Printed in U.S.A.
Vol. 116, No. 2

Notes

MAN CAMPS AND BAD MEN: LITIGATING VIOLENCE AGAINST AMERICAN INDIAN WOMEN

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ABSTRACT—The crisis of sexual violence plaguing Indian Country is made drastically worse by oil-pipeline construction, which often occurs near reservations. The "man camps" constructed to house pipeline workers are hotbeds of rape, domestic violence, and sex trafficking, and American Indian women are frequently targeted due to a perception that men will not be prosecuted for assaulting them. Victims have little recourse, facing underfunded police departments, indifferent prosecutors, and a federal government all too willing to turn a blind eye to the ongoing violence.

This Note proposes a litigation strategy for tribes to address the crisis and compel federal action. Litigation would rely upon the "Bad Men" clauses in 1867 and 1868 tribal–federal treaties, which mandate government action when "bad men among the Whites" commit crimes against tribal members. Indian law canons of construction urge that these treaties be construed in favor of the tribes and interpreted in the manner in which historical tribal signatories would have understood them. Under the doctrine of *parens patriae*, tribes could bring Bad Men lawsuits on behalf of tribal members who have been harmed. Because Indian signatories to the Bad Men treaties would have understood them to impose a positive and prospective obligation to protect, tribes ought to be able to use such litigation to compel federal protection for the women victimized as a result of pipeline construction.

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INTRODUCTION

On January 20, 2021, then-President-elect Joe Biden formally announced his intention to revoke the permit for construction of the Keystone XL Pipeline.[1] The pipeline's developer, TC Energy, responded by signaling its intention to cancel the project.[2] After years of support from the Trump Administration, the Keystone XL Pipeline was coming to an end.[3]

[1] Ben Lefebvre & Lauren Gardner, *Biden Kills Keystone XL Permit, Again*, POLITICO (Jan. 20, 2021, 7:36 PM), https://www.politico.com/news/2021/01/20/joe-biden-kills-keystone-xl-pipeline-permit-460555 [https://perma.cc/G3YN-4URT]. The Keystone XL project was a planned extension of the Keystone Pipeline System, which transports oil from the Alberta tar sands to refineries in Texas. Melissa Denchak, *What Is the Keystone XL Pipeline?*, NAT'L RES. DEF. COUNCIL (Jan. 20, 2021), https://www.nrdc.org/stories/what-keystone-pipeline [https://perma.cc/2ZJN-X9JD]. The planned extension would have run from western Canada through Montana, South Dakota, and Nebraska. *Id.*

[2] Lefebvre & Gardner, *supra* note 1.

[3] *See* Sarah Deer & Elizabeth Ann Kronk Warner, Raping Indian Country 11–12 (Jan. 16, 2020) (unpublished manuscript), https://papers.ssrn.com/a=3497007 [https://perma.cc/Z3HX-VNVY] (describing the Trump Administration's reversals of Obama-era restrictions on the Keystone XL Pipeline).

While some decried the end of the pipeline, it was cause for celebration for the Rosebud and Fort Belknap tribes.[4] In March 2020, the tribes had filed a motion for a preliminary injunction to halt the Keystone construction, pending the completion of litigation on its environmental impact.[5] Even as the litigation progressed, however, TC Energy was already beginning construction on the pipeline extension and building the first housing camp for itinerant pipeline workers.[6] Both pipeline and camp were in Meade County, home to the Cheyenne River Indian Reservation.[7]

Pipeline construction in close proximity to a reservation poses more than just environmental danger to the tribes. The ongoing crisis of sexual violence[8] occurring in Indian Country[9] increases when "man camps" of oil workers arrive. These temporary housing camps, built to accommodate the influx of workers necessary for pipeline construction, are well documented to be hotbeds of sexual violence.[10] Speaking to a crowd of pipeline protestors, Yankton Sioux activist Faith Spotted Eagle raised concerns about the sexual violence that often accompanies such camps. "We are worried about man camps that are coming to our territory," she said. "We have seen our women suffer."[11]

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[4] The Rosebud Sioux Reservation, located in south-central South Dakota, is home to 21,245 members of the Sicangu Sioux tribe. *Rosebud Sioux Reservation*, AKTA LAKOTA MUSEUM & CULTURAL CTR., http://aktalakota.stjo.org/site/News2?page=NewsArticle&id=8658 [https://perma.cc/RFA7-4ZKG]. The Fort Belknap Reservation is the fourth largest in Montana and is home to the Assiniboine and Gros Ventre tribes. *About Us*, FORT BELKNAP TRIBE, https://ftbelknap.org [https://perma.cc/99FY-VL6P].

[5] *See* Memorandum in Support of Motion for Preliminary Injunction at 2, Rosebud v. Trump, No. 4:18-cv-00118-BMM (D. Mont. Mar. 2, 2020).

[6] Talli Nauman, *Meade County OKs Man-Camp*, NATIVE SUN NEWS (Mar. 12, 2020), https://www.indianz.com/News/2020/03/12/native-sun-news-today-meade-county-oks-m.asp [https://perma.cc/PL6K-C4FU]. This construction continued notwithstanding the ongoing COVID-19 pandemic. Matthew Campbell, *Statement from Fort Belknap and Rosebud on KXL Lawsuit*, TURTLE TALK (Apr. 13, 2020), https://turtletalk.blog/2020/04/13/statement-from-fort-belknap-and-rosebud-on-kxl-lawsuit [https://perma.cc/D6MT-2DPU].

[7] Nauman, *supra* note 6; *Cheyenne River Agency*, BUREAU OF INDIAN AFFAIRS, https://www.bia.gov/regional-offices/great-plains/south-dakota/cheyenne-river-agency [https://perma.cc/C6K8-HGB5].

[8] "Sexual violence" refers to all crimes of a gendered or sexual nature, such as sexual assault, intimate-partner violence, and rape. *Types of Sexual Violence*, RAINN, https://www.rainn.org/types-sexual-violence [https://perma.cc/Z8LT-3EQH].

[9] "Indian Country" is a term of art referring to all federal land that has been set aside for the primary use of American Indians, including reservations as well as other (allotted, restricted, and trust) lands. 18 U.S.C. § 1151.

[10] *See infra* notes 75–78 (describing the ways in which the conditions of pipeline-worker housing camps increase the risk of sexual violence against American Indian women).

[11] Evan McMorris-Santoro, *Native American Activists Argue Feds Building Keystone Will Lead to Rape*, BUZZFEED NEWS (Apr. 23, 2014, 7:05 PM), https://www.buzzfeednews.com/article/evanmcsan/native-american-activists-argue-feds-building-keystone-will [https://perma.cc/RJM7-QFS9].

The increase in sexual violence accompanying these man camps may be attributed to a conflux of factors: the male-dominated nature of the oil industry,[12] lax standards that allow the hiring of sex offenders,[13] and the perceived lack of consequences for violence against Indian women.[14] When violence does occur, tribes have few tools with which to address it, since they have been hamstrung by a maze of regulations and limitations.[15] State and federal governments, meanwhile, have been slow to act and ineffective in their response.[16]

While President Biden's approach to the Keystone XL Pipeline provides some hope for activists, the problem is far from over. Line 3, TransMountain, and other fossil fuel projects continue to pose similar risks to tribal groups.[17] Even with the historic confirmation of Secretary Deb Haaland, a member of New Mexico's Laguna Pueblo tribe, to lead the Department of the Interior,[18] many tribal leaders have expressed concern that Indigenous voices are not being heard when energy decisions are made.[19] So while leaders and advocates alike celebrated the end of Keystone XL, they nonetheless were clear that they had no intention to give up the ongoing fight against similar projects.[20]

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[12] *See infra* note 83.

[13] *See infra* notes 84–85.

[14] *See infra* notes 79–80 and accompanying text.

[15] *See infra* Section I.D.

[16] *See infra* Section I.D.

[17] *See* Indigenous Environmental Network, *Biden Revokes Keystone XL, Indigenous Leaders Celebrate and Push for Stronger Action*, YUBANET (Jan. 20, 2021), https://yubanet.com/enviro/biden-revokes-keystone-xl-indigenous-leaders-celebrate-and-push-for-stronger-action [https://perma.cc/AFJ3-2CDT]. In 2021, two liquid-petroleum-pipeline projects have been completed, and seventeen new projects have been announced or are under construction. *EIA's Updated Liquids Pipeline Database Shows 19 Projects Moving Toward Completion in 2021*, U.S. ENERGY INFO. ADMIN. (June 25, 2021), https://www.eia.gov/todayinenergy/detail.php?id=48516 [https://perma.cc/QC6K-RGKE].

[18] Melanie K. Yazzie, *The Radical Possibility of Deb Haaland at the Department of Interior*, GIZMODO (Jan. 19, 2021, 9:59 AM), https://earther.gizmodo.com/the-radical-possibility-of-deb-haaland-at-the-departmen-1846084793 [https://perma.cc/M6MP-XP89]. Secretary Haaland's appointment was confirmed March 15, 2021. Coral Davenport, *Deb Haaland Becomes First Native American Cabinet Secretary*, N.Y. TIMES (Mar. 15, 2021), https://www.nytimes.com/2021/03/15/climate/deb-haaland-confirmation-secretary-of-interior.html [https://perma.cc/U7QE-AKDG].

[19] *See*, *e.g.*, Indigenous Environmental Network, *supra* note 17 (explaining that "[t]he State department did not consult" the tribe about the Keystone XL Pipeline and "never paid attention" to the tribe).

[20] *Id.* Even if President Biden continues to pursue an anti-pipeline policy, many leaders want long-term solutions that can last beyond the end of the Biden presidency. *See* Nora Mabie, *"We're All Elated": Fort Peck Tribal Members Relieved as Biden Blocks Keystone XL Pipeline*, GREAT FALLS TRIB. (Jan. 20, 2021, 4:27 PM), https://www.greatfallstribune.com/story/news/2021/01/20/president-joe-biden-cancels-keystone-xl-pipeline-tribal-members-montana-react/4215834001 [https://perma.cc/VJ52-3LAP].

While the violent effect of resource extraction on American Indian[21] women continues to be the subject of considerable advocacy, the legal implications of this phenomenon have not garnered much attention. In particular, scholarship has not engaged in the formation of a litigation strategy to address the violence that accompanies pipeline construction.[22] When advocacy groups have used litigation to attack the pipelines, their approach has focused on environmental issues rather than the violence that pipeline construction effects. Such an approach does little to address the violence that many American Indian women have experienced, and it cannot provide reparations for victims of violence. This Note fills the gap in existing scholarship by discussing how "Bad Men" clauses of American Indian treaties provide an avenue for a creative litigation strategy that brings victims' voices to the forefront of the discussion of oil pipelines.

The Bad Men clauses require federal prosecution of non-Indians who commit crimes against tribal members and provide a cause of action against the government for injured American Indian plaintiffs.[23] These clauses were

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[21] This Note uses the terms "American Indian" or "Indian" to refer to the Indigenous peoples of the United States. Historically, "American Indians" has been used as a legal term of art to refer to those Indigenous people who were in the United States at the time of its Founding. *American Indian Law*, CORNELL L. SCH., LEGAL INFO. INST., https://www.law.cornell.edu/wex/american_indian_law [https://perma.cc/BUU9-VHTG]; *see also Frequently Asked Questions*, NATIVE AM. RTS. FUND, https://www.narf.org/frequently-asked-questions/ [https://perma.cc/9FKT-NP44] ("[I]t is appropriate to use the terms American Indians and Alaska Natives."). *See generally* Michael Yellow Bird, *What We Want to Be Called: Indigenous Peoples' Perspectives on Racial and Ethnic Identity Labels*, 23 AM. INDIAN Q. 1 (1999) (discussing nomenclature when referring to North American Indigenous peoples). Alaskan Natives and Indigenous Hawaiians are typically not included under the umbrella of American Indians, since they are not governed by treaty law. *See* Rosita Kaaháni Worl & Heather Kendall-Miller, *Alaska's Conflicting Objectives*, 147 DAEDALUS 39, 40 (2018) (explaining that, because treaty making with tribes ended in 1871, Alaskan Natives did not enter treaties with the United States); Justin L. Pybas, Note, *Native Hawaiians: The Issue of Federal Recognition*, 30 AM. INDIAN L. REV. 185, 187 (2006) (indicating that the United States does not recognize Native Hawaiians as a political organization like American Indian tribes). Since this Note deals with issues of treaty law, it will speak only of American Indians.

[22] *But see* Kathleen Finn, Erica Gadja, Thomas Perin & Carla Fredericks, *Responsible Resource Development and Prevention of Sex Trafficking: Safeguarding Native Women and Children on the Fort Berthold Reservation*, 40 HARV. J.L. & GENDER 1, 1–3 (2017) (providing a survey of potential solutions to the problems caused by man camps). The existing scholarship focuses primarily on congressional legislation that could be passed regarding closing jurisdictional gaps, tribal policing solutions, and corporate practices, but it does not engage in much discussion of litigation strategy. *See id.* at 51; *see also* Sarah Deer & Mary Kathryn Nagle, *The Rapidly Increasing Extraction of Oil, and Native Women, in North Dakota*, FED. LAW., Apr. 2017, at 35 (providing a general survey of the problem and required solutions); Lily Grisafi, Note, *Living in the Blast Zone: Sexual Violence Piped onto Native Land by Extractive Industries*, 53 COLUM. J.L. & SOC. PROBS. 509, 510–13 (2020) (discussing broad legislative solutions to violence against Indian women near fracking sites). In this Note, I propose a treaty-based litigation strategy, which has not previously been discussed. *See infra* Part III.

[23] *See infra* Section II.A (describing the historic origin and purposes of Bad Men clauses in Indian treaties).

added to treaties between tribes and the federal government likely in response to the violence that accompanied westward expansion—much of which was committed against American Indian women.[24] In the twenty-first century, these clauses may provide a unique avenue for tribes to address the violence against women that results from modern resource extraction.[25] Such litigation would also bring the voices of American Indian women to the center of narratives surrounding oil pipelines, which could positively shape the future of our policy discussions.[26]

Part I of this Note discusses the crisis of sexual violence that plagues Indian Country, its origins in a history of colonial violence, and the federal government's failure to provide justice for American Indian victims. Part I also demonstrates how resource extraction has historically resulted in violence against American Indian women and how, in the modern era, oil pipelines continue to effect sexual violence. Part II provides background on the treaties that form the backbone of American Indian law and on the Bad Men clauses that provide a pathway to litigation brought by tribal members against the U.S. government. Finally, Part III offers recommendations as to how these clauses might be used as part of a litigation strategy.

I. A HISTORY OF INJUSTICE

A cursory examination of the relevant statistics reveals that the rape of American Indian women is stunningly prevalent and inadequately addressed on policing, prosecutorial, and legislative levels. The long history of violent resource extraction in Indian Country has been accompanied by a parallel and intersecting history of violence against American Indian women. Any discussion of the problems engendered by modern pipelines must begin with a discussion of the history and magnitude of these problems and the ways in which American Indian women are both targeted as victims and then subsequently "denied access to justice on the basis of their gender and [their] Indigenous identity."[27]

This Part will first illustrate the extent of the violence faced by American Indian women. It will then discuss, first, how resource extraction

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[24] *See infra* note 151 and accompanying text (discussing the violence against women that the treaties sought to address).

[25] *See infra* Part III.

[26] *See infra* Section III.D (describing how Bad Men litigation can incorporate the voices of American Indian women, whose experiences of violence have frequently been excluded from pipeline narratives).

[27] AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 5 (2007); *see also* ANDREA SMITH, CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE 8 (2005) ("When a Native woman suffers abuse, this abuse is an attack on her identity as a woman and an attack on her identity as Native. The issues of colonial, race, and gender oppression cannot be separated.").

has historically contributed to sexual violence against American Indian women; second, how pipeline construction creates the modern instantiation of this phenomenon; and, third, how the criminal justice system has failed to address the current problems.

A. Rape in Indian Country

The problem of sexual violence in Indian Country transcends the word "epidemic"; it is a crisis and a devastating pattern of violence.[28] American Indians are twice as likely to experience a rape or sexual assault as any other race.[29] Violent crime victimization of American Indian women occurs at 2.5 times the national rate,[30] and one in three American Indian women will be raped during her lifetime.[31] Even these shocking numbers likely underestimate the incidence of violence due to underreporting and inadequate research.[32] Rape is seen as inevitable for many American Indian women; they "talk to their daughters about what to do when"—not if—"they are sexually assaulted," and young American Indian women often "live their lives in anticipation of being raped."[33]

Unlike members of other racial demographics, American Indian women are more likely to be victimized by members of another race than by members of their own race. A majority of American Indian victims of violent

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[28] *See* SARAH DEER, THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA, at ix–x (2015) [hereinafter DEER, BEGINNING AND END OF RAPE]. Professor Deer argues that the term "epidemic," often used to describe the pattern of sexual violence experienced by American Indian women, is misleading in that it evokes the idea of a crisis of mysterious origin. *Id.* The rape of American Indian women is not the inevitable result of biology, as with a disease, but the result of deliberately enacted patterns of racially and sexually charged violence. *Id.*; *see infra* Section I.B.

[29] STEVEN W. PERRY, BUREAU OF JUST. STAT., A BJS STATISTICAL PROFILE, 1992-2002: AMERICAN INDIANS AND CRIME 5 (2004).

[30] *Id.* at 7.

[31] *See* PATRICIA TJADEN & NANCY THOENNES, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 22 (2000). During their lifetimes, 34.1% of American Indian women will be raped, as opposed to an average of 18.2% for all races. Similarly, 61.4% will be physically assaulted, as opposed to 51.8% for all races, and 17.0% will be stalked, compared to 8.2% for all races. *Id.*

[32] AMNESTY INT'L, *supra* note 27, at 2–4; *see also* Sarah Deer, *Criminal Justice in Indian Country*, 37 AM. INDIAN L. REV. 347, 376–77 (2013) [hereinafter Deer, *Criminal Justice*] (asserting that tribal leaders are skeptical of these statistics based on personal experience and believe that the statistics understate the extent of the problem).

[33] Deer, *Criminal Justice*, *supra* note 32, at 376 (citing NATIVE AM. WOMEN'S HEALTH EDUC. RES. CTR., INDIGENOUS WOMEN'S DIALOGUE: ROUNDTABLE REPORT ON THE ACCESSIBILITY OF PLAN B AS AN OVER THE COUNTER (OTC) WITHIN INDIAN HEALTH SERVICE 10 (2012)); Kirsten Matoy Carlson, *UN Special Rapporteur Investigates Epidemic of Violence Against Indian Women in the United States*, TURTLE TALK (Jan. 29, 2011), https://turtletalk.blog/2011/01/29/un-special-rapporteur-investigates-epidemic-of-violence-against-indian-women-in-the-united-states [https://perma.cc/7K4F-KZPD].

crimes reported that their attacker was white.[34] Comparatively, only around 30% of white victims of violent crime and only around 20% of Black victims reported that their attacker was of a different race than that of the victim.[35] Sexual assault of American Indian victims is also anomalous in two other ways. First, over 40% of sexual assaults against American Indians occurred in and around the victim's own home or that of a friend, relative, or neighbor, compared to about 30% of violent victimizations reported by victims of all races.[36] Second, over 40% of sexual assaults against American Indians were committed by someone who was a stranger to the victim.[37] By comparison, only 26% of rape across races was committed by a stranger.[38] The story that these data tell is one of sexual assaults committed—on Indian reservations and in the homes of American Indians—by non-Indian offenders.

In addition to their prevalence, sexual assaults against American Indian victims are particularly severe. American Indian victims are more likely to suffer physical injuries from sexual assault, and those injuries require medical care 47% of the time, as opposed to 34% across races.[39] American Indian victims report the use of a weapon during the assault in 25% of cases, much higher than the 9% cross-racial average.[40] American Indian victims typically report multiple instances of victimization, frequently beginning in childhood.[41] Finally, American Indian women frequently suffer long-term effects from this violence, exhibiting high rates of posttraumatic stress

[34] PERRY, *supra* note 29, at 9. When asked the race of their offender, American Indian victims of violent crime primarily said the offender was white (57%), followed by other race (34%) and Black (9%). *Id.* Specifically with regard to domestic violence and sexual assault, 75% of American Indians were victimized by an offender of another race, while only 11% of nationwide "intimate violence" was reported as interracial. LAWRENCE A. GREENFELD & STEVEN K. SMITH, BUREAU OF JUST. STAT., AMERICAN INDIANS AND CRIME 8 (1999).

[35] GREENFELD & SMITH, *supra* note 34, at 7.

[36] *Id.* at 10.

[37] PERRY, *supra* note 29, at 8.

[38] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUST., CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2008 – STATISTICAL TABLES, PERCENT DISTRIBUTION OF VICTIMIZATIONS, BY TYPE OF CRIME AND RELATIONSHIP TO OFFENDER (2011).

[39] RONET BACHMAN, HEATHER ZAYKOWSKI, RACHEL KALLMYER, MARGARITA POTEYEVA & CHRISTINA LANIER, VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN 36 (2008).

[40] *Id.* at 37.

[41] *See* TJADEN & THOENNES, *supra* note 31, at 35. Approximately 54% of first sexual assaults among women occur before the victim is eighteen years old; 22% of female rape victims were younger than twelve years old when they were first raped. *Id.*

disorder as well as depression, attempted or completed suicide, and disordered eating.[42]

Rape of American Indian women cannot be understood separately from the victims' identity as American Indian, nor can it be extricated from the long history of colonial violence that has been carried out against American Indian women. Andrea Smith, a rape-crisis counselor, writes that every American Indian rape victim she has counseled has said to her at some point, "I wish I was no longer Indian."[43] The fact that victims associate the gendered violence they have experienced with their racial identity demonstrates the inherently violent and gendered nature of the project of colonization: in order to seize land that belongs to someone else, colonizers must come to view the land—and its inhabitants—as inherently violable.[44] Racism serves colonialism by depicting nonwhite people as violable in this way. To this end, American Indian land and American Indian bodies are both represented as untamed and therefore available for seizure and use by white colonizers.[45] Furthermore, whereas European women are viewed as "pure" and "civilized," American Indian women are frequently seen by white colonizers as embodying a "savage sexuality," which makes them targets for sexual violence.[46]

The idea that the rape of an Indian woman is less serious than the rape of a white woman has persisted far beyond its colonization-era origins. For instance, a 1968 court decision upheld the validity of criminal statutes that imposed greater penalties for the rape of a white woman than for the rape of

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[42] Roe Bubar, *Cultural Competence, Justice, and Supervision: Sexual Assault Against Native Women*, 33 WOMEN & THERAPY 55, 62–63 (2009). The violence that rape inflicts both on individual victims and on their communities cannot be conveyed with mere statistics. While the various long-term impacts of rape have been extensively documented in studies across many disciplines, even these studies are unable to capture the "simultaneously physical and spiritual" harm of rape. DEER, BEGINNING AND END OF RAPE, *supra* note 28, at 11.

[43] SMITH, *supra* note 27, at 8.

[44] *Id.* at 12, 55 ("Native peoples have become marked as inherently violable through a process of sexual colonization. By extension, their lands and territories have become marked as violable as well."); Sarah Deer, *Decolonizing Rape Law: A Native Feminist Synthesis of Safety and Sovereignty*, 24 WÍČAZO ŠA REV. 149, 150 (2009) [hereinafter Deer, *Decolonizing Rape Law*] ("Rape is more than a metaphor for colonization—it is part and parcel of colonization.").

[45] SMITH, *supra* note 27, at 55.

[46] Genevieve M. Le May, Note, *The Cycles of Violence Against Native Women: An Analysis of Colonialism, Historical Legislation and the Violence Against Women Reauthorization Act of 2013*, 12 PORTLAND ST. U. MCNAIR SCHOLARS ONLINE J. 1, 6 (2018). *See generally* AMY L. CASSELMAN, INJUSTICE IN INDIAN COUNTRY: JURISDICTION, AMERICAN LAW, AND SEXUAL VIOLENCE AGAINST NATIVE WOMEN (2016) (describing how the sexualization and othering of Indian women was a crucial part of the project of colonial conquest).

an American Indian woman.[47] The notion that American Indian women's bodies are inherently available for exploitation has persisted in popular culture as well, as perhaps best illustrated by the 1982 video game *Custer's Revenge*, the objective of which was for the player-controlled General Custer to have sex with an American Indian woman bound to a post.[48]

Sexual violence has been an omnipresent part of life for American Indian women since the beginning of white colonization of the Americas. To understand the nature of this crisis and how it relates to modern pipeline construction, we must begin with a historical examination of the ways in which resource extraction has effected and intensified this violence.

B. Resource Extraction and Violence Against Women

Resource extraction from tribal lands has been a recurring factor that drives violence against American Indian women. Historically, the discovery of natural resources during westward expansion brought in men hoping to extract those resources.[49] Either incidentally or as part of a strategy for gaining control of resources, the pursuit of natural resources has time and again resulted in violence against American Indian women.[50]

The forced relocation of American Indians, for instance, has been frequently driven by the discovery of resources on Indian land.[51] Not only has the process of relocation been, in itself, devastatingly violent,[52] but any

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[47] Gray v. United States, 394 F.2d 96, 98 (9th Cir. 1968) (finding that it was within Congress's plenary power over Indian law to set varying penalties for rape committed by an American Indian man, including a diminished penalty when the victim was also Indian).

[48] *See* AMNESTY INT'L, *supra* note 27, at 16–17 (describing *Custer's Revenge* (Atari, 1982)). Contemporary media depictions of American Indians serve to both reflect and perpetuate negative stereotypes. *See generally* S. Elizabeth Bird, *Gendered Construction of the American Indian in Popular Media*, 49 J. COMMC'N. 61 (1999) (explaining the history of sexualized imagery depicting American Indians and its relation to colonial domination).

[49] *See* Darren Dobson, *Manifest Destiny and the Environmental Impacts of Westward Expansion*, 29 FLINDERS J. HIST. & POL. 41, 52–53 (2013) (describing how the natural resources of the American West drove westward expansion and led to exploitation of the environment and of Indigenous peoples).

[50] *See id.* at 65 (describing the enslavement and forced prostitution of American Indian women by California's gold miners).

[51] Consider, for example, the forced removal of the Cherokee after gold was discovered in Georgia, in and around Cherokee territory. DAVID WILLIAMS, THE GEORGIA GOLD RUSH: TWENTY-NINERS, CHEROKEES, AND GOLD FEVER 12–19 (1993). Gold was discovered in 1828, and thousands of miners began to pour into the state. *Id.* In 1830, President Andrew Jackson authorized the Indian Removal Act, forcing the Cherokee, Choctaw, Muscogee Creek, and Seminole tribes from their land and relocating them to Oklahoma. Pub. L. No. 21-148, 4 Stat. 411 (1830). Approximately 6,000 Cherokee died on the resulting Trail of Tears. *1838: Cherokee Die on Trail of Tears*, NAT'L LIBRARY OF MED., https://www.nlm.nih.gov/nativevoices/timeline/296.html [https://perma.cc/6CXR-U9BA].

[52] *See* Kaden Prowse, *The Use of Violence on the American Frontiers: Examining U.S.-Native American Relations in the 18th and 19th Centuries*, 8 INQUIRIES J. 1, 1–2 (2016) (describing violence

resistance to relocation has been met with violence that is often directed at American Indian women and children.

This pattern is best exemplified by the Wounded Knee Massacre. In 1868, the United States signed the Fort Laramie Treaty with the Sioux Nation, granting the Sioux exclusive territorial rights to the Black Hills, in what is now South Dakota.[53] But when an 1874 military expedition discovered gold in the Hills, Congress passed legislation authorizing their seizure—in violation of the treaty.[54] When some tribes refused to sign a new treaty ceding the Black Hills, federal agents intervened.[55] At Wounded Knee in 1890, a deaf Miniconjou Sioux man failed to comply with orders to hand over his gun, and federal agents responded by slaughtering around 300 Miniconjou.[56] Nearly half were women and children, many of them attempting to flee, only to be cut down by mounted soldiers.[57]

Murder and subjugation of American Indian women have also been employed by white men as a direct means of access to tribal resources.[58] Because marriage to an American Indian woman would historically give her husband control over her property, many white men have seen American Indian women themselves as resources to be commoditized when oil or other

against American Indian civilians during the Northwest Indian War, the First Seminole War, and the Nez Percé War).

[53] Treaty Between the United States of America and Different Tribes of Sioux Indians art. II, Apr. 29, 1868, 15 Stat. 635 [hereinafter Fort Laramie Treaty] ("[N]o persons . . . except . . . officers, agents, and employees of the government . . . shall ever be permitted to pass over, settle upon, or reside in the territory described in this article . . . .").

[54] *See* Act of Aug. 15, 1876, ch. 289, 19 Stat. 176, 192.

[55] U.S. DEP'T OF THE INTERIOR, NATIVE AMERICAN TREATIES AND BROKEN PROMISES: 1851 TO 1877, at 125 (2014). Although the United States threatened to cut off much-needed rations, there was insufficient consensus among the Sioux to confirm the new treaty. Regardless, the United States redrew the boundaries of Sioux territory, laying claim to the Black Hills. Agreement of 1877, 19 Stat. 254 (1877). This "agreement" shrunk Sioux territory from 60 million to 21.7 million acres. Myles Hudson, *Wounded Knee Massacre*, BRITANNICA (Dec. 22, 2020), https://www.britannica.com/event/Wounded-Knee-Massacre [https://perma.cc/Z7NP-M6Z3].

[56] Hudson, *supra* note 55.

[57] *Id*. Nearly a century later, the U.S. Supreme Court held that the seizure of the Black Hills without just compensation was unconstitutional. United States v. Sioux Nation of Indians, 448 U.S. 371, 423–24 (1980). Nevertheless, to this day the federal government has refused to return the Hills to the Sioux. *See* Oglala Sioux Tribe v. United States, 650 F.2d 140, 142 (8th Cir. 1981) (holding that a federal district court did not have jurisdiction to entertain a suit for quiet title to the Black Hills). Demands to return the Hills persist to this day. *See* Nick Estes, *The Battle for the Black Hills*, HIGH COUNTRY NEWS (Jan. 1, 2021), https://www.hcn.org/issues/53.1/indigenous-affairs-social-justice-the-battle-for-the-black-hills [https://perma.cc/2YXE-CCR6].

[58] DEER, BEGINNING AND END OF RAPE, *supra* note 28, at 65–67.

valuable resources are discovered on Indian land.[59] A particularly violent example of this phenomenon occurred in the early twentieth century in Osage County, Oklahoma, when a group of white men carried out a scheme to marry and murder Osage women, all in an effort to pass Osage oil rights to the white husband of an Indian woman named Mollie Kyle.[60]

Although their land had been seized by the government, the legally savvy Osage tribe had retained headrights to the deposits beneath the soil.[61] When oil was discovered on that land in 1897, the tribe became, per capita, the wealthiest group of people in the world.[62] Then, in 1921, the murders began. The first person murdered was twenty-five-year-old Anna Brown, quickly followed by her sisters, brother-in-law, mother, and cousin.[63] The family's oil wealth was left to Anna's surviving sister, Mollie, whose white husband was part of an organized crime family.[64] When investigations into the deaths began in earnest, the investigators suspected that Mollie was already being poisoned.[65]

The phenomenon represented in the Osage murders is not unique. Again and again, American Indian women have been used as tools for non-Indians to gain control of tribal resources.[66] This exploitation has extended into the

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[59] *Id.* After an 1888 addendum to the Dawes Act declared that American Indian women who married white men had "de facto" abandoned their tribal identity, men would also sometimes marry Indian women to "strategically separate" the women from their lands and to strip them of the protections of tribal law. Le May, *supra* note 46, at 6 (referencing An Act in Relation to Marriage Between White Men and Indian Women, ch. 818, 25 Stat. 392 (Aug. 9, 1988) (later codified at 25 U.S.C §§ 181–183)); *see also* Kay Givens McGowan, *Weeping for the Lost Matriarchy*, *in* DAUGHTERS OF MOTHER EARTH: THE WISDOM OF NATIVE AMERICAN WOMEN 53, 64–65 (Barbara Alice Mann ed., 2006) (documenting the effects that this amendment had on American Indian women).

[60] DAVID GRANN, KILLERS OF THE FLOWER MOON: THE OSAGE MURDERS AND THE BIRTH OF THE FBI 6–8, 25, 36, 68–69, 94, 218–19 (2017).

[61] *Id.* at 52; *see* Osage Allotment Act, Pub. L. No. 59-321, 34 Stat. 539, 542 (1906).

[62] GRANN, *supra* note 60, at 6. In one year alone, the tribe brought in more than $30 million in revenue—over $400 million today, adjusted for inflation. *Id.*

[63] *Id.* at 15–16, 36.

[64] *Id.* at 218–19, 290–91; Jon D. May, *Osage Murders*, OKLA. HIST. SOC'Y https://www.okhistory.org/publications/enc/entry.php?entry=OS005 [https://perma.cc/L3BJ-H6E9]. Osage allotment specifically provided for the inclusion of Osage women "who have, or have had, white husbands." Osage Allotment Act, 34 Stat. at 539–40.

[65] GRANN, *supra* note 60, at 290. It was later determined that the husband's organized crime family was behind the murders. *Id.* at 290–91; May, *supra* note 64. Fortunately, the plot on Mollie's life never came to fruition, and Mollie survived as the heir to her family's wealth. *See* GRANN, *supra* note 60, at 290.

[66] *See, e.g.*, Bethany Berger, *After Pocahontas: Indian Women and the Law, 1830 to 1934*, 21 AM. INDIAN L. REV. 1, 22–23 (1997) (recounting instances of white men legally becoming the heads of their Indian wives' households and subsequently selling their wives' allotments of land); Douglas Deur, *"She Is Particularly Useful to Her Husband": Strategic Marriages Between Hudson's Bay Company Employees and Native Women at Fort Vancouver*, NAT'L PARK SERV. (Feb. 14, 2017),

modern era, in which oil and natural gas have replaced gold as the most coveted natural resources, and fracking and piping oil and gas have resulted in further victimization of Indian women.[67] Oil pipelines, which cross the American Midwest, frequently lie close to Indian reservations and have often been criticized for invading Indian sovereignty.[68] And when tribes have protested the pipelines, they have frequently been met with violence.[69] The battle over oil has been analogized to the seizure of the Black Hills and the multitudinous other examples of violent seizure of Indian lands and resources that have occurred throughout history.[70]

The Biden presidency has signaled that it intends to change course from the environmental-regulation rollbacks of the Trump era,[71] and the environmental impact of pipelines will likely receive more attention under

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https://www.nps.gov/articles/hbcmarriages.htm [https://perma.cc/P9S3-4DRT] (describing a strategy of Hudson Bay Company employees' marriages to Indian women in order to facilitate the fur trade); Kaarin Mann, *Interracial Marriage in Early America: Motivation and the Colonial Project*, 5 MICH. J. HIST., Fall 2007, at 1, 3 (also describing the role of interracial marriage in the early American fur trade).

[67] *See* Mary Annette Pember, *Brave Heart Women Fight to Ban Man-Camps, Which Bring Rape and Abuse*, INDIAN COUNTRY TODAY (Sept. 12, 2018), https://indiancountrytoday.com/archive/brave-heart-women-fight-to-ban-man-camps-which-bring-rape-and-abuse--TVT3WEO-kaOL2wFSW0e1w [https://perma.cc/F7VV-QN8X] (comparing modern oil pipelines to the nineteenth-century "militarization of the Plains" and the resultant "systematic sexual brutalization of Native women by soldiers"); Alexandria Herr, *Oil Companies Want You to Think They're Feminist. It's BS.*, GRIST (Mar. 9, 2021), https://grist.org/justice/oil-companies-not-feminist-international-womens-day [https://perma.cc/LT45-PBKQ] (noting the disproportionate effect of both climate change and resource extraction on women, particularly women of color).

[68] *See, e.g.*, Deer & Warner, *supra* note 3, at 1–5 (criticizing extraction operations near Indian Country for negatively "impacting tribal communities through climate change and the safety of Native people, especially women and children"); Ashley A. Glick, *The Wild West Re-Lived: Oil Pipelines Threaten Native American Tribal Lands*, 30 VILL. ENV'T L.J. 105, 110–16 (2019) (highlighting the controversy of expanding the Dakota Access Pipeline given the "potential effects on protected tribal lands of the Standing Rock Sioux Tribe"); Cindy S. Woods, *The Great Sioux Nation v. the Black Snake: Native American Rights and the Keystone XL Pipeline*, 22 BUFF. HUM. RTS. L. REV. 67, 68–69 (2016) (discussing the "environmental and cultural threat" of the Keystone XL Pipeline).

[69] *See* Sam Levin & Will Parrish, *Keystone XL: Police Discussed Stopping Anti-Pipeline Activists 'by Any Means,'* GUARDIAN (Nov. 25, 2019, 6:00 AM), https://www.theguardian.com/environment/2019/nov/25/keystone-xl-protests-pipeline-activism-environment [https://perma.cc/XCF3-W93C]. During a 2016 protest against the Dakota Access Pipeline at the Standing Rock reservation in North Dakota, police "deployed water cannons, teargas grenades, bean bag rounds and other weapons, causing serious injuries to protesters." *Id.*

[70] *See* Glick, *supra* note 68, at 134 (referencing repeated incursions onto Indian lands to access resources such as wildlife and gold and categorizing oil pipelines as the latest in this series of violations).

[71] President Biden has pledged to end oil and gas drilling on public lands, promised to restore Bears' Ears National Monument, and appointed the first ever American Indian cabinet secretary to head the Department of the Interior. Timothy Egan, *After Five Centuries, a Native American with Real Power*, N.Y. TIMES (Jan. 1, 2021), https://www.nytimes.com/2021/01/01/opinion/native-american-secretary-interior-deb-haaland.html [https://perma.cc/5VD8-Q842].

Secretary of the Interior Deb Haaland.[72] Even if the Biden–Harris Administration keeps its promise to cancel the Keystone pipeline, the violence that accompanies other pipelines built near reservations may persist. Under the Obama–Biden Administration, the FBI infiltrated Standing Rock camps protesting against the Dakota Access Pipeline (DAPL).[73] The Administration also lifted the limit on exporting crude oil, resulting in a boom in domestic pipelines.[74] As long as the federal government incentivizes continued pipeline construction, the corresponding effects on Indian tribes, and particularly on American Indian women, will also likely continue.

C. "Man Camps" and Sexual Assault

The deleterious effects of pipelines begin even before their construction is complete. Construction requires that large groups of workers, typically itinerant men, be brought in to perform the work.[75] These workers are housed in "man camps," temporary housing settlements set up specifically for pipeline workers.[76] The introduction of man camps near reservations has

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[72] *See* Yazzie, *supra* note 18. Secretary Haaland has stated that "it's a time in our world . . . to listen to Indigenous people when it comes to climate change" and the environment. *Id.* She may face an uphill battle, however, since President Biden has disavowed some of her most progressive positions. Nick Estes, *Deb Haaland's Tough Road Ahead at the Interior Department*, INTERCEPT (Dec. 29, 2020, 6:00 AM), https://theintercept.com/2020/12/29/deb-haaland-interior-native [https://perma.cc/FVF3-P9XJ]. Secretary Haaland herself has reassured conservatives that she will "strike the right balance" when it comes to energy policy, rather than staunchly opposing drilling and pipelines. Matthew Daly, *Interior Nominee Haaland Questioned on Drilling, Pipelines*, ASSOCIATED PRESS (Feb. 22, 2021), https://apnews.com/article/deb-haaland-confirmation-pipelines-4f95bb205ecf152efa997ae4d1d06205 [https://perma.cc/MQ7R-WFAX].

[73] Estes, *supra* note 72.

[74] *Id.*

[75] TransCanada advertised that the construction of the Keystone XL Pipeline would have resulted in the "creation of more than 42,000 U.S.-based and 2,500 Canadian-based jobs." *Keystone XL Pipeline*, TC ENERGY, https://www.tcenergy.com/operations/oil-and-liquids/keystone-xl [https://perma.cc/4EYU-RW2F]. When a construction project occurs, these workers are housed in transient camps of around 1,000 workers each, frequently placed only a few miles from reservation lands. A.C. Shilton, *The Human Cost of Keystone XL*, PAC. STANDARD (June 14, 2017), https://psmag.com/environment/the-human-cost-of-keystone-xl [https://perma.cc/R2N5-V42S]. Workers are overwhelmingly male—men make up around 80% of those employed in oil and gas extraction overall, and college-educated women make up only 15% of workers in technical and field roles. BUREAU OF LAB. STAT., EMPLOYED PERSONS BY DETAILED INDUSTRY, SEX, RACE, AND HISPANIC OR LATINO ETHNICITY 1 (2019); KATHARINA RICK, IVÁN MARTÉN & ULRIKE VON LONSKI, WORLD PETROLEUM COUNCIL & BOS. CONSULTING GRP., UNTAPPED RESERVES: PROMOTING GENDER BALANCE IN OIL AND GAS 6 (2017), https://image-src.bcg.com/Images/BCG-Untapped-Reserves-July-2017_tcm9-164677.pdf [https://perma.cc/4M4L-2CMT].

[76] *See* Shilton, *supra* note 75. Man camps take two forms: documented camps run by the oil companies and undocumented camps that are often little more than "50–100 trailers that a rancher or farmer has set up on his land to rent out and make money." Pember, *supra* note 67.

been shown to correlate strongly with an increase in sexual assaults, domestic violence, and sex trafficking.[77]

Such camps have been constructed for oil-field workers near Bakken, North Dakota, and the effects of the Bakken camps spell a grim warning for reservations near pipeline construction sites.[78] Several studies have addressed the impact that the Bakken camps have had on crime rates and on rates of gender-based violence in particular.[79] Like in Bakken, affected communities rarely have the resources to respond to the rapid population

[77] DHEESHANA S. JAYASUNDARA, THOMASINE HEITKAMP, RONI MAYZER, ELIZABETH LEGERSKI & TRACY A. EVANSON, EXPLORATORY RESEARCH ON THE IMPACT OF THE GROWING OIL INDUSTRY IN NORTH DAKOTA AND MONTANA ON DOMESTIC VIOLENCE, DATING VIOLENCE, SEXUAL ASSAULT, AND STALKING: A FINAL SUMMARY OVERVIEW 6–8 (2016); DEER, BEGINNING AND END OF RAPE, *supra* note 28, at 77–78. The phenomenon of increased crime during resource-based booms has also been extensively studied in other contexts. *See, e.g.*, Asha D. Luthra, The Relationship of Crime and Oil Development in the Coastal Regions of Louisiana 1 (2006) (Ph.D. dissertation, Louisiana State University), https://digitalcommons.lsu.edu/gradschool_dissertations/1671/ [https://perma.cc/6J7J-2VAR] (discussing oil in coastal Louisiana); Rick Ruddell, *Boomtown Policing: Responding to the Dark Side of Resource Development*, 5 POLICING 328, 328 (2011) (highlighting oil booms in Canada); Victoria Sweet, *Extracting More than Resources: Human Security and Arctic Indigenous Women*, 37 SEATTLE U. L. REV. 1157, 1162–65 (2014) (addressing arctic resource extraction). Female respondents report a greater fear of increased crime than do male respondents in surveys of affected populations. Rick Ruddell, Dheeshana S. Jayasundara, Roni Mayzer & Thomasine Heitkamp, *Drilling Down: An Examination of the Boom-Crime Relationship in Resource-Based Boom Countries*, 15 W. CRIMINOLOGY REV. 3, 6 (2014); *see also* John Eligon, *An Oil Town Where Men Are Many, and Women Are Hounded*, N.Y. TIMES (Jan. 15, 2013), https://www.nytimes.com/2013/01/16/us/16women.html [https://perma.cc/FRX5-9YN4] (discussing the experiences of women in an oil-boom town in North Dakota).

[78] *See Bakken Housing, Lodging, Hotels, and Man Camps*, BAKKEN SHALE, https://bakkenshale.com/housing [https://perma.cc/HU7P-BFZ3] (advertising housing in Bakken man camps); *see also* Jordan G. Teicher, *Inside the Temporary Homes of North Dakota Oil Workers*, SLATE (Mar. 14, 2016, 11:03 AM), https://slate.com/culture/2016/03/kyle-cassidy-photographs-the-homes-of-oil-workers-in-north-dakota-in-the-bakken-goes-boom.html [https://perma.cc/8R2Q-L5K8] (documenting via photojournalism the homes in man camps).

[79] *See* JAYASUNDARA ET AL., *supra* note 77, at 2–4 (conducting a mixed-methods approach that combines qualitative and quantitative analysis in evaluating increased rates of domestic and dating violence, stalking, and sexual assault after an oil boom in the Bakken region of Montana and North Dakota); Ruddell et al., *supra* note 77, at 3, 6–7 (comparing violent and property crime rates for twenty-six oil-producing and twenty-six analogous nonproducing counties as well as pre- and post-boom statistics for thirteen producing and thirteen nonproducing counties in the Bakken region). There are some limitations to these studies, stemming mainly from the lack of longitudinal data and the fact that police may become more selective in which crimes they choose to prosecute when faced with rapidly increasing crime rates. *Id.* at 10. However, the data are sufficient to show statistically significant increases in crimes of sexual violence in particular. JAYASUNDARA ET AL., *supra* note 77, at 6. Data specifically addressing the effects on reservations are somewhat limited. *See* Suzette Brewer, *Sold for Sex: Senate Committee Investigates Human Trafficking of Native Women and Children*, REWIRE NEWS (Sept. 28, 2017, 11:53 AM), https://rewire.news/article/2017/09/28/sold-sex-senate-committee-investigates-human-trafficking-native-women-children [https://perma.cc/A8GR-WU6C]. General studies of resource extraction do note its disproportionate effect on Indigenous women. *See, e.g.*, Sara L. Seck & Penelope Simons, *Resource Extraction and the Human Rights of Women and Girls*, 31 CANADIAN J. WOMEN & L. i, iii–iv (2019) ("Different and increased burdens and challenges confront Indigenous women and girls . . . .").

increases and shifting demographics that result from an oil boom.[80] Consequently, tribal police officers in Bakken have reported being unable to deal with the increased crime that accompanies man camps.[81]

Several factors have been posited to explain the increase in crimes of sexual violence near man camps.[82] Foremost is that in oil-boom regions, men significantly outnumber women.[83] More concerningly, an unusually large percentage of the Bakken camp men were previously convicted sex offenders.[84] When demand for workers exceeds supply, as is often the case during oil booms given the type of labor to be done, employers become less discriminating and increasingly willing to hire applicants with criminal records, including those with a history of sex crimes.[85]

Prevalent among workers in these camps is the idea that no negative repercussions will flow from the abuse or assault of an American Indian woman. Annita Lucchesi, a Southern Cheyenne woman who works for the

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[80] Ruddell et al., *supra* note 77, at 4.

[81] Damon Buckley, *Firsthand Account of Man Camp in North Dakota from Local Tribal Cop*, LAKOTA TIMES (May 22, 2014), https://www.lakotatimes.com/articles/firsthand-account-of-man-camp-in-north-dakota-from-local-tribal-cop [https://perma.cc/CG3U-TQFP] (discussing tribal police officers' reports about the lack of resources to police tribal populations and the inability to deal with the increased crime that man camps bring).

[82] *See* Jemma Tosh & Maya Gislason, Fracking Is a Feminist Issue: An Intersectional Ecofeminist Commentary on Natural Resource Extraction and Rape 5 (2016) (unpublished manuscript), https://www.academia.edu/25244261/fracking_is_a_feminist_issue_an_intersectional_ecofeminist_commentary_on_natural_resource_extraction_and_rape [https://perma.cc/E7YM-THSB]. Dr. Tosh and Professor Gislason list the factors that create a boom-town culture where "violence can thrive": an influx of young men; a work culture that encourages "sexism, physical dominance, and hypermasculinity"; a disconnect between the men and the surrounding community; and substance abuse and other destructive behavior. *Id.*

[83] In 2011, there were 1.6 young, single men for every young, single woman in the North Dakota counties affected by the oil boom. Alleen Brown & Michelle Latimer, *A New Film Examines Sexual Violence as a Feature of the Bakken Oil Boom*, INTERCEPT (July 1, 2018, 10:30 AM), https://theintercept.com/2018/07/01/nuuca-bakken-oil-boom-sexual-violence [https://perma.cc/YZQ2-4XJ6]. It is a global trend that when men significantly outnumber women, violent crime, prostitution, and sex trafficking increase in prevalence. *See* Simon Denyer & Annie Gowen, *Too Many Men*, WASH. POST (Apr. 18, 2018), https://www.washingtonpost.com/graphics/2018/world/too-many-men [https://perma.cc/74M8-NDBZ] (documenting this trend in India and China).

[84] Joel Berger & Jon P. Beckman, *Sexual Predators, Energy Development, and Conservation in Greater Yellowstone*, 24 CONSERVATION BIOLOGY 891, 894 (2010) ("[F]requency of registered sex offenders grew approximately two to three times in areas reliant on energy extraction."); Deer & Warner, *supra* note 3, at 35–36. One trend noted among the crime data for the Bakken region was an increased number of perpetrators with previous convictions. JAYASUNDARA ET AL., *supra* note 77, at 10. Tribal police chief Grace Her Many Horses, who had previously worked in the Bakken region, reported that her department discovered thirteen sex offenders in a single man camp right next to a tribal casino. Buckley, *supra* note 81.

[85] Brown & Latimer, *supra* note 83. Many of these sex offenders are also unregistered—in 2015, almost 20% of sex offenders living near the Fort Berthold reservation in the Bakken region of North Dakota had failed to register, as compared to 4%–5% in the rest of the state. *Id.*

National Indigenous Women's Resource Council, reported a conversation that she overheard between oil workers in North Dakota: "They were saying . . . 'in North Dakota you can take whatever pretty little Indian girl that you like and you can do whatever you want and police don't give a fuck about it.'"[86] Hearing this, Lucchesi said, "it really sunk in" how bad things were in the region, "when men can talk openly about raping women and there are no consequences."[87]

In addition to the immediate impact that man camps have on violence near reservations, ripple effects also harm American Indian women beyond the reservations' boundaries. Women may be forced out of their communities to escape the violence occurring there, only to be exposed to homelessness and further violence.[88] At the same time, increased sex trafficking brings in women, many of them American Indian, from other states.[89] These women, too, are subjected to the violence of the man camps.

When tribes have brought their concerns regarding man camps to the federal government, the government has been largely unresponsive.[90] And while the Biden Administration has shown "incredibly promising signals" that it is serious about productive engagement with tribes on pipeline issues, tribal advocates cannot yet breathe a sigh of relief.[91] It is not yet clear whether the Administration will include tribes in continued conversation and engage them in meaningful partnerships to address pipeline issues.[92] Certainly, the cancellation of Keystone XL alone is insufficient. Recent sex-crime arrests in Minnesota indicate that Line 3 pipeline workers are contributing

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[86] Shilton, *supra* note 75.

[87] *Id.* Tribal police also report frequently hearing from non-Indian men that they can "[get] away with anything here." Le May, *supra* note 46, at 11–12; *see also* CASSELMAN, supra note 46, at 56–57 (describing how white rapists specifically seek out American Indian women and intentionally victimize them on Indian land because the tangle of jurisdiction creates the perception that there will be no repercussions for such crimes).

[88] DAWN MEMEE HARVARD, EXTREME EXTRACTION AND SEXUAL VIOLENCE AGAINST INDIGENOUS WOMEN IN THE GREAT PLAINS 6–7 (2015). *See generally* Bogumil Terminski, *Mining-Induced Displacement and Resettlement: Social Problem and Human Rights Issue (A Global Perspective)*, INT'L NETWORK ON DISPLACEMENT & RESETTLEMENT, http://indr.org/wp-content/uploads/2013/04/B.-terminski-mining-induced-displacement-and-resettlement.pdf [https://perma.cc/CK69-SL9F] (discussing the effects of resource extraction on displacement of Indigenous peoples).

[89] HARVARD, *supra* note 88, at 6. Women were brought through Wisconsin and Minnesota to feed the market for sex in the Bakken region. *Id.* Bakken has been described as a "hot bed of trafficking," with the majority of the victims being American Indian and a large percentage being children under the age of eighteen. Brewer, *supra* note 79.

[90] *See* Indigenous Environmental Network, *supra* note 17.

[91] Patty A. Ferguson-Bohnee & Lauren van Schilfgaarde, *The Next Four Years for Indian Country Need Human Rights*, 46 HUM. RTS. MAG. (Mar. 3, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-next-four-years/the-next-four-years-for-indian-country-need-human-rights [https://perma.cc/SU92-R9K7].

[92] *Id.*

significantly to human trafficking in the region,[93] and Michigan's Indigenous communities have expressed concern about the impact of Line 5 construction on the women and girls of the Mackinac Straits tribes.[94]

Faced with an indifferent government, tribes must rely on the rule of law to address the increase in reservation violence that accompanies an oil boom. Unfortunately, the legal systems in place in Indian Country do little to offer either protection or justice to American Indian women, as discussed in the next Section. Rather, the problems of sexual violence against American Indian women are compounded and multiplied by the tangle of conflicting regulations that sexual assault survivors must navigate.[95]

D. (In)justice for American Indian Victims

Because of jurisdictional issues and underinvestment in tribal policing and prosecution, American Indian women have little recourse when they become victims of a crime. The tangled criminal jurisdiction faced by American Indian crime victims began in 1883 with *Ex parte Crow Dog*, a homicide case in which the Supreme Court reluctantly upheld tribes' exclusive right to prosecute a felony committed by one American Indian against another on tribal land.[96] In response, Congress passed the Major Crimes Act (MCA), granting exclusive jurisdiction to federal courts, and sometimes tribal courts, over enumerated felonies committed on Indian land, regardless of the victim's race.[97] Rape was among the seven major crimes

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[93] *See* Jim Lovrien & Izabel Johnson, *2 Arrests in Human Trafficking Sting Were Line 3 Workers*, DULUTH NEWS TRIB. (Feb. 23, 2021, 6:45 PM), https://www.duluthnewstribune.com/news/crime-and-courts/6901823-2-arrests-in-human-trafficking-sting-were-line-3-workers [https://perma.cc/587E-DLZK].

[94] *See* Laina G. Stebbins, *Tribes Worry Line 5 Tunnel Construction Could Bring Sex Trafficking, Violence to Native Communities*, MICH. ADVANCE (Mar. 8, 2021, 1:28 PM), https://patch.com/michigan/across-mi/tribes-worry-line-5-tunnel-construction-could-bring-sex-trafficking-violence [https://perma.cc/5NSQ-LNBV]. Tribal advocates have called for President Biden to go beyond revocation of the Keystone XL permits and to take action to stop the violence surrounding the Line 3 and DAPL pipelines, which "cause the same damage KXL would have." Anya Zoledziowski, *To Keep Indigenous Women Safe Joe Biden Must Go Beyond Keystone XL*, VICE (Feb. 18, 2021, 10:46 AM), https://www.vice.com/en/article/epd94j/to-keep-indigenous-women-safe-joe-biden-must-go-beyond-keystone-xl [https://perma.cc/BBN9-ZJAC].

[95] *See* AMNESTY INT'L, *supra* note 27, at 6–10.

[96] 109 U.S. 556, 557, 572 (1883); *see also* DEER, BEGINNING AND END OF RAPE, *supra* note 28, 35–36 (discussing the effect of *Crow Dog* on Indian criminal law).

[97] Act of Mar. 3, 1885, Pub. L. No. 48-341, § 9, 23 Stat. 362, 385; *see* Murphy v. Royal, 875 F.3d 896, 915 (10th Cir. 2017) (discussing federal jurisdiction over crimes listed in the MCA and occurring in Indian Country), *aff'd sub nom.* Sharp v. Murphy, 140 S. Ct. 2412 (2020). The modern version of the MCA entered the Code in 1948. *See* Act of June 25, 1948, Pub. L. 80-772, § 1153, 62 Stat. 683, 758 (codified as amended at 18 U.S.C. § 1153). Notably, "Section 1153 of Title 18 grants jurisdiction to federal courts, exclusive of the states, over Indians who commit any of the listed offenses, regardless of

the MCA originally placed under exclusive federal jurisdiction.[98] Current enumerated offenses include sexual abuse[99] as well as intimate and dating violence.[100]

Issues of jurisdiction are compounded by Public Law 280 (PL 280), which transferred extensive criminal jurisdiction over Indian Country to six states.[101] PL 280 also opened the door for any state to assume jurisdiction in the future.[102] As a result, in many states, crimes involving sexual violence committed on a reservation are subject to tribal, federal, *and* state jurisdiction, creating confusion for victims and allowing for buck-passing between enforcers.[103]

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whether the victim is an Indian or non-Indian." *Criminal Resource Manual, 679. The Major Crimes Act – 18 U.S.C. § 1153*, U.S. DEP'T OF JUST., https://www.justice.gov/archives/jm/criminal-resource-manual-679-major-crimes-act-18-usc-1153 [https://perma.cc/5FGZ-BJHR] (citing United States v. John, 437 U.S. 634 (1978)). Yet "[i]t remains an open question whether federal jurisdiction is exclusive of tribal jurisdiction." *Id.* (first citing Duro v. Reina, 495 U.S. 676, 680 n.1 (1990); and then citing Wetsit v. Stafne, 44 F.3d 823 (9th Cir. 1995)).

98 Act of Mar. 3, 1885 § 9, 23 Stat. at 385 ("[A]ll Indians, committing . . . any of the following crimes, namely murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny . . . within the limits of any Indian reservation, shall be subject to . . . the exclusive jurisdiction of the United States.").

99 18 U.S.C. § 1153(a). The MCA applies to chapter 109 of the federal Code, which covers sexual abuse. *Id.* §§ 2241–2248.

100 *Id.* § 1153(a). Felonies under Section 113, which covers intimate and dating violence, also fall under the MCA. *Id.* § 113(a)(7)–(8).

101 *See* Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–1326, 28 U.S.C. § 1360). Initially affected states were California, Minnesota, Nebraska, Oregon, and Wisconsin. *Id.* Alaska was added to PL 280 when it became a state in 1959. Ada Pecos Melton & Jerry Gardner, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, AM. INDIAN DEV. ASSOCS. (2013); *see also* Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1658 (1998) ("The problems caused by Public Law 280 directly result from its ambiguous legal history, imprecise drafting, and lack of an express statement of the statute's objective.").

102 Melton & Gardner, *supra* note 101. Although a 1968 amendment to PL 280 imposed a tribal consent requirement, the requirement did not apply retroactively to those states that had already assumed jurisdictional authority. *Id.*; 1968 Civil Rights Act, Pub. L. No. 90-284, 82 Stat. 73 (codified at 25 U.S.C. § 1321). Since the passage of PL 280, nine more states—Arizona, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington—have assumed either partial or full jurisdiction over Indian Country within their states. Melton & Gardner, *supra* note 101.

103 Melton & Gardner, *supra* note 101. The Supreme Court's recent decision in *McGirt v. Oklahoma* tackled issues of concurrent state, federal, and tribal jurisdiction. *See* 140 S. Ct. 2452, 2459 (2020). In finding that the area in which the defendant had committed his criminal acts was tribal land, the Court limited criminal jurisdiction over those acts to only the federal and tribal governments, since Oklahoma is not a PL 280 state. *Id. See generally* Dominga Cruz, Sarah Deer & Kathleen Tipler, *The Oklahoma Decision Reveals Why Native Americans Have a Hard Time Seeking Justice*, WASH. POST (July 22, 2020, 5:00 AM), https://www.washingtonpost.com/politics/2020/07/22/oklahoma-decision-reveals-why-native-americans-have-hard-time-seeking-justice [https://perma.cc/R675-7RP6] (discussing *McGirt*'s place in the larger scheme of criminal jurisdiction covering American Indian victims and defendants).

Jurisdictional issues were further exacerbated by *Oliphant v. Suquamish Indian Tribe*, which stripped tribes of their right to try non-Indian offenders for crimes committed against tribal members.[104] *Oliphant* was particularly damaging to tribes' ability to deal with sexual assault. Because the majority of sexual assaults committed against American Indian women are committed by non-Indians, *Oliphant* left tribal governments with little ability to address most rapes of tribal members.[105]

Congress attempted to address *Oliphant*'s disregard for tribal sovereignty in part by reauthorizing the Violence Against Women Act (VAWA) in 2013, which granted tribes authority to prosecute certain domestic violence offenses committed against tribal members by non-Indians.[106] However, the VAWA's *Oliphant* fix was extremely limited. First, the VAWA exception applied only to domestic violence and only when the offender had significant ties to the reservation, such as marriage or employment.[107] Second, even when *Oliphant*'s effects are abrogated, tribes have limited ability to prosecute. Under the Indian Civil Rights Act of 1968 (ICRA), tribal courts can impose maximum penalties of three years' incarceration and a $15,000 fine—even for serious crimes such as murder or rape.[108] As a result, even when tribes do have the authority to prosecute a

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[104] 435 U.S. 191, 193–95 (1978). The *Oliphant* decision cited a historical understanding of tribes as unable to prosecute white citizens and also argued that tribes' "quasi-sovereign" status was inherently limiting, such that prosecution of nontribal members was incompatible with that limited role. *Id.* at 206, 208–09. However, the heart of the *Oliphant* opinion was not legal reasoning but rather a racially motivated desire to protect white citizens from tribal prosecution. Judith V. Royster, *Oliphant and Its Discontents: An Essay Introducing the Case for Reargument Before the American Indian Nations Supreme Court*, 13 KAN. J.L. & PUB. POL'Y 59, 60 (2003).

[105] *See* PERRY, *supra* note 29, at 5.

[106] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54, 120–23 (codified at 25 U.S.C. § 1304).

[107] *Id.*; *see* Rory Flay, *A Silent Epidemic: Revisiting the 2013 Reauthorization of the Violence Against Women Act to Better Protect American Indian Native Women*, 5 AM. INDIAN L.J. 230, 254–56 (2016) (discussing how the limitations of VAWA prevent it from acting as a true *Oliphant* fix).

[108] 25 U.S.C. § 1302(a)(7)(C). The original ICRA imposed limitations of one-year incarceration and a $5,000 fine. *See id.* § 1302(a)(7)(B); *Indian Civil Rights Act*, TRIBAL CT. CLEARINGHOUSE, https://www.tribal-institute.org/lists/icra.htm [https://perma.cc/9RS4-W9N4]. The 2010 Tribal Law and Order Act (TLOA) raised these maxima but with further conditions added, to which tribal courts must adhere in order to impose the greater penalties. 25 U.S.C. § 1302; *see, e.g.*, Jill Elizabeth Tompkins, *Defining the Indian Civil Rights Act's "Sufficiently Trained" Tribal Court Judge*, 4 AM. INDIAN L.J. 53, 83 (2015) (discussing the special licensure requirements for tribal judges to be considered qualified under TLOA and VAWA and noting that "[m]any tribes believe that the imposition [of these standards] infringes on tribal sovereignty and self-determination"). These limitations are based on persistent misconceptions of the tribal court system as lacking the civil rights protections guaranteed by state and federal courts. *See id.* at 58–61 (explaining that such criticisms are "only supported by anecdotes regarding a few isolated tribal court systems"). *See generally General Guide to Criminal Jurisdiction in Indian Country*, TRIBAL COURT CLEARINGHOUSE, https://www.tribal-institute.org/lists/jurisdiction.htm

serious crime such as rape, they may choose not to for fear of imposing only a minor penalty while rendering the perpetrator immune from state or federal prosecution.[109] *Oliphant* has rightly come under heavy criticism for its disregard of tribal sovereignty and for its detrimental effect on tribes' ability to address crimes committed against American Indians.[110] However, *Oliphant* remains good law today. As a result, rape of an American Indian woman by a white man could be prosecuted by tribal courts only if the perpetrator had sufficient ties to the reservation and certain other conditions were met—but tribal courts could still only impose a limited sentence and fine. The same rape would also be subject to federal jurisdiction and *might* be subject to state jurisdiction, depending on whether the state was a PL 280 state.

This conflicting web of regulations and overlapping jurisdiction makes it exceedingly difficult for American Indian sexual assault survivors to obtain justice. Crimes are potentially subject to the jurisdiction of three different court systems, depending on the identities of victim and offender, the place the crime occurred, and the seriousness of the offense.[111] This jurisdictional labyrinth creates almost insurmountable uncertainty for victims when determining the law enforcement body to which they should report a crime, for law enforcement when determining whether they have the authority to investigate and make arrests, and for prosecutors when

[https://perma.cc/HNX2-FGF3] (describing the combined effects of TLOA and VAWA on Indian Country criminal jurisdiction). The message the ICRA's limitations sends to tribes is that "tribal justice systems are only equipped to handle less serious crimes." AMNESTY INT'L, *supra* note 27, at 29.

[109] AMNESTY INT'L, *supra* note 27, at 29. The choice to prosecute a rapist would mean only a minor penalty could be imposed and would render the perpetrator immune from state or federal prosecution because the Constitution prohibits trying a defendant more than once for the same crime. U.S. CONST. amend. V ("No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . .").

[110] *See, e.g.*, Sarah Deer, *Federal Indian Law and Violent Crime: Native Women and Children at the Mercy of the State*, 31 SOC. JUST. 17, 22 (2004) (arguing that *Oliphant* is "[p]erhaps the most dangerous and damaging contemporary intrusion on tribal justice systems"); Matthew L.M. Fletcher, *Addressing the Epidemic of Domestic Violence in Indian Country by Restoring Tribal Sovereignty*, 3 ADVANCE 31, 35 (2009) (explaining that *Oliphant* "created a gaping loophole in law enforcement"); Kelly Gaines Stoner & Lauren Van Schilfgaarde, *Addressing the* Oliphant *in the Room: Domestic Violence and the Safety of American Indian and Alaska Native Children in Indian Country*, 22 WIDENER L. REV. 239, 253 (2016) (arguing that the only remedies available to tribes under *Oliphant* are "a far cry from an effective penance or deterrent"); Marie Quasius, Note, *Native American Rape Victims: Desperately Seeking an* Oliphant*-Fix*, 93 MINN. L. REV. 1902, 1915 (2009) (noting that *Oliphant* was decided "[o]n the basis of dictum in one district court case, two Attorneys General opinions from the mid-nineteenth century, a 1960 statement by a Senate committee, and a 1970 Interior Solicitor's opinion that was subsequently revoked"); Amy Radon, Note, *Tribal Jurisdiction and Domestic Violence: The Need for Non-Indian Accountability on the Reservation*, 37 U. MICH. J.L. REFORM 1275, 1292–93 (2004) (describing the decision as "particularly devastating for tribes such as the Makah, Tulalips, and Yakima, 'where the non-Indian population exceeds two-thirds of the total reservation population'").

[111] AMNESTY INT'L, *supra* note 27, at 27–28.

determining who ought to bring charges against an offender.[112] Oftentimes, this overlapping jurisdiction allows perpetrators to avoid responsibility when victims, police, or prosecutors are stymied in their pursuit of justice by the convoluted systems they must navigate.[113] Amnesty International reported a story in which two American Indian women were kidnapped, blindfolded, and raped by non-Indian men. Prosecutors were concerned that, because the victims were unable to say whether their assaults took place on federal, state, or tribal land, they might be unable to obtain justice.[114] As in that case, the end result of the jurisdictional morass is that victims are often left with neither protection nor redress, and perpetrators, confident they will not be held accountable, feel empowered to victimize again.[115]

In addition to jurisdictional issues, tribes must contend with both underfunded law enforcement and prosecutorial indifference towards cases that are difficult to prove.[116] Tribal policing is dramatically underfunded, providing tribes with less than 80% of the resources available to comparable non-Indian communities.[117] And when American Indian women report their assaults to state or federal police, they are often dismissed and ignored.[118] Even when these crimes are investigated, there are frequently lengthy delays that can result in the loss of invaluable evidence.[119] Other policing concerns include the lack of transparency about the investigative process, inadequate

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[112] *Id.*

[113] *Id.*

[114] *Id.* at 27.

[115] *Id.* at 27–28. Unprosecuted rapists are likely to repeat their crimes. David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 78 (2002). (finding that over 60% of self-reported rapists had committed more than one rape and that repeated rapists averaged six victims per offender).

[116] *See* Samuel D. Cardick, Note, *The Failure of the Tribal Law and Order Act of 2010 to End the Rape of American Indian Women*, 31 ST. LOUIS U. PUB. L. REV. 539, 556 (2012) (explaining that the efficacy of legal reforms are hampered by "lack of funding, poor training, and occasionally apathy").

[117] STEWART WAKELING, MIRIAM JORGENSEN, SUSAN MICHAELSON & MANLEY BEGAY, POLICING ON AMERICAN INDIAN RESERVATIONS: A REPORT TO THE NATIONAL INSTITUTE OF JUSTICE 27 (2001) (reporting funding levels of $83 per resident in Indian communities and $104 in similarly sized non-Indian communities).

[118] AMNESTY INT'L, *supra* note 27, at 42. Supporting local law enforcement is a low priority for the FBI agents who are responsible for federal policing. Cardick, *supra* note 116, at 557–59. The impact of local law enforcement's dearth of resources is compounded when dealing with crimes against American Indians, particularly rape. Especially when alcohol is involved, rape victims often report being treated "like a drunk Native woman first and a rape victim second." AMNESTY INT'L, *supra* note 27, at 1. Stereotypes regarding American Indians and alcohol are pervasive, and there are many reports of police officers assuming that Indian women who have been targeted for sexual violence were drinking. *Id.* at 46–48. Poor treatment of victims by police also strongly contributes to American Indian women's decisions not to report rapes. Sherry Hamby, *The Path of Helpseeking: Perceptions of Law Enforcement Among American Indian Victims of Sexual Assault*, 36 J. PREVENTION & INTERVENTION IN THE CMTY. 89, 94 (2008).

[119] AMNESTY INT'L, *supra* note 27, at 42.

protections for victim confidentiality, and the failure of nontribal jurisdictions to honor tribal protection orders.[120]

Victims face additional barriers to justice at the prosecution stage. In 2011, only 35% of reported rape cases on Indian reservations were prosecuted by the U.S. Justice Department.[121] When federal prosecutors declined to pursue a case, that case was prosecuted in other courts only 6% of the time.[122] This failure to prosecute can be attributed in part to failures at the police level; poorly investigated cases may be near-impossible to prosecute because of the lack of admissible evidence.[123] However, inadequate prosecution can also be traced to prosecutors who do not think that Indian Country rape cases are worthy of their time.[124] A former U.S. Attorney reported that, "I've had [Assistant U.S. Attorneys] look right at me and say, 'I did not sign up for this' . . . they want to do big drug cases, white-collar crime and conspiracy."[125] Analysis of the prosecution statistics for Indian Country rapes implies not only that police hand prosecutors more poorly investigated cases but also that prosecutors "may be applying overly stringent criteria for selecting cases."[126] There is a widespread perception that

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[120] *Id.* at 47–49.

[121] Sierra Crane-Murdoch, *On Indian Land, Criminals Can Get Away with Almost Anything*, ATLANTIC (Feb. 22, 2013), https://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391 [https://perma.cc/LNW3-ZH6L]; *see also Bill Moyers Journal: Obama's Inherited Problems; Exposé on Broken Justice on the Reservations* (PBS television broadcast Nov. 14, 2008) [hereinafter *Bill Moyers Journal*] (transcript available at http://www.pbs.org/moyers/journal/11142008/transcript4.html [https://perma.cc/J7HA-73BG]) (describing a botched prosecution of a violent crime in the Navajo Nation). Only 37% of reported rapes are prosecuted nationwide, but rapes are more likely to be prosecuted when they are violent or committed by a stranger—both of which are more common among American Indian women. Rebecca Campbell, Sharon M. Wasco, Courtney E. Ahrens, Tracy Sefl & Holly E. Barnes, *Preventing the "Second Rape": Rape Survivors' Experiences with Community Service Providers*, 16 J. INTERPERSONAL VIOLENCE 1239, 1247–48 (2001) (reporting that 80% of prosecuted cases involved a stranger offender); Patricia A. Frazier & Beth Haney, *Sexual Assault Cases in the Legal System: Police, Prosecutor, and Victim Perspectives*, 20 LAW & HUM. BEHAV. 607, 622 (1996) (describing how more severe cases are more likely to be prosecuted); Samantha Lundrigan, Mandeep K. Dhami & Kelly Agudelo, *Factors Predicting Conviction in Stranger Rape Cases*, 10 FRONTIERS PSYCH. 1, 2 (2019) (describing how cases involving stranger perpetrators and other co-occurring crimes are more likely to be prosecuted); *see also supra* notes 29–40 and accompanying text (discussing the prevalence and violence of sexual assaults committed against American Indian women). *See generally* UNIV. KY. CTR. FOR RSCH. ON VIOLENCE AGAINST WOMEN, TOP TEN THINGS ADVOCATES NEED TO KNOW (2011) (providing statistics and strategies).

[122] AMNESTY INT'L, *supra* note 27, at 66 ("Only 27 of the 475 cases [federal prosecutors] declined were prosecuted in other courts.").

[123] *Bill Moyers Journal*, *supra* note 121.

[124] *Id.*

[125] *Id.* (alterations in original).

[126] AMNESTY INT'L, *supra* note 27, at 66.

federal prosecutors are unlikely to pursue a rape case "unless a conviction is virtually guaranteed."[127]

Extensive literature identifies solutions to the problem of the sexual assault of American Indian women. Proposals include a comprehensive repudiation of *Oliphant*,[128] amendments to VAWA,[129] and the creation of new statutory tools.[130] One common suggestion is to return some degree of power to tribes, allowing them to forge their own solutions.[131] But the government has been slow to act.[132] Although the Biden Administration has pledged to "work with tribal leaders to find long term solutions to address" *Oliphant*'s detrimental effects on rape prosecutions,[133] such solutions may be futile since the Executive Branch cannot take the necessary step of overturning *Oliphant* and enabling effective prosecutions of non-Indian criminals.[134] Much of the Biden–Harris plan to resolve the *Oliphant* problem relies upon the 2013

[127] *Id.* at 67. This failure to prosecute crimes in Indian Country is not confined to rape cases; for instance, fourteen federal human trafficking investigations in Indian Country between 2013 and 2016 led to only two prosecutions. Brewer, *supra* note 79.

[128] Deer & Warner, *supra* note 3, at 45–48.

[129] Flay, *supra* note 107, at 236–37 (suggesting that VAWA's *Oliphant* exception be broadened).

[130] *See, e.g.*, Adam Crepelle, *Concealed Carry to Reduce Sexual Violence Against American Indian Women*, 26 KAN. J.L. & PUB. POL'Y 236, 250–51 (2017) (arguing that expanding Second Amendment protections for American Indian women would reduce sexual assault rates); Virginia Davis & Kevin K. Washburn, *Sex Offender Registration in Indian Country*, 6 OHIO ST. J. CRIM. L. 3, 23 (2008) (proposing a revised sex offender registry for Indian Country); Sarah Deer, *Expanding the Network of Safety: Tribal Protection Orders for Survivors of Sexual Assault*, 4 TRIBAL L.J. 1, 15 (2018) [hereinafter Deer, *Expanding the Network*] (proposing a new protection-order statute for American Indian women).

[131] *See* Fletcher, *supra* note 110, at 38 (proposing congressional legislation giving tribal courts jurisdiction over domestic violence and related crimes); Kimberly Robertson, *The 'Law and Order' of Violence Against Native Women: A Native Feminist Analysis of the Tribal Law and Order Act*, 5 DECOLONIZATION: INDIGENEITY, EDUC. & SOC'Y 1, 11 (2016) (arguing that solutions ought to be Indigenous in nature and should not involve the "settler state"); Jasmine Owens, Comment, *"Historic" in a Bad Way: How the Tribal Law and Order Act Continues the American Tradition of Providing Inadequate Protection to American Indian and Alaska Native Rape Victims*, 102 J. CRIM. L. & CRIMINOLOGY 497, 522 (2012) (proposing concurrent federal–tribal jurisdiction over major crimes such as rape).

[132] *See* N. Bruce Duthu, *Broken Justice in Indian Country*, N.Y. TIMES (Aug. 11, 2008), https://www.nytimes.com/2008/08/11/opinion/11duthu.html [https://perma.cc/NZ6S-3SAV] (arguing that congressional appropriation of funds for public safety in Indian Country is insufficient when not combined with comprehensive legal reform).

[133] *Biden–Harris Plan for Tribal Nations*, JOEBIDEN.COM, https://joebiden.com/tribalnations [https://perma.cc/SN94-RVRP].

[134] *See* Ferguson-Bohnee & Schilfgaarde, *supra* note 91 ("Tribes must be enabled to protect themselves. This must include a full *Oliphant* fix.").

reauthorization of VAWA.[135] Unfortunately, VAWA lacks the teeth necessary to tackle the criminal law problems facing Indian Country.[136]

Where, as here, the federal government has failed in its duty to protect some of its most vulnerable citizens, the question becomes: What *can* be done? The following Parts explore the possibility that the treaties and legal canons that govern American Indian law can form the basis of a litigation strategy that can directly address the government's inaction.

II. TREATY OBLIGATIONS AND "BAD MEN"

Underlying much of American Indian jurisprudence is a series of treaties between tribes and the federal government.[137] Treaties are "the supreme law of the land," and are thus a powerful legal tool.[138] Lawsuits to uphold the rights of Indian tribes have often relied upon the guarantees of these treaties.[139] Tribes have achieved some of their greatest legal victories when the Court has required the government to adhere to its treaty obligations.[140]

This Part argues that by failing to address the violence against American Indian women discussed in Part I, the U.S. government has failed to satisfy

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[135] *See Biden–Harris Plan for Tribal Nations*, *supra* note 133 (indicating that VAWA 2019 will be a top legislative priority); Ferguson-Bohnee & Schilfgaarde, *supra* note 91 (noting that President Biden championed the initial VAWA of 1994 while serving as a Senator).

[136] *See supra* notes 107–109 and accompanying text.

[137] While the federal government ceased using treaty making as the basis of American Indian law in 1871, opting instead to create law through the legislative process, treaties remain the foundation of much of the field of Indian law. Mark G. Hirsch, *1871: The End of Indian Treaty-Making*, AM. INDIAN, Summer–Fall 2014, at 40, 41. Tribes have increasingly used treaties as the basis of litigation in the twentieth and twenty-first centuries. *Id.* at 44. Some Indian activists have even called for the restoration of formal treaty making between the United States and Indian tribes. *See, e.g.*, Press Release, Trail of Broken Treaties, 20-Point Position Paper (Oct. 31, 1972), https://www.aimovement.org/ggc/trailofbrokentreaties.html [https://perma.cc/7C8L-VD6N].

[138] U.S. CONST. art. VI, cl. 2; *see* Rosebud v. Trump, 428 F. Supp. 3d 282, 293–94 (D. Mont. 2019) (discussing the weight of Indian treaties); *see also* Alleen Brown, *Half of Oklahoma is "Indian Country." What If All Native Treaties Were Upheld?*, INTERCEPT (July 17, 2020, 6:00 AM), https://theintercept.com/2020/07/17/mcgirt-v-oklahoma-indian-native-treaties [https://perma.cc/6RZB-TN3W].

[139] *See, e.g.*, McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020) (holding a large portion of eastern Oklahoma to be Indian Country under an 1832 treaty); Antoine v. Washington, 420 U.S. 194, 195–97 (1975) (holding that under an 1891 treaty with the Colville Indians, state hunting laws cannot apply to the tribe); Menominee Tribe of Indians v. United States, 391 U.S. 404, 405–06 (1968) (upholding Menominee hunting and fishing treaty rights when they had not been explicitly abrogated); United States v. Winans, 198 U.S. 371, 377, 381 (1905) (upholding Yakima fishing rights as protected by an 1859 treaty); *cf.* South Dakota v. Bourland, 508 U.S. 679, 687–88 (1993) (concluding that Congress had explicitly abrogated the Cheyenne River Sioux's hunting and fishing rights); Lone Wolf v. Hitchcock, 187 U.S. 553, 565–66 (1903) (holding that Congress has plenary power to unilaterally abrogate treaty obligations to Indian tribes).

[140] *See McGirt*, 140 S. Ct. at 2459; *see also* Brown, *supra* note 138 (discussing *McGirt*'s significance).

its treaty obligations to affected Indian tribes. A series of nineteenth-century treaties impose on the federal government a positive duty to protect tribes from violence by non-Indians.[141] The strength of this obligation is enhanced both by legal canons of interpretation and by the government's trust responsibility to the tribes. In failing to protect American Indian women, the government has broken its treaty promises, opening itself up to litigation.

A. Origins of the "Bad Men" Clauses

Many of the Plains Indian tribes signed treaties with the U.S. government in 1867 and 1868. These treaties marked the end to a decade of heightened hostility between the United States and some of the tribes that had most resisted, and thus caused the most difficulty for, the westward expansion of white settlers.[142] Nine major treaties were signed as part of this Great Peace Commission.[143] Because the U.S. government had a strong interest in ending hostilities with the tribes in order to continue westward expansion, these treaties included provisions aimed at establishing a lasting peace between the parties.[144] Among these provisions were the "Bad Men" clauses.[145] An example of such a clause can be found in the Fort Laramie Treaty:

> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent, and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.[146]

The Bad Men clauses required the U.S. government to arrest, prosecute, and punish violators, and to provide compensation for any harm done to American Indians by white men.[147] Paired with "bad men among the Indians" provisions, these clauses involved a degree of reciprocity. Although the clauses were asymmetrical with regard to extradition, as they required all

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[141] *See infra* notes 146–165 and accompanying text.

[142] Note, *A Bad Man Is Hard to Find*, 127 HARV. L. REV. 2521, 2523–25 (2014). For example, consider the Fort Laramie Treaty. *See supra* notes 53–57 and accompanying text.

[143] Note, *supra* note 142, at 2523–25; *see infra* notes 153–160 and accompanying text.

[144] Note, *supra* note 142, at 2523–25.

[145] *Id.* at 2525–26.

[146] Fort Laramie Treaty, *supra* note 53, art. I; *see also* Elk v. United States, 87 Fed. Cl. 70, 72 (2009) (citing the Bad Men clause of the Fort Laramie Treaty).

[147] *Elk*, 87 Fed. Cl. at 80–81.

wrongdoers to be tried in U.S. courts, the clauses provided for compensation to both the tribes and the United States.[148]

The Bad Men clauses were likely drafted in recognition of the great violence that had been inflicted upon American Indians by white settlers.[149] In testimony before Congress in 1867, various tribal leaders described the mistreatment of American Indian women in particular by white settlers.[150] The product of an 1867 congressional investigation by Senator James Doolittle, known as the Doolittle Commission Report (Doolittle Report or Report), found that such violence was rampant and included the rape, murder, mutilation, and forced prostitution of American Indian women.[151] The Report concluded that a "large majority" of wars with the Indians could be traced to the violent actions of "lawless white men" and called for provisions to protect Indians from such violence in order to "save the government from unnecessary and expensive Indian wars."[152]

In addition to the Fort Laramie Treaty with the Sioux Nation, Bad Men clauses also appear in treaties made with the Apache,[153] Cheyenne and Arapahoe,[154] Choctaw and Chickasaw,[155] Crow,[156] Eastern Band of Shoshoni

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[148] Note, *supra* note 142, at 2528.

[149] *See id.* at 2523.

[150] *Elk*, 87 Fed. Cl. at 80.

[151] *Id.* at 80–81 (citing JOINT SPECIAL COMM. APPOINTED UNDER JOINT RESOL. OF MARCH 3, 1865, CONDITIONS OF THE INDIAN TRIBES, S. REP. NO. 39-136 (1867) [hereinafter DOOLITTLE REPORT]); *see also* Note, *supra* note 142, at 2523. The Doolittle Report summarized the tribal view on federal–tribal relations, largely basing its conclusions on twenty-six responses to a questionnaire sent out to federal agents and others who dealt directly with Indian tribes. Harry Kelsey, *The Doolittle Report of 1867: Its Preparations and Shortcomings*, 17 ARIZ. & W. 107, 113 (1975).

[152] DOOLITTLE REPORT, *supra* note 151, at 5, 9; *see also Elk*, 87 Fed. Cl. at 80 (discussing these arguments in the Doolittle Report).

[153] Treaty Between the United States of America and the Kiowa, Comanche, and Apache Tribes of Indians, Oct. 21, 1867, 15 Stat. 589. This treaty added the Apache to the preexisting treaty with the Kiowa and Comanche, which included a Bad Men clause. *Id.* at art. 4 (incorporating all rights and obligations of the earlier treaty); Treaty Between the United States of America and the Kiowa and Comanche Tribes of Indians, Oct. 21, 1867, 15 Stat. 581.

[154] Treaty Between the United States of America and the Cheyenne and Arapahoe Tribes of Indians, Oct. 28, 1867, 15 Stat. 593.

[155] Treaty Between the United States of America and the Choctaw and Chickasaw Tribes of Indians, June 22, 1855, 11 Stat. 611. While this treaty does not use the term "bad men," its indemnification clause contains all of the hallmarks of a Bad Men clause. *See id.* at art. 14 ("The United States shall protect the Choctaws and Chickasaws from domestic strife, from hostile invasion, and from aggression by other Indians and white persons not subject to their jurisdiction and laws; and for all injuries resulting from such invasion or aggression, full indemnity is hereby guaranteed to the party or parties injured . . . .").

[156] Treaty Between the United States of America and the Crow Tribe of Indians, Crow-U.S. art. I, May 7, 1868, 15 Stat. 649.

and Bannock,[157] Kiowa and Comanche,[158] Navajo,[159] and Ute[160] tribes.[161] The existence of similar clauses predates the Doolittle Report, first appearing in the 1855 treaty with the Choctaws and Chickasaws;[162] some treaties employed similar language as early as 1825.[163] However, the Bad Men language as it appeared in the nine treaties of the Great Peace Commission did not become a stock part of treaties until the late 1860s.[164] The repeated use of such clauses during this period supports an inference that the treaty language of the period was influenced by the Doolittle Report, since the report immediately preceded the sharp uptick in the use of Bad Men clauses.[165]

Despite the prevalence of the Bad Men clauses, they have garnered little scholarly attention.[166] Litigation has only infrequently engaged with the Bad Men clauses, and most discussion of these clauses by courts has been only in passing.[167] But the clauses must be viewed in light of the current situation as well as the standard canons of American Indian law, which dictate that treaties be interpreted in the light most favorable to their Indian signatories. With that understanding, it is clear that the dearth of discussion represents an untapped potential for litigation.[168]

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[157] Treaty Between the United States of America and the Eastern Band of Shoshoni and Bannock Tribe of Indians art. I, July 3, 1868, 15 Stat. 673.

[158] Treaty Between the United States of America and the Kiowa and Comanche Tribes of Indians, Oct. 21, 1867, 15 Stat. 581.

[159] Treaty Between the United States of America and the Navajo Tribe of Indians, Navajo-U.S., June 1, 1868, 15 Stat. 667.

[160] Treaty Between the United States of America and the Tabeguache, Muache, Capote, Weeminuche, Yampa, Grand River, and Uintah Bands of Ute Indians, Mar. 2, 1868, 15 Stat. 619.

[161] *See* Note, *supra* note 142, at 2526–27 & nn.33–40 (discussing the similarities and differences between the Bad Men clauses found in these different treaties).

[162] *See* Treaty Between the United States of America and the Choctaw and Chickasaw Tribes of Indians, *supra* note 155.

[163] *See* Elk v. United States, 87 Fed. Cl. 70, 80 (2009). These treaties required the U.S. government to provide "full indemnification for any horses or other property which may be stolen from [the Indians] by any [non-Indian] citizens." *Id.* (quoting Treaty with the Kansa, Kansa-U.S., June 3, 1825, 7 Stat. 244, and Treaty with the Ponca, Ponca-U.S., June 9, 1825, 7 Stat. 247).

[164] *See id.* at 81.

[165] *See id.*

[166] Note, *supra* note 142, at 2527 n.43 (surveying literature discussing the Bad Men clauses and noting that almost all of the works that discussed them extensively are recent student notes). Since the *Bad Man* note was published in 2014, there has been no new significant scholarship devoted to the Bad Men clauses and, therefore, no scholarship relating the clauses to recent issues regarding pipelines.

[167] *See* Lillian Marquez, Note, *Making "Bad Men" Pay: Recovering Pain and Suffering Damages for Torts on Indian Reservations Under the Bad Men Clause*, 260 FED. CIR. BAR J. 609, 609 (2011).

[168] *See infra* Part III.

B. The Federal Trust Responsibility

In addition to establishing obligations such as those found in the Bad Men clauses, the treaties signed between the United States and Indian nations established a trust responsibility incumbent upon the United States, which has long been recognized by federal courts.[169] The trust responsibility was judicially recognized in *Cherokee Nation v. Georgia*, which asserted that the relationship of a tribe to the United States was akin to "that of a ward to his guardian."[170] In relocating tribes to reservations and depriving them of many of their usufructuary rights[171] to their traditionally held lands, the federal government transformed once-autonomous tribes into dependent nations.[172]

This tribal–federal relationship is unique, as it draws elements from contract, international, and constitutional law.[173] Consequently, this relationship holds a special place in American jurisprudence.[174] Underlying the paradigms of Indian law, the trust responsibility is the foundational basis of all legislation regarding American Indians.[175] A 1977 Senate report summarized the purpose of the trust doctrine as ensuring the welfare of Indian tribes and tribal members.[176] To realize this purpose, the federal government had a positive obligation to provide the services necessary "to

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[169] *The Origins of Our Trust Responsibility Towards the Tribes*, FRIENDS COMM. ON NAT'L LEGIS. (Sept. 29, 2016), https://www.fcnl.org/updates/the-origins-of-our-trust-responsibility-towards-the-tribes-132 [https://perma.cc/MGT9-PDAP].

[170] 30 U.S. (5 Pet.) 1, 17 (1831). Later cases maintained the trust relationship between the United States and the tribes. *See, e.g.*, United States v. Mitchell, 463 U.S. 206, 224–25 (1983) (explaining that the United States has a fiduciary trust responsibility to responsibly manage allotted Indian forest land); Morton v. Mancari, 417 U.S. 535, 553–54 (1974) (stating that "proper fulfillment" of the trust permits preferential hiring of American Indians by the Bureau of Indian Affairs); United States v. Mason, 412 U.S. 391, 398 (1973) (ruling that the United States had not breached its trust responsibility by paying a contestable inheritance tax); Seminole Nation v. United States, 316 U.S. 286, 296 (1942) (determining that the United States had breached its trust responsibility when it allowed tribal officials to misappropriate funds).

[171] Usufructuary rights are a bundle of property rights that confer upon a party the right to use, enjoy, and derive income from property in which the party does not have an ownership right. *Usufruct*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[172] *See* Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, *We Need Protection from Our Protectors: The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENV'T & ADMIN. L. 397, 403–04 (2017) (describing how relocation to reservations and the deprivation of usufructuary rights stripped tribes of the ability to provide for themselves, making them dependent on the federal government for food, shelter, and other necessities).

[173] *Id.* at 400–01.

[174] *See id.* (describing how the tribal–federal relationship has been commonly characterized as in a class of its own in American law).

[175] *Id.* at 424.

[176] AM. INDIAN POL'Y REV. COMM'N, FINAL REPORT, APPENDIXES, AND INDEX SUBMITTED TO CONGRESS 651 (1977). The report went on to explain that while the majority of legal scholarship dealt with the federal government's responsibilities over the protection of land and natural resources, the trust responsibility also extended to the provision of services and protection of tribal self-government. *Id.*

raise the . . . social well-being of the Indian people" to a level comparable to the non-Indian society.[177] The responsibility for Indian welfare that the trust doctrine places on the federal government is a crucial element of Indian law litigation.[178]

C. Canons of Indian Law

When invoking the foundational treaties of American Indian law, the guiding principles of interpretation are the Indian law canons of construction.[179] Originally arising out of Chief Justice John Marshall's opinion in *Worcester v. Georgia*,[180] these principles are "rooted in the unique trust relationship between the United States and the Indians."[181]

Felix Cohen articulated these canons of construction in his seminal *Handbook of Federal Indian Law*, writing that courts must liberally construe treaties to favor American Indians, resolve ambiguities in favor of American Indians, and construe treaties "as the Indians would have understood them."[182] Cohen also wrote that the Court had developed "a strong presumption that treaty rights have not been abrogated or modified by subsequent congressional enactments" and that any congressional abrogation of treaty rights must be established by a "clear and plain" intention to abrogate.[183]

These canons can be understood as analogous to the principles of contract interpretation that construe ambiguities against the drafter of the contract, especially when the parties to the contract have asymmetrical bargaining power.[184] Because of the inherent imbalance in bargaining power between tribes and the U.S. government,[185] as well as the trust obligation held

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[177] *Id.*

[178] *See* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985) (highlighting the "unique trust relationship between the United States and the Indians").

[179] *See id.* at 247.

[180] 31 U.S. (6 Pet.) 515, 582 (1832).

[181] *County of Oneida*, 470 U.S. at 247.

[182] FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 222 (1982). The Supreme Court has frequently relied upon these canons. *See, e.g.*, McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (2020) (stating that the Court will not "lightly infer" a breach of Congressional promises); Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 790 (2014) (explaining that the rule of express abrogation "reflects an enduring principle of Indian law"); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 (1982) (rejecting an argument of implicit abrogation).

[183] COHEN, *supra* note 182, at 222–23.

[184] Note, *supra* note 142, at 2535; *see* RESTATEMENT (SECOND) OF CONTRACTS § 206 (AM. L. INST. 1981).

[185] *See* Rey-Bear & Fletcher, *supra* note 172, at 402–03 (describing tribes' dependency on the U.S. government that the federal government created when forcibly uprooting and removing tribes from their traditionally held land); text accompanying *supra* note 172.

by the government, courts give these canons particular strength.[186] Additional support for an interpretation against the drafter comes from the fact that the American Indian signatories frequently were unable to read the English-language treaties and so had limited ability to criticize the language used.[187] Therefore, interpreters of a treaty should look to how the American Indian signatories likely understood the agreement at the time the treaty was signed.[188]

While the Supreme Court has not always applied these principles in a consistent manner, the Court has never expressly repudiated them.[189] The canons remain the primary lens through which treaties are interpreted.[190] In particular, Bad Men clauses have consistently been interpreted through the

[186] Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942) ("In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self-imposed policy . . . it has charged itself with moral obligations of the highest responsibility and trust."); *see, e.g.*, Albuquerque Indian Rts. v. Lujan, 930 F.2d 49, 58–59 (D.C. Cir. 1991) (suggesting that the *Chevron* principle of deference to the interpretations of administrative agencies may be subordinate to the canons of Indian law construction (citing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984))); *see also* Note, *Indian Canon Originalism*, 126 HARV. L. REV. 1100, 1101 (2013) (offering an originalist defense of this strong interpretation of the canons).

[187] Note, *supra* note 186, at 1102 (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 551 (1832)).

[188] *Id.* This task may be difficult since tribes usually lacked written records surrounding the treaties. The Doolittle Report provides an important exception since it is one of the few cases in which large amounts of information regarding tribes' understanding of treaty promises was deliberately gathered. *See supra* note 151 and accompanying text.

[189] Jill De La Hunt, Note, *The Canons of Indian Treaty and Statutory Construction: A Proposal for Codification*, 17 U. MICH. J.L. REFORM 681, 693–94 (1984). An interpretation of Indian law favorable to the tribes may be more likely in the current Roberts Court, since Justice Neil Gorsuch tends towards a very American Indian-friendly interpretation of the law. *See* Richard Guest, *Memorandum on the Nomination of Neil Gorsuch to the Supreme Court of the United States – an Indian Law Perspective*, NATIVE AM. RTS. FUND (Mar. 16, 2017), https://sct.narf.org/articles/indian_law_jurispurdence/gorsuch-indian-law.pdf [https://perma.cc/TE5N-UN77]. Since his nomination, Justice Gorsuch has consistently joined with the liberal Justices on American Indian law cases, most significantly in *McGirt*. Dahlia Lithwick, *What's Behind Neil Gorsuch's Stunning Win for Indigenous People*, SLATE (July 13, 2020, 3:34 PM), https://slate.com/news-and-politics/2020/07/mcgirt-v-oklahoma-neil-gorsuch-tribal-rights.html [https://perma.cc/KHP2-SXCU]. But the nomination of Justice Amy Coney Barrett to replace Justice Ruth Bader Ginsburg creates uncertainty about whether an American Indian-friendly majority can be maintained; Justice Barrett has an extremely limited Indian law record, so it is difficult to judge how she might vote. Joel West Williams, *Memorandum on the Nomination of Amy Coney Barrett to the Supreme Court of the United States: An Indian Law Perspective*, NATIVE AM. RTS. FUND (Oct. 6, 2020), https://sct.narf.org/articles/indian_law_jurispurdence/amy_coney_barrett_indian_law.pdf?_ga=2.221841816.1465175848.1602268586-1865702208.1602268586 [https://perma.cc/7M4L-JZQX].

[190] *See* Kelly Kunsch, *A Legal Practitioner's Guide to Indian and Tribal Law Research*, 5 AM. INDIAN L.J. 101, 108 (2017).

lens of the canons, meaning they have been construed as they would have been understood by the American Indian treaty signatories.[191]

A canonical interpretation of the Bad Men clauses within treaties signed by tribes affected by oil pipelines would impose upon the federal government a positive duty to protect American Indian women from sexual assault. The treaties of the late 1860s, such as the Fort Laramie Treaty, were peace treaties, intended to bring an end to hostilities between Indian tribes and white settlers.[192] The Bad Men clauses in these treaties, which used broad language, likely were included in these treaties as a direct response to the violence inflicted upon American Indian women by the white men moving west in search of wealth and resources.[193] This sequence supports an interpretation that the American Indian signatories to these treaties would have understood the clauses as protection for American Indian women from white men engaged in resource extraction. Likewise, the Bad Men clauses should be understood to impose an obligation on the government to protect modern American Indian women from the analogous crimes committed against them today.

III. RECOMMENDATIONS

Not only do the Bad Men clauses of the treaties establish an affirmative obligation incumbent on the government, they also provide a cause of action in the Court of Federal Claims for suits against the federal government.[194] The right of tribes to sue the government was broadly established by the Tucker Act[195] and includes suits brought under treaties between tribes and the government.[196] There are several reasons why a suit brought against the government might be preferable to a suit against an individual. Suits against the government avoid the risk of a judgment-proof defendant and provide an

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[191] Note, *supra* note 142, at 2534 (citing, as an example of an application of this canon, *Richard v. United States*, 677 F.3d 1141, 1149 n.14 (Fed. Cir. 2012)); *see also* Hernandez v. United States, 93 Fed. Cl. 193, 199 (2010) (considering whether a Bad Men clause applies to a given act is determined by whether that act "would have threatened the peace that the Fort Laramie Treaty was intended to protect"). *But see* Garreaux v. United States, 77 Fed. Cl. 726, 737 (2007) ("Although it is true that the Court is to construe treaties liberally, resolving ambiguities in favor of the Indians, the Court cannot rewrite or expand treaties beyond their clear terms to remedy a claimed injustice.").

[192] *See* Laura Matson, *Treaties & Territory: Resource Struggles and the Legal Foundations of the U.S./American Indian Relationship*, OPEN RIVERS, Winter 2017, at 61, 63, 65.

[193] *See supra* Section I.B.

[194] Marquez, *supra* note 167, at 624.

[195] *See* Act of Mar. 3, 1887, ch. 359, 24 Stat. 505. For its modern form, see Act of June 25, 1948, Pub. L. 80-773, § 1491, 62 Stat. 869, 940 (codified as amended at 28 U.S.C. § 1491).

[196] Hebah v. United States (*Hebah I*), 428 F.2d 1334, 1339–40 (Ct. Cl. 1970). Specifically addressing Bad Men clauses, the Court of Claims held that Indian treaties fell within the meaning of the Tucker Act. *Id.* at 1340.

avenue for recovery when the perpetrator of an assault is unknown, as might occur in instances of assault by a stranger.[197]

The tribes affected by construction of pipelines such as the DAPL and Keystone XL are, by and large, signatories to treaties containing Bad Men clauses.[198] This Part argues that these tribes could bring claims against the government under the Tucker Act using the Bad Men clauses of their respective treaties and the doctrine of *parens patriae*.[199] This litigation could be part of a strategy to ensure protections for tribal members at risk of victimization by pipeline workers.

A. Litigating Bad Men Claims

American Indian women have successfully used the Bad Men clauses of tribal treaties in litigation alleging that the federal government neglected its responsibility to protect American Indian women from sexual assault. In 2009, an Oglala Sioux woman named Lavetta Elk won a claim for damages against the government under the Bad Men clause of the Fort Laramie Treaty after she was sexually assaulted by an army recruiter.[200] Finding that the treaty incorporated tort liability concepts in addition to contractual principles, the court concluded that Elk's treaty rights allowed her to recover

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[197] *See* Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55, 82 (2006) (describing some of the barriers to rape-related tort actions posed by unknown assailants); *see also id.* at 99 (explaining how damages "may not be recoverable from the assailants themselves" in such cases).

[198] The tribes affected by the DAPL—the Cheyenne River Sioux Tribe, Oglala Sioux Tribe, Standing Rock Sioux Tribe, and Yankton Sioux Tribe—are signatories to the Fort Laramie Treaty, which contains a Bad Men clause. Blake Nicholson, *Tribes Seek to Challenge Corps' Dakota Access Pipeline Study*, AP NEWS (Dec. 10, 2018), https://apnews.com/512bee8fe57f457287aa6e00b2d58cca [https://perma.cc/V525-RKUB]. The tribes affected by the Keystone XL Pipeline are the Rosebud Sioux and the Fort Belknap tribes. Vanessa Romo, *Native American Tribes File Lawsuit Seeking to Invalidate Keystone XL Pipeline Permit*, NPR (Sept. 10, 2018, 11:59 PM), https://www.npr.org/2018/09/10/646523140/native-american-tribes-file-lawsuit-seeking-to-invalidate-keystone-xl-pipeline-p [https://perma.cc/3NUG-R5FY]. But one of the Fort Belknap tribes—the Fort Belknap Gros Ventre—is a signatory only to the Fort Belknap Treaty, which does not contain a Bad Men clause. *See* FORT BELKNAP TRIBE, *supra* note 4; Agreement with the Indians of the Fort Belknap Indian Reservation in Montana, Fort Belknap-U.S., Oct. 9, 1895, 29 Stat. 350 (1895). Although the Fort Belknap Gros Ventre may be consequently hindered in treaty litigation regarding the Keystone XL Pipeline, suits could still be brought under these treaties by the Rosebud Sioux and Fort Belknap Nakoda tribes.

[199] *Parens patriae* is the principle that a sovereign entity must care for those under its sovereignty who are unable to care for themselves, akin to a parent's responsibility to their child. *See infra* notes 219–224 and accompanying text.

[200] *See* Note, *supra* note 142, at 2521 (discussing *Elk v. United States*, 87 Fed. Cl. 70, 72–77 (2009)).

damages for any specific expenses she had incurred as a result of the assault, as well as for "pain, suffering, and mental anguish."[201]

While there has been little litigation similar to Elk's claim,[202] her success offers optimism for similar legal strategies.[203] Courts have established that Bad Men litigation will pass initial review when it concerns an affirmative criminal act committed against an American Indian whose permanent residence is on an Indian reservation.[204] Granted, the plaintiff must not have opted to receive compensation under a different federal vehicle and must not have a claim pending in another court.[205] Furthermore, the plaintiff must have exhausted her administrative remedies prior to filing her suit.[206] These limitations, however, are far from fatal to the potential of

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[201] *Elk*, 87 Fed. Cl. at 81–83, 89. Ultimately, *Elk* settled out of court for $650,000 while the case was pending appeal in the Federal Circuit. Chet Brokaw, *$650,000 Settlement in Lawsuit Based on 1868 Treaty*, NATIVE TIMES (Jan. 11, 2010), https://www.nativetimes.com/index.php?option=com_content&view=article&id=2857:650000-settlement-in-lawsuit-based-on-1868-treaty&catid=51&Itemid=27 [https://perma.cc/VU8R-J66S].

[202] Few cases have been brought under the Bad Men clauses, and many of these claims have been unsuccessful. *See, e.g.*, Jones v. United States, No. 13-227L, 2020 WL 4197757, at *2–3, 26 (Ct. Cl. July 8, 2020) (addressing a Bad Men claim brought in response to the police shooting of an American Indian man, unsuccessful); Flying Horse v. United States, 696 Fed. App'x 495, 496–97 (Fed. Cir. 2017) (addressing a claim related to unlawful detention of an Indian prisoner, unsuccessful); Richard v. United States, 677 F.3d 1141, 1142 (Fed. Cir. 2012) (addressing a claim related to two Indians killed by a drunk driver, successful); Pablo v. United States, 98 Fed. Cl. 376, 377–78 (2011) (addressing a claim brought due to the sexual abuse of an Indian girl by a police officer, unsuccessful); Herrera v. United States, 39 Fed. Cl. 419, 419–20 (1997) (addressing a claim brought due to an assault of Indian students by fellow residents of a school dormitory, unsuccessful), *aff'd*, 168 F.3d 1319 (Fed. Cir. 1998); Benally v. United States, 14 Cl. Ct. 8, 9, 11 (1987) (addressing a claim brought due to sexual abuse of Indian students by a teacher at a government-run boarding school, unsuccessful); Begay v. United States, 219 Ct. Cl. 599, 600, 602–03 (1979) (addressing a claim brought due to sexual abuse of Indian students by a teacher at a government-run boarding school, successful); Chambers v. United States, 202 Ct. Cl. 1124, 1124 (1973) (addressing a claim related to the shooting of an Indian police officer, unsuccessful); Hebah v. United States (*Hebah II*), 456 F.2d 696, 698–99 (Ct. Cl. 1972); *Hebah I*, 428 F.2d 1334, 1335–36 (Ct. Cl. 1970) (addressing a claim brought in response to the police shooting of an Indian man, unsuccessful). However, the majority of this litigation was before *Elk*, and more recent successes in *Elk* and *Richard* offer reason for optimism.

[203] *See* Note, *supra* note 142, at 2528. The dearth of Bad Men litigation does not substantially hinder future litigation, as the Federal Circuit has held that previous nonenforcement of the clauses has not extinguished American Indian claimants' treaty rights. *Id.* at 2530 (citing Tsosie v. United States, 825 F.2d 393, 399 (Fed. Cir. 1987)); *accord Richard*, 677 F.3d at 1150–52, 1150 n.18 ("Treaty rights are not so easily dissolved.").

[204] Marquez, *supra* note 167, at 620 (citing *Hebah II*, 456 F.2d at 704).

[205] Note, *supra* note 142, at 2530 (first citing *Chambers*, 202 Ct. Cl. 1124; and then citing *Benally*, 14 Cl. Ct. 8).

[206] *See, e.g.*, *Hebah I*, 428 F.2d at 1340; *see also Flying Horse*, 696 Fed. App'x at 497 (demonstrating an example where a plaintiff was required to file a notice of intent to file suit to the Assistant Secretary of the Interior for Indian Affairs); *Begay*, 219 Ct. Cl. at 601 (holding that plaintiffs had to file administrative complaints with the Department of the Interior prior to bringing Bad Men claims). *But see*

Bad Men litigation, and some court decisions provide slightly more expansive opportunities for effective Bad Men litigation.

For example, a perpetrator need not be an agent of the federal government in order to be a "bad man" within the meaning of the treaties.[207] In *Richard v. United States*, the Federal Circuit held that a drunk driver who killed two American Indians on the Pine Ridge Reservation was a "bad man," irrespective of the driver's lack of ties to the federal government.[208] The court's decision follows logically from an interpretation of the Bad Men clause at issue through the lens of the Indian law canons. Because these provisions likely were prompted in large part by violence done to Indians by white civilians, the understanding of the tribes at the time of the treaties' drafting would likely have been that the Bad Men clauses included actions by nongovernmental as well as governmental actors.[209]

Like Lavetta Elk, victims of sexual assaults resulting from pipeline construction might bring Bad Men suits against the government. Under the framework established in *Richard*, such suits could be brought notwithstanding that the crimes were committed by individuals unconnected to the federal government.[210]

This litigation strategy does come with limitations. Crimes committed against American Indian victims who have permanently moved off a reservation cannot be brought under the Bad Men clauses, for instance.[211] The success of a Bad Men claim also requires the identification of clear and discrete federally punishable crimes.[212] This requires that the plaintiff prove by a preponderance of the evidence that all elements of a federal crime have been met.[213] If a court finds that plaintiffs have not provided sufficient

San Carlos Irrigation & Drainage Dist. v. United States, 111 F.3d 1557, 1564–65 (Fed. Cir. 1997) (stating that the exhaustion doctrine is not "a matter of jurisdiction" but is "committed to judicial discretion" unless required by statute). There is some variance between courts about what is required for a plaintiff to have exhausted her remedies; however, recent decisions have not loosened the most stringent exhaustion requirements. *See* Note, *supra* note 142, at 2531–32.

[207] The perpetrator need not even be a non-Indian. *See Hebah I*, 428 F.2d at 1340 (holding that the treaty provision covers any "people subject to the authority of the United States").

[208] 677 F.3d at 1142, 1152–53.

[209] *See supra* Part II.

[210] 677 F.3d at 1152–53.

[211] *See* Pablo v. United States, 98 Fed. Cl. 376, 377–78 (2011); Jonny Bonner, *Court Won't Let Navajo Invoke "Bad Men" Clause*, COURTHOUSE NEWS (May 4, 2011), https://www.courthousenews.com/court-wont-let-navajo-invoke-bad-men-clause [https://perma.cc/KUY2-SWDN]; *see also* Herrera v. United States, 39 Fed. Cl. 419, 420 (1997).

[212] *See* Jones v. United States, No. 13-227L, 2020 WL 4197757, at *10–11 (Cl. Ct. July 8, 2020) (rejecting a Bad Men claim for the alleged police shooting of a Ute Indian man when plaintiffs were unable to sufficiently demonstrate the necessary material facts).

[213] *Id.*

evidence of any element, the claim may fail.[214] As discussed in Part I, victims of sexual violence are already hindered at every stage of policing and prosecution, which can make their cases even harder to prove in court.

One other barrier to Bad Men litigation exists because the Bad Men clauses are unique in that they protect the rights of individual American Indians rather than of tribes.[215] As a result, litigation requires individual plaintiffs who have themselves been the victims of sexual violence. For a tribe to initiate a lawsuit against the government, therefore, survivors of sexual violence must come forward and disclose their trauma and then wait, possibly years, for an uncertain resolution.[216] During the course of Elk's lawsuit, she was forced to contend with a Justice Department-hired forensic psychiatrist who argued that Elk was exaggerating both the attack itself and her resultant symptoms and who accused Elk of being unreliable and manipulative.[217] This potential revictimization of rape survivors by the judicial system may not be worth enduring for many potential plaintiffs, especially when the result of a legal victory will be monetary damages, something that not all victims would find to be adequate or satisfying.[218]

It is clear that Bad Men litigation can be used retrospectively to compensate victims for their past suffering. But retrospective litigation comes with high costs to survivors that may make it inaccessible to many American Indian women. These limitations raise a new question about the potential of Bad Men litigation: could tribes also use the Bad Men clauses prospectively to bring lawsuits to compel the government to honor its treaty obligations and protect Indian women from violence during pipeline construction? This question may be understood as two separate questions: first, whether Bad Men litigation may be brought by the tribes themselves rather than individuals, and second, whether Bad Men litigation may be forward-looking.

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214 *Id.*

215 Elk v. United States, 87 Fed. Cl. 70, 78 (2009) (stating that, unlike the "very great majority of Indian treaties," Bad Men clauses concern "the rights of and obligations to individual Indians" (quoting *Hebah I*, 428 F.2d 1334, 1337 (1970))).

216 DEER, BEGINNING AND END OF RAPE, *supra* note 28, at 55.

217 *Id.* at 57.

218 *See id.* at 58 (explaining that since the damage of rape is "difficult to quantify," it is also hard to determine an appropriate amount of compensatory damages).

B. Parens Patriae *and Tribal Standing*

Litigation brought by tribes, like all federal litigation, must overcome issues of Article III standing.[219] In order to establish standing, a plaintiff must demonstrate that she herself has suffered an "injury in fact."[220] Because the Bad Men clauses have been found to support the "rights of and obligations to individual American Indians,"[221] the government might maintain that only individuals who have suffered a cognizable injury, who are the actual victims of past sexual assaults, can bring suit. Requiring individuals, rather than their tribes, to bring suit could replicate the *Elk* predicament, in which survivors of sexual assault risk revictimization by the judicial process.[222]

Tribes might overcome this barrier, however, by invoking *parens patriae* standing to bring suits on behalf of tribal members. *Parens patriae* is the principle that a sovereign entity must care for those under its sovereignty who are "unable to care for themselves," akin to a parent's responsibility to their child.[223] A sovereign may bring a *parens patriae* suit when it is "express[ing] a quasi-sovereign interest," which is defined as "a set of interests that the [sovereign] has in the well-being of its populace."[224] Litigation must also be brought on behalf of a "substantial portion" of the sovereign's population.[225] The Supreme Court "has not attempted to draw any definitive limits on the proportion of the population of the State that must be adversely affected," but courts must consider the "indirect effects of the injury" in addition to its direct impact when determining what constitutes a "sufficiently substantial segment of [the] population."[226] The requirements of Article III standing are satisfied when a sovereign entity brings suit on behalf of its injured citizens.[227]

While *parens patriae* suits have traditionally been brought by states, they may also be brought by "similarly situated" entities when those entities can also legally represent a quasi-sovereign interest over their citizens.[228]

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[219] *See* U.S. CONST. art. III, § 2 (limiting the "judicial Power" to "Cases" and "Controversies"); Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (observing that Supreme Court precedent has articulated an "irreducible constitutional minimum of standing" requirement).

[220] *Lujan*, 504 U.S. at 560.

[221] *See* Elk v. United States, 87 Fed. Cl. 70, 78 (2009) (quoting *Hebah I*, 428 F.2d 1334, 1337 (Ct. Cl. 1970)).

[222] *See* DEER, BEGINNING AND END OF RAPE, *supra* note 28, at 57–58.

[223] *Parens patriae*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[224] Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 602, 607 (1982).

[225] Pennsylvania v. West Virginia, 262 U.S. 553, 592 (1923).

[226] *Snapp & Son*, 458 U.S. at 607.

[227] *See* Massachusetts v. EPA, 549 U.S. 497, 519–21 (2007).

[228] *See Snapp & Son*, 458 U.S. at 608 n.15 (holding that, despite lacking statehood, Puerto Rico "has a claim to represent its quasi-sovereign interests in federal court at least as strong as that of any State").

Tribes meet these criteria: they have sovereignty over their citizens, as established by the Marshall Trilogy of cases[229] and affirmed by numerous subsequent Supreme Court decisions.[230]

Despite tribes' sovereign status, their right to bring *parens patriae* cases has not been clearly cemented in federal case law.[231] Several circuit courts have implicitly or expressly accepted tribal *parens patriae* standing, but often without providing analysis on the issue.[232] In contrast, the District of Montana incorrectly analyzed *parens patriae* in 1983, holding that a tribe must be litigating on behalf of all of its members, not just a substantial proportion, in order to assert a *parens patriae* claim.[233] This decision, while inconsistent with Supreme Court case law,[234] has been applied without reflection in a series of subsequent district court cases.[235] Most recently, in *Cheyenne & Arapaho Tribes v. United States*, the Court of Federal Claims struck down an attempt by the Cheyenne and Arapaho tribes to leverage *parens patriae* standing to litigate a Bad Men clause. The court ruled that Bad Men clauses protect only individual rights and that since "not all tribal members have suffered the alleged wrongs committed by the . . . Bad Men," the clauses are inconsistent with *parens patriae* standing.[236] Other recent cases, however, have trended towards recognition of tribal *parens patriae*,[237]

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[229] *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 581 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 53 (1831); Johnson & Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543, 593 (1823).

[230] *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71–72 (1978) (holding that a tribe has the sovereign right to adjudicate whether membership criteria discriminates based on gender).

[231] Cami Fraser, Note, *Protecting Native Americans: The Tribe as* Parens Patriae, 5 MICH. J. RACE & L. 665, 668 (2000).

[232] *See, e.g.*, Sisseton-Wahpeton Sioux Tribe v. United States, 90 F.3d 351, 353–55 (9th Cir. 1996) (implicit); Navajo Nation v. Dist. Ct., 831 F.2d 929, 929–30 (10th Cir. 1987) (implicit); Standing Rock Sioux Indian Tribe v. Dorgan, 505 F.2d 1135, 1137 (8th Cir. 1974) (express).

[233] Assiniboine & Sioux Tribes v. Montana, 568 F. Supp. 269, 277 (D. Mont. 1983); *see* Fraser, *supra* note 231, at 683 (analyzing why *Assiniboine* was incorrectly decided).

[234] *See* Pennsylvania v. West Virginia, 262 U.S. 553, 591–92 (1923) (holding that a threat to the entirety of a population is not required, only a "substantial portion of the [sovereign]'s population").

[235] *See* Kickapoo Traditional Tribe of Tex. v. Chacon, 46 F. Supp. 2d 644, 652 (W.D. Tex. 1999); Navajo Nation v. Super. Ct., 47 F. Supp. 2d 1233, 1240 (E.D. Wash. 1999); Alabama & Coushatta Tribes of Tex. v. Trs. of the Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319, 1327 (E.D. Tex. 1993); Kickapoo Tribe of Okla. v. Lujan, 728 F. Supp. 791, 795 (D.D.C. 1990); *see also* Fraser, *supra* note 231, at 684–91 (discussing each of these cases).

[236] 151 Fed. Cl. 511, 519 (2020) (internal quotation marks omitted).

[237] *See, e.g.*, Oglala Sioux Tribe v. Fleming, 904 F.3d 603, 609–10 (8th Cir. 2018). The lower court had found *parens patriae* standing under 25 U.S.C. § 1902, holding that an action to protect Indian children was "inextricably bound up with the Tribes' ability to maintain their integrity and 'promote the stability and security of Indian tribes and families.'" *Id.* at 609. The Eighth Circuit reversed on other grounds without addressing the district court's finding of *parens patriae*. *Id.* at 610.

and scholars have advocated for the use of tribal *parens patriae* to address issues from climate change[238] to the opioid crisis.[239]

The use of tribal *parens patriae* to address pipeline-related sexual violence would be in keeping both with the doctrine itself and with a canonical interpretation of the treaties under which tribes would sue. *Parens patriae* exists to protect those who lack the power, resources, and stamina to engage in litigation themselves.[240] Further, allowing tribes to serve as the legal protectors of tribal members would be in line with how tribal signatories to the Bad Men treaties understood the framework of rights and responsibilities to which they were agreeing. Many tribal signatories to these treaties had a more collectivist conception of community than did their federal government counterparts.[241] The rights they sought to protect are more accurately conceptualized as also belonging to the entire tribe, rather than only to the individual.[242] Rather than an individual right to be free from violence against oneself, an example of a collective right would be a right for the *community* to be free from violence.

This *parens patriae* litigation approach would be novel in addressing claims related to sexual violence. But Bad Men claims have previously satisfied standing requirements when brought by small classes of plaintiffs

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[238] Elizabeth Ann Kronk, *Effective Access to Justice: Applying the* Parens Patriae *Standing Doctrine to Climate Change-Related Claims Brought by Native Nations*, 32 PUB. LAND & RES. L. REV. 1, 9–10 (2011).

[239] Robert C. Batson, *Addressing the Opioid Crisis in Indian Country with a* Parens Patriae *Action in Tribal Court*, 11 ALB. GOV'T L. REV. 104, 109 (2018); *see also* Christine Minhee, *The Curious Case of the Cherokee Nation*, OPIOID SETTLEMENT TRACKER (Jan. 30, 2020), https://www.opioidsettlementtracker.com/blog/cherokee [https://perma.cc/N72C-ZUKZ] (advocating for *parens patriae* standing for tribal sovereigns in opioid litigation).

[240] *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.3 (3d ed. 1999) ("[I]n a society in which litigation costs are enormous and the protection of constitutional rights is imperative, allowing the government to sue on behalf of its citizens can provide essential safeguards that otherwise might be lacking.").

[241] *See* Rory Taylor, *6 Native Leaders on What It Would Look Like if the U.S. Kept Its Promises*, VOX (Sept. 23, 2019, 8:30 AM), https://www.vox.com/first-person/2019/9/23/20872713/native-american-indian-treaties [https://perma.cc/F5BR-3CE7]. Oral histories of many tribes show that they fought hard to protect the rights of their entire tribes and considered the generations that were to come. *Id.*; *see also* Michael D. McNally, *Native American Religious Freedom as a Collective Right*, 2019 BYU L. REV. 205, 210 (explaining that many American Indian religious rights are collective rather than individual, concerned more with practices of the community than with "the private conscience rights" of individuals); Melanie Riccobene Jarboe, Comment, *Collective Rights to Indigenous Land in* Carcieri v. Salazar, B.C. THIRD WORLD L.J. 395, 399–400 (2010) (describing how individualized conceptions of property ownership harm Indigenous communities, who often understand property rights through a collectivist lens).

[242] *See* Jarboe, *supra* note 241, at 399–400.

who had been victims of sexual violence.[243] And, as established by *Richard*, courts ought to recognize novel claims based on Indian treaties, so long as those claims are consistent with original understanding of the treaties.[244]

Cheyenne & Arapaho Tribes also stands as a barrier to this litigation approach.[245] But this decision is inconsistent with how treaties would have been understood by the tribal signatories because tribes conceptualized the rights proscribed in treaties as collective rather than individual.[246] Therefore, the court's decision stands in violation of the Indian law canons of construction. The decision is also nonprecedential, since it comes out of the Court of Federal Claims. If a subsequent Court of Claims decision applied *Cheyenne & Arapaho Tribes*, tribal advocates could appeal, arguing under the Indian law canons of construction, and seek to overturn such an erroneous ruling in the Federal Circuit. If a rule contrary to *Cheyenne & Arapaho Tribes* is established, tribes would then be assured of their ability to bring suits compelling the government to protect Indian women from pipeline-related violence.

C. A Prospective Approach

The second question that must be addressed is whether Bad Men litigation could take a prospective approach—if tribes were to bring these suits, could they not only demand monetary damages but also seek injunctive relief by calling upon the federal government to enforce its treaty obligations? While litigation like *Elk* only addresses the government's Bad Men obligations after a crime has occurred, these clauses also include a positive obligation that, when a crime is committed against an American Indian, the federal government must "proceed at once to cause the offender to be arrested and punished according to the laws of the United States."[247]

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[243] *See* Begay v. United States, 219 Ct. Cl. 599, 600 (1979) (finding that six victims of sexual assault at an American Indian boarding school had standing); *see also* Arielle Zionts, *Five Oglala Sioux Members Cite "Bad Men Among Whites" Clause in Weber Lawsuit*, RAPID CITY J. (June 2, 2020), https://rapidcityjournal.com/news/local/crime-and-courts/five-oglala-sioux-members-cite-bad-men-among-whites-clause-in-weber-lawsuit/article_bde4f067-8560-524d-86a9-b1da71b4d8df.html [https://perma.cc/6U73-GPTP] (detailing a Bad Men claim by five Oglala Sioux tribe members against a pediatrician who worked for the Indian Health Service).

[244] Jim Leach, *American Indian Rights and Treaties – the Story of the 1868 Treaty of Fort Laramie*, INSIDER EXCLUSIVE, https://insiderexclusive.com/american-indian-rights-and-treaties-the-story-of-the-1868-treaty-of-fort-laramie [https://perma.cc/Q3QU-YGXU]; *see also* Richard v. United States, 677 F.3d 1141, 1152–53 (Fed. Cir. 2012) (holding that, despite the novelty of Bad Men claims against private actors, "[t]he Treaty text, the object and policy behind the Treaty, and . . . precedent" demand that such claims be allowed to proceed).

[245] *See* Cheyenne & Arapaho Tribes v. United States, 151 Fed. Cl. 511, 519 (2020).

[246] *See* Jarboe, *supra* note 241, at 399–400.

[247] Fort Laramie Treaty, *supra* note 53, art. I.

A canonical interpretation of the treaties would support a broader litigation approach.[248] Bad Men clauses likely were added to treaties to address the violence that was occurring against tribes, and especially against Indian women.[249] Federal courts have already held that the 1868 treaties including Bad Men clauses would have been understood by Indian signatories as acting to shield Indians from attacks by white soldiers and settlers.[250]

Litigation seeking to enforce broad government responsibilities would likely include anthropological and ethnohistorical evidence that demonstrates how the signatory tribes would have understood the provisions in question.[251] This evidence might include how sexual crimes were treated in the cultures of signatory tribes. For example, the way rape was treated in European culture—as a property crime committed against a woman's father or husband—was not shared by tribal cultures.[252] Many tribes consequently offered stronger protections against sexual violence than the European cultures that supplanted them in the Americas; notably, the victim herself often played a significant role in determining punishment or recompense.[253] Whereas European laws were frequently punitive and focused on recompense and vengeance for the *legally* injured party (a woman's male guardian), tribal laws more frequently focused on avoiding violence from the

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[248] *See* Pember, *supra* note 67. Tribal leaders and advocates have called for the United States to honor treaties, including the Bad Men clauses, by protecting American Indian women. *Id.* Yankton Sioux advocate Faith Spotted Eagle told a South Dakota U.S. Attorney that "[o]ur grandfathers signed those treaties with the belief that our health, education and welfare would be protected for generations to come." *Id.*

[249] *See supra* Section II.A.

[250] James D. Leach, *"Bad Men Among the Whites" Claims After* Richard v. United States, 43 N.M. L. REV. 533, 539 (2013) (citing Richard v. United States, 677 F.3d 1141, 1148 (Fed. Cir. 2012)). *Richard* explains that the Bad Men clauses "sought to protect . . . Indians against whites." 677 F.3d at 1148. The opinion cites a finding of the Doolittle Report that "Indian wars are to be traced to the aggressions of lawless white men, always to be found upon the frontier." *Id.* at 1149.

[251] *See* Note, *supra* note 142, at 2541. Similar strategies have been previously employed in litigation that has addressed provisions of Indian treaties. *Id.* (citing United States v. Consol. Wounded Knee Cases, 389 F. Supp. 235 (D. Neb. & D.S.D. 1975)).

[252] *See* DEER, BEGINNING AND END OF RAPE, *supra* note 28, at 16–30 (contrasting Anglo-American historical understandings of rape with that of Indigenous tribes).

[253] *Id.* at 17 (quoting Mvskoke law: "what she say it be law"). Mvskoke law left it to the injured woman to determine whether "to whip or pay"—whether punitive or compensatory measures would be imposed in response to the crime. *Id.*; *see also* Virginia H. Murray, *A Comparative Survey of the Historic Civil, Common, and American Indian Tribal Law Responses to Domestic Violence*, 23 OKLA. CITY U. L. REV. 433, 434–35, 443–56 (1998) (analyzing protections against domestic violence among the Cheyenne, Navajo, and Cherokee societies).

outset and on restorative justice.[254] These tribes would likely have understood the legal protections offered as more than merely compensatory.

So, what would this litigation look like in the context of oil pipelines? In demanding government action, tribes could rely upon the text of Bad Men clauses, which state, for example, that "the United States will . . . proceed at once to cause the offender to be arrested and punished according to the laws of the United States."[255] The federal government is in violation of a Bad Men clause when it fails to provide adequate resources for tribal police to arrest offenders,[256] when federal prosecutors ignore offenses,[257] and when federal agents turn a deaf ear to tribal concerns regarding a pipeline's effect on their women and girls.[258] Litigation could raise each of these claims and demand that the federal government take substantive action to address them.

This sort of litigation would raise several novel legal arguments, requiring litigators to traverse uncharted waters. Bad Men lawsuits have been infrequently deployed and have never been used to secure injunctive relief. Further, the approach described above would require use of the *parens patriae* doctrine, which has been inconsistently applied in the past.[259] If successful, however, the litigation strategy described could bring significant positive change to Indian Country. Despite the potential pitfalls faced by Bad Men claims, even those who are skeptical of this legal strategy admit that "[c]reative legal minds will continue to develop novel approaches to holding the federal government accountable."[260] The use of Bad Men litigation to

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[254] *See* Murray, *supra* note 253, at 446 (explaining that Cheyenne, Navajo, and Cherokee domestic violence policies focused on the prevention of violence). *See generally* Amber Halldin, *Restoring the Victim and the Community: A Look at the Tribal Response to Sexual Violence Committed by Non-Indians in Indian Country Through Non-Criminal Approaches*, 84 N.D. L. REV 1, 16–17 (2008) (defending the value of a criminal law approach to sexual crimes that focuses on restorative justice); James W. Zion & Elsie B. Zion, *Hozho' Sokee' – Stay Together Nicely: Domestic Violence Under Navajo Common Law*, 25 ARIZ. ST. L.J. 407, 422–25 (1993) (exploring restorative justice as a means of addressing domestic violence in Navajo common law); Rebecca A. Hart & M. Alexander Lowther, Comment, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CALIF. L. REV. 185, 218–21 (2008) (discussing the efficacy of "peacemaker courts" in addressing domestic violence). *But see* Deer, *Decolonizing Rape Law*, *supra* note 44, at 155–61 (addressing the shortcomings of peacemaking methods in terms of assuring victims' safety, preventing coercion, and ensuring that criminal behavior is not excused).

[255] Fort Laramie Treaty, *supra* note 53, art. I. This precise language is not in every treaty, but many treaties signed during the 1860s contain identical or near-identical clauses. *See supra* notes 153–161 and accompanying text.

[256] *See* WAKELING, *supra* note 117. Tribal police forces rely on the federal government for funding. *Id.* at 7. Only four of the 178 tribal police departments in the United States are self-funded by their tribes. *Id.*

[257] *See* Crane-Murdoch, *supra* note 121; *Bill Moyers Journal*, *supra* note 121.

[258] *See supra* notes 90–94 and accompanying text.

[259] *See supra* notes 231–236 and accompanying text.

[260] DEER, BEGINNING AND END OF RAPE, *supra* note 28, at 58.

address the crisis of sexual violence that accompanies oil pipelines is one such approach.

D. Narratives and Legal Strategy

There is one additional benefit to be gained from invoking Bad Men clauses and bringing suits against the government to address the violence engendered by pipeline construction. Raising these claims and elevating the voices of victims has the potential to deepen the cultural narrative that occurs surrounding pipelines.

Litigation is, fundamentally, the telling of persuasive stories.[261] The outcome of a lawsuit is shaped both by the narratives that the storyteller chooses to use and in the way that the listener understands those narratives through familiar story heuristics.[262] Discussions—both in activism and in litigation—that touch on pipelines and American Indian tribes have typically centered around narratives of environmental destruction.[263] These stories describe the importance of the natural resources that may be damaged or destroyed by the pipelines, and they rely on the magnitude of this potential loss as a means of persuasion.[264] The story that is told is true; however, it is but one small part of the larger universe of narratives that exist surrounding oil pipelines.

Bad Men litigation has the potential to broaden and deepen the story that is told about the impact of oil pipelines. The long history of resource extraction and violence against American Indian women should be made a part of this narrative, creating a story grounded in the historical context that has shaped our modern world.[265] More importantly, this story can incorporate the modern voices that are too often lost: those of survivors of the intersectional race- and gender-based violence perpetuated by oil pipelines.

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[261] Diana Lopez Jones, *Stock Stories, Cultural Norms, and the Shape of Justice for Native Americans Involved in Interparental Child Custody Disputes in State Court Proceedings*, 5 PHX. L. REV. 457, 459 (2012).

[262] *Id*.

[263] *See* Glick, *supra* note 68, at 110–16 (summarizing the present state of American Indian anti-pipeline litigation and protests).

[264] *See, e.g.*, Memorandum in Support of Standing Rock Sioux Tribe's Motion for Summary Judgment on Remand at 10, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 16-cv-1534 (D.D.C. Aug. 16, 2019) (describing environmental damage that was "devastating to the Tribe's economy and culture"); Memorandum of Plaintiff Oglala Sioux Tribe in Support of Its Motion for Summary Judgment at 15–16, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 16-cv-1534 (D.D.C. Aug. 16, 2019) (describing the impact that an oil spill would have on tribal fishing and drinking water).

[265] *See supra* Section I.B.

While, of course, no individual ought to be obligated to publicly share their story, and sexual assault litigation can be harmful to survivors,[266] litigation may offer an opportunity for healing.[267] Recognition of the value and impact of a survivor's story can represent validation and acknowledgement that may be of great value to some American Indian survivors of sexual violence.[268]

There is also tremendous power in stories. Stories of American Indian survivors "are stories of despair and pain but also of strength and survival."[269] Survivors' stories can form an important cornerstone in constructing a new jurisprudence to address sexual assault in Indian Country. The idea of incorporating female narratives and voices into policy discussions is one rooted in ancient tradition and represents a recognition of the unique knowledge that is specific to women's experiences.[270]

Stories are the basis not only of litigation but also of human interaction.[271] The stories that we tell build upon each other to form a shared understanding of the world.[272] Incorporation of new stories, particularly those of disadvantaged individuals and cultures, into our understanding both in and out of the courtroom, can offer the possibility of justice to those who have routinely been disenfranchised by our legal system.[273]

CONCLUSION

There is an ongoing crisis of sexual violence in Indian Country, amplified and exacerbated by the effect of oil pipelines. This phenomenon is part of a legacy of colonial violence that has permeated Indian law since its inception. However, the long history of violence against American Indian

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266 JESSICA MINDLIN & LIANI JEAN HEH REEVES, CTR. FOR L. & PUB. POL'Y ON SEXUAL VIOLENCE, CONFIDENTIALITY AND SEXUAL VIOLENCE SURVIVORS: A TOOLKIT FOR STATE COALITIONS 9 (2005) ("[F]or a victim of sexual violence, the need for autonomy and control over her body, the private details of her life, and the decisions that must be made relative to the assault (including whether and how to assist with a criminal prosecution . . .), are often essential to recovery."). Sexual assault litigation may result in breaches of victim confidentiality, and a victim's sexual history may be put on trial, both of which may be harmful to survivors. *Id.* Therefore, in discussing the power of these narratives, it is important to remember that no woman should "feel pressured or obligated to share [her] story in a public forum." DEER, BEGINNING AND END OF RAPE, *supra* note 28, at 116.

267 *See* Deer, *Expanding the Network*, *supra* note 130, at 17 (describing the value of storytelling with regard to protection orders for survivors of sexual violence).

268 *Id.*

269 DEER, BEGINNING AND END OF RAPE, *supra* note 28, at 116.

270 *Id.*; *see also* Deer, *Expanding the Network*, *supra* note 130, at 21 (arguing that reform to rape law ought to be grounded in the voices of women's advocates and the stories of survivors).

271 Jones, *supra* note 261, at 462–63.

272 *Id.*

273 *Id.* at 484–85.

women also offers one potential method to address the modern crisis. Originally created in part to respond to violence against American Indian women, the Bad Men clauses of American Indian treaties may provide an avenue for creative litigation strategies to combat the violence that accompanies oil pipelines, as well as to give a voice to survivors of sexual violence. Litigators are storytellers, and those who deal with pipeline litigation are telling a story about the effect that pipelines have on Indian Country and the individuals who live there. The question that must be asked is: what kind of story will that be?