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Missing & Murdered Indigenous People

Victoria Giordano

I. Introduction

In 2021, Gabby Petito, a popular Youtuber who documented her "Van Life" aesthetic through vlogs, went missing while on a cross-country trip with her fiancé, Brian Laundrie, camping through the National Parks.[1] In weeks of media coverage and action taken by local authorities to find both Gabby and Brian, where the latter was quickly deemed a "person of interest," Gabby's remains were eventually found near Grand Teton National Park in Wyoming.[2] The tragedy continued to unfold while justice was playing out, with Brian found dead through "a self-inflicted gunshot wound to the head," while also claiming responsibility for Gabby's death in a suicide note.[3]

Gabby's is a troubling case that highlighted the dangers and realities of domestic violence; her story spanned months of media coverage and a nationwide search.[4] Yet that does not tell the full story of what her murder uncovered about our society today. While Gabby was being searched for, at least four other bodies were found along Gabby and Brian's travel path.[5] Furthermore, between 2011 and 2020, 710 Indigenous persons were reported missing in Wyoming, and of those cases, only 42% had articles written up, compared to the 76% of articles on missing White people.[6]

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[1] Tamara Weitzman, Chelsea Narvaez, Michelle Singer, *Gabby Petito-Brian Laundrie case: The full story behind the high-profile deaths*, CBS NEWS: 48 HOURS, (May 25, 2023, 11:05 AM EDT), https://www.cbsnews.com/news/gabby-petito-brian-laundrie-case-story-deaths/.
[2] Weitzman, *supra* note 1.
[3] Weitzman, *supra* note 1.
[4] Jericka Duncan, *Would Gabby Petito be alive today if warning signs of domestic violence had been acted on earlier?*, CBS NEWS: 48 HOURS, (May 28, 2023, 2:47 AM EDT), https://www.cbsnews.com/news/gabby-petito-brian-laundrie-deaths-48-hours/.
[5] Sophia Ankel, *At least 4 other bodies were found during the almost 2-month search for Gabby Petito and Brian Laundrie*, BUSINESS INSIDER, (Oct. 21, 2021, 7:42 AM EDT), https://www.businessinsider.com/gabby-petito-brian-laundrie-search-other-bodies-found-2021-10#:~:text=The%20hunt%20for%20Gabby%20Petito,reserve%20where%20Laundrie%20went%20missing.
[6] *UW Research finds that Indigenous People in the State are Missing and Murdered at Disproportionate Rates, Media Coverage Lacking*, WYOMING SURVEY & ANALYSIS CENTER, (2021),

Journalist Gwen Ifill dubbed this phenomenon as the "Missing White Woman Syndrome," which is used to "describe the media's fascination with, and detailed coverage of, the cases of missing or endangered white women - compared to the seeming disinterest in covering the disappearances of people of color."[7] In the podcast "Consider This from NPR," on the episode titled *Missing White Woman Syndrome: The Media Bias Against Missing People of Color*, they studied the incorporation of the media and how critical it is to families to receive justice for their loved ones, as the "lack of media coverage for people of color often means their loved ones struggle not only to get news coverage for the case, but also police resources dedicated to finding them."[8] For example, when a minor of color goes missing, 90% of the time law enforcement identifies that child as a "runaway," and no Amber Alert is issued or media coverage granted; accordingly, "they remain missing 4 times longer than any other group."[9]

Further, the issues that Native people face do not stop at a lack of media coverage or nationwide attention. In the 2022 update to the Violence Against Women Act ("VAWA 2022"), Congress found that within tribal communities, 96% of women victims and 89% of male victims "have experienced sexual violence by a non-Indian perpetrator at least once in their lifetime."[10] Even more, VAWA 2022 reports from the Center for Disease Control and Prevention ("CDC") find homicide to be the third leading cause of death for Native women between 10 and 24 years of age, and fifth leading cause of death for Native women between 25 and 34 years of age.[11] This was

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https://wysac.uwyo.edu/wysac/projects/mmip-report/#:~:text=The%20report%20states%20that%2C%20of,Indigenous%20people%20and%20White%20people.

[7] *Missing White Woman Syndrome: The Media Bias Against Missing People of Color*, NPR: CONSIDER THIS FROM NPR, (June 8, 2023, 5:05 PM EDT), https://www.npr.org/2023/06/06/1180499403/missing-white-woman-syndrome-the-media-bias-towards-missing-people-of-color#:~:text=The%20late%20journalist%20Gwen%20Ifill,disappearances%20of%20people%20of%20color.

[8] *Missing White Woman Syndrome: The Media Bias Against Missing People of Color*, *supra* note 7.

[9] *Missing White Woman Syndrome: The Media Bias Against Missing People of Color*, *supra* note 7.

[10] Violence Against Women Act Reauthorization Act of 2022, S. 3623, Title VIII, §801(a)(3) (2022).

[11] Violence Against Women Act Reauthorization Act of 2022, §801(a)(7)(A)-(B).

found to be more than ten times the national average in some areas of the United States.[12] However, the most glaring fact in the VAWA 2022 comes from a 2017 report by the Department of Justice ("DOJ"), stating that of the criminal prosecutions for crimes in Indian country the US Attorneys declined to prosecute, 66% of those involved assault, murder, or sexual assault.[13]

In the landmark Native American case of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 211 (1978), the U.S. Supreme Court emphasized the idea that Native tribes forfeited the option of "full sovereignty in return for the protection of the United States."[14] From this declaration, the majority held "that Indian tribes do not have inherent jurisdiction to try and to punish non-Indians."[15] Justice Thurgood Marshall criticizes the majority in his dissenting opinion by succinctly stating: "Indian tribes enjoy as a necessary aspect of their retained sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation."[16]

What Justice Marshall is calling out in *Oliphant* is important for the modern issues still plaguing Natives today, such as the Missing and Murdered Indigenous People ("MMIP") crisis. The hypocrisy of the majority when boldly claiming the responsibility to protect tribes from non-Indians, who are not under tribal jurisdiction according to the Supreme Court, while simultaneously relinquishing their own assertion of responsibility for cases that come their way is striking. The American government cannot have it both ways, so the solution required is one of two options: allow tribal courts complete sovereignty and jurisdiction over all crimes committed against tribal members, or fully embrace the concept of the "protector role" they forced themselves into.

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[12] Violence Against Women Act Reauthorization Act of 2022, §801(a)(8).
[13] Violence Against Women Act Reauthorization Act of 2022, §801(a)(9).
[14] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 211 (1978).
[15] *Oliphant v. Suquamish*, 435 U.S. at 212.
[16] *Id*.

This paper will address the past frameworks that have helped expand the current turmoil Native people face today. Beginning in Section II, the background framework for Federal Indian Law, as well as the history of the MMIP crisis, is evaluated. Section III outlines the argument presented and how history and caselaw supports a stronger response from the U.S. Government, regardless of what avenue they follow. Finally, Section IV emphasizes the conclusion of this research paper and goals for the future.

II. Background

A. An Introduction to Federal Indian Law

The history of Federal Indian Law in theory begins at the time of colonialization. Despite what the settlers may have believed, the tribes had their own system of governance within their own communities and between the tribes.[17] There was the narrative that Natives were "savage" members of society that required the help of the colonists to modernize and put together a sense of law and order.[18] In the Supreme Court case of *Johnson v. M'Intosh*, 21 U.S. 543, 590 (1823), the court referred to "the tribes of Indians inhabiting this country" as "fierce savages," and to "leave them in possession of their country, was to leave the country a wilderness."[19] They could not be trusted to govern themselves, and "to govern them as a distinct people, was impossible," as they defended their home and independence with ferocity.[20] Despite going through a

[17] William G. DiNome, *American Indians: Part ii: American Indians before European contact*, NCPEDIA, (2006), https://www.ncpedia.org/american-indians/before-europeans.
[18] Natsu Taylor Sait, SETTLER COLONIALISM, RACE, AND THE LAW: WHY STRUCTURAL RACISM PERSISTS 44 (New York University Press, 2020).
[19] *Johnson v. M'Intosh*, 21 U.S. 543, 590 (1823).
[20] *M'Intosh*, 21 U.S. at 590.

"decolonization" period in the 1960s, the United States still has a collection of laws and statutes that have been built into the legal system that has created a web of misdirects and confusion.[21] Accordingly, it is crucial to determine where the problem lies so that it can be addressed and corrected.

As Sarah Deer, "a professor of women, gender and sexuality studies at the University of Kansas, and a citizen of the Muscogee (Creek) Nation of Oklahoma,"[22] puts it: "[n]ative people are both overvictimized and overincarcerated at significant rates, and nearly everyone who has worked in Indian country can tell you that the criminal justice framework is to blame."[23] Critically, Deer claims that the "federal government has systemically stripped power from tribal nations, leaving tribal nations without effective legal remedies that are grounded in tribal law."[24] As such, the U.S. government has not held true to their guarantee in *Oliphant* when they claimed that because tribes sought congressional permission to try a non-Indian in tribal courts, criminal jurisdiction over non-Indians is thus not inherent in tribal sovereignty.[25]

Through this brief recap of Federal Indian Law, the following topics will be addressed in turn: (i) tribal sovereignty, the constitution, and jurisdiction; and (ii) where the courts stand in reference to Federal Indian Law.

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[21] Sait, *supra* note 18, at 41.
[22] Maureen Pao, *Savanna's Act Addresses Alarming Number Of Missing Or Killed Native Women*, NPR: WNYC, (Sept. 29, 2020, 7:02 PM EDT), https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/09/28/917807372/savannas-act-addresses-alarming-numbers-of-missing-or-murdered-native-women.
[23] Sarah Deer, THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA 31 (Regents of the University of Minnesota, 2015).
[24] Deer, *supra* note 23, at 32.
[25] *Oliphant v. Suquamish*, 435 U.S. at 211.

i. Tribal Sovereignty, the Constitution, & Jurisdiction

There is a divisiveness between the branches of government and the Tribal Nation. Groups that in theory must help each other to succeed have been creating divides since "Indians" were referenced in the US Constitution. Yet through statutes like the Major Crimes Act, the Indian Relocation Act, and the Indian Civil Rights Act, the rights and freedoms granted to Natives have been constantly stripped away. The holdings from the Supreme Court also follow in a similar vein.

There is a hesitation in many cases regarding MMIP victims about who is responsible for enacting justice. Yet the question is not easy to answer in many cases, as jurisdiction has not been legally or judicially fully addressed. Where there are clear answers about certain aspects, for example, how Double Jeopardy does not apply to Native defendants as *United States v. Lara*, 541 U.S. 193, 196 (2004), held, there are still questions that remain in regards to harms that occur off native land and if the attacker is non-Native.[26] This uncertainty expands the issue, as the Honorable B. J. Jones[27] states, because of jurisdictional blurred lines "the security of women is compromised and the legal system is diminished in the eyes of both victims and offenders."[28] Furthermore, Deer notes: "[t]ribal governments exercised inherent authority over territory, people, and relevant subject matters as developed through cultural practices and legal norms."[29] Accordingly, tribes wish to remain sovereign and regain the complete jurisdiction they practiced without question before colonization. However, the United States has forced tribes to be reliant on the federal

[26] *United States v. Lara*, 541 U.S. 193, 196 (2004).
[27] "B. J. Jones is the chief judge for the Sisseton-Wahpeton Oyate and Prairie Island Indian Community tribal courts, as well as an associate and special judge for several other tribes in the Dakotas and Minnesota. He also serves as the legal consultant for Sacred Circle, the national support center to end domestic violence against Native women and, in that capacity, trains tribal court personnel nationwide on appropriate tribal justice responses to domestic violence." Sarah Deer et al., *About the Contributors*, SHARING OUR STORIES OF SURVIVAL 356 (Tribal Law and Policy Institute, 2008).
[28] B. J. Jones, *Jurisdiction and Violence against Native Women*, *in* SHARING OUR STORIES OF SURVIVAL, (Sarah Deer et al., 233-47, 245) (Tribal Law and Policy Institute, 2008).
[29] Deer, *supra* note 23, at 34.

government for protection that they agreed to without consideration. Deer explains that: "the federal and state governments have drastically diminished recognized tribal power. As a result of this complicated federal legal scheme, tribal governments have been denied jurisdiction over the vast majority of sexual violence that happens to Native women."[30]

The first crucial federal statute regarding tribal control and protection is the Major Crimes Act ("MCA"), enacted in 1885.[31] The enactment was a strong response from Congress as a result of the Supreme Court's holding in *Ex Parte Crow Dog*, 109 U.S. 556, 572 (1883), which granted tribes the right to have jurisdiction as "semi-independent tribes whom our government has always recognized as exempt from our laws, whether within or without the limits of an organized State or Territory, and, in regard to their domestic government, [were] left to their own rules and traditions."[32] Additionally, the court stated that Congress was silent on this issue of one Indian killing another Indian on Indian land being allowed in state court, and thus was not within their jurisdiction to try them.[33] Furthermore, the court spoke to Congress directly when they said: "To justify such a departure, in such a case, requires a clear expression of the intention of Congress, and that we have not been able to find;" and so Congress did exactly that.[34] Congress enacted the MCA, which determined that "tribal nation and the federal government thus share 'concurrent' jurisdiction over the crimes, and in theory can operate independent of one another."[35] Therefore, Congress specifically limited the tribal jurisdiction that the Supreme Court had granted, also diminishing the power the tribes had. Furthermore, despite some amendments, the language

[30] Deer, *supra* note 23, at 34.
[31] *SANE Program Development and Operation Guide*, *Legal and Ethical Foundations for SANE Practice: Tribal Law*, OFFICE OF JUSTICE PROGRAMS: OFFICE FOR VICTIMS OF CARE, https://www.ovcttac.gov/saneguide/legal-and-ethical-foundations-for-sane-practice/tribal-law/.
[32] *Ex Parte Crow Dog*, 109 U.S. 556, 572 (1883).
[33] *Id*.
[34] *Id*.
[35] Deer, *supra* note 23, at 36.

and power of the MCA still remains firmly intact today from when it was first enacted in 1885 and is used as a way to substantially limit tribal court's power and jurisdiction.

In an act that further complicated the jurisdictional issue, the enactment of Public Law 83-280 ("PL 280") "was a transfer of legal authority (jurisdiction) from the federal government to state governments which significantly changed the division of legal authority among tribal, federal, and state governments."[36] Deer labels PL 280 as an official government termination policy that "was designed to eliminate federal recognition of Indian nations and force Native people to assimilate into the mainstream U.S. population."[37] Critically, "[n]either the states nor the tribes, however, consented to this arrangement, and states were not provided with any additional resources with which to enforce crimes in Indian country."[38] States that have relinquished federal control over Indian territories include Alaska, Oregon, California, Nebraska, Minnesota, and Wisconsin, and in these states, tribal governments have been at a disadvantage when trying to control crime.[39] Without support, financially and otherwise, to enact jurisdiction over tribal issues, some states are inadequately prepared to properly address MMIP cases that come to their attention.

The legislation of the Indian Civil Rights Act of 1968 ("ICRA") created more restrictions and regulations on the question of jurisdiction in regard to Native Americans seeking justice.[40] In regards to justice, ICRA limited the punishments tribal courts could impose for criminal offenses – "tribes were limited to misdemeanor (minor crimes) jurisdiction."[41] The sentence that could result from a criminal case in tribal court is: "any 1 offense any penalty or punishment greater than

[36] *Public Law 280*, THE TRIBAL COURT CLEARINGHOUSE, TRIBAL LAW AND POLICY INSTITUTE, https://www.tribal-institute.org/lists/pl280.htm.
[37] Deer, *supra* note 23, at 37.
[38] Deer, *supra* note 23, at 37.
[39] Deer, *supra* note 23, at 38.
[40] Indian Civil Rights Act of 1968, 25 U.S.C.A. §1302 (1968).
[41] Deer, *supra* note 23, at 40.

imprisonment for a term of 1 year or a fine of $5,000, or both."[42] However, there could be "a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but not to exceed $15,000, or both," but only if the accused defendant had previously been convicted of the same or comparable crime in any U.S. jurisdiction, or if the punishment is comparable to an offense from the federal or state governments that would result in a sentencing of more than one year of imprisonment.[43] The bottom line, however, is that the sentence in tribal jurisdiction will always be deemed a misdemeanor, even if the enacted and convicted crime well exceeds that category. This allows for perpetrators of MMIP cases to literally get away with murder in the form of it being classified as a misdemeanor in tribal courts.

ii. Supreme Court's Input

Tribes are defined by the Supreme Court case *Oliphant v. Suquamish* as being a "territorial sovereignty" within the United States, and through their "incorporation into the territory… their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty."[44] This leads to the concept of "tribal criminal jurisdiction over non-Indians," which was held to be considered "inconsistent with treaty provisions recognizing the sovereignty of the United States over the territory assigned to the Indian nation and the dependence of the Indians on the United States."[45] This case regarded a non-Indian resident who lived on the Port Madison tribal reservation and was arrested by tribal authorities for assaulting a tribal officer and resisting arrest.[46] Oliphant, the petitioner, then applied for a writ of habeas corpus to the United States District Court for the Western District of Washington, where he argued that the tribal court did not have

[42] 25 U.S.C.A. §1302(a)(7)(B).
[43] 25 U.S.C.A. § 1302(b)(1)-(2).
[44] *Oliphant v. Suquamish*, 435 U.S. at 209.
[45] *Id.* at 199.
[46] *Id.* at 195.

jurisdiction over non-Indians such as himself.[47] To this, the Supreme Court agreed that Indian tribal courts do not have criminal jurisdiction over non-Indians.[48]

Since its publication in 1978, *Oliphant* has consistently been upheld in the numerous cases following its holding. Further, in *Lara*, the Supreme Court went further to retain their control over the "sovereign" tribes by disqualifying a Double Jeopardy argument against a Native defendant.[49] Lara, the respondent, was tried and convicted in tribal court, but was then brought to court for a similar crime in the Federal District Court for the District of North Dakota, and would normally have been protected under the 5th Amendment's Double Jeopardy Clause[50].[51] However, the government argued, and the Supreme Court agreed, that because the specific language of the clause excludes prosecutions brought by "separate sovereigns," Double Jeopardy protection did not apply to Lara.[52] This rule stems from *United States v. Wheeler*, 435 U.S. 313, 319 (1978), which held that both tribes and the US government have the ability to punish a similar offense because they are acting within their own sovereignty.[53] Furthermore, *Duro v. Reina*, 495 U.S. 676, 679 (1990), held that "the retained sovereignty of the tribe as a political and social organization to govern its own affairs does not include the authority to impose criminal sanctions against a citizen outside its own membership."[54]

To sum up these foundational cases regarding jurisdiction: *Oliphant* determined that "Indian tribes to not have inherent jurisdiction to try and to punish non-Indians,"[55] and *Lara* held

[47] *Oliphant v. Suquamish*, 435 U.S. at 195.
[48] *Id.*
[49] *Lara*, 541 U.S. at 197.
[50] "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . " U.S. CONST. amend. V.
[51] *Lara*, 541 U.S. at 197.
[52] *Id*.
[53] *United States v. Wheeler*, 435 U.S. 313, 319 (1978).
[54] *Duro v. Reina*, 495 U.S. 676, 679 (1990).
[55] *Oliphant v. Suquamish*, 435 U.S. at 212.

that "the Double Jeopardy Clause does not prohibit the Federal Government from proceeding with the present prosecution for a discrete federal offense."[56]

However, there are more cases that further complicate the question of jurisdiction, specifically in criminal cases. As recently as 2022, the Supreme Court took a strong approach in their holding in *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022); yet it left many Native attorneys worried that this has erased centuries of sovereign tradition and practice.[57]

Oklahoma v. Castro-Huerta centers around the jurisdictional issue of "crimes committed by non-Indians against Indians *in Indian country*" (emphasis added).[58] The court ultimately held that "the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country."[59] The determination stems from *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), which forms the boundaries of what is considered "Indian country" in the state of Oklahoma.[60] The majority's animosity was pointed out by Justic Gorsuch in his dissenting opinion from *Castro-Huerta*, in which he called upon Congress to answer for the majority's limitation upon tribal sovereignty and jurisdiction: "One can only hope the political branches and future courts will do their duty to honor this Nation's promises even as we have failed today to do our own."[61]

However, as Section III of this paper will elaborate on, there are a few ways forward. Cleanly addressing the question of jurisdiction is a crucial step necessary to end the MMIP

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[56] *Lara*, 541 U.S. at 197.
[57] Kristen Matoy Carlson, *Supreme Court reversed almost 200 years of US law and tradition upholding tribal sovereignty in its latest term*, THE CONVERSATION, (July 21, 2022, 8:25 AM EDT), http://theconversation.com/supreme-court-reversed-almost-200-years-of-us-law-and-tradition-upholding-tribal-sovereignty-in-its-latest-term-186264.
[58] *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2491 (2022).
[59] *Id*.
[60] *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020).
[61] *Castro-Huerta*, 142 S. Ct. at 2527.

epidemic.. However, while the most important overall goal for tribal scholars and attorneys would be to have complete tribal sovereignty, navigation and collaboration with states may be the most effective step for the immediate future.

B. The MMIP Crisis

Initially titled the "Missing and Murdered Indigenous Women" ("MMIW") crisis, or also the "Missing and Murdered Indigenous Women & Girls" ("MMIWG"), the name has rebranded to replace "Women/Girls" with simply the term "People," as this issue has now shown to span away from the concept of gender. This is because, as research conducted for Congress as recently as January 2022 has found, "84% of American Indian and Alaskan Native (["AI/AN"]) women and 82% of AI/AN men reported experiencing violent victimizations in their lifetime," meaning the problem is a Native problem, not necessarily a gender issue.[62] Additionally, LGBTQIA+ and Two-Spirit[63] members are incorporated within MMIP, as they are also often the targets of violent attacks.[64] What began as a solely women's issue has expanded in an effort to protect men and people not initially considered. However, the assailant has been shown to remain the same in the years of data collection.[65]

In a National Crime Victimization Survey that spanned from 1992 to 2005, Native participants "reported that between 50% and 70% of perpetrators were not Native American."[66]

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[62] Emily J. Hanson, *Missing and Murdered Indigenous People (MMIP): Overview of Recent Research, Legislation, and Selected Issues for Congress*, CONGRESSIONAL RESEARCH SERVICE 1 (2022), https://www.everycrsreport.com/files/2022-01-10_R47010_687276ae391c038b20b650c739426fdf92054379.pdf.

[63] "Native American two-spirit people were male, female, and sometimes intersexed individuals who combined activities of both men and women with traits unique to their status as two-spirit people. In most tribes, they were considered neither men nor women; they occupied a distinct, alternative gender status." *Two-Spirit*, INDIAN HEALTH SERVICE, https://www.ihs.gov/lgbt/health/twospirit/.

[64] *About DOJ Efforts to Address MMIP*, U.S. DEPARTMENT OF JUSTICE (Nov. 1, 2023) https://www.justice.gov/tribal/mmip/about.

[65] Hanson, *supra* note 62, at 6.

[66] Hanson, *supra* note 62, at 6.

Additionally, when the CDC conducted the National Intimate Partner and Sexual Violence Survey in 2010, there was a high majority of Native victims who reported violence by an interracial perpetrator.[67] According to the Indian Law Resource Center, it is reported that non-Indians commit 96% of sexual violence against Native women.[68] From these findings, it is clear that Natives fear attacks from non-Natives at a disproportionate rate, which fuels tribe's desire for federal recognition regarding tribes' "sovereign right to prosecute non-Indian offenders."[69]

Additionally, there is a common misconception that Native Americans only live on tribal land or reservations; however, according to an AI/AN Census, a majority of Native Americans reside in urban areas outside of tribal lands.[70] As of 2017, it was reported that "78% of Native Americans live off-reservation, and 72% live in urban or suburban environments."[71] This could do with the fact that many tribes were essentially forced off reservations and pushed into city boundaries.[72]

In the 1950s, Congress decided that Native Americans needed to assimilate into U.S. culture, enacting the Indian Relocation Act of 1956 ("IRA") to end federal recognition of most tribes, and thus encouraging Native Americans to leave their reservations and move to cities.[73] The IRA is "impetus for the relocation of the large number of Native Americans now living in urban areas."[74] It is undeniable that the goal of the American government was to eventually no longer

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[67] Hanson, *supra* note 62, at 9.
[68] *Ending Violence Against Native Women*, INDIAN LAW RESOURCE CENTER, https://indianlaw.org/issue/ending-violence-against-native-women.
[69] André B. Rosay, *Violence Against American Indian And Alaska Native Women And Men*, 277 NIJ JOURNAL 38-45, 4 (June 1, 2016).
[70] Hanson, *supra* note 62, at 17.
[71] Joe Whittle, *Most Native Americans live in cities, not reservations. Here are their stories*, THE GUARDIAN (Sept. 4, 2017, 6:00 PM EDT), https://www.theguardian.com/us-news/2017/sep/04/native-americans-stories-california.
[72] Alexia Fernández Campbell, *How America's Past Shapes Native Americans' Present*, THE ATLANTIC: BUSINESS (Oct. 12, 2016), https://www.theatlantic.com/business/archive/2016/10/native-americans-minneapolis/503441/.
[73] Campbell, *supra* note 72.
[74] Campbell, *supra* note 72.

have a Bureau of Indian Affairs ("BIA"), tribal governments, reservations, and or even have any more Native Americans, as they began assimilating into mainstream America.[75] Instead of wiping out Natives, the movement created a migration that reshaped "Indian Country," where now more than two-thirds of Natives live in cities and not on reservations.[76]

As of the most recent 2020 U.S. Census, about 71% of American Indians and Alaskan Natives live in urban areas.[77] As of June 2023, the NamUs databased listed 820 cases of missing AI/AN individuals; of those cases:

> 155 went missing from tribal land, 536 did not go missing from tribal land, and for 129 it was either unknown (21) or not provided (108) whether they went missing from tribal land; and 81 had their primary residence on tribal land, 358 did not have their primary residence on tribal land, and for 381 the primary residence locations were unknown (49) or not provided (332).[78]

This data shows that the primary focus of MMIP cases occur outside of tribal land. Even more, the tribal communities in cities are rarely ever able to have a strong presence, partly because they cannot afford to.[79] Federal funding is paramount to being able to focus resources in areas where they are necessary, as the federally funded Not Invisible Act ("NIA") Commission detailed in numerous findings within their report.[80] However, federal policies continue to focus on reducing violence against Native Americans on tribal lands, while not expanding the focus to all jurisdictions.[81]

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[75] Max Nesterak, *The 1950s plan to erase Indian Country*, UPROOTED (Nov. 1, 2019), https://www.apmreports.org/episode/2019/11/01/uprooted-the-1950s-plan-to-erase-indian-country.
[76] Nesterak, *supra* note 75.
[77] *Urban Indian Health*, URBAN INDIAN HEALTH INSTITUTE, https://www.uihi.org/urban-indian-health/.
[78] Hanson, *supra* note 62, at 12.
[79] Nesterak, *supra* note 75.
[80] The Not Invisible Act Commission, NOT ONE MORE: FINDINGS & RECOMMENDATIONS OF THE NOT INVISIBLE ACT COMMISSION, (Neera Tanden et al., Nov. 1, 2023).
[81] Hanson, *supra* note 62, at 17.

The resulting effect is that non-Natives now understand they can get away with acts of violence, as the question of jurisdiction follows tribal members into urban cities. As the Honorable B. J. Jones states: if "the law is blurred as to who has the responsibility and authority to prosecute and punish perpetrators of domestic violence against Native women, the security of women is compromised and the legal system is diminished in the eyes of both victims and offenders."[82]

i. Federal Laws & Statutes

As noted before, the MCA was implemented in 1885 as a response to the Supreme Court decision of *Crow Dog*, to reverse the holding and enact federal legislation that granted "federal courts jurisdiction over certain major crimes committed by an Indian against another Indian."[83] When the Supreme Court granted more power to tribal jurisdiction in *Crow Dog*, Congress was quick to remedy that; and this jurisdictional limitation has been reinforced in more recent cases such as *Duro v. Reina* (holding that "the retained sovereignty of the tribe as a political and social organization to govern its own affairs does not include the authority to impose criminal sanctions against a citizen outside its own membership"[84]) and *U.S. v. Wheeler* (holding that because "tribal and federal prosecutions are brought by separate sovereigns, they are not "for the same offence," and the Double Jeopardy Clause thus does not bar one when the other has occurred."[85]) Overall, it has been decided that if there is a major felony that involves an Indian, whether as the plaintiff or defendant, then it is a matter for state or federal prosecution.[86]

[82] Jones, *supra* note 28, at 245.
[83] The Major Crimes Act, 18 U.S.C. §1153 (CRIMINAL RESOURCE MANUAL, CRM 500-999, 679).
[84] *Duro v. Reina*, 495 U.S. at 679.
[85] *Wheeler*, 435 U.S. at 329-30.
[86] The Major Crimes Act, §1153.

ICRA was most recently approved as of March 1, 2024, and continues to limit how much the tribal courts can impose as a sentencing for guilty parties.[87] Reading through ICRA, there is the feeling that although it is labeled as "Indian Civil Rights," it does more to protect non-Indian defendants, as evidenced by subsection (b) and (c), where the rights of those being tried are clearly defined.[88] In fact, the Indian Law & Order Commission ("ILOC") declared that "ICRA infringes on Tribal authority" by limiting "the powers of Tribal governments by requiring them to adhere to certain Bill of Rights protections, including the equal protection and due process clauses."[89] While ICRA was said by the Supreme Court that it would protect people from "'arbitrary and unjust actions of tribal governments,'" it also put restraints on the punishments tribal courts could impose.[90] It might not come as a surprise then that because of the sentencing restrictions and federal prosecutors declining to take cases, high crime rates continue in Indian Country.[91] Thus, the Tribal Law and Order Act of 2010 ("TLAO") was enacted to combat the issue of violence in Indian Country, and ICRA was amended to increase the sentencing capacity.[92] The TLAO began by reminding the nation that "the United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian country" as a result of their efforts stripping power away from tribal sovereignty.[93] The purposes were then laid out as such:

> (1) to clarify the responsibilities of Federal, State, tribal, and local governments with respect to crimes committed in Indian country;
> (2) to increase coordination and communication among Federal, State, tribal, and local law enforcement agencies;

[87] Indian Civil Rights Act, §1302.
[88] Indian Civil Rights Act, §1302(b)-(c).
[89] Indian Law & Order Commission, Troy A. Eid et al., *A Roadmap For Making Native America Safer: Report To The President And Congress Of The United States*, INDIAN LAW & ORDER COMMISSION (Nov. 2013), https://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf.
[90] Bj Jones et al., *Intersecting Laws: the Tribal Law and Order Act and the Indian Civil Rights Act*, TRIBAL JUDICIAL INSTITUTE 4 (Oct. 2016), https://www.appa-net.org/eweb/docs/APPA/pubs/ILTLOAICRA.pdf.
[91] Jones et al., *supra* note 90, at 5.
[92] Jones et al., *supra* note 90, at 5.
[93] Tribal Law and Order Act of 2010, Title II, H.R. 725-4 §202(a)(1) (2010).

> (3) to empower tribal governments with the authority, resources, and information necessary to safely and effectively provide public safety in Indian country;
> (4) to reduce the prevalence of violent crime in Indian country and to combat sexual and domestic violence against American Indian and Alaska Native women;
> (5) to prevent drug trafficking and reduce rates of alcohol and drug addiction in Indian country; and
> (6) to increase and standardize the collection of criminal data and the sharing of criminal history information among Federal, State, and tribal officials responsible for responding to and investigating crimes in Indian country.[94]

Yet from its enactment in 2010, the TLAO can be said to not have been a success, as MMIP issues are still prevalent today. Accordingly, there have been other taskforces and acts that were enacted to try and solve this epidemic.

In 2019, Congress enacted two acts to combat MMIP: the Not Invisible Act of 2019 ("NIA") and Savanna's Act.[95] Furthermore, President Trump's Executive Order 13898 created the Task Force on Missing and Murdered American Indians and Alaska Natives, or as it is more known as: Operation Lady Justice ("OLJ").[96] These three programs are still new, and their reach or effectiveness is still hard to judge. However, the goals of these programs can only be a step in the right direction. Yet it is important to note that President Biden was required to sign Executive Order 14053 on November 15, 2021 to address the fact that, in regards to the NIA and Savanna's Act, "both the Departments of Justice and Interior have failed to meet the statutory deadlines set under

[94] Tribal Law and Order Act of 2010, §202(b)(1)-(6).
[95] *Savanna's Act and the Not Invisible Act Signed into Law*, INDIAN LAW RESOURCE CENTER, https://indianlaw.org/swsn/savanna_not_invisible_laws.
[96] Task Force Members and Director, Katharine Sullivan et al., *Presidential Task Force on Missing and Murdered American Indians and Alaska Natives: Operation Lady Justice*, DEPARTMENT OF JUSTICE, https://web.archive.org/web/20201011055129/https:/operationladyjustice.usdoj.gov/sites/g/files/xyckuh281/files/media/document/oljtaskforcesum.pdf.

the new laws."[97] The executive order was signed to create a tone of urgency for the two acts to take immediate action in their statutory deadlines.[98]

Beginning with the NIA, this act first established a joint commission, together with the Secretary of the Interior and the Attorney General, to combat "violent crime on Indian lands and against Indians."[99] However, NIA was not designed to be a continuous program; it had a countdown to end two years after the date of enactment.[100] On November 1, 2023, the Commission, which consisted of Director Neera Tanden (White House Domestic Policy Council), Secretary Deb Haaland (U.S. Department of the Interior), and Attorney General Merrick Garland (U.S. Department of Justice), released their findings and recommendations.[101] In an extensive analysis, split into multiple subcommittees each looking at different perspectives and issues, the over 200 page document offers key foundational recommendations as well as analysis into the MMIP crisis.[102] The NIA Commission addressed numerous issues when it comes to combatting the MMIP crisis.

First, the policies and programs in place for reporting and collecting data of these MMIP cases is not at the standard it should be in order for justice to be dealt. As the Commission found, "there is a lack of available data at all levels of government but especially at the national level to ascertain the extent of the problem of (1) missing AI/AN persons, (2) homicides and violent deaths of AI/AN people, and (3) AI/AN individuals who are trafficked."[103] To address this, the

[97] Rose Quilt et al., *President Biden Signs Executive Order*, NATIONAL INDIGENOUS WOMEN'S RESOURCE CENTER: RESTORATION MAGAZINE, https://www.niwrc.org/restoration-magazine/february-2022/president-biden-signs-executive-order.
[98] Rose Quilt et al., *supra* note 97.
[99] Not Invisible Act of 2019, S. 982 §4 (2019).
[100] Not Invisible Act of 2019, §4(e).
[101] The Not Invisible Act Commission, *supra* note 80.
[102] The Not Invisible Act Commission, *supra* note 80.
[103] The Not Invisible Act Commission, *supra* note 80, at 62.

Commission recommends "that the federal government generate accurate crime reports for Indian country, especially in Tribal areas subject to P.L. 83-280."[104] This is also a practice that the Indian Law and Order Commission recommended back in 2013, highlighting the true importance it has in this issue, and that it still has not been remedied.[105] Furthermore, the Commission asks state, tribal, and local governments to mandate or strongly encourage law enforcement agencies to report crime and missing person data to the National Incident-based Reporting System ("NIBRS").[106] The Commission also calls on Congress to administer appropriate funds to help data collection, as well as enact legislation that requires, or strongly incentivizes, law enforcement agencies to report the data annually to NIBRS.[107] Furthermore, the Commission found that "violent crimes and the deaths that result from them are notoriously underreported among AI/AN people," which leads to a lack of understanding in regards to the actual numbers relating to mortality rates and homicides within AI/AN communities.[108] Additionally, while databases such as National Crime Information Center ("NCIC") and NamUs are available to assist users in managing and resolving cases, it must go one step further, as the federal government must make "seamless data sharing possible to improve justice system response and resolve cases;" then that data must "be provided to Congress for consideration regarding appropriations to support this compatibility of systems."[109]

Additionally, the topic of race in relation to the victim is a reason why there is limited data at the moment, as without some idea of identification on the victim, the only way to determine if the victim is AI/AN is by "exercising visual verification practices or not indicating race or ethnicity

[104] The Not Invisible Act Commission, *supra* note 80, at 62.
[105] Eid et al., *supra* note 89.
[106] The Not Invisible Act Commission, *supra* note 80, at 64.
[107] The Not Invisible Act Commission, *supra* note 80, at 65.
[108] The Not Invisible Act Commission, *supra* note 80, at 66.
[109] The Not Invisible Act Commission, *supra* note 80, at 67.

at all."[110] For this, the Commission calls on the CDC to "develop and implement a nationwide program using different delivery modes to train [medical examiners or coroners], funeral directors, and physicians on the importance of coding AI/AN decedents correctly and accurately."[111] However, using race and ethnicity questions to determine classifications of AI/AN victims is problematic, so the Commission suggests that the best method to identify individuals is by determining their tribal enrollment, as "Tribal Sovereigns deem who is and is not Indian."[112]

Other areas where tribes are behind in resources include: a lack of awareness of investigative tools that could better help tribes in their investigations of MMIP cases[113]; a need for an increase in forensic analysis systems within Indian country[114]; a disparity in pay and benefits between tribal and federal law enforcements, causing tribal members to choose state or federal agencies over tribal agencies[115]; and many more discussed in great detail throughout the report.

Similarly, OLJ's tasks are meant to increase data collection tactics, increase communication between the various agencies, seek clarity to the continuous question of jurisdiction, and create a team to address cold MMIP cases.[116] However, like the NIA, this is not a full time task force, with the program having published two different reports to the president detailing their activities and findings within two years of the enactment.[117] Yet from OLJ, a new unit was created within the Bureau of Indian Affairs Office of Justice Services ("BIA-OJS") by Secretary of the Interior Deb

[110] The Not Invisible Act Commission, *supra* note 80, at 68.
[111] The Not Invisible Act Commission, *supra* note 80, at 68.
[112] The Not Invisible Act Commission, *supra* note 80, at 69.
[113] The Not Invisible Act Commission, *supra* note 80, at 72.
[114] The Not Invisible Act Commission, *supra* note 80, at 73.
[115] The Not Invisible Act Commission, *supra* note 80, at 81.
[116] Sullivan et al., *supra* note 96.
[117] Sullivan et al., *supra* note 96.

Haaland, called the Missing & Murdered Unit ("MMU").[118] The goal of MMU is to "put the full weight of the federal government into investigating these cases and marshal law enforcement resources across federal agencies and throughout Indian country."[119] The overall mission for the MMU is to prevent MMIP cases from becoming cold cases by working with tribal, FBI, and BIA Investigators, and expanding its collaborative efforts with numerous other agencies.[120]

Within the federally funded OLJ taskforce, their first report, issued in 2020, included conversations with important tribal representatives such as Ernie Weyand (MMIP Program Coordinator for the District of Montana) and Algin Young (Associate Director, Bureau of Indian Affairs ("BIA"), Office of Justice Services ("OJS")), which detailed an inside viewpoint of what tribal members are dealing with.[121] They note that each tribe is different in regards to their MMIP cases and crime overall; however, while sometimes members go missing from within the reservation, it is the ones that go missing within the jurisdictions surrounding the reservation that are more difficult to track."[122] This is because of many factors, including issues such as the hazy tribal boundaries, made more complicated with PL 280 states, making it difficult to propertly report and investigate cases, as well as the issue of tribal members who live off reservations not being

[118] *Secretary Haaland Creates New Missing & Murdered Unit to Pursue Justice for Missing or Murdered American Indians and Alaska Natives*, U.S. DEPARTMENT OF THE INTERIOR (April 1, 2021), https://www.doi.gov/news/secretary-haaland-creates-new-missing-murdered-unit-pursue-justice-missing-or-murdered-american.
[119] *Secretary Haaland Creates New Missing & Murdered Unit to Pursue Justice for Missing or Murdered American Indians and Alaska Natives*, *supra* note 118.
[120] *Secretary Haaland Creates New Missing & Murdered Unit to Pursue Justice for Missing or Murdered American Indians and Alaska Natives*, *supra* note 118.
[121] Operation Lady Justice Taskforce, *Report To The President: Activities and Accomplish of the First Year of Operation Lady Justice*, DEPARTMENT OF JUSTICE 55, (Nov. 25, 2020), https://www.niwrc.org/sites/default/files/images/resource/operation-lady-justice-report-508_final.pdf.
[122] Operation Lady Justice Taskforce, *supra* note 121.

identified as Native American by outside law enforcement agencies, making the sharing of information with tribes nonexistent.[123]

Meanwhile, Savanna's Act is a continuous response to the MMIP epidemic, and stems from the tragic story of Savanna LaFontaine-Greywind, a member of the Spirit Lake Nation, who was 22 years old and 8 months pregnant when her body was found in the Red River.[124] Neighbors Brooke Crews and William Henry Hoehn were convicted of the murder of Savanna and the kidnapping of her unborn child.[125] In an effort to prevent more tragedy's such as this from occurring, Savanna's Act was introduced with the purpose to: (1) clarify the responsibilities between the federal, state, tribal, and local law enforcement agencies; (2) increase coordination between the stated agencies; (3) offer tribal governments the means to effectively address the MMIP crisis themselves; and (4) increase the data collection and sharing between federal, state, and tribal officials.[126] Furthermore, every year the Attorney General has the responsibility to request that tribal, state, and local law enforcement agencies submit all relevant information pertaining to MMIP to the DOJ.[127] Key to this initiative is that data is also required for any MMIP case, regardless of where the Native victim resides.[128] This addresses the issue of a majority of Natives now living off reservations and in urban cities, as they will be considered in these reports.[129]

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[123] Operation Lady Justice Taskforce, *supra* note 121.
[124] Pao, *supra* note 22.
[125] Dan Gunderson, *Fargo woman gets life for killing pregnant Greywind, stealing baby*, MPRNEWS, (Feb. 2, 2018, 2:54 PM EDT), https://www.mprnews.org/story/2018/02/02/life-for-woman-who-killed-savanna-greywind-stole-baby.
[126] Savanna's Act, S. 227 §2 (2019).
[127] Savanna's Act, §6(b)(1).
[128] *Ending Violence Against Native Women*, *supra* note 68.
[129] *Urban Indian Health*, *supra* note 77.

As the MMIP crisis began as a female-focused issue, it has been addressed through the Violence Against Women Acts. The Violence Against Women Act of 2005 ("VAWA 2005") was the first to address the MMIP (then MMIW) issue and specifically names Indigenous women[130] under Title IX.[131] The Violence Against Women Act was then reinstated in 2013 ("VAWA 2013") and aimed to increase support for the protection of Native women.[132] However, VAWA 2013 was still limited to violent acts that occur only if it involved those in a relationship with their attacker.[133] Therefore, VAWA 2022 was pivotal in expanding protection for Native members, especially when the attacker is non-Native.[134] VAWA 2022 expanded the VAWA 2013 jurisdictional provision to include more categories of criminal conduct that a tribal court could enforce against a non-Indian, including "sexual violence, violence, obstruction of justice, and assaults against tribal justice personnel."[135] VAWA 2022 is a huge step forward in regards to solving the MMIP issue plaguing Native people, as it also codified the DOJ's "Tribal Access Program" ("TAP") to increase the resources tribes can access from the national criminal information databases.[136] Additionally, in the NIA Commission report, it was found that "there is a lack of available funds for Tribal law enforcement to develop, implement, and enhance their own data collection and sharing ventures." Accordingly, they called on Congress to "fully fund annually the DOJ's [TAP] for all eligible and willing Tribal [law enforcement agencies] to enhance the ability of Tribal governments and their

[130] Sheena L. Gilbert et al., *Federal policy has failed to protect Indigenous women*, THE CONVERSATION, (June 18, 2021, 8:32 AM EDT), https://theconversation.com/federal-policy-has-failed-to-protect-indigenous-women-159679.
[131] Violence Against Women and Department of Justice Reauthorization Act of 2005, Public Law 109–162, Title IX, 119 STAT. 3077-84, (2006).
[132] Violence Against Women Reauthorization Act of 2013, Public Law 113–4, Title IX, 127 STAT. 118-26, §904 (2013).
[133] Violence Against Women Reauthorization Act of 2013, supra note 132, at 120-3.
[134] *Violence Against Native Women Publications*, TRIBAL LAW AND POLICY INSTITUTE, https://www.home.tlpi.org/violence-against-native-women-publicatio.
[135] *Violence Against Native Women Publications*, *supra* note 134.
[136] Violence Against Women Act of 2022, H. R. 2471, Title VIII, 847-62, 849-50, §802 (2022).

enforcement agencies to access, enter information into, and obtain information from national criminal information databases."[137]

III. Argument

When analyzing the entirety of Federal Indian Law and the MMIP crisis, it is clear that there are points of contention that must be resolved for progress to be made and justice to be dealt. The blurring of lines regarding federal, state, and tribal jurisdiction has been the most critical hinderance for the sovereign Indian nation. One solution was brought forward in *US v. Wheeler*, where the court boldly stated that the "problem would, of course, be solved if Congress, in the exercise of its plenary power over the tribes, chose to deprive tribes of criminal jurisdiction altogether."[138] While this would no doubt clear up the question of jurisdiction, as tribal jurisdiction would simply no longer be a factor, this option is blatantly racist and simply a non-starter. So the question remains about what needs to happen.

The current breakdown of who holds jurisdiction *on a reservation* is as follows:

	Non-Native Defendant	**Native Defendant**
Non-Native Victim	State Jurisdiction	Federal Jurisdiction Tribal Jurisdiction
Native Victim	PL 280 State Jurisdiction Federal Jurisdiction	Federal Jurisdiction PL 280 State Jurisdiction Tribal Jurisdiction

However, what is the answer when a Native is attacked by a non-Native on non-Tribal land? This is a question that jurisdictions are still pondering, and the issuance of PL 280 regulations and

[137] The Not Invisible Act Commission, *supra* note 80, at 70.
[138] *Wheeler*, 435 U.S. at 331.

Castro-Huerta's holding have further complicated the issue. Furthermore, the focus for a long time has been the crimes that occur on reservation land; and while those are equally important, resources need to be offered to the area where the most Natives reside: urban cities.

When considering the majority of cases that encapsulate the issue of MMIP, which includes a Native victim and a non-Native attacker, and that the federal government declined to prosecute 66% of these cases, it becomes clearer to see why this issue is properly labeled as an "epidemic."[139] It is the third leading cause of death for Native women, and for women who live on reservations, the rate of murder is ten times higher than the national average.[140] However, with a large majority of Natives living in Urban areas due to the IRA, it only follows that data collected in those areas would be crucial for solving this issue, as it that information is crucial to understanding the full severity of the MMIP crisis.[141] Yet, before 2017, "no research has been done on rates of such violence among American Indian and Alaska Native women living in urban areas."[142] To try to rectify this, the Urban Indian Health Institution ("UIHI"), began a study to find a shocking discovery: of the 5,712 cases reported in 2016, only 116 actually were logged into the Department of Justice database for missing persons (NamUs).[143] In this study from UIHI, it is noted that, of the attackers they were able to identify, 83% were male and about half were non-Native.[144] More disturbingly, the report notes that of the cases that went to trial, 28% of the perpetrators were never found guilty or held accountable, and many were dismissed.[145]

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[139] Violence Against Women Act Reauthorization Act of 2022, §801(a)(9).
[140] Urban Indian Health Institute, Annita Lucchesi et al., *Missing-and-Murdered-Indigenous-Women-and-Girls-Report: A snapshot of data from 71 urban cities in the United States*, URBAN INDIAN HEALTH INSTITUTE: OUR BODIES, OUR STORIES 2, (2017), https://www.uihi.org/wp-content/uploads/2018/11/Missing-and-Murdered-Indigenous-Women-and-Girls-Report.pdf.
[141] The Not Invisible Act Commission, *supra* note 80 at 67.
[142] Lucchesi et al., *supra* note 140.
[143] Lucchesi et al., *supra* note 140.
[144] Lucchesi et al., *supra* note 140.
[145] Lucchesi et al., *supra* note 140, at 6.

A. The Problem Areas & Possible Solutions

i. The Jurisdictional Headache

For most tribal scholars and attorneys, it is clear that the true obstacle in the way of achieving justice is the "[f]ederal restrictions placed on a tribe's jurisdiction including a tribe's [lack of] ability to hold non-Indians accountable for committing crimes in Indian country and to institute adequate criminal sentences in these cases."[146] To remove this obstacle, a complete reformation of Federal Indian Law is required, as the many statutes and caselaw have created a patchy foundation, but something concrete is necessary to address all unfocused questions. Most importantly, it is crucial to get to a point where Tribal Sovereignty truly means that tribes are sovereign nations. To begin, ICRA and TLAO need to be more reflective of that ideology; so a reformation, or even complete revolution, of those acts need to be implemented.

It is agreed by most Federal Indian attorneys and scholars that the biggest issue with finding solutions for MMIP cases is this question of jurisdiction. The most effective way to resolve who has jurisdiction over whom would be to scrap the current checkerboard of cases and statutes to create a clean and concise guideline. Within this new law, tribal sovereignty in the natural form should be guaranteed, as it is the best way to allow tribes to protect their members. Granting tribal courts with the same powers that state or federal courts have in regards to jurisdiction and sentencing, would without doubt make tribal jurisdiction more powerful and effective. To have a truly sovereign court system for tribes would increase their personal ability to protect tribal members that live both within and outside of reservations or tribal land.

[146] Kelly Gaines-Stoner, *Tribal Judicial Sovereignty: A Tireless and Tenacious Effort to Address Domestic Violence*. 53 FAMILY LAW QUARTERLY: INTIMATE PARTNER VIOLENCE AND RESTORATIVE JUSTICE 167-182, (Fall 2019).

However, it is understood that the gold standard outline above is a tall order for this country without a substantial nationwide movement and more native members in positions of power. Until that dream comes to pass, the next best solution is to work with states and the federal government to ensure these crimes do not go unpunished.

ii. Teamwork Between Tribes, States, and the Federal Government is the Most Effective Step Forward

At the current moment, the focus of the MMIP crisis cannot be forgotten: to ensure justice for victims and their families, and to prevent cases such as these from happening. This is because, at the end of the day, families who have a loved one who is a victim of MMIP crimes do not necessarily care who takes on the case, as long as justice is served. In fact, the NIA Commission determined that the federal government focuses more on their relationship with the tribes themselves, and not necessarily the tribal members who have experienced MMIP loss, resulting in these family members "advocating for justice and systematic change often without the assistance of their Tribes."[147] This is not to say that tribal members do not agree with the end-goals of the tribes, but their immediate focus is instead on finding their loved ones or seeking legal justice.

Where Gabby Petito's remains were eventually found, two-hours away was Tianna Wagon, a family member who suffered the loss of two of her sisters: in January 2019, Jocelyn Watt (30) was murdered in her home along with her companion; in 2020, Jade Wagon (23) was initially reported missing, but was then found dead in the Wind River Reservation, in what was labeled as an "accident."[148] As the search for Gabby was occurring, Tianna was consumed with the question of why her sisters' cases did not get the same nationwide media coverage, determining that

[147] The Not Invisible Act Commission, *supra* note 80, at 106.
[148] Ben Kesslen, *All-out search, media attention for Gabby Petito reveals glaring disparity for Wyoming's Indigenous people*, NBC NEWS, (Sept. 24, 2021, 10:04 AM EDT), https://www.nbcnews.com/news/us-news/all-out-search-media-attention-gabby-petito-reveals-glaring-disparity-n1279980.

"'people could care less about minority people in rural Wyoming,'" but also declared that her "'sisters' lives count and matter then when they were alive and even more so now when they are gone and their cases are unsolved.'"[149]

When considering the important role that media has played in cases such as Gabby Petito's, the NIA Commission pinpoints testimony from MMIP victim's family members "expressing their frustration and pain that their loved one's disappearance was ignored by the media."[150] This ignorance from the media leads directly to MMIP cases being more likely to be ignored or go unsolved by the law enforcement systems.[151] While there is no concrete solution provided apart from having a jurisdiction-crossing-roundtable to discuss what more the media should be doing, the best step forward is to educate the mass public on the epidemic that is happening around them. It is clear that when there is an interesting or wide reaching missing person case, the public provides law enforcement with their own resources to help the case be solved, as was the case with Gabby Petito when many people offered evidence to help find Gabby.[152] In fact, the speed in which Gabby's case was resolved was in large part because of how many eyes were on the case, because in comparison, "Indigenous families in the state are going on 20 or 30 years with no leads or answers from authorities on their missing family members."[153]

This discrepancy in media coverage is not about pitting the value of lives against each other, but instead offering the same effort to Indigenous people that white people receive. The mother to Jocelyn Watt and Jade Wagon is determined to find justice for her daughters and the other 710 people who have faced similar fates in that area because "'they have lives, they have

[149] Kesslen, *supra* note 148.
[150] The Not Invisible Act Commission, *supra* note 80, at 102.
[151] The Not Invisible Act Commission, *supra* note 80, at 102.
[152] Ankel, *supra* note 5.
[153] Kesslen, *supra* note 148.

stories… [and t]hey aren't just numbers.'"[154] These cases exemplify how desperate family members of MMIP victims are simply looking for justice, regardless of what jurisdiction is responsible for taking on the case. For them, finding the attacker is the priority, not necessarily gaining tribal sovereignty; because while that is important for tribes to be granted, the immediate issue is preventing the continuation of MMIP cases, regardless of how that happens.

In that regard, collaboration will be required between state, federal, and tribal jurisdictions. There has been situations in the past where positive results come from these jurisdictions working together. For instance, the Child Welfare Cross-Jurisdictional efforts in the Western District of Michigan show that to protect children, states and tribes can work together effectively.[155] The US Attorney's Office created a state sponsored taskforce "to create a model tribal-specific protocol for the investigation and prosecution of child sexual abuse crimes in Indian Country," through the use of a multi-disciplinary team that generally includes "a tribal prosecutor, law enforcement (FBI, BIA, tribal police), tribal social services personnel, and in some instances, private counselors, psychiatrists, and health care professionals."[156] This method has been effective in providing for "timely and effective detection, investigation and prosecution of child sexual assault cases and proactively [identifying] the needs of the victims of child sexual abuse."[157]

Additionally, there have even been agreements struck between state police officers and tribes.[158] In an agreement made in 2010 between the Michigan Department of State Police and the Saginaw Chippewa Indian Tribe of Michigan, the two parties agreed that "all people that live

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[154] Kesslen, *supra* note 148.
[155] *Indian Country Initiatives*, UNITED STATES ATORNEY'S OFFICE WESTERN DISTRICT OF MICHIGAN, (July 25, 2022), https://www.justice.gov/usao-wdmi/community-outreach/indian-country-initiatives.
[156] *Indian Country Initiatives*, *supra* note 155.
[157] *Indian Country Initiatives*, *supra* note 155.
[158] *Law Enforcement Agreement Between the Michigan Department Of State Police and the Saginaw Chippewa Indian Tribe Of Michigan*, (Nov. 9, 2010), https://turtletalk.files.wordpress.com/2010/11/exhibit-c-law-enforcement-agreement.pdf.

within the Tribe's Indian Country… Indian and non-Indian alike, are entitled to feel safe and secure, and are entitled to equal protection by law enforcement."[159] Within the bylaws, the parties addressed that both cross-appointed State and Tribal Officers both have the power of the other to enforce Tribal or State laws within the Tribe's Indian Country.[160] This ability to essentially combine jurisdictions is a perfect example of allowing states and tribes to work together to solve issues, regardless of who technically holds the inherent power.

iii. The *Castro-Huerta* Setback

Yet the *Castro-Huerta* case has caused some turmoil between states and tribes.[161] Somehow, the state claimed that they have lost jurisdiction over 18,000 cases per year because of the holding from *McGirt*, and now because many of those are going uninvestigated or unprosecuted, it is endangering public safety.[162] Yet this number was never sourced by the state, and through a comprehensive investigation, that number does not seem to be accurate.[163] Regardless of this uncited claim, the Supreme Court sided with the state, changing how crimes are prosecuted on tribal land all over the country.[164]

As noted, the court held that "the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country."[165] They further elaborate that because "Indian country within a State's territory is part of a State, not

[159] *Law Enforcement Agreement Between the Michigan Department Of State Police and the Saginaw Chippewa Indian Tribe Of Michigan*, *supra* note 158.
[160] *Law Enforcement Agreement Between the Michigan Department Of State Police and the Saginaw Chippewa Indian Tribe Of Michigan*, *supra* note 158.
[161] Rebecca Nagle and Allison Herrera, *Where Is Oklahoma Getting Its Numbers From in Its Supreme Court Case?*, THE ATLANTIC, (April 26, 2022), https://www.theatlantic.com/ideas/archive/2022/04/scotus-oklahoma-castro-huerta-inaccurate-prosecution-data/629674/.
[162] Nagle and Herrera, *supra* note 161.
[163] Nagle and Herrera, *supra* note 161.
[164] Nagle and Herrera, *supra* note 161.
[165] *Castro-Huerta*, 142 S. Ct. at 2491.

separate from a State," then the "State has jurisdiction to prosecute crimes committed in Indian country unless state jurisdiction is preempted."[166]

In a scathing dissenting opinion, which the majority sharply criticizes[167], Justice Neil Gorsuch explains the timeline of tribal jurisdiction within this country, beginning with the holding from *Worcester v. Georgia*, 31 U.S. 515 (1832), which stated that a tribe "is a distinct community occupying its own territory," where the state they reside in has no legal force over, unless an act of Congress makes it so.[168] Justice Gorsuch compared the *Worcester* case to the present one, claiming that "[w]here our predecessors refused to participate in one State's unlawful power grab at the expense of the Cherokee, today's Court accedes to another's."[169] Castro-Huerta was initially tried in federal court and sentenced with respect to his guilty verdict, but the state of Oklahoma, according to Justice Gorsuch, is trying to "gain a legal foothold for its wish to exercise jurisdiction over crimes involving tribal members on tribal lands" by undoing his federal conviction and having "him transferred from federal prison to a state facility to resume his state sentence."[170] Justice Gorsuch strongly proclaims that "[t]ribes are not private organizations within state boundaries. Their reservations are not glorified private campgrounds. Tribes are sovereigns," which should mean that "the criminal laws of the States 'can have no force' on tribal members within tribal bounds unless and until Congress clearly ordains otherwise."[171] In the end, Justice Gorsuch concludes his dissent with a message to Congress: "One can only hope the political branches and

[166] *Castro-Huerta*, 142 S. Ct. at 2504.
[167] "From start to finish, the dissent employs extraordinary rhetoric in articulating its deeply held policy views about what Indian law should be. The dissent goes so far as to draft a proposed statute for Congress. But this Court's proper role under Article III of the Constitution is to declare what the law is, not what we think the law should be. The dissent's views about the jurisdictional question presented in this case are contrary to this Court's precedents and to the laws enacted by Congress." *Id*.
[168] *Worcester v. Georgia*, 31 U.S. 515, 561 (1832).
[169] *Castro-Huerta*, 142 S. Ct. at 2505.
[170] *Id.* at 2510.
[171] *Id.* at 2511.

future courts will do their duty to honor this Nation's promises even as we have failed today to do our own."[172]

Furthermore, while federally there has been more clarity and progress, the Supreme Court's decision in *Castro-Huerta* highlights the discrepancies in the convictions courts in different jurisdictions can administer: namely tribal courts. Hopefully, most people who read the facts of the case understand that the *Castro-Huerta* parent-defendants were clearly guilty of severe child-abuse.[173] As such, this case is not arguing those facts, but instead questioning the State's apparent ability to prosecute to begin with.[174] However, if this case were brought to a tribal court, because of ICRA the maximum sentence that the defendants in *Castro-Huerta* could have been given would be $15,000 and three years in prison, but only if certain qualifications are met.[175] That is a huge difference compared to the 35-years (with the possibility for parole) they were issued by the trial court.[176] While tribes understandably seek complete jurisdiction as a sovereign nation, there will be severe limitations, because of ICRA, in their ability to convict without the state or federal government stepping in. Now, with more funding and resources being provided by the federal branch of government to protect Native members, there is an apparent movement in the right direction. However, without the proper framework in place, granting tribes complete jurisdiction as the legal body stands right now would not help the MMIP situation; in fact, it could even complicate it. ICRA prevents abusers such as Castro-Huerta be sentenced to more than essentially

[172] *Castro-Huerta*, 142 S. Ct. at 2527.
[173] "One day in 2015, Castro-Huerta's sister-in-law was in the house and noticed that the young girl [age 5] was sick. After a 911 call, the girl was rushed to a Tulsa hospital in critical condition. Dehydrated, emaciated, and covered in lice and excrement, she weighed only 19 pounds. Investigators later found her bed filled with bedbugs and cockroaches. When questioned, Castro-Huerta admitted that he had severely undernourished his stepdaughter during the preceding month." *Id.* at 2491-2.
[174] *Id.* at 2491.
[175] Indian Civil Rights Act, §1302(b).
[176] *Castro-Huerta*, 142 S. Ct. at 2491.

a misdemeanor, where the state and federal governments have the power to convict abusers more effectively.

As a result, the current predicament facing tribes and their fight for complete sovereignty is unfortunately being outweighed by the MMIP epidemic. Addressing that crisis can only be done with the support and collaboration of states and the federal government. Furthermore, the more that the everyday American and non-Native citizen is made aware of this crisis, the more the media and population can call on their states and the federal government to do more to protect tribal members from being victims of MMIP cases.

B. Where Does that Leave the MMIP Crisis Today?

As this paper has acknowledged, the question and problem of jurisdictional responsibility is not an easy one to address. However, what is clear is that Native people are currently dealing with is mostly non-Native white men attacking Native members and never being convicted for those crimes.[177] However, one major concern with the NIA report is the fact that it focuses on crimes that occur within Indian land.[178] As noted before in Section II, almost three-fourths of Natives now live in urban areas, and the data that needs to be analyzed in that area is crucial to understanding the full grasp of the situation.[179] Yet, since the UIHI 2017 urban city report, there have been federal and legal strides made in the wake of raising awareness for MMIP cases.

The Lady Justice Taskforce brough forward more relevant and accurate data through the DOJ's wider reach. Furthermore, implementation of the Not Invisible Act and Savanna's Act create a federal promise that MMIP victims will not be forgotten any longer. In fact, Savanna's

[177] *Ending Violence Against Native Women*, *supra* note 68.
[178] Not Invisible Act of 2019, §4(a).
[179] Lucchesi et al., *supra* note 140, at 2.

Act requires the federal law enforcement to incorporate guidelines developed by the DOJ on this issue.[180] Critically, the DOJ's role in this is to help develop and implement the policies and protocols for law enforcement to follow for MMIP cases, and provide grants relating to MMIP victims.[181] These actions from the DOJ address two issues that have been holding back justice for the victims and their families: hope for jurisdictional clarity, and the promise for more comprehensive data collection techniques. The NIA Commission also collected important data about victims of MMIP, helping bridge the gap in information that was lost or never reported.

More action has been done in recent years, especially in the federal level; however, so much more progress is required to bring an end to the MMIP epidemic. While tribes rightfully seek true sovereignty, the current crisis requires collaboration between states, the federal government, and tribes alike. Otherwise, the confusion of jurisdiction will be the only focus, and the cases regarding MMIP victims will continue to be overlooked.

IV. Conclusion & Recommendations

Steps have been taken to address this nationwide issue, as it encapsulates all Americans, not just tribal members. With attackers being overwhelmingly non-Native, and a blackout on media coverage for Native victims, without non-Native support, this crisis will simply continue. According, the more native members that hold positions of power, such as Deb Haaland, would only benefit Natives, as they have a direct voice in an area where a difference could be made. If not for Deb Haaland, the MMU branch of the BIA would never have been established, and the

[180] Savanna's Act, §5(a).
[181] Savanna's Act, §5(a)(1).

collection of resources would likely not have been done. Crossing the jurisdictional boundaries is crucial in all frames of the situation: whether that be through treaties made between tribes and states, sharing of data and resources between jurisdictions, or simply exposing the entirety of the American population to this epidemic. As seen with situations like Gabby Petito's, more can be done when the full force of the country is behind seeking justice for atrocities committed. That same level of interest and effort must also go towards MMIP cases.

Overall, my recommendations are as follows:

1. Expand the tribal court's powers to have it be equal to that of a state's judicial powers.[182]
2. Amend, or eradicate, IRAC and TLAO to expand the convictions that tribal courts are able to administer.
3. Offer a multi-jurisdictional branch to address cases specific to tribal issues that currently are happening; as well as the cold cases.[183]
4. Create some clarity on the overwhelmingly confusing and overly complicated jurisdictional question, while allowing tribes to have full and concurrent jurisdiction over their members and non-member perpetrators, in order to adequately convict attackers.[184]
5. Congress must act on Justice Gorsuch's dissenting opinion from *Oliphant* and overturn the majority's holding in that case.[185]
6. Provide more data collection tools for Natives living in urban areas in regards to the MMIP issue occurring outside of tribal lands. [186]

[182] The Not Invisible Act Commission, *supra* note 80, at 14-5.
[183] The Not Invisible Act Commission, *supra* note 80, at 14-5.
[184] The Not Invisible Act Commission, *supra* note 80, at 14-5.
[185] The Not Invisible Act Commission, *supra* note 80, at 14-5.
[186] The Not Invisible Act Commission, *supra* note 80, at 12-4.

7. Offer funding to enhance the effectiveness of the taskforces now in place to try to combat the MMIP situation.[187]
8. Encourage more Natives to run for positions within government and hold more seats in jobs of power.

The NIA Commission has generated a report of over 200 pages, full of findings and recommendations regarding the MMIP epidemic. While there is some overlap with my own suggestions, it is a crucial document to use as a foundation for what the nation's next steps should be in addressing this issue. As such, while I have other recommendations separate from what the NIA addresses, I offer full support to their research and recommendations, as implementations of them can only be a step in the right direction.

[187] The Not Invisible Act Commission, *supra* note 80, at 12-4.