethnocide to Ethnoviolence: Layers of Native American Victimization*, 5 *CONTEMP. JUST. REV.* 231, 235–36 (2002) (discussing the ethnocide of Native people).

45. ZIIBIWING CTR. OF ANISHINABE CULTURE & LIFEWAYS, *supra* note 44, at 4–5; see also Graham, *supra* note 41, at 51.

the widespread sexual abuse that occurred in many facilities.⁴⁶ This painful aspect of the boarding school era has only recently received widespread attention.⁴⁷

At least two aspects of the boarding school era are relevant to this discussion on Native motherhood. First, it was both a racist and anti-sovereignty project. At its core, removing children from their homes on a mass scale reinforced racist beliefs about the capacity of Native people to be good parents and served to break up tribal kinship networks that formed the basis for self-government. Second, the boarding school era disrupted the normal transmission of parenting values and skills by denying Native children the opportunity to experience these practices for themselves. Corporal punishment, once abhorred in Native communities, was regularly instituted at most boarding schools.⁴⁸ Many survivors of the boarding school era have expressed how difficult it was for them to be good parents themselves, because they had been raised in non-Native institutions that repeatedly punished them for being Indian.⁴⁹

From the children's perspective, the boarding school era also introduced systemic internalized oppression about mothering.⁵⁰ Native children no longer had access to the parenting styles of their culture.⁵¹ Instead, they learned systemic military-style organization and corporal discipline.⁵²

46. See, e.g., SWIFT, *supra* note 40, at 129.

47. Stephanie Woodard, *South Dakota Boarding School Survivors Detail Sexual Abuse*, INDIAN COUNTRY (July 28, 2011), <http://indiancountrytodaymedianetwork.com/2011/07/28/south-dakota-boarding-school-survivors-detail-sexual-abuse-42420>.

48. DAVID WALLACE ADAMS, *EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875–1928*, at 121 (1995).

49. Patrick J. Morrisette, *The Holocaust of First Nation People: Residual Effects on Parenting and Treatment Implications*, 16 CONTEMP. FAM. THERAPY 381, 381 (1994).

50. ZIIBIWING CTR. OF ANISHINABE CULTURE & LIFEWAYS, *supra* note 44, at 10.

51. ST. PIERRE & LONG SOLDIER, *supra* note 19, at 203 (“This educational system systematically destroyed Indian parenting patterns, slowly squeezing the life out of the traditional Indian attitude toward extended family.”).

52. Horejsi et al., *supra* note 20, at 329. In one study, for example, many Native women who attended boarding schools later had less confidence about their abilities to mother. Ann Metcalf, *From Schoolgirl to Mother: The Effects of Education on Navajo Women*, 23 SOC. PROBS. 535, 535 (1976) (documenting anxiety and lack of confidence in a group of Navajo mothers who were separated from their families as children).

More recently, the long-lasting, psychological harm that has developed in response to the family-destroying policies and practices of the federal government has been characterized as “historical trauma.”⁵³ Historical trauma permeates many of the physical and psychological challenges faced by Native people, including pregnancy and parenting. Conceptualizing historical trauma has been helpful for the field of social work and psychology; later in this article, we consider particularly how historical trauma can inform feminist legal theory.⁵⁴

3. *Twentieth Century Child Protection System*

The systemic interference between Native children and their parents continued unabated in the twentieth century. When attendance at boarding school was no longer compulsory, Native families became the targets of another growing movement—the child protection system. Social workers became the new saviors of Native children and interfered with families for the “crimes” of poverty and isolation. Child welfare workers often explicitly argued that Native babies and children would be better off if they were living with non-Native, affluent families.⁵⁵ The Child Welfare League, for example, established an official Indian Adoption Project that lasted from 1959 to 1967.⁵⁶ *Lakota Woman* author Mary Crow Dog explained that in the 1950s and 1960s “[a] flush toilet to a white social worker [was] more important than a good grandmother.”⁵⁷ Child welfare workers classified kinship practices, such as sibling care, as “neglect.”⁵⁸

53. Maria Yellow Horse Brave Heart, *The Historical Trauma Response Among Natives and Its Relationship to Substance Abuse*, in HEALING AND MENTAL HEALTH FOR NATIVE AMERICANS, *supra* note 42, at 7.

54. See *infra* Part IV. One significant drawback of using a historical trauma framework is that it often dominates stereotypes showing Native people as broken rather than celebrating the strength and resiliency of Native people. See, e.g., Eve Tuck, *Suspending Damage: A Letter to Communities*, 79 HARV. EDUC. REV. 409, 413 (2009) (“[T]he danger in damage-centered research is that it is a pathologizing approach in which the oppression singularly defines a community.”).

55. See, e.g., SWIFT, *supra* note 40, at 131–32.

56. Claire Palmiste, *From the Indian Adoption Project to the Indian Child Welfare Act: The Resistance of Native American Communities*, 22 INDIGENOUS POL’Y J. 1, 1 (2011).

57. MARY CROW DOG & RICHARD ERDOES, *LAKOTA WOMAN* 16 (1st ed. 1990).

58. See, e.g., Gertrude Buckanaga, *I Always Felt Truly Indian*, in I AM THE FIRE OF TIME 94, 94 (Jane B. Katz ed., 1977) (“Today, if a child is left alone with older

Attacks on Native families came from many disciplines, including health care. One example emerges from a health care campaign to address high rates of infant mortality on reservations in the early 1900s, called “Save the Babies.” The national program was intended to teach Native mothers proper sanitation and health care for newborns.⁵⁹ Unfortunately, this campaign also came at a price—practitioners often operated with a racist assumption that Native women were ignorant about infant care and that Native ways of caring for children were inferior to those of the Euro-American culture.⁶⁰ In reality, the cause of high infant mortality rates in tribal communities was more likely related to poverty, malnutrition, and oppression.⁶¹ But because of the disrespectful nature of such programs, Native mothers were often inclined to avoid these health care practitioners and social workers.

The very philosophical approach of Western social work created a climate in which the ability of the government power to break up the Native family was self-executing:

Child protection workers are directed to identify and design treatment for the problematic behaviours of *individual* caregivers, not to document and develop responses to problems of poverty, racism, and violence, and the way these affect women’s lives. Not surprisingly, then, child protection discourse tends to blame individual mothers for child neglect.⁶²

The wholesale removal of Native children—almost always on account of “neglect”—from their communities reached such a high level in the late twentieth century that it took an act of Congress to intervene. According to a 1969 study, data showed that, nationally, between twenty-five and thirty-five percent of Native children had

children, the Welfare will come in and say that the child is neglected. But within Indian families, it was accepted that the older children would care for the younger ones.”).

59. Gregory R. Campbell, *The Political Epidemiology of Infant Mortality: A Health Crisis Among Montana American Indians*, 13 AM. INDIAN CULTURE & RES. J. 105, 108 (1989); see also Patricia Jasen, *Race, Culture, and the Colonization of Childbirth in Northern Canada*, 10 SOC’Y. FOR HIST. MED. 383, 395–96 (1997) (discussing a governmental survey of infant mortality based on the assumption that more contact with governmental health services would improve rates).

60. Campbell, *supra* note 59, at 107–08.

61. *Id.*

62. Marlee Kline, *Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women*, 18 QUEEN’S L.J. 306, 320 (1993).

been separated from their families.⁶³ Extreme examples included rates of adoptive placements for Native children that were nineteen times that of non-Native children in Washington State.⁶⁴ In that same time frame, foster care placements for Native children in South Dakota were approximately sixteen times greater than the rate for non-Native children.⁶⁵

When Congress passed the Indian Child Welfare Act (ICWA) in 1978, it signaled an acknowledgment that the American legal system had been used as a tool to destroy Native families and was intended to enhance the likelihood that Native families could stay together.⁶⁶ However, even after thirty-five years of ICWA, Native children are still removed from their homes at rates far exceeding that of other groups.⁶⁷ Native women have heard of these sad tales for at least three generations—from their mothers, grandmothers, aunts, and sisters.

C. *The Legacy of Child Removal and Native Mothers*

Today's Native pregnant women and mothers wrestle with this dark legacy of child removal when assessing their options for help in times of crisis. For good reason, there is a great deal of distrust of outside intervention.⁶⁸ "Native parents may behave in ways that cause practitioners to view them as 'uncooperative,' 'unmotivated,' 'resistant,' or 'hard-to-reach.'"⁶⁹ In many tribal communities, disclosing domestic violence or child abuse is considered to be a

63. Mannes, *supra* note 35, at 267.

64. *Id.* at 267–68.

65. Carl Mindell & Alan Gurwitt, *The Placement of American Indian Children—the Need for Change*, in *THE DESTRUCTION OF AMERICAN INDIAN FAMILIES* 61, 62 (Steven Unger ed., 1977); *see also* SWIFT, *supra* note 40, at 45 (explaining that, in Canada, this era can be considered the "sixties scoop").

66. *See* Indian Child Welfare Act, Pub. L. No. 95-608, §§ 2–3, 92 Stat. 3069 (1978) (codified as amended at 25 U.S.C. §§ 1901–1902 (2012)).

67. *See generally* NAT'L INDIAN CHILD WELFARE ASS'N & THE PEW CHARITABLE TRUSTS, *TIME FOR REFORM: A MATTER OF JUSTICE FOR AMERICAN INDIAN AND ALASKAN NATIVE CHILDREN* (2007), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Foster_care_reform/NICWARReport.pdf (stating that Native children are disproportionately represented in state foster care systems).

68. *See generally* Horejsi et al., *supra* note 20, at 329 (describing the societal and historical influences that impact a Native's way of thinking about outside intervention).

69. *Id.* at 329–30. In context, these distrustful behaviors can actually be seen as proactive coping strategies to deal with a destructive system.

sign of inexcusable betrayal—because alerting authorities to any potential harm within the home can open the door to child removal.⁷⁰ Given the trauma of mass child removal in tribal communities, it has been safer to try to resolve the problem internally rather than seek help from third parties. Outside agency intervention from state and federal agencies may not be overtly racist today, but there continue to be vestiges of superiority and disrespect for Native cultures. Even today, standard social work curriculum does not explain the historical context in which Native people parent.⁷¹ Duran and Duran note bluntly that “[m]ost of the attempts at providing services to Native American people have ended in failure.”⁷²

Simultaneously, due to the breakdown of extended kinship networks and systems of care, the once-strong internal tribal structures themselves might not be able to take on these issues and protect children from harm.⁷³ Ultimately, the colonial influence on Native communities has deeply damaged traditional kinships. Tribal governments have actually replicated the child protection systems of the state governments. “The modern attack on the civil and tribal rights of Indian women of childbearing age on reservation homelands . . . has often resulted in staggering, violent, misogynistic practices previously unknown to the tribes.”⁷⁴ Thus, a Native mother suffering from addiction, poverty, abuse, or neglect may be effectively trapped with no viable options for keeping her family safe. Disclosing the challenges to outside authorities risks child removal; therefore, from this perspective, it is better not to seek help. However, this strategy effectively isolates Native women

70. This dynamic is explored in Michele Bograd, *Strengthening Domestic Violence Theories: Intersections of Race, Class, Sexual Orientation and Gender*, in *DOMESTIC VIOLENCE AT THE MARGINS: READINGS ON RACE, CLASS, GENDER, AND CULTURE* 25, 31 (Natalie J. Sokoloff & Christina Platt eds., 2005) (“[P]sychological consequences of battering may be compounded by the ‘microaggressions’ of racism, heterosexism, and classism in and out of the reference group.”).

71. Suzanne L. Cross et al., *Working on the Front Lines: The Role of Social Work in Response to the Indian Child Welfare Act of 1978*, in *FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT AT 30*, *supra* note 41, at 3.

72. EDUARDO DURAN & BONNIE DURAN, *NATIVE AMERICAN POSTCOLONIAL PSYCHOLOGY* 8 (1995).

73. Long & Curry, *supra* note 15, at 211 (noting that all of the Native American elders who participated in the study perceived the history of federal policies as having “broke[n] the family circle”).

74. Cook-Lynn, *supra* note 10, at 110.

who fear for their well-being and that of their children. With no intervention, support, or advice, a situation can deteriorate rapidly. This creates a devastating risk for mothers and children.⁷⁵

A system that is supposed to protect and nurture children has been crudely warped by a patchwork of policies rooted in superiority and disrespect. No wonder that a Native woman might avoid seeking help when she is suffering and scared—there are many rational disincentives for seeking help.⁷⁶ “Nati[ve] women are blamed for the difficulties they experience in child-raising, which in turn obfuscates the roots of these difficulties in the history and current dynamics of colonialism and racial oppression.”⁷⁷

Statistics demonstrate that today’s Native women face significant barriers to resources and help. Native women and girls suffer the highest rates of domestic violence and sexual assault in the United States.⁷⁸ Native communities suffer the highest rates of poverty, unemployment, and malnutrition in the nation.⁷⁹ As a result, Native women and children are at a heightened risk for harm. Native infants die at a rate two to three times higher than the rate for white infants.⁸⁰ Native women lack equal access to health care, including adequate prenatal care.⁸¹ Mothers and pregnant

75. For example, some tribes (largely influenced by state models) will prosecute a woman for child neglect for being a victim of domestic violence. *See, e.g.*, JAMES G. WHITE ET AL., CRIMINAL PROSECUTION OF BATTERED NATIVE WOMEN FOR FAILURE TO PROTECT I (2005), available at <http://www.swclap.org/pdfs/FAILURETOPROTECT.pdf>. While the intent of such laws may be to protect children, they also present enormous disincentives for a mother to report abuse or ask for help. *Id.* at 8–9. A Native woman might “stay” in an abusive marriage—not because she lacks self-esteem or has learned helplessness, but because of a well-justified fear of losing custody of her children. *See id.* at 10.

76. In the Canadian parallel, Kline explains, “[W]hile First Nation women are often victims of the child welfare system, they are not *passive* victims.” Kline, *supra* note 62, at 316.

77. *Id.* at 306.

78. Sarah Deer, *Criminal Justice in Indian Country*, 37 AM. INDIAN L. REV. 375, 377 (2013).

79. *See* Michelle Sarche & Paul Spicer, *Poverty and Health Disparities for American Indian and Alaska Native Children: Current Knowledge and Future Prospects*, 1136 ANNALS N.Y. ACAD. SCI. 126, 127 (2008).

80. OFFICE OF GEN. COUNSEL, U.S. COMM’N ON CIVIL RIGHTS, NATIVE AMERICAN HEALTH CARE DISPARITIES BRIEFING 14 (2004), available at http://libraries.ucsd.edu/bib/fed/usccr_natam_disparities.pdf.

81. Amnesty International reports that forty-one percent of American Indian and Alaska Native women do not receive “adequate prenatal care” as defined by the federal Healthy People 2010 goals. AMNESTY INT’L, DEADLY DELIVERY: THE

women suffering from chronic psychological distress may have few options; in some tribal communities, the only mental health care service is emergency psychiatric care.⁸²

It is within this historical context that we encounter Dana Deegan, a Native woman from North Dakota whose personal tragedy provides a modern day window into the lives and challenges of Native mothers. Through Dana's story, we explore the potential for feminist legal theories and the role of a feminist lawyer to act as a systemic catalyst for intervention.

III. THE STORY OF *UNITED STATES V. DEEGAN*

In this section, we focus on the story of one Native woman who committed the crime of neonaticide. Through her case study, we hope to better understand how the child protection system and other legal interventions failed to protect her and her newborn son.

A. *Dana's Story*

Dana Deegan is an Arikara woman from the Fort Berthold Reservation in North Dakota who is currently serving a ten-year sentence in federal prison for a crime that emerged from desperation and tragedy.⁸³ Dana's story epitomizes the ultimate tragic consequence of the historical trauma experienced by her people—the death of a child. In 1998 Dana was twenty-five years old with three young daughters, living on a remote and isolated reservation. In October of that year, Dana gave birth to a fourth child, a baby boy, alone in the shower of her trailer home. Dana's memories of the birth and its aftermath are fragmented and clouded because of the trauma she had experienced throughout her life, described more fully below. Suffering from dissociation, terror, panic, and suicidal thoughts, Dana left the newborn in the home and fled with her three daughters to a place of refuge with her mother. When she returned home two weeks later, her baby

MATERNAL HEALTH CARE CRISIS IN THE USA 6 (2010), available at <http://www.amnestyusa.org/sites/default/files/pdfs/deadlydelivery.pdf>.

82. See OFFICE OF GEN. COUNSEL, *supra* note 80, at 9.

83. Ms. Deegan's case is poignantly chronicled by Eighth Circuit Judge Myron Bright in *United States v. Deegan*, 605 F.3d 625, 639–45 (8th Cir. 2010) (Bright, J., dissenting). The facts are drawn from Bright's dissent, as well as a report by neonaticide expert Phillip Resnick.

had died. She kept the incident secret and placed her baby's body near a tree so that she could see him from her home.

During the next nine years, Dana's life substantially improved due to her strength and resilience. She continued to raise her three daughters and contributed in meaningful ways to their lives and the lives of others in her community. She gained more stability than she had known in the past, received some higher education, and had a full-time job.⁸⁴ However, her resilience was cut short. In 1999 the baby's body was discovered near the home where Dana and her family lived in 1998. For a variety of reasons, Dana was not identified as the mother of the baby (through DNA) until 2007. The federal government prosecuted Dana pursuant to the Major Crimes Act, which removes major crimes, such as murder, from tribal jurisdiction, even though the alleged crimes occurred in Indian Country and were perpetrated by enrolled Indians against other Indians.⁸⁵

After a federal grand jury indicted her on a charge of first-degree murder, Dana confessed to causing her baby's (now known as Moses) death and entered into a plea agreement with the government for a reduced charge of second-degree murder.⁸⁶ Despite numerous mitigating circumstances, Dana was sentenced to over ten years in prison.⁸⁷ At her 2008 sentencing hearing, the judge imposed 121 months after determining that an upward departure from the federal sentencing guidelines was justified because the crime was "unusually heinous, cruel, and brutal."⁸⁸ She is currently serving her ten-year sentence in federal prison with a

84. Letter from Marmie Jotter to President Barack Obama (Sept. 11, 2013) (on file with authors); *see also* Petition for Clemency and Commutation 12-13, 26 (Mar. 6, 2014) (on file with authors).

85. 18 U.S.C. § 1153(a) (2012). Because "major" crimes committed by Indians on reservations fall under federal jurisdiction, the sentencing structure varies widely from state law. Therefore, Native people are often punished more severely than their non-Native counterparts in state court. *See, e.g.,* Edwin L. Hall & Albert A. Simkus, *Inequality in the Types of Sentences Received by Native Americans and Whites*, 13 *CRIMINOLOGY* 199, 200 (1975).

86. *Deegan*, 605 F.3d at 628.

87. *Id.* at 629.

88. *Id.* at 628 (quoting the district court presentencing order). Moreover, the U.S. Attorney at the time of the crime described the crime as "violent and vicious" and described Dana's actions as heartless. Paul Walsh, *N.D. Mom Sentenced in "Slow-Motion" Death of Newborn Left Alone for Two Weeks*, *STAR TRIB.* (Minneapolis) (May 13, 2008, 11:05 AM), <http://www.startribune.com/local/18894054.html>.

release date of March 6, 2017. Deegan's supporters have mounted a campaign petitioning President Obama for clemency.⁸⁹

A review of the facts demonstrates that the death of Dana's baby was the ultimate tragic outcome of a life marked by extreme violence, which all took place in the shadow of the catastrophic history of systemic attacks on Native motherhood.

Dana Deegan is a survivor of horrific emotional, physical, and sexual abuse perpetrated by nearly every man in her life.⁹⁰ None of the perpetrators have ever been held accountable for their actions in the criminal justice system.⁹¹ From an early age, Dana witnessed and was the victim of extreme domestic violence at the hands of her father.⁹² Dana's father was an alcoholic and ultimately died from complications of this addiction.⁹³ Her mother would often stay away at work (she typically worked two jobs) to escape her violent husband.⁹⁴ Dana reported seeing her father severely beat her mother about once a month, resulting in broken bones and blackened eyes.⁹⁵ Dana's father beat her on a daily basis for many years.⁹⁶ She learned how to hide serious injuries from school officials and lie about absences.⁹⁷ Dana reported that she experienced what she now believes are dissociations as a result of these beatings.⁹⁸

Dana was also sexually abused by some of her father's friends between the ages of five and eleven.⁹⁹ By the time she was nine years old, Dana had experienced sexual touching, oral sex, vaginal and anal penetration, and torture.¹⁰⁰ At age eleven, she summoned

89. See, e.g., Stephen J. Lee, *Federal Judge Fights for Release of N.D. Indian*, GRAND FORKS HERALD, Oct. 15, 2013, available at LEXIS; FREE DANA DEEGAN, <http://www.freedana.com> (last visited Mar. 12, 2014).

90. See Letter from Phillip J. Resnick, Dir. of Forensic Psychiatry, Case W. Reserve Univ. Sch. of Med., to William D. Schmidt, Assistant Fed. Pub. Defender, Dists. of S.D. & N.D. (Apr. 9, 2008) (on file with authors) (psychological evaluation documenting Dana's history of trauma and violence).

91. See *id.* at 21.

92. *Id.* at 3–4.

93. *Id.* at 3.

94. *Id.*

95. *Id.* at 4.

96. See *id.*

97. *Id.*

98. *Id.* at 4–5.

99. *Id.* at 5.

100. *Id.*

the courage to report the abuse to her mother.¹⁰¹ Her mother felt guilty for not protecting her.¹⁰² When her mother told her father, he beat one of the accused men severely, almost causing his death.¹⁰³ Her father then also lashed out violently against her mother for being “a slut” who let the abuse happen.¹⁰⁴

As a result of this abuse, Dana was in and out of the foster-care system starting at age eleven.¹⁰⁵ Dana and her siblings were split up during this time.¹⁰⁶ Sometimes her father would stop drinking and the children would come home for a while—but ultimately he would resume drinking and the children would be removed again.¹⁰⁷

Dana met the man who would become the father of her children when she was fifteen.¹⁰⁸ They began a romantic relationship, which quickly became abusive. When Dana was seventeen, he assaulted her for the first time.¹⁰⁹ His violence and substance abuse became a common experience for Dana in the relationship.¹¹⁰

She went on to have three daughters with her common-law husband,¹¹¹ and his violence toward her escalated over time.¹¹² She had few options for safety.¹¹³ As a foster child herself, Dana knew firsthand the pain of being removed from a family. She legitimately feared that disclosing the abuse would separate her from her children.¹¹⁴ Her husband’s mother, who was a central figure in her life, provided some stability and support between the beatings (her husband tended to avoid violence and drinking in front of his mother).¹¹⁵

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *See id.*

109. *Id.*

110. *See id.* at 7–8, 10.

111. *Id.* at 6.

112. *Id.* at 19.

113. *See id.* at 10.

114. *Id.* at 7.

115. *Id.*

As a result of these incidents, Dana began experiencing depression and post-traumatic stress disorder from a very early age.¹¹⁶ At the time Moses was born, she was severely depressed.¹¹⁷ Although she learned she was pregnant around the four-month mark of her pregnancy, she did not believe or really have the ability to accept that she was pregnant.¹¹⁸ She made no plans for the birth and did not receive any prenatal care.¹¹⁹ She reported feeling at the end of her rope.¹²⁰ She had been suicidal at various points in her life.¹²¹ She did not think she could care for another baby and knew she could not go home because of her own father's physical abuse and drinking.¹²² She reports being terrified of losing her three daughters at the time.¹²³ The violence Dana suffered at the hands of Moses' father cannot be overstated.¹²⁴ At the time of Moses' birth, her common-law husband assaulted Dana regularly, took any money she might have acquired to feed her babies, and spent it on alcohol and drugs (methamphetamine).¹²⁵ One can imagine many scenarios in which Dana's family could have been quickly split apart if she were to admit that she needed help. In this light, Dana's ultimate, desperate act seemed the only option for saving her family.

At the time of Moses' birth, Dana lived in almost complete geographic isolation from the outside world. She was separated from other people and had no resources (legal or otherwise). One unique aspect of Native motherhood is that life on the reservation, for many mothers, can be lonely and isolated. For many poor mothers living in urban areas, community resources, while often scarce, are at least accessible. These mothers also have churches or other community support groups that help connect women and provide support.

To better understand Dana's case, it is helpful to explore the gendered crime of neonaticide. Although Moses' death clearly

116. *Id.* at 13, 18.

117. *Id.* at 13.

118. *Id.* at 10.

119. *Id.*

120. *See id.* at 11.

121. *See id.* at 9.

122. *Id.* at 11.

123. *Id.*

124. *See id.* at 10.

125. *Id.* at 10, 17.

meets the definition of neonaticide, Dana's particular circumstances as a Native woman differ from the prototypical case of neonaticide. Therefore, Dana's distinct story reminds us that theories cannot fully explain or conceptualize the context and culture of individual lives.

B. Neonaticide

"Neonaticide" refers to the killing of an infant within the first twenty-four hours of his or her life.¹²⁶ Neonaticide is a type of filicide, which is the more general term given to parents who kill their children.¹²⁷ Dr. Phillip Resnick, Director of Forensic Psychiatry at Case Western Reserve University, created the term "neonaticide."¹²⁸ One estimate suggests that between 150 and 300 neonaticides occur each year in the United States.¹²⁹ Typically, victims of neonaticide die by strangulation, suffocation, or abandonment shortly after birth.¹³⁰ Neonaticide is almost exclusively a crime committed by the birth mother.¹³¹ In most cases of neonaticide, the mother had concealed her pregnancy from others—and even denied it to herself. Rarely is the crime truly premeditated; in most cases, the crime is an acute reaction to the shock and fear of the unplanned birth.

Scholars who have looked carefully at case histories of neonaticide have concluded that there are common "warning signs" that precede the event.¹³² Commonalities among these crimes include unusual behavior by a pregnant woman, such as denial of pregnancy and disassociation. Often women who commit neonaticide are teenagers who are experiencing an unwanted pregnancy. These young women experience overwhelming feelings

126. Isser & Schwartz, *supra* note 2, at 581.

127. *Id.* at 586.

128. Dr. Resnick is one of the leading medical experts on this crime. See Phillip J. Resnick, *Murder of the Newborn: A Psychiatric Review of Neonaticide*, 126 AM. J. PSYCHIATRY 1414, 1419 (1970). This early publication introduced neonaticide as a gendered crime. *Id.* at 1414.

129. Isser & Schwartz, *supra* note 2, at 582.

130. See GEOFFREY R. MCKEE, WHY MOTHERS KILL: A FORENSIC PSYCHOLOGIST'S CASEBOOK 19–20 (2006); Isser & Schwartz, *supra* note 2, at 581.

131. See Isser & Schwartz, *supra* note 2, at 581.

132. See generally *id.* at 581–84 (describing common symptoms that indicate "neonaticide syndrome").

of shame, guilt, and tremendous fear upon giving birth.¹³³ Many of these women report suddenly going into labor in bathrooms or bedrooms. They often deliver their babies alone—and then either kill their infants on the day of their births, or wrap their babies in blankets and throw them in the trash to die.¹³⁴

Because neonaticide occurs on the day of the baby's birth, it is not clear to what extent postpartum mental illness plays a role.¹³⁵ Unlike postpartum psychosis, which has been the underlying cause of some cases of infanticide (the killing of a child under one year of age), it seems less likely that postpartum mental disorders are involved with neonaticide.¹³⁶ But the physiological responses to pregnancy and childbirth, which ultimately lead to serious postpartum issues, are likely parts of any neonaticide event.¹³⁷

In the United States, mothers who kill their newborn babies are often charged with murder and some receive prison sentences for their crimes.¹³⁸ However, the actual sentences vary widely. One study found that convictions ranged from “unlawful disposal of a body” to first-degree murder.¹³⁹ Further, the same study found that sentencing recommendations ranged from intensive therapy to a prison sentence of thirty-four years.¹⁴⁰ Lengthy sentences for murder are imposed in some cases despite clear evidence of the mother's distress and shock at the time of the birth, and also in many cases, evidence of prior abuse or trauma experienced by the

133. See *id.* at 581–82.

134. *Id.* at 581–83.

135. See *id.* at 587 (finding that postpartum symptoms appear shortly after birth).

136. Michelle Oberman, “*Lady Madonna, Children at Your Feet*”: *Tragedies at the Intersection of Motherhood, Mental Illness and the Law*, 10 WM. & MARY J. WOMEN & L. 33, 36, 38 (2003) (finding the majority of mothers who kill their children while suffering from postpartum mental illness commit infanticide rather than neonaticide). Oberman also discusses the fact that neonaticide and other crimes that women commit against their young children are often the result of both psychological and social circumstances. *Id.* at 35, 53.

137. See *id.* at 55–56 (finding postpartum mental illness is often just one more destabilizing factor in the lives of mothers who are already mentally ill before giving birth).

138. Christine A. Fazio & Jennifer L. Comito, *Rethinking the Tough Sentencing of Teenage Neonaticide Offenders in the United States*, 67 FORDHAM L. REV. 3109, 3136–37 (1999).

139. *Id.* at 3142 (citing Michelle Oberman, *Mothers Who Kill: Coming to Terms with Modern American Infanticide*, 34 AM. CRIM. L. REV. 1, 24–25 (1996)).

140. *Id.* at 3142–43.

mother during her pregnancy.¹⁴¹ Intense media coverage of neonaticide crimes has been increasingly prevalent.¹⁴² Media attention may affect sentencing, given how harshly mothers who kill their babies are treated in the news; judges and juries may be consciously or unconsciously taking this information into their decisions. There seems to be some difference in sentencing outcomes between cases tried in state versus federal court, as well as those tried in juvenile court, in the cases of teenage mothers.¹⁴³ Sentencing regimes in federal court are stricter than state court. The federal government typically prosecutes murders that occur within a tribal jurisdiction. Thus, Native mothers are likely to receive harsher sentences than white women tried in state court.¹⁴⁴

The United States' response to neonaticide differs from the response of some other countries. England, Australia, Canada, and Hong Kong, for example, have enacted infanticide acts.¹⁴⁵ In both England and Hong Kong, women charged and convicted under these acts often receive lenient sentences, consisting of probation with psychiatric treatment required.¹⁴⁶ The origins of these infanticide statutes are based on a two-pronged rationale.¹⁴⁷ One, from a policy perspective, there was concern about the harsh treatment in the criminal justice system of young, single, and low-income women.¹⁴⁸ The second consideration was the psychiatric issues that could be occurring in these cases during the birthing process—which occurs mostly alone for women who kill their newborns.¹⁴⁹ As will be discussed in more detail later in this paper,

141. Margaret Ryznar, *A Crime of Its Own? A Proposal for Achieving Greater Sentencing Consistency in Neonaticide and Infanticide Cases*, 47 U.S.F. L. REV. 459, 461 (2013); see, e.g., *United States v. Deegan*, 605 F.3d 625, 640 n.10 (8th Cir. 2010) (Bright, J., dissenting) (“Twenty-four year old patient comes in to evaluate injuries sustained in an altercation with her boyfriend last night. She is 37 weeks pregnant.” (quoting Deegan’s medical records)).

142. See, e.g., Jocelyn Renee Lewis, *Media Representation of Maternal Neonaticide* (May 2008) (unpublished M.A. thesis, Texas A&M University), available at <http://repository.tamu.edu/bitstream/handle/1969.1/85970/Lewis.pdf>.

143. See Fazio & Comito, *supra* note 138, at 3142–46; Ryznar, *supra* note 141, at 469–77.

144. *Deegan*, 605 F.3d at 657–58 (Bright, J., dissenting).

145. Fazio & Comito, *supra* note 138, at 3137.

146. *Id.* at 3140.

147. *Id.* at 3138.

148. *Id.*

149. *Id.*

infanticide acts are a clear example of the cultural or difference-based feminist legal theory in practice.¹⁵⁰ There are no “infanticide specific” laws in the United States. However, all fifty states have adopted “safe haven” laws whereby a parent can leave an unwanted newborn at a safe place in complete anonymity.¹⁵¹

Neonaticide also affects other children and the family of the woman who commits this act. Other children of this woman are now in very real danger of losing their mother. First, the mother may be sentenced to a long prison stay. If the mother is fortunate enough to remain in the community with probation or some other alternative disposition, CPS in many states defines the killing of a newborn baby as “egregious harm.”¹⁵² When there is a determination of egregious harm made, the state will move quickly to terminate the parental rights of the parent who is found to have caused this harm.¹⁵³ This scenario—sometimes called a “fast track” termination—often means that the state is relieved of its obligation to provide any efforts to try to reunify mother and child.¹⁵⁴ Thus, a woman who kills her newborn and has other children may lose the rights to these children without an opportunity to prove her ability to parent in a meaningful way.

In Dana’s case, some of the events of Moses’ conception, pregnancy, and death clearly fit within the clinical understanding of neonaticide. However, others do not. Consistent with most cases, Dana had not told others about her pregnancy, and it appears as though she denied being pregnant even to herself.¹⁵⁵ She did not

150. See *infra* Part IV.A.

151. Susan Ayres, *Kairos and Safe Havens: The Timing and Calamity of Unwanted Birth*, 15 WM. MARY J. WOMEN & L. 227, 250 (2008); Isser & Schwartz, *supra* note 2, at 582. The story of Moses was one of the high-profile cases that helped inspire North Dakota’s Safe Haven Law. Jenny Michael, *Case Helped Inspire Safe Haven Law*, BISMARCK TRIB., May 18, 2007, at A1, available at LEXIS.

152. See, e.g., MINN. STAT. § 260C.301, subdiv. 1(b)(6) (2012) (codifying the egregious harm termination standard). Many states have similar provisions that allow a filing of a termination of parental rights petition if there has been a finding of egregious harm. Egregious harm is defined in section 260C.007 subdivision 14.

153. See *id.* § 260C.301, subdiv. 1(b)(6).

154. William Michael Vesneski, *Judging Parents: Courts, Child Welfare, and Criteria for Terminating Parental Rights 6* (2012) (unpublished Ph.D. dissertation, University of Washington), available at https://digital.lib.washington.edu/researchworks/bitstream/handle/1773/22572/Vesneski_washington_0250E_10838.pdf.

155. See Letter from Phillip J. Resnick, *supra* note 90, at 10. Dr. Resnick

receive prenatal care, nor did she prepare herself for the birth. She reports dissociation at the time of the birth and very little existing memory as to the exact events of that day.¹⁵⁶ She reports feeling overwhelmed by the circumstances of the pregnancy and birth.¹⁵⁷ It is unclear whether this pregnancy was coerced.¹⁵⁸

However, Dana was not a teenager at the time of the birth.¹⁵⁹ This was not her first child, nor her first experience with labor. Dana did not immediately kill her baby in a violent or quick manner.¹⁶⁰ We will never know to what extent postpartum mental health disorders affected the events of Moses' birth. While Dana provided some information during her sentencing about her motivations at the time of the birth,¹⁶¹ it is impossible to know what really happened because of the level of dissociation and trauma at the time. What we do know is that Dana was not in a situation either before or immediately after the birth to seek or receive help. She was completely alone. She also stated that she was terrified of losing her daughters to CPS.¹⁶² Dana herself entered the foster care system at age eleven after reporting the sexual and physical abuse she experienced.¹⁶³ This further trauma of being removed from her mother and siblings likely made Dana extremely wary of reaching

included the detailed findings of his psychiatric evaluation of Dana Deegan in a letter to William D. Schmidt, Assistant Federal Prosecutor at the Deegan federal criminal trial. This letter was a part of the trial record.

156. *Id.* at 11.

157. *Id.*

158. Coercive reproduction is defined as "behaviors that a partner uses to maintain power and control" over a partner's reproductive health or reproductive decision making and includes behaviors intended to pressure or coerce a partner into becoming a parent or ending a pregnancy. Coercive reproduction is a form of domestic violence. *Tools for Educators: Intimate Partner Violence and Coercive Reproduction*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/resources/research-papers/relationship-abuse-26786.htm> (last visited Mar. 16, 2014).

159. *See* Letter from Phillip J. Resnick, *supra* note 90, at 3, 10 (stating that Dana was born on May 5, 1973 and that Moses was born October 20, 1998); *see also id.* at 94.

160. *See* *United States v. Deegan*, 605 F.3d 625, 627 (8th Cir. 2010).

161. *Id.* at 628 (recounting that Deegan asked for leniency in sentencing based on "her 'psychological and emotional condition' at the time of the offense, her history as a victim of abuse, and the fact that she acted impulsively, among other reasons").

162. Letter from Phillip J. Resnick, *supra* note 90, at 10, 21.

163. *See id.* at 5.

out for help as an adult with children of her own. This memory of trauma in her childhood also represents a clear example of historical trauma effecting the choices and life of an individual Native woman.

Dana's story presents an opportunity to look at the effects of historical trauma on the life of one Native woman.¹⁶⁴ In doing so, we begin to understand how historical trauma, in combination with Dana's own personal abuse, created extreme circumstances that resulted in desperate actions. Dana experienced multiple layers of oppression. We cannot view Dana simply as a generic woman in a generic legal system. To truly understand her circumstances, choices, and the judicial response to her actions, we need to break through a one-dimensional analysis to view her story as that of a Native mother, with all the historical trauma and unique individual trauma that comes along with this unique role in our society.

IV. FEMINIST LAWYERING THEORIES AND PRACTICE

I represent "bad mothers" because I need the truths they tell me concerning our common culture. They tell truths by exposing to me our likeness and our differences. I see myself reflected in them sometimes, recognizing in their gestures and their attitudes variations of ones familiar to me because they are my own. Beyond that, though, in their difference they tell me truths. They tell me truths when they refuse to let me see who they are, when they hold up a mirror facing me, between themselves and me, so that I confront that mirror as a barrier. It tells me of my situatedness in our culture. It reminds me of realities of class and of race, for example, that impede my understanding of my client and hers of me, that impede our working together and my adequately representing her. It reminds me that however much I know and care for her, there are ways in which I do not understand her. . . . She is familiar to me in myself and she is a mystery—which is why I want to know her.¹⁶⁵

164. See generally LUANA ROSS, *INVENTING THE SAVAGE: THE SOCIAL CONSTRUCTION OF NATIVE AMERICAN CRIMINALITY* (1998) (providing a larger study of how Native women are entrapped by the criminal justice system).

165. Marie Ashe, "Bad Mothers," "Good Lawyers," and "Legal Ethics," 81 *Geo. L.J.* 2533, 2566 (1993) (emphasis added).

At the core of Dana's case is the story of a Native woman and mother living in constant fear and danger, in extreme poverty, and without access to support, legal or otherwise. She exists in the world as someone aware of the historical trauma of Native women through time, and this historical context is a part of her individual story. Examining Dana's life story and crime through the lens of feminist legal theories may help us understand what could have been done to better help Dana and her family. We conclude that theories focusing on context and intersectionality provide the most relevant framework for the type of holistic, feminist lawyering that may have best helped Dana and other women like her.

Considering feminist approaches to this type of tragedy is one way to help elicit a policy reform needed in the way our child protection system responds to women in crisis.¹⁶⁶ However, this paper does not explicitly discuss how child protection systems could be improved to help Native mothers. Instead, we focus on how feminist lawyers could help Native women. It is our hope that improving the practice of representing women like Dana will impact the child protection system and the way that system perceives, treats, and delivers services to Native women and their families.

We begin this section by discussing a general framework for understanding prevalent feminist legal theories that Dana's circumstances implicate. This framework is followed by a consideration of how feminist legal theories can inform lawyering practices.

A. *Feminist Legal Theories of Equality and Difference*

At its core, legal feminism stands for the principle that all human beings should be treated with "equality, respect and justice."¹⁶⁷ These principles have helped many social movements change political and civil society.¹⁶⁸ Feminism, in its early stages of

166. See Elizabeth Rapaport, *Mad Women and Desperate Girls: Infanticide and Child Murder in Law and Myth*, 33 *FORDHAM URB. L.J.* 527, 545 (2005–2006) ("If the protection of children were our primary concern, we would concentrate attention on the conditions that produce severe child abuse and the children who may be living at risk.").

167. Carrie Menkel-Meadow, *Mainstreaming Feminist Legal Theory*, 23 *PAC. L.J.* 1493, 1497 (1991–1992).

168. *Id.*

litigation and theory, focused on the notion of “sameness”—that men and women are the same and should have equal rights.¹⁶⁹

Equality feminism, the oldest of the main branches of feminist theories, is based on the fundamental belief that “providing women legal rights against discrimination represents the extent to which undesirable social and economic conditions affecting women can be eliminated by legal change.”¹⁷⁰ Equality feminists focus on the oppression of women within the construct of the law. The goal of early feminist litigation was to eliminate bias or preferences in the law that favored men over women. This theory is helpful for women who are being denied equal treatment under the law. The limitations of this early theory were soon seen, however, and a second, more nuanced theory emerged to address the real and unique differences between men and women.¹⁷¹ The development of new theories was predicated on a more specific political goal: end sexist oppression in all its forms.¹⁷²

Cultural- or biological-difference-based feminism seeks to improve the position of women “through legal and social strategies which validate women’s differences from men.”¹⁷³ The first rift in consensus among early feminist theorists¹⁷⁴ occurred when some feminists wanted to explore the differences that gender presented with pregnant women.¹⁷⁵ Catherine MacKinnon was among the first of feminist legal scholars to clearly call out and question how conventional legal categories reinforced patriarchy.¹⁷⁶ She argued that legal categories created by men defined rules that limited

169. *Id.* at 1497–98.

170. JUDITH G. GREENBERG ET AL., *FRUG’S WOMEN AND THE LAW* 57 (2d ed. 1998).

171. Indeed, one Native critique of mainstream feminism is that “the concept of equality is neither relevant nor necessary for Aboriginal women in Aboriginal societies; rather these are concepts imposed by the colonizers, including feminists.” Verna St. Denis, *Feminism Is for Everybody: Aboriginal Women, Feminism and Diversity*, in *MAKING SPACE FOR INDIGENOUS FEMINISM*, *supra* note 12, at 38.

172. See BELL HOOKS, *FEMINIST THEORY FROM MARGIN TO CENTER* 26 (1984).

173. GREENBERG ET AL., *supra* note 170, at 57.

174. See Jenna Basiliere, *Political Is Personal: Scholarly Manifestations of the Feminist Sex Wars*, 22 *MICH. FEMINIST STUD.* 1, 1 (2009) (noting the rift between feminist theorists).

175. MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 386–95 (3d ed. 2012).

176. Catherine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *THE MORAL FOUNDATIONS OF CIVIL RIGHTS* 88 (Robert K. Fullinwider & Claudia Mills eds., 1986).

women's legal rights. She and others began to diverge from "equality" feminists. MacKinnon's work looking at sexual harassment as workplace discrimination forced the legal feminist movement to reevaluate the legal system—through a feminist lens. MacKinnon focused on power and dominance relations in her scholarship on sexual harassment and rape. However, more generally, a second category of feminist legal theory was born—focusing on women being different.¹⁷⁷

Some feminist theorists have objected to MacKinnon's theories of difference because they do not take enough into account the issue of race, class, and culture.¹⁷⁸ In response to concerns about the limitations of existing feminist legal theory, a new school of thought has emerged, known as intersectional feminism.¹⁷⁹ Intersectional feminist legal scholars have emerged from, and been informed by, the critical race theory movement, but have an independent methodology through which both gender and race are the central focal points for analysis. The strength of an intersectionality approach is that it allows both race and gender to be considered in tandem, bringing attention to the injustices that often come with being a woman of color in any legal system. In recent years, feminist theorists like Kimberlé Crenshaw have introduced the concept of intersectionality as a way to understand the experience of women of color in the justice system.¹⁸⁰ Crenshaw seeks to contrast black women's experiences in what she finds to be a single-axis analysis in the law.¹⁸¹ Her work and theories are useful when looking at the experiences of Native women.

Indigenous feminism has been emerging in the interdisciplinary academic world more recently, but has its roots in precolonial conceptions of gender.¹⁸² Like intersectional feminism,

177. *Id.* at 81.

178. *See, e.g.,* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (critiquing MacKinnon's analysis of a seminal Indian law case, *Santa Clara Pueblo v. Martinez*); Francine R. Skenandore, *Revisiting Santa Clara Pueblo v. Martinez: Feminist Perspectives on Tribal Sovereignty*, 17 WIS. WOMEN'S L.J. 347, 355–58 (2002) (same).

179. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 166 (1989).

180. *See* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245 (1991).

181. *See id.* at 1242–45.

182. *See* Martell & Deer, *supra* note 12, at 816.

indigenous feminism considers gender and race—but also considers the role of colonization in the lives of Native women.¹⁸³ A legal theory informed by indigenous feminism best explains Dana’s story and explores potential legal remedies for her experience. Trying to understand a case like Dana’s using a feminist model that is not informed by colonization would fall short. Dana’s experience being a racial minority, for example, may not play nearly as significant a role in her life as the history of child removal in tribal communities. Considering colonization without gender is likewise problematic. Dana’s experience as a Native mother is vastly different than that of Native men or fathers. In particular, in Dana’s case, she bore the brunt of the child rearing and, therefore, also bore all the risk should her poverty, abuse, or trauma be used against her by the State. She simply had more on the line because of her position as a Native mother.

An intersectional feminist approach is simultaneously useful because it allows us to consider the history of the child protection system from the perspective of Native women. In order to better understand Dana’s experience, we must also consider her experiences as a Native woman in the criminal justice system. Dana, like many women in the criminal justice system, arrived as a result of trauma.

B. Women and the Criminal Justice System

A national profile provides the following characteristics of women offenders.¹⁸⁴ They are disproportionately women of color in their early to mid-thirties. Most have fragmented family histories with other family members often involved in the criminal justice system.¹⁸⁵ Many are survivors of sexual and physical abuse as children and adults, and most have significant substance abuse or

183. See, e.g., Mishuana R. Goeman & Jennifer Nez Denetdale, Guest Editors’ Introduction, *Native Feminism: Legacies, Interventions, and Indigenous Sovereignties*, 24 WICAZO SA REV., Fall 2009, at 9, 10; Joyce Green, *Taking Account of Aboriginal Feminism*, in MAKING SPACE FOR INDIGENOUS FEMINISMS, *supra* note 12, at 20 (“Aboriginal feminists raise issues of colonialism, racism and sexism, and the unpleasant synergy between these three violations of human rights.”).

184. Stephanie Covington, *The Relational Theory of Women’s Psychological Development: Implications for the Criminal Justice System*, in FEMALE OFFENDERS: CRITICAL PERSPECTIVES & EFFECTIVE INTERVENTIONS 135, 137–38 (Ruth Zaplin ed., 2d ed. 2007).

185. *Id.* at 137.

mental health problems. Many have only high school diplomas or GEDs. In sum, most women in the system are young, poor, undereducated, and nonwhite, who have complex histories of trauma, mental health, and addiction.¹⁸⁶ Dana's life story fits into this paradigm—in particular, those relating to fragmented family, severe physical and psychological trauma, and mental health problems that exacerbated an already precarious situation.

In this section, we address gender as it relates to charging and sentencing, feminist legal theories that have affected women in the criminal justice system, and how trauma is often a catalyst for entry into the criminal justice system for many women.

1. *Gender in Charging and Sentencing*

There is a rich debate about the value of using gender in decisions of charging and sentencing. In the United States, we generally do not consider gender explicitly in our criminal codes or charging decisions. This differs, as mentioned earlier in this article, from England and Australia, where infanticide laws exist.¹⁸⁷ These laws clearly incorporate notions of cultural or different feminist legal theory. That is, they recognize that immediately after the birth of a baby, in certain circumstances, hormones, postpartum depression and psychosis, and other gendered differences have real and significant impacts on the events leading up to a crime.¹⁸⁸ As such, when a mother kills a newborn immediately after birth, the laws of these countries explicitly recognize that gender matters and should be considered. They then go on to provide different outcomes for women in these circumstances based on these biological differences.¹⁸⁹

Sentencing in the United States presents a different picture than charging. Although in most states and at the federal level, sentencing guidelines are determined based on severity levels and criminal history, there are clearly situations where gender, and in particular motherhood, are considered in sentencing or in the actual finding of guilt. Examples of this include battered women's

186. *Id.* at 138.

187. Isser & Schwartz, *supra* note 2, at 577; *see supra* note 145 and accompanying text.

188. Isser & Schwartz, *supra* note 2, at 587–89.

189. *See supra* note 146 and accompanying text.

syndrome and postpartum psychosis.¹⁹⁰ Battered women's syndrome is recognized as an affirmative defense to murder in some jurisdictions.¹⁹¹ Postpartum psychosis has been considered in both the guilt phase (as a defense of mental insanity) and in the sentencing phase in several high profile cases of filicide, including the Andrea Yates case.¹⁹²

2. *Feminist Theories and Criminal Justice*

Feminist legal theories have addressed criminal justice issues, although often in the context of men as compared to white women.¹⁹³ What has resulted in the context of female homicide is some strife between theorists who think men and women should be treated equally in the criminal courts, and those who think that women are different and should have special consideration in the courts.¹⁹⁴ This analysis has not often enough included an examination of intersectionality or the double stigma that Native women experience in the criminal justice system. A framework that includes just the experiences of white women misses the historical context so important to truly understanding the experiences and realities of Native women in the criminal justice system—particularly those who are incarcerated.¹⁹⁵

Some traditional biological theories of gender and crime address the differences between men and women who commit

190. BRENDA L. RUSSELL, BATTERED WOMAN SYNDROME AS A LEGAL DEFENSE 18–22 (2010); Oberman, *supra* note 136, at 63–65.

191. RUSSELL, *supra* note 190, at 6.

192. Oberman, *supra* note 136, at 39–43.

193. Stephanie S. Covington & Barbara E. Bloom, *Gendered Justice: Women in the Criminal Justice System*, in GENDERED JUSTICE: ADDRESSING FEMALE OFFENDERS 3, 5–7 (Barbara E. Bloom ed., 2003); Kolleen Duley, *Gender and Criminality*, 18 UCLA WOMEN'S L.J. 273, 274 (2012).

194. Isser & Schwartz, *supra* note 2, at 580.

195. It is difficult to gather quantitative data about incarcerated Native women. Julie C. Abril, *Native American Indian Women: Implications for Prison Research*, 4 SW. J. CRIM. JUST., no. 2, 2007, at 133, 134. Evidence suggests that Native women are “over-incarcerated” (incarcerated at higher per capita rates than other races), but comprehensive data is not always available, sometimes because prison systems primarily release statistics dealing with white and black offenders. For example, former Yokuts prisoner Stormy Ogden explained that her racial classification in the California correctional system was “other.” Stormy Ogden, *Prisoner W-20170/Other*, in SHARING OUR STORIES OF SURVIVAL 149, 157 (Sarah Deer et al. eds., 2008).

crimes, in particular, crimes against their children.¹⁹⁶ These traditional comparisons emphasize that social, cultural, economic, and political environments contribute to gendered homicide. In particular, poverty, lack of education, parental neglect, domestic violence, and drug or alcohol addiction are “potent” factors in the causes of homicide of children for both men and women—but women are burdened by stereotypical expectations of their roles and by a lack of economic independence that make these factors more pronounced in situations where women kill.¹⁹⁷ Still others feel that the differences between men and women in the system are not just based on social factors, but biological factors as well.

Biological theorists, such as Carol Gilligan, believe that women’s psychological needs and biological roles are imprinted genetically.¹⁹⁸ She and others believe that men and women are hardwired differently—and that these biological differences manifest themselves in different behaviors. So in the case of a woman who kills her child, this woman’s behavior can be understood from a biological perspective and may make her actions less culpable than a man’s in a similar situation.¹⁹⁹ However, this theory does not provide a meaningful place to assess the experience of Native women who commit crimes against their children. Further context is needed to understand the personal and historic traumas that play into scenarios involving Native women in the criminal justice system.

3. *Trauma as a Pathway to Prison*

Some feminists, like Stephanie Covington, have contributed significant understanding to women’s traumas as they relate to their involvement in the criminal justice system.²⁰⁰ Covington’s work has shown us that trauma plays a major role in women’s entries into the criminal system and that an understanding of the unique trauma experienced by women is needed to prevent their

196. Isser & Schwartz, *supra* note 2, at 577.

197. *Id.* at 579.

198. See generally CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982) (calling attention to “the discrepant data on women’s experience” and providing “a basis upon which to generate [a] new theory”).

199. *Id.*

200. Covington, *supra* note 184, at 135.

entries into the system, or to assist in programming and services to treat women in the system or after their releases.²⁰¹

Covington has demonstrated success in developing gender-responsive programming for women in the criminal justice system.²⁰² Her approach focuses on several core principles including recognizing the unique needs and experiences of women; acknowledging the female perspective, such as recovery from trauma; and respecting the unique ways that females develop psychologically.²⁰³ She defines gender-responsive programming, including what is used to try to prevent entry into the criminal justice system, as that which seeks to provide equality in terms of furnishing opportunities that mean the same to each gender.²⁰⁴ This legitimizes differences between men and women.²⁰⁵ She advocates creating environments for women that focus on relationships with other people and keeping these core relationships with others intact and healthy. She also emphasizes that any programming or treatment must include recovery from trauma.²⁰⁶

Covington's work is holistic. It seeks to provide women with the tools necessary to succeed in many aspects of their lives. By learning how to deal with individual trauma and addiction in the context of developing healthy and safe relationships, she empowers women to understand their own histories of abuse in a new way.²⁰⁷ She has developed curriculum to help women work through their past traumas and to help lead them to an understanding of their past choices and behaviors in the context of these traumas. Her hope is that this understanding allows women to move beyond the traumas to create lives lived on their terms as opposed to lives lived in constant cycles of repeating trauma.

However, her theories relating to trauma are not sufficiently intersectional in the context of the experiences of Native women.

201. *Id.* at 154–57.

202. *Id.* at 157.

203. *Id.* at 154–57.

204. *Id.* at 141.

205. *Id.*

206. Stephanie S. Covington, *A Woman's Journey Home: Challenges for Female Offenders*, in *PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES* 67, 95 (Jeremy Travis & Michelle Waul eds., 2003).

207. Covington, *supra* note 184, at 156–57.

She does not overlay the experiences of Native women as opposed to other women or men. Her work is extraordinarily valuable in understanding that men and women commit crimes for very different reasons and that women have vastly different needs to recover from past traumas, but it does not inform our understanding of how racially based, historical trauma plays into a crime committed by a Native woman. Covington's work helps us understand how individual traumas act as a trigger for many women. What we need to understand and implement when working with Native mothers is another layer, incorporating their individual circumstances, including past traumas, but also how the historical trauma of colonial practices affects their choices and lives.²⁰⁸

C. *Feminist Lawyering*

Feminist legal theories can inform practice. We have seen historically that feminism has inspired successful litigation and advocacy. Pioneers such as Ruth Bader Ginsberg used theories of equality feminism to successfully litigate workplace sex discrimination.²⁰⁹ Reproductive rights and access to birth control and abortion represent a second wave of successful feminist theory in practice.²¹⁰ In the reproductive rights cases, there was a focus on the biological differences between men and women.²¹¹ We believe that Crenshaw's intersectional approach, when informed by indigenous feminism, can inform a model of holistic practice that helps Native women.

1. *Holistic Lawyering*

"Holistic lawyering" can take many forms. It generally refers to a practice that is client centered and not limited by case

208. See generally ROSS, *supra* note 164. This intervention has been identified in the field of psychology: "Successful clinical interventions are not possible in a Native American setting unless the provider or agency is cognizant of the sociohistorical factors that have had a devastating effect on the dynamics of the Native American family." DURAN & DURAN, *supra* note 72, at 27.

209. See CHAMALLAS, *supra* note 175, at 35.

210. See generally *id.* ch. 4 ("The Generation of Difference"); *id.* ch. 9 ("Applied Feminist Legal Scholarship: Motherhood and Reproduction").

211. See generally *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception); MARGARET SANGER, *WOMEN AND THE NEW RACE* 2 (1920).

specificity.²¹² Two fundamental components seem to appear in many holistic models of practice—advocacy through interdisciplinary work and a presence in the client community.²¹³ In many holistic models, making a long-term difference in the lives of clients is a goal.²¹⁴ Holistic lawyering has come about in large part because of the pressing needs of indigent clients. In the criminal context, many poor people charged with crimes also face mental health struggles, addiction, child protection involvement, loss of housing, and other collateral consequences of their criminal charges. The holistic mindset, as explained by Michael Pinard in the context of representing indigent criminal defendants, takes into account the social, psychological, and socioeconomic factors that often underlay criminal cases.²¹⁵ Thus, the practice of holistic lawyering seeks to put clients' legal and non-legal needs at the forefront. Improving the client's overall position is a goal of both attorney and client.²¹⁶

The practice of holistic lawyering is also understood to mean a lawyer harmonizing his or her legal practice with his or her innermost values.²¹⁷ Using this view of holistic lawyering, a lawyer creates a practice with a more humanist philosophy.²¹⁸ The goals are not about winning or losing or the adversarial system, but instead about the focus on obtaining just goals through collaborative communication and work. Holistic lawyering in this sense relates not only to providing client-centered representation, but also focuses on how the lawyer engages in practice. It considers the lawyer's level of satisfaction with his or her practice as an integral part of the holistic equation.²¹⁹

212. Robin G. Steinberg, *Beyond Lawyering: How Holistic Representation Makes for Good Policy, Better Lawyers, and More Satisfied Clients*, 30 N.Y.U. REV. L. & SOC. CHANGE 625, 630 (2006).

213. *Id.*

214. *Id.* at 628.

215. Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1071 (2004).

216. *Id.* at 1093; *see also id.* at 1067 n.2 (citing Erik Luna, *The Practice of Restorative Justice: Punishment Theory, Holism and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 283).

217. *See* J. KIM WRIGHT, LAWYERS AS PEACEMAKERS: PRACTICING HOLISTIC, PROBLEM-SOLVING LAW 303 (2010).

218. *Id.*

219. Michael L. Perlin, *Stepping Outside the Box: Viewing Your Client in a Whole*

We find both philosophies useful in thinking about a model of feminist representation that could help Native women like Dana. We see value in a client-centered practice that considers the very real social, psychological, and socioeconomic factors at play with any client in the criminal justice system, and this should include an awareness of the historical trauma experienced in Native communities.²²⁰ We also recognize the importance of keeping lawyers themselves balanced and healthy, in particular in situations where they are representing women who have suffered extreme trauma and abuse. Recognizing and being able to provide self-care for secondary trauma will need to be integrated into these lawyers' practices.²²¹

New Light, 37 CAL. W. L. REV. 65, 68 (2000).

220. Trauma-informed legal advocacy provides a framework for representing clients who have experienced extreme violence, which includes framing advocacy around the past injury of clients rather than their sickness or badness. SANDRA L. BLOOM, PHILA. DEP'T OF BEHAVIORAL HEALTH TRAUMA TASK FORCE, TRAUMA-INFORMED SYSTEMS TRANSFORMATION: RECOVERY AS A PUBLIC HEALTH CONCERN 16–17 (2006), available at http://www.sanctuaryweb.com/PDFs_new/Bloom%20Trauma-Informed%20Systems%20Transformation%20in%20Philadelphia.pdf.

221. Attorneys experiencing secondary trauma may experience anxiety, loss of sleep, increased fear, lack of personal and professional confidence, depression, and other physical symptoms. Empathy is the key factor in the transfer of traumatic experiences to another person. Creating a support network to deal with vicarious trauma is an essential part of a practice for attorneys working with clients who have been traumatized or are experiencing trauma. Attorneys must be mindful of their own self-care. Secondary trauma that is untreated can have devastating effects on the life of the attorney. See, e.g., Marjorie A. Silver et al., *Stress, Burnout, Vicarious Trauma, and Other Emotional Realities in the Lawyer/Client Relationship*, 19 *TOURO L. REV.* 847, 853–54 (2004). Attorneys experiencing vicarious trauma should seek help. Arin Greenwood, *Ripple Effects: Education and Self-Care Can Help Lawyers Avoid Internalizing Client Trauma*, 92 *A.B.A. J.*, Jan. 2006, at 20, 20; see also JOSEPHINE G. PRYCE ET AL., *SECONDARY TRAUMATIC STRESS AND THE CHILD WELFARE PROFESSIONAL* 50–51 (2007) (child welfare professionals); Sandra L. Bloom, *Caring for the Caregiver: Avoiding and Treating Vicarious Traumatization*, in *SEXUAL ASSAULT: VICTIMIZATION ACROSS THE LIFESPAN* 459 (Angelo P. Giardino et al. eds., 2003) (clinicians, hospital workers, and law enforcement personnel); Andrew P. Levin & Scott Greisberg, *Vicarious Trauma in Attorneys*, 24 *PACE L. REV.* 245, 251–52 (2003); Lisa McCann & Laurie Anne Pearlman, *Vicarious Traumatization: A Framework for Understanding the Psychological Effects of Working with Victims*, 3 *J. TRAUMATIC STRESS* 131, 132 (1990) (mental health professionals).

2. *Representing Native Women*

In a holistic model for Native women, an awareness of historical trauma should be central to the representation. This means that in every decision and interaction an attorney has, he or she should be aware of the implications of colonialism on the individuals and their family.²²² For example, when examining a Native mother's decision to not seek help or report abuse, the lawyer should understand that, historically, these have been dangerous choices in the Native community. In the context of representing a Native mother for whom a child has been removed from her home, or who is a victim of domestic violence, it is essential that the system is attentive to the unique characteristics of Native mothers who have experienced historical trauma.²²³ This advocacy demands that the system and finder of fact consider the context and complexity of the experiences of Native mothers, including the effects of historical trauma on these women and communities. Thus, an intersectional framework is necessary—one that incorporates the dual reality of clients who are Native and who are women. This intersection could also include the unique characteristics of mothers and motherhood.

Dana's case provides a unique opportunity to reflect on what a holistic model of representation using an intersectional feminist approach might look like. Sadly, an attorney or advocate could have started representing Dana from the time she was born. The early abuse she suffered and the toxicity of her biological family presented challenges very early in her life.²²⁴ This is part of what makes her story so compelling. We can see the implications of historical trauma played out in her life. Dana herself was a victim of extreme trauma, but her own life reflects that realities of colonial

222. Effective lawyers for Native people should also consider the dynamics of the local community in which the client resides. See Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 24 AM. INDIAN L. REV. 229, 245 (2000).

223. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 141–42 (explaining that black women do not experience problems merely as a minority or as a female, but unique challenges as minority females).

224. *United States v. Deegan*, 605 F.3d 625, 639 (8th Cir. 2010) (Bright, J., dissenting).

trauma played out in many Native communities.²²⁵ Because of this duality, she represents a distinct scenario to study communal and individual trauma in a legal system through a lens of feminist practice.

Legal intervention could include the actions of an attorney and/or the actions of the State. There are many points in Dana's life where legal intervention could have made a significant difference. However, it is unlikely that traditional legal models of representation would have been effective in Dana's case because these models do not provide enough context about her particular trauma, both historical and individual. We feel that a practice centered by Native women's unique experiences and grounded with the knowledge of historical trauma would have provided a more effective advocate to Dana at several critical points in her life.

The first point at which a holistic and intersectional approach may have been effective was in protecting Dana, her mother, and her siblings from the abuse of her father.²²⁶ While it is true that child protection intervened on numerous occasions to place Dana and her siblings in foster care, the ultimate issues of her father's domestic abuse and chemical abuse were not dealt with in a way that allowed Dana or her family to be free from the threat of future abuse. Nor did any attorney try to advocate for her mother or Dana in a way that acknowledged the lingering threat that colonial systems represented in their lives. This meant that even after leaving foster care, or aging out of the system, Dana never felt safe returning home to live with her mother because her father continued to be a danger to her. It also meant that the underlying fear that Dana, her mother, and her siblings felt about their family being forever torn apart—as had happened to so many others—was not given a voice or place in the legal system.

How can a mother reach out for help from the legal or social systems about potential harm to her children? The professionals

225. *See id.* at 662 (“This case also lifts the curtain on the terrible abuse suffered by Ms. Deegan as a young child and young woman on the Fort Berthold Indian Reservation in North Dakota. Unfortunately, her suffering is not an isolated instance. The pervasive and terrible abuse of women and children occurs on every Indian reservation in this country.”)

226. *Id.* at 628 (majority opinion) (“She based her argument for leniency on what she described as her ‘psychological and emotional condition’ at the time of the offense, her history as a victim of abuse, and the fact that she acted impulsively, among other reasons.”).

who have access to resources for help are typically also mandatory reporters—including social workers, medical care providers, and police officers. A woman who struggles to protect her children—from her partner, from poverty,²²⁷ or from her own mental illness—risks losing her children if she discloses the painful truth of her existence.²²⁸ If, for instance, she admits to a helping professional: “I am overwhelmed; I am not able to be a good parent right now” or “I am fearful that my children are in danger,” she will likely be faced with potential removal of her children and/or criminal charges. Access to people who are not mandatory reporters thus becomes a matter of life and death.

Part of what is hard to know in this case is how the experience of being a Native woman living on a reservation would have affected any legal intervention. It is clear that Native women have good reason to distrust state intervention.²²⁹ It is also clear that for many Native women, securing an attorney for any type of case is nearly impossible given the lack of resources and isolated locations of many reservations.²³⁰ It is naïve to think that an attorney in any circumstance can save a child or a family, but certainly the right attorney in many circumstances can achieve fundamental changes in a family’s or individual’s life. But, in a Native community, this sort of practice will take years to establish, and will require the commitment of both time and emotional energy of many dedicated and empathetic attorneys. It will also take significant and sustainable funding, which is currently often unavailable to Native communities.²³¹

The second time that intersectional feminist and holistic legal representation may have helped Dana is when she experienced domestic violence at the hands of her children’s father.²³² Would Dana herself have been open to a legal advocate to help her navigate the system? In this instance, an attorney would need to balance Dana’s deep distrust of the system (the same system that separated her family into foster care when she reported abuse as a

227. *See id.* at 627–28.

228. *See id.* at 642 (Bright, J., dissenting).

229. Horejsi et al., *supra* note 20, at 330–31.

230. *Id.* at 339.

231. JANET RENO ET AL., U.S. DEP’T OF JUSTICE, REVITALIZING COMMUNITIES: INNOVATIVE STATE AND LOCAL PROGRAMS 37 (June 1997), available at <https://www.ncjrs.gov/pdffiles/165360.pdf>.

232. *Deegan*, 605 F.3d at 640 (Bright, J., dissenting).

child) with Dana's desire to live a life free of abuse and trauma.²³³ Before the death of her baby, Dana was genuinely afraid that disclosing the domestic violence would have threatened the existence of her family.²³⁴ Another compounding layer to all of this is the "extreme poverty and isolation" that Dana experienced, in particular, before the birth of Moses.²³⁵ How could an attorney have helped with these circumstances?

Perhaps the most fundamental question that this case presents is what could or should a holistic and feminist approach look like when women exhibit signs that they will harm their children, or in representing women who have already harmed their children?²³⁶ These scenarios present the most difficult questions for attorneys who purport to be holistic and feminists. Some of us, as feminist attorneys who seek to practice holistically, like to think that we would be capable of helping a Native woman like Dana. But when unpacking what this looks like in practice, it becomes clear that this type of representation is very challenging in both holistic senses—that is, putting the client in a better overall position and also practicing in a way that the attorney feels a more humanistic connection and philosophy in her work. It is challenging to create a client-centered practice in which Dana's whole world of problems would be dealt with. It is also virtually impossible to imagine engaging in this type of work while remaining balanced and healthy. However, the right attorney in any given circumstance can affect both individual and systemic changes.

Attorneys can be catalysts for change. The change can ignite awareness in both their clients and other stakeholders. An attorney who takes on the role of representing a Native mother who has harmed her child, or is at risk of harming her child, would be helped by being able to see the subtle warning signs that there is more going on with this mother or family than what appears at first

233. *Id.* at 639.

234. *Id.* at 640–41.

235. *Id.* at 641 ("Ms. Deegan's state of despair and depression was not merely the result of the physical, verbal, and sexual abuse she suffered. Ms. Deegan lived in extreme poverty and isolation.").

236. Victims of domestic violence benefit from the assistance of attorneys. *See, e.g.,* Adrienne Jennings Lockie, *Salt in the Wounds: Why Attorneys Should Not Be Mandated Reporters of Child Abuse*, 36 N.M. L. REV. 125, 141 (2006).

glance.²³⁷ An attorney, in some cases, is the first and best individual to see indicators of risk of harm.²³⁸

In many jurisdictions, attorneys are not explicitly included in statutes as mandatory reporters of child abuse. In such jurisdictions, they are obligated above all else to keep their clients' lives in their confidence.²³⁹ An attorney may be the only "safe" person for a woman like Dana. For women like Dana (or her mother) who may be scared to reveal past abuse and trauma, the presence of an attorney, well trained in the contextual and historical traumas his or her client has experienced, may provide the outlet or support that this client needs to open up. Because of the lawyer-client relationship, this information would be kept confidential. This is very different from the relationship that Dana or her mother would have had with case workers, tribal domestic violence advocates, or even other family members.²⁴⁰

This unique role of confidant allows an attorney to build a trusting relationship with his or her client. However, one challenge that comes along with working with Native women who have experienced trauma, abuse, or have mental health concerns, is that once a client reveals information about his or her situation, in many cases, the client does not want this information shared or used in his or her case. An attorney must talk through the concerns and benefits of sharing personal information about abuse or trauma with other stakeholders or the finder of fact. In the case of Native women, there is additional stigma attached to sharing this information. Above all else, attorneys should give Native women clients who have experienced trauma and abuse the dignity of having control over how their story and information is shared.

237. See generally Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437 (2008) (discussing insights for interviewing and counseling clients).

238. See Evan R. Seamone, *Attorneys as First-Responders: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veteran's Legal Decision-Making Process*, 202 MIL. L. REV. 144, 146-47 (2009).

239. Mandatory reporting laws often conflict with attorney professional responsibility rules (namely maintaining the confidentiality of clients). Lockie, *supra* note 236, at 129.

240. See CHILD WELFARE INFO. GATEWAY, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 2-3 (2012), available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.pdf.

Some Native clients do decide to have this personal information shared or it is a part of the reason why the case exists. In child protection cases, cases involving orders for protection, and in criminal cases, information about past trauma, abuse, drug use, and mental health concerns are often a part of the case from the beginning. Attorneys in these situations must work through with clients how to frame these complex issues in a way that does not harm their clients or the clients' families.²⁴¹ This may mean delving further into the situation, to unearth more facts and details about trauma or abuse that might help an outsider better understand the client's position and behavior, or how historical trauma in this particular community has impacted his or her choices.

By understanding the intersection of oppressions that Native mothers experience, an attorney will be better situated to address the systematic discrimination that exists because of this complicated duality. Native mothers have ended up where they are (as clients in a divorce, orders for protection, housing court, or as criminal defendants) because of their experiences in the world being Native, victims, women, and mothers. When attorneys can articulate this reality to fact finders, stakeholders, and system decision makers, their clients have the best chance of being truly understood and, therefore, of being treated fairly.

V. CONCLUSION

While we offer suggestions as to what strategies our feminist approach would look like or would have looked like in Dana's life, we also want to recognize at the end that perhaps the most important feminist legal response to a situation like Dana's is to continue to advocate and work for her legal rights after the death of Moses. If Dana thought she was isolated before the birth of Moses, and felt alone and afraid and overwhelmed, those feelings have magnified since her charges, trial, conviction, and prison sentence.²⁴² Dana, like many mothers in prison, has been written off

241. For example, one study suggests that most women who are hospitalized for mental illness after birth lose full custody of their children at some point. Jill G. Joseph et al., *Characteristics and Perceived Needs of Mothers with Serious Mental Illness*, 50 *PSYCHIATRIC SERVICES* 1357, 1358 (1999). Deciding whether or not to seek psychiatric care, then, has legal implications for which holistic services could be very helpful.

242. Dana entered the federal prison system in 2008. She was initially incarcerated in California and was unable to visit with her three daughters for over

and forgotten by most of us. For many feminist lawyers, Dana represented a compelling client before the death of Moses. She represented the ultimate intersectional example of exploitation. She was a victim. She was poor. She was Native. She was a mother. However, as soon as she was convicted of causing the death of her child, she became a pariah to some in the community that should still be supporting her the most—feminist lawyers. When in reality what had happened was that another layer in the intersection of Dana’s life had emerged. Now, she was also a convicted felon.²⁴³

It is our belief that attorneys equipped with a holistic and intersectional feminist method can be catalysts for change for Native mothers and their children. Attorneys using this approach can effect change in the lives of their clients and—we hope—within systems that have historically oppressed and unfairly treated these clients. We hope that this practice, if implemented, can effect change within both the child protection and criminal justice systems. Our focus on the history of Native women reminds us how oppressed they have historically been, and how this oppression affects individuals’ lives. Dana’s story provides a unique lens to examine our approach. She is a Native mother who experienced individual and historical trauma without effective intervention—and this trauma had horrific results in her life.

Our particular feminist approach may provide the best chance there is to protect Native women and their children in dire circumstances. Attorneys advocate to judges and county prosecutors, caseworkers, guardians, and all of these stakeholders who ultimately make decisions about the fate of Native women and their children. If they can be made aware of the implications of individual and historical trauma in a meaningful way, interventions and outcomes may begin to change. We also believe that in some

two years. By all accounts, Dana is a wonderful, caring mother to her three daughters despite being incarcerated. Her daughters trust her and seek her advice as they transition into adulthood.

243. A lawyer representing Dana after her conviction and prison sentence will have to be attuned to the needs of women in prison, and more importantly, to the unique client needs upon release. *See generally* STEPHANIE S. COVINGTON, A WOMAN’S JOURNEY HOME: CHALLENGES FOR FEMALE OFFENDERS AND THEIR CHILDREN 15 (2002), *available at* <http://www.aspe.hhs.gov/hsp/prison2home02/Covington.pdf> (describing the effects of prison on women’s mental health and family structure and examining the unique situation that exists for mothers in prison, and the potential impact that this separation from children can have on the women).

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cases the right kind of feminist legal intervention, and the confidentiality it provides, can prevent future harm. This too gives us hope for mothers like Dana.