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Missing or Murdered Indigenous Persons: Legal, Prosecution, Advocacy, & Healthcare

In This Issue

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Introduction

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For years, tribal citizens and grass roots organizations sought to bring attention to the issues surrounding missing or murdered American Indians and Alaska Natives. In tribal consultations and listening sessions, tribal leaders, advocates, law enforcement, community members, and others raised concerns about the disappearance or murder of American Indian and Alaska Native people across the United States. Tribes began taking concerted action to address these issues in their communities. Some states also recognized these concerns and took action through legislation, state-level task forces, and tribally based field hearings. Individual federal agencies also responded, with the Department of Justice (Department), Department of the Interior (DOI), and Department of Health and Human Services (HHS) all proposing solutions. In 2019, the federal response began coordination in earnest.

In November 2019, the U.S. Attorney General announced the Department's Missing and Murdered Indigenous Persons (MMIP) Initiative noting, "American Indian and Alaska Native people suffer from unacceptable and disproportionately high levels of violence, which can have lasting impacts on families and communities." The Department's MMIP Initiative is a coordinated effort by U.S. Attorneys, the Federal Bureau of investigation (FBI), the Office of Tribal Justice (OTJ), and the Office of Justice Programs (OJP). Its objectives focus on placing MMIP coordinators in select U.S. Attorneys' Offices (USAOs) to work with federal, tribal, state, and local agencies to develop common protocols and procedures for responding to reports of missing or murdered indigenous people; deploying the FBI's most advanced response capabilities to support MMIP related investigations; and providing for the analysis of federally supported databases and data collection practices to identify opportunities to improve missing persons data.

For similar reasons, the President issued Executive Order 13898 on November 26, 2019, establishing the Presidential Task Force on Missing and Murdered American Indians and Alaska Natives, also known as Operation Lady Justice (OLJ). OLJ is co-chaired by the Department and DOI with participation by HHS and has complementary goals to the Department's MMIP Initiative. These goals include developing guidelines applicable to new and unsolved cases of missing or murdered persons in American Indian and Alaska Native communities, improving the way law enforcement investigators and prosecutors respond to the high volume of such cases, collecting and sharing data among various jurisdictions and law enforcement agencies, and establishing Bureau of Indian Affairs Office of Justice Services (BIA-OJS) led cold case teams to address unsolved homicides and unresolved, long-term missing person cases involving American Indians and Alaskan Natives.

Since the launch of the Department's MMIP Initiative and OLJ, concerted efforts have advanced the development of the Tribal Community Response Plans (TCRP) containing guidelines for responding to missing indigenous person cases. The guidelines were developed as a result of nationwide listening sessions and tribal consultations that provided pertinent insight into the nature and scope of the MMIP problem. The referenced guidelines address law enforcement response, victim support services, involvement of key community stakeholders and community-based organizations, and strategies for media and public outreach and communications.

In October 2020, two bills addressing MMIP matters and violent crime impacting tribal communities were signed by the President. The Not Invisible Act provides for the creation of a joint commission on violent crime on Indian lands and against American Indians and Alaska Natives. Savanna's Act, named after Savanna Greywind, a 22-year-old member of the Spirit Lake Tribe who was tragically murdered in North Dakota in 2017, reinforces the steps to improve MMIP data relevance and access and to create guidelines to respond to MMIP cases.

The issue of MMIP is a priority for the Department. Accordingly, two special editions of the DOJ Journal are dedicated to the issues surrounding missing or murdered American Indians and Alaska Natives. Both editions compile articles from tribal, local, state, federal, and private sector authors. The January 2021 edition is focused on law enforcement and prevention related issues. The March

2021 edition is focused on topics related to law, prosecution, advocacy, and health care related issues. It is our hope that these articles serve as a basis for continuing the conversation and advancing this work forward.

The best solutions to tribal issues come from tribes, and it is our responsibility to listen. Over the last year, listening has made it clear that a coordinated response that involves prevention, intervention, and law enforcement efforts is critical to both understanding these issues and providing the resources that tribes need to solve them at a tribal level.

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Working Together: Building and Sustaining a Multijurisdictional Response to Missing or Murdered Indigenous Children and Adolescents

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I. Introduction

Sadly, children, all too frequently, go missing in communities across the country, including tribal communities. A prompt, comprehensive response to these cases is critical to recovering the children and prosecuting cases if a child fell victim to a crime. Our fundamental understanding and knowledge of investigating missing person cases and the development of improved investigative techniques has increased dramatically over the last several years. This article covers some of the key components of a comprehensive response to a missing, neglected, abused, or exploited child case, including federal law, multidisciplinary teams, forensic interviews, and prosecution strategies for using a forensic interview at trial.

Each discipline responsible for providing safety and protection to victims of abuse, exploitation, and violence has an interest in developing best practice methods for responding to cases where an individual, adult or child, goes missing. The standardization of the investigative process must continue to be influenced and directed by the combination of evidence-based research and the collection of valid

and reliable data, in conjunction with the practical, real-life application of knowledge and field experience.

II. Federal law

The steady progression of collaborative efforts in investigating, prosecuting, and providing necessary services to victims, families, and the greater community led to the realization of the need for functioning and integrated partnerships or "teams" to effectively investigate all types of missing or murdered persons in Indian country.[1] Federal law supports and advances the team approach to these kinds of cases.

The Indian Child Protection Act was first enacted in 1990.[2] In addition to legislating the creation and implementation of child protection teams (CPTs) in Indian country for the first time, it required the following:

- the establishment of a central registry for information on child abuse in Indian country;
- the waiver of the parental consent requirement in child abuse investigations for forensic interviews;
- the prioritization of protecting children by allowing interviews and examinations to be conducted in a manner that minimizes trauma to children using a multidisciplinary team (MDT);
- a federal magistrate or district court judge to enforce the provisions; and
- confidentiality in child abuse investigations and the sharing of information on a need to know basis, while expediting the sharing of information with MDT members.[3]

The passing of the Indian Child Protection Act allowed for the evolution of both CPTs and MDTs in Indian country.[4] Although the difference between the two teams can be understood with the basic explanation that MDTs are prosecution focused and CPTs are

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[1] Indian Child Protection and Family Violence Prevention (Native American Children's Safety) Act of 1990, Pub. L. No. 101-630, 104 Stat. 4544 (codified as amended at 25 U.S.C. §§ 3201–3206 (2016)).
[2] *Id.*
[3] *Id.*
[4] *Id.*

designed with the protection of the child at their forefront, in Indian country, the members of both teams are often the same people. This structure enhances the mobilization of a multi-jurisdictional system response when a child or person goes missing and encourages the maximization of resources to address safety, potential for exposure to violence (risk factor), systems-based wrap around resources, and convictions in cases.[5]

An effective MDT depends on a shared understanding of its goals and mission and also shared knowledge of the general practices and procedures the team follows in its efforts to investigate and prosecute child abuse cases and to provide vital intervention services to child abuse victims and their families.[6] Cooperation, sharing information, and case coordination are some of the benefits that support a multidisciplinary approach to investigating cases of child abuse and neglect. The MDT model is readily adaptable to other types of cases, such as elder abuse, sexual assault, and missing person cases.

Currently, most states have legislation mandating a MDT approach to child abuse.[7] There is also a federal criminal code section requiring a multidisciplinary approach to investigating crimes against children. This federal law applies to cases in Indian country. Federal prosecutors and law enforcement officials must work with their tribal counterparts to develop a comprehensive MDT that can be engaged the moment a case of suspected abuse is reported. The federal law calls for the MDT to be involved in the following:

- medical diagnoses and evaluation of services;
- telephone consultation services in emergencies and other situations;
- psychological and psychiatric diagnoses and evaluation services for the child, parent, etc.;
- expert medical, psychological, and related professional testimony;
- case service coordination; and

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[5] *See id.*

[6] DEBRA A. POOLE & MICHAEL E. LAMB, INVESTIGATIVE INTERVIEWS OF CHILDREN: A GUIDE FOR HELPING PROFESSIONALS (1998).

[7] Maxine Jacobson, *Child Sexual Abuse and the Multidisciplinary Team Approach,* 8 CHILDHOOD 231, 234 (2001).

- training services.[8]

The research conducted by Kathleen Coulborn Faller and James Henry in their case study on community collaboration in child sexual abuse cases suggests the focus of policy and practice in child sexual abuse investigations should be on professionals and system coordination.[9] "Adults can and should bear primary responsibility for obtaining successful outcomes in child sexual abuse cases, not child witnesses."[10] The MDT approach is integral to success in most child maltreatment investigations. "Children's advocacy centers stress coordination of investigation and intervention services by bringing together professionals and agencies as a multidisciplinary team to create a child-focused approach to child abuse cases."[11] While this article focuses on cases with child victims, the principles and practices described herein apply equally to missing person cases involving adolescents and adults. As tribal communities work to create a community response to missing or murdered indigenous persons, the MDT approach should be incorporated.

III. Attorney General Guidelines for Victim and Witness Assistance (2011)

These publicly available guidelines are very helpful when a community or team works to develop a comprehensive response to cases involving children.

A. Child protections during criminal investigations

1. Multidisciplinary child abuse teams

The Attorney General Guidelines define an MDT as a professional unit composed of representatives from health, social service, law

[8] 18 U.S.C. § 3509(g).
[9] Kathleen Faller & James Henry, *Child Sexual Abuse: A Case Study in Community Collaboration*, 24 CHILD ABUSE & NEGLECT 1215, 1223 (2000).
[10] *Id.*
[11] Lisa Snell, *Child Advocacy Centers: One Stop on the Road to Performance-based Child Protection,* REASON FOUND (Feb. 2003), https://reason.org/policy-study/child-advocacy-centers/.

enforcement, and legal service agencies to coordinate the assistance needed to handle cases of child abuse.[12] MDTs have three goals:

- minimize the number of interviews of children to reduce the risk of suggestibility in the interviewing process;
- provide needed services to children; and
- monitor the children's safety and well-being.[13]

A MDT should be used when feasible.[14] Department of Justice (Department) personnel should use existing MDTs in their local communities. Law enforcement personnel are encouraged to bring other professionals onto MDTs. Local laws and guidelines concerning MDTs may vary, and federal personnel should be familiar with the local provisions. If no MDT is in place in a community, Department personnel should coordinate with the local child protective services agency, other agencies, and experts to assemble the expertise necessary to ensure the most effective response to the crime and the victim.

2. Investigation/forensic interviewing of child victims and witnesses

The first investigator responding to a report of child abuse or sexual abuse should refer the child victim for a medical examination. Whenever possible, interviews of child victims and witnesses should be conducted by personnel properly trained in the techniques designed to best elicit truthful information from a child while minimizing additional trauma to the child.[15]

MDTs in Indian country guide the process before, during, and after a report of concern for a missing person is initiated and during the investigation/prosecution of a case. MDTs in Indian country do not solely exist for the successful investigation or prosecution of a case. MDTs also address the complexities involving native community members and focus on the best outcome for an individual, as well as the greater impact on the community in which a person has gone missing. Working within the context of a MDT allows for the

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[12] U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL GUIDELINES FOR VICTIM & WITNESS ASSISTANCE 18 (2012) [hereinafter A.G. GUIDELINES].
[13] *Id.*
[14] 18 U.S.C. § 3509(g)(1).
[15] A.G. GUIDELINES, *supra* note 12.

leveraging of relationships and resources with the understanding that the process ensures the needs of vulnerable indigenous persons are met. Of significant benefit is the relationship of the forensic interviewer within the context of an MDT. The interviewer plays a role in gathering evidence through statements, assessing for both the immediate concerns of the investigation and the greater needs of the victim, the witness, the family, and community members upon the return or recovery of a victim or the tragic fallout when a live recovery is not successful.

IV. The forensic interview

Interviewing children and adolescents about events they may have experienced or witnessed can be one of the greatest challenges in the career of those who work to protect children. A review of court cases, media, and literature indicates increased scrutiny of the manner in which interviews are conducted by professionals involved in the investigation of cases where children may be victims or witnesses of a crime.[16] Forensic interviews are an effective method to gather information from children who are possible victims or witnesses. The forensic interview is one piece of a comprehensive investigation by a MDT.

The goal of a forensic or investigative interview is to obtain a factual statement from a child or adolescent in a developmentally sensitive, unbiased, and legally defensible manner that supports accurate and fair decision making in the criminal justice and child welfare systems.[17] Decisions about interviewing children and the extent of the interview process must weigh and balance the potential impact, both positive and negative, on the child, as well as the safety of the child and other children.[18] According to the National Children's Advocacy Center (NCAC), "It is never the desire of a forensic interviewer to 'get information' at the expense of the child's emotional and psychological well-being."[19] Selecting the appropriate individual to conduct the

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[16] *Id.*

[17] STATE OF MICH. GOVERNOR'S TASK FORCE ON CHILD ABUSE & NEGLECT & DEP'T OF HEALTH & HUM. SERVS., FORENSIC INTERVIEWING PROTOCOL 1 (4th ed. 2017) [hereinafter MICHIGAN PROTOCOL].

[18] NAT'L CHILD.'S ADVOC. CTR., POSITION PAPER ON THE INTRODUCTION OF EVIDENCE IN FORENSIC INTERVIEWS OF CHILDREN 3 (2013).

[19] *Id.*

forensic interview is a critical decision. A poorly conducted interview could become the focus of a court case and have a deleterious impact on the child and the willingness of the family to cooperate with the investigation and prosecution.

Federal Bureau of Investigation (FBI) child/adolescent forensic interviewers (CAFIs) are victim service providers with specialized forensic interviewing expertise.[20] In accordance with the Attorney General Guidelines for Victim and Witness Assistance, the FBI is required, whenever possible, to utilize personnel properly trained in forensic interviewing techniques for interviews of minor victims and witnesses.[21] FBI CAFIs use an evidence-based, legally sound, developmentally appropriate, and child-sensitive methodology designed to obtain accurate information and minimize trauma experienced by minor victims or witnesses. Although forensic interviews are primarily used as an investigative tool, they may yield useful information for a child protection agency or other agencies making decisions concerning custodial placement and mental health treatment. CAFIs are integral members of MDTs. A CAFI may be the one to conduct the forensic interview of a witness that leads to the recovery of a missing person or missing child. CAFIs also provide, consult, and train MDTs.

A qualified and culturally sensitive interviewer is vital in working with victims in Indian country. Knowledge and experience in language and a tribe's traditions, culture, and social structure are imperative. Such knowledge allows interviewers to avoid the misinterpretation of nonverbal communications. Cultural taboos may inhibit children from discussing certain topics. Understanding family, clan, band, and society relationships may also be important to an interviewer. Interviewers need to be knowledgeable about tribal ceremonies and feast days so they avoid asking inappropriate questions and can assign dates to events described in relation to those ceremonies or feasts. There are, however, other interview considerations:

- The initial report may not have been made by a guardian;

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[20] *Children Affected by Crime*, U.S. DEP'T OF JUST. & FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/file-repository/children_crime.pdf/view (last visited Jan. 26, 2021).
[21] A.G. GUIDELINES, *supra* note 12, at 18.

- any legal guardian and next-of-kin identification may be complicated;
- multiple people or families may be involved in parenting;
- understanding relationships and family is important;
- more people or families may be in a household;
- additional children may need a forensic interview; and
- communication needs may look different.

Forensic interviewing protocols for suspected victims of abuse, neglect, and sexual exploitation were developed, recommended, and widely implemented. Most protocols are based on research and utilize specific phases to facilitate reliable and detailed disclosures. The FBI's forensic interviewing protocol is modeled after Michigan's 1998 protocol authored by Dr. Debra Poole.[22]

The forensic interviewing protocol used by the FBI is based on a phased interview approach that is investigative and consistent with national standards and guidelines, including those adopted and promulgated by the American Professional Society on the Abuse of Children (2012), the NCAC, and the National Children's Alliance (NCA).[23] The interview includes seven phases, and each phase serves a unique purpose:

- build rapport;
- establish ground rules;
- conduct a practice interview;
- introduce the topic;
- elicit a free narrative;
- question and clarify; and
- close the interview.

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[22] MICHIGAN PROTOCOL, *supra* note 17, at Preface.
[23] Chris Newlin et al., *Child Forensic Interviewing: Best Practices*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION, JUV. JUST. BULL. 2 (Sept. 2015), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/248749.pdf.

A. Building rapport

Building rapport is crucial in completing a successful interview. Building rapport begins from the time the interviewer introduces himself to the child and continues until the interview concludes. This phase can be the most critical piece of the interview and can hinder the interview and investigation if not done well. If done well, this can help the child to feel comfortable in the interview setting and encourage him to talk.

B. Establish the ground rules

Providing a child with an age-appropriate instruction regarding the forensic interview is also important. There are four main ground rules that the FBI protocol establishes with a child or adolescent. These ground rules ask a child or adolescent to agree to tell the truth, to correct the interviewer when he makes a mistake, to not guess at an answer, and to ask for clarification if the child or adolescent does not understand a question.

C. Conduct a practice interview

A practice interview helps children understand what happens in the interview process and that they, the children, provide the information. The practice interview also allows an interviewer to assess a child's ability to describe events, as well as his language skills, development skills, and sequencing skills. This is typically accomplished by identifying a neutral event (birthday party, sporting event) or reoccurring event (bedtime routine) and asking the child or adolescent to discuss the event from beginning to end. This phase is optional and based on an interviewer's judgement.

D. Introduce the topic

The substantive portion of an interview begins when the interviewer prompts a transition to the target topic. It is not appropriate to start the substantive phase of the interview by introducing the abuse allegation or the alleged perpetrator. Interviewers should start with the least suggestive prompt that might raise the topic.

E. Elicit a free narrative

If a child reported something related to abuse, an interviewer should maximize the use of open-ended questioning techniques to elicit the narrative. The most common errors made by interviewers are omitting

the free narrative phase or shifting prematurely to specific questions. To elicit a narrative, an interviewer follows a disclosure of abuse with an open invitation.

F. Question and clarify

Once a child or adolescent finishes her narrative, it is time to focus on legally relevant information. This technique is an effective way to clarify previous statements and allows an interviewer to cover topics in an order that helps paint a clear picture of a child or adolescent's experience. It is important to use open-ended prompts during this phase, but specific and focused questions may be necessary.

G. Close the interview

Regardless of whether a disclosure is made, it is important to provide a respectful end to an interview. This phase has three major objectives: answering any questions the child or adolescent has, reverting to a neutral topic, and thanking the child.[24]

Regardless of the outcome of the interview, an interviewer should provide the child or adolescent with the opportunity to ask questions and express worries or concerns. It is important to answer questions truthfully and inquire as to the reason the child may be asking the question(s). Finally, it is important to thank the child for participating in the interview process, regardless of the outcome of the interview.

While the entire investigation or interview process has the potential to distress a victim, criminal justice professionals do not forgo these processes out of fear of inflicting potential trauma. Professionals working within the federal criminal justice process are directed to, and should, use methods designed to minimize additional stress resulting from participating in the criminal justice process and ensure that victims have adequate support. FBI CAFIs use a research-based interview protocol and question continuum designed to minimize secondary trauma to the victim.

V. A missing child case example

In a case involving a missing 11-year-old Native American female in Shiprock, New Mexico, in May 2016, investigators had to create a strategy to interview multiple child witnesses. This included the victim's nine-year-old brother, who was in the same van with the

[24] MICHIGAN PROTOCOL, *supra* note 17, at 23–24.

subject and his sister when she went missing, and an unknown number of school children from the community who were walking home from school at the time of the abduction. The school children were considered potential witnesses early in the investigation because they were believed to have been witnesses to the abduction or were approached directly by the subject, who drove up and down the road asking kids if they wanted a ride home.

These witnesses were critical to identifying the subject and revealing information about the young girl's location. As soon as law enforcement located and identified the brother, a trained criminal investigator conducted a minimal facts interview to immediately gather a subject description and attempt to map the location where the boy last saw his sister. A CAFI was then consulted and deployed to conduct the forensic interview. Crucial information was gathered during those two interviews that assisted investigators in identifying the subject. The information gained from the other child witnesses in the community lacked clarity and contained conflicting information, likely because the witness interviews were not conducted in a forensically sound manner. Due to the urgency of the situation, interviews were conducted without consulting a subject-matter expert (SME). In this case, devising a plan with SME guidance would have assisted investigators in gaining clearer information.

Using an SME or CAFI consultation in the early stages of an investigation helps first responders determine a strategy and approach when interviewing any potential child or adolescent witnesses, as well as any recovered victim. When investigators plan for and utilize non-leading, developmentally sensitive strategies, child witnesses can provide a wealth of information. If interviews are mishandled or conducted in haste, critical information can be lost and precious time and resources wasted.

VI. Prosecution strategies concerning the use of the forensic interview at trial

In many child sexual assault cases headed for trial, one question is almost always asked: Does the child have to testify in court in the presence of the defendant? Family members often ask if it is necessary for a child to sit on the witness stand, potentially for hours, and be subjected to cross-examination. This question is even more fervently asked when investigators record the child's forensic interview. Every prosecutor has been asked dozens of times, "Why can't you just play

the recording?" The easy answer is that the recording is hearsay and, thus, not admissible. A review of the Federal Rules of Evidence and case law, however, demonstrates that there are instances where the recorded forensic interview may be played in court and, in fact, may not be hearsay. It is likely that the victim will still be called to the witness stand. But with planning and a robust pretrial motion practice, the government may be able to have the forensic interviewer testify about what the child said during the interview or may be able to play the recorded interview at trial.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted.[25] Hearsay, absent a recognized exception, is not admissible in court.[26] The trier of fact, typically a jury, needs to hear from the witness who saw, heard, or experienced an event pertaining to the case. The forensic interview of a child victim is an out-of-court statement. Forensic interviews are typically conducted when there is some indication that a child may have been abused or harmed. Generally, law enforcement or social services is already involved in the investigation. One of the stated purposes for conducting a forensic or phased interview is to engage in hypothesis testing. For example, authorities may have received information that bruises on a child's buttocks were the result of repeated strikes with a belt. The forensic interview will explore, in a non-leading manner, other potential reasons for the bruising. Perhaps the child fell on the playground or suffers from a medical condition that resulted in bruises. Frequently, the forensic interview is conducted at the behest of law enforcement or child protective services. Information gleaned during the interview is shared with relevant criminal justice and social services agencies. This information may result in removal of the child from his home or criminal charges. In many instances, forensic interviews of child victims are conducted in anticipation of litigation.

The Supreme Court, in *Crawford v. Washington*, held that, where the government offers hearsay evidence at trial that is "testimonial" in nature, the Confrontation Clause of the Sixth Amendment requires actual confrontation, that is cross-examination of the declarant, regardless of the reliability of the statement.[27] For many years, prosecutors relied on the ability to "make their case" using hearsay

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[25] FED. R. EVID. 801(c).
[26] FED. R. EVID. 802.
[27] 541 U.S. 36, 61–62 (2004).

exceptions. In fact, in some types of cases, like domestic violence cases, many prosecutors litigated their cases without the in-court testimony of the victim because victims may recant on the stand earlier statements to law enforcement about their abuse or appear hostile to the government. In these cases, prosecutors relied heavily on hearsay exceptions like excited utterance or present sense impression. And courts often granted motions to admit this hearsay testimony because of the statement's "indicia of reliability."[28] Post *Crawford*, a statement is "testimonial" if "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[29] In evaluating the statements, a court determines "whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'"[30] The *Crawford* decision does not provide a comprehensive list of what kind of statements are testimonial. Greater clarity about what is testimonial appears in subsequent Supreme Court opinions.

In *Ohio v. Clark*, the Supreme Court took up the question of "whether statements to persons other than law enforcement officers are subject to the Confrontation Clause."[31] There, the defendant was charged with multiple felony offenses for abuse perpetrated on his girlfriend's three-year-old son and eighteen-month-old daughter.[32] The case began when the boy went to school with visible injuries. When questioned by a teacher about the source of the marks, he identified the defendant.[33] The trial court found the three-year-old not competent to testify but permitted the admission of his incriminating statement to his teacher under the state's version of Rule 807 (residual exception).[34] The defendant appealed his convictions, arguing a violation of his confrontation rights.[35] The state appellate court agreed and reversed. The Ohio Supreme Court affirmed, holding that the victim's "statements qualified as testimonial because the

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[28] Ohio v. Roberts, 448 U.S. 56, 65–67 (1980).
[29] Davis v. Washington, 547 U.S. 813, 822 (2006).
[30] Ohio v. Clark, 576 U.S. 237, 245 (2015) (citing Michigan v. Bryant, 562 U.S. 344, 358 (2011)) (alteration in original).
[31] *Id.* at 246.
[32] *Id.* at 240–41.
[33] *Id.*
[34] *Id.* at 242.
[35] *Id.*

primary purpose of the teachers' questioning 'was not to deal with an existing emergency but rather to gather evidence potentially relevant to a subsequent criminal prosecution.'"[36]

The U.S. Supreme Court found that the boy's statements to his teacher were not made with the primary purpose of creating evidence for the defendant's prosecution. Therefore, introducing the statements at trial did not violate the Confrontation Clause.[37] The Court, instead, found that the boy's statements were made in the context of alarm over suspected child abuse and the teacher's need to ensure the boy was going home to a safe environment.[38] His teachers asked him about his injuries immediately upon observing them. Moreover, the questioning took place in an informal setting, a preschool lunchroom and classroom. As the Court characterized the teachers' actions, they acted "precisely as any concerned citizen would talk to a child who might be the victim of abuse."[39] The victim's young age also factored into the Court's ruling; "statements by very young children will rarely, if ever, implicate the Confrontation Clause."[40]

If a statement is testimonial, "the Confrontation Clause is . . . satisfied when the hearsay declarant testifies at trial and is available for cross-examination."[41] In short, *Crawford* is no longer an issue. Sometimes, children who testify are poor witnesses with limited recall or are unresponsive. Does this change the *Crawford* calculus for these defendants? The defense raised this argument in *United States v. Kappell*.[42] Kappell was charged with multiple counts of child sexual abuse and faced a mandatory life sentence. The two child victims testified at trial and were cross-examined. Kappell argued on appeal "that because the two children were unresponsive or inarticulate at some points during their trial testimony, they should be viewed as 'unavailable' witnesses, whom the defendant could not effectively cross-examine."[43] The court, in finding that Kappell's confrontation rights were not violated, relied on *Bugh v. Mitchell* and held as follows:

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[36] *Id.*
[37] *Id.* at 246–47.
[38] *Id.*
[39] *Id.* at 247.
[40] *Id.* at 247–48.
[41] Bear Stops v. United States, 339 F.3d 777, 781 (8th Cir. 2003).
[42] 418 F.3d 550 (6th Cir. 2005).
[43] *Id.* at 555.

> [T]he Confrontation Clause guarantees only the opportunity for cross examination, and that the Clause is not violated by the admission of hearsay evidence when the witness's memory fails at trial. . . . While counsel's cross-examination of Robin may not have yielded the desired answers, and Robin may not have recalled the circumstances surrounding her previous statements, counsel clearly had the opportunity to expose such infirmities, by pointing out Robin's youth and lack of memory. The jury had the opportunity to observe Robin's demeanor, thus permitting the jury to draw its own conclusions regarding her credibility as a witness.[44]

The Sixth Circuit found that all of these considerations applied in the *Kappell* case.[45]

Can a recording of a child's forensic interview ever be used at trial? Yes. Prosecutors work hard to anticipate what defense strategies or issues will be raised at trial, and they can file a motion in limine requesting that the judge either rule to include or exclude certain evidence at trial. Frequently in child sexual abuse cases, pretrial motions are filed concerning the admissibility of recorded forensic interviews. Defense attorneys may attack a child victim's memory or credibility, or a prosecutor may be concerned that a child will become anxious or intimidated and become unwilling or unable to testify. This is particularly true when there has been a substantial period between a child's forensic interview and the start of the criminal trial. A prosecutor may request that the victim's prior statements, consisting of recorded forensic interviews, be admitted as non-hearsay offered as substantive evidence.

The Federal Rules of Evidence provide that a prior out-of-court statement is not hearsay where "[t]he declarant testifies and is subject to cross-examination about a prior statement, and the statement is consistent with the declarant's testimony and is offered to rehabilitate the declarant's credibility as a witness when attacked on another ground."[46] Before Rule 801(d)(1)(B) was amended in 2014, only prior consistent statements offered to rebut charges of recent fabrication or

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[44] *Id.* at 556 (quoting Bugh v. Mitchell, 329 F.3d 496 (6th Cir. 2003)).
[45] *Id.* at 556.
[46] FED. R. EVID. 801(d)(1)(B)(ii) (cleaned up).

improper motive were substantively admissible.[47] With the addition of subpart (ii) in 2014, however, consistent statements that rebut other attacks on a witness—for example, "charges of inconsistency or faulty memory"—may be received as substantive evidence.[48] Accordingly, courts have admitted prior statements made by child witnesses to rehabilitate those witnesses after attacks on cross-examination related to the witnesses' memory and the consistency of their statements.[49]

In *United States v. J.A.S., Jr.*, the Sixth Circuit held the child victim's forensic interview was consistent with her trial testimony and plainly admissible under subsection (ii) after cross-examination where the defense attorney "point[ed] out that some aspects of her trial testimony were new . . . and . . . highlight[ed] some collateral points on which her testimony and her prior descriptions supposedly differed."[50] The court found that Rule 801(d)(1)(B) allows for the admission of a trial witness's out-of-court statements if three requirements are met: First, the statements are consistent with the witness's testimony. Second, the statements are offered to rehabilitate the witness after an opposing party tried to impeach her "on another ground." And third, the opposing party can cross-examine the witness about the prior statements.[51] In *United States v. Cox*, the defendant attacked a child victim's memory by asserting that her testimony was not based on an actual memory of the event but on reviewing photos.[52] An agent then testified that the victim told him about the abuse before seeing any photos. Thus, the child's prior statements were admitted to rebut the claim of a faulty memory.[53] Contrast that holding with *United States v. Magnan,* where the Tenth Circuit found that prior consistent statements were wrongly admitted at trial.[54] In that case, the government argued that the defense's opening statement opened the door to introducing prior consistent statements under Rule

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[47] FED. R. EVID. 801(d)(1)(B) advisory committee's note to 2014 amendment.
[48] *Id.*
[49] *See, e.g.,* United States v. J.A.S., Jr., 862 F.3d 543, 545 (6th Cir. 2017); United States v. Cox, 871 F.3d 479, 487 (6th Cir. 2017).
[50] *J.A.S., Jr.*, 862 F.3d at 545.
[51] *Id.*
[52] *Cox*, 871 F.3d at 487.
[53] *Id.*
[54] United States v. Magnan, 756 F. App'x 807, 818(10th Cir. 2018) (not precedential).

801(d)(1)(B)(ii). The court, however, found that, because the defendant had not actually elicited inconsistent statements or accused the witness of a faulty memory, Rule 801(d)(1)(B)(ii) was not triggered.[55]

Another way a child victim's recorded forensic interview or statement to the forensic interviewer may be admitted at trial is through the residual hearsay exception. This hearsay exception provides that:

> Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804:
>
> (1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and
>
> (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.[56]

Rule 807 was amended in 2019. The rule now provides the following:

> "[t]he statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement—including its substance and the declarant's name—so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing. . . ."[57]

In *United States v. Patrick Wandahsega*, a six-year-old boy spontaneously disclosed that his father sexually abused him; the boy made these statements at different times to his maternal grandmother and to the mother of defendant's other children.[58] Over defendant's objection, the court permitted both individuals to testify at trial about what the boy said his father did to him. The trial court found the hearsay statements admissible pursuant to Rule 807.[59] The

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[55] *Id.*
[56] FED. R. EVID. 807(a)(1)–(2).
[57] FED. R. EVID. 807(b).
[58] 924 F.3d 868, 874 (6th Cir. 2019).
[59] *Id.* at 881.

defendant was convicted at trial of abusive sexual contact.[60] In addressing the hearsay issue on appeal, the Sixth Circuit reiterated what the U.S. Supreme Court listed as factors of "particularized guarantees of trustworthiness in the context of child sexual abuse: '(1) spontaneity; (2) consistent repetition; (3) the mental state of the declarant; (4) the use of terminology unexpected of a child of similar age; and (5) the lack of a motive to fabricate.'"[61] The trial court found that the victim's statements were reliable because the statements were spontaneous and not given in an interview session setting.[62] On appeal, the defendant argued that the statements failed the first prong of the Rule 807 analysis because both witnesses disliked him and had reasons to testify against him.[63] The Sixth Circuit found that the defendant had an opportunity to cross-examine both witnesses and that the jury could make a determination about their credibility.[64] The defendant also argued that, because the victim testified at trial, the hearsay testimony was not the most probative evidence available regarding the alleged abuse and, therefore, did not meet Rule 807's requirements. The appellate court found that the victim's statements to his grandmother and the mother of defendant's other children were more probative regarding defendant's conduct than the victim's testimony alone.[65] At trial, the victim testified only that the defendant touched his private parts more than one time. He could not provide information about the dates of abuse. His grandmother testified that the boy told her that the abuse occurred a couple of nights before his disclosure to her.[66] The second adult witness took the victim to the hospital for an examination. The court found that her testimony would have been disjointed and incomplete without the context that the boy first told her that his father did something bad to him.[67] The court ruled that the trial court properly admitted the hearsay statements under the residual hearsay exception.[68]

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[60] *Id.* at 875.
[61] *Id.* at 881 (citing Stuart v. Wilson, 442 F.3d 506, 522 (6th Cir. 2006)).
[62] *Id.* at 882.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*

Rule 807 and case law also permit a forensic interviewer to testify about what a victim told the interviewer. In *United States v. Thunder Horse*, the court permitted the forensic interviewer to testify pursuant to the residual hearsay exception about statements the child victim made to her during a forensic interview at a child advocacy center.[69] On appeal, the defendant argued that the forensic interviewer's testimony lacked the required circumstantial guarantees of trustworthiness.[70] The court outlined:

> [A] wide range of factors in determining whether this type of hearsay testimony is sufficiently trustworthy, including: the training and experience of the interviewer; whether the child was interviewed using open-ended questions; the age of the child and whether the child used age-appropriate language in discussing the abuse; the length of time between the incident of abuse and the making of the hearsay statement; and whether the child repeated the same facts consistently to adults.[71]

The Eighth Circuit found multiple circumstantial guarantees of trustworthiness present: the relatively short period of time between the incident and the forensic interview; the interviewer's two decades of experience; the use of open-ended, non-leading questions by the interviewer; the childlike description of the offense by the victim; and the victim's denial during cross examination that she told a friend that the abuse did not happen.[72] The court, in affirming the defendant's conviction, found that the forensic interviewer's testimony was properly admitted pursuant to Rule 807.

Recorded forensic interviews have also been admitted into evidence and played for the jury following an application of Rule 807. In *United States v. Smith*, the defendant was charged with two counts of aggravated sexual abuse of a child.[73] The child was taken to a child advocacy center for a forensic interview, which was recorded. The victim told the forensic interviewer that the defendant "placed his

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[69] 370 F.3d 745, 748–47 (8th Cir. 2004).
[70] *Id.*
[71] *Id.* at 748.
[72] *Id.*
[73] 591 F.3d 974, 977 (8th Cir. 2010).

fingers in her vagina on one occasion and that he touched her vaginal area over her clothing on an earlier occasion."[74]

At trial, defense counsel called the forensic interviewer as a witness for the purpose of establishing an apparent inconsistency in the victim's testimony and to further the defendant's theory of the case that the victim's story was the product of influence from her mother and defendant's girlfriend.[75] The government sought to introduce the recording of the entire forensic interview during its cross-examination of the forensic interviewer. The trial court allowed the recording to be played pursuant to Rule 807.[76] The defendant appealed his conviction and argued the trial court failed to properly discuss the requirements for admitting the recorded forensic interview under Rule 807 and the criteria outlined in *United States v. Thunder Horse*.[77]

The Eighth Circuit found that the government's cross-examination of the forensic interviewer established the foundational requirements for admission of the DVD under Rule 807. When the defendant objected to the government's foundational questions, the district court overruled the objections, noting that the government was "laying the foundation to the offer of the interview."[78] The district court stated that it was satisfied that an adequate foundation for admission of the recording pursuant to Rule 807 and the *Thunder Horse* factors had been provided.[79] The court affirmed the defendant's conviction.[80]

There is a responsibility to provide the best response possible to children in the most effective, supportive, and expedient manner. These multidisciplinary, best practice standards raise the bar to its highest level. They are achievable and, once in place, will make the admirable work of our colleagues much easier and, more importantly, make the investigative process less traumatic for those involved.

About the Authors

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[74] *Id.* at 977.
[75] *Id.* at 978.
[76] *Id.*
[77] *Id.* at 980.
[78] *Id.* at 981.
[79] *Id.*
[80] *Id.* at 983.

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[81] Catherine S. Connell & Martha J. Finnegan, *Interviewing Compliant Adolescent Victims*, 99 FBI L. ENF'T BULL., no. 5, 2010, at 16; Catherine S. Connell & Martha J. Finnegan, *A Picture is Worth a Thousand Words: Incorporating Child Pornography Images in the Forensic Interview*, AM. PRO. SOC'Y ABUSE CHILD. ADVISOR, no. 4, 2013, at 20.

developing and conducting trainings nationally throughout Indian country while implementing best-practice methods of responding to violence against children, youth, and adults. She is nationally known as a child abuse expert for her work with children, adolescents, and young adults and has responded to thousands of cases involving victims and witnesses to child sexual abuse, child abduction or kidnapping, witness to domestic violence, homicide, and child homicide, physical abuse, human trafficking, computer facilitated crimes against children, terrorism, sextortion, and complicated multi-victim cases. She supervises CAFIs responsible for conducting interviews, providing training, providing case consultations, and providing technical assistance to federal, state, tribal and local law enforcement agencies, including the FBI, the Bureau of Indian Affairs, tribal or local police departments, United States Attorney's Offices, district attorneys' offices, juvenile probation, child protective services, armed forces services, the National Transportation Safety Board, and the US Department of State.

Victim Services for Native Families with Missing Loved Ones

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I. Introduction

Ambiguous loss describes the unknown circumstances and resulting anxiety that families may experience after the disappearance of a loved one.[1] They do not know if their family member is alive, safe,

[1] Pauline Boss, *About Ambiguous Loss*, AMBIGUOUS LOSS PIONEERED BY PAULINE BOSS, https://www.ambiguousloss.com/about/ (last visited Aug. 5, 2020).

sick, hurt, in danger, or ever coming home. In long-term cases, there is often no return home, no funeral, and no memorial. This kind of loss may also occur after reunification with a loved one if the person is physically present but psychologically or emotionally absent as a result of victimization and/or the length of time missing.[2] Families may struggle with both types of loss.

Families live through fear, anxiety, and frustration when a loved one is missing. Families also feel hope. Hope that their family member is found soon. Hope that people will do everything possible to find their missing loved one. Many people also experience helplessness, anger, and pain that is exacerbated by not knowing if their loved one is safe. Coping with not knowing the fate of the missing person can result in complicated grief and overwhelming despair. This ambiguous loss can lead to a disruption of daily living and have significant emotional, social, financial, and relationship impacts. Lives are forever changed—generations and entire tribal communities impacted—when the missing person does not come home.

Victim service providers (VSPs) are a group of professionals who provide direct services to individuals impacted by the disappearance of a loved one and victims of crime. VSPs come from disciplines that include familiarity with social work, criminal justice, and the social sciences. Many VSPs have experience in child welfare, domestic violence and sexual assault advocacy, and counseling. VSPs include tribal advocates, federal victim specialists (VSs), and other victim services personnel.

When a person is reported missing or a crime occurs in Indian country, there may be a multi-jurisdictional response to the investigation, the victim, and families. Understanding victim impact can help professionals who investigate and assist families improve their response to victim needs. Interacting with families in a victim-centered, trauma-informed, and culturally responsive way demonstrates respect, builds trust, and offers support when people are most vulnerable.

This article describes victim advocacy and coordinated services for families in missing person cases that are provided by Tribal Victim Services, the Bureau of Indian Affairs (BIA), the Federal Bureau of Investigation (FBI), and United States Attorney's Offices (USAOs).

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[2] Pauline Boss, *FAQ*, AMBIGUOUS LOSS PIONEERED BY PAULINE BOSS, https://www.ambiguousloss.com/about/faq/ (last visited Aug. 5, 2020).

Each of these agencies play an important role in assisting families to ensure that their needs are met and their voices are heard.

II. Victim services guiding principles

A victim-centered practice focuses on concerns of victims and their needs while reducing system impacts of trauma when families are involved in the criminal justice system. Historically, courts in the United States focused on punishing offenders while the victim was rarely heard, listened to, or protected. In contrast, many traditional tribal justice systems used a restorative process meant to repair harm while keeping the victim central to any resolution or reparations. VSPs keep this systematic focus on victims while delivering services in a non-judgmental and compassionate manner. VSPs create opportunities to engage families while treating them with dignity and respect, listening to concerns, and providing information.[3] A victim-centered approach guides the process before, during, and after delivery of all services to victims.[4]

Trauma is an emotional response to a difficult or terrifying event.[5] Families are terrified about what may have happened to their loved one who is missing. They may also be afraid that first responders—and others—will stop looking for their loved one. Trauma-informed services are a whole-health approach to communicating, interacting, and treating individuals, families, and communities living with trauma.[6] Trauma-informed victim services involve listening, providing support, establishing safety, and sharing information to maximize family involvement, improve system experiences, build trust, and foster empowerment. VSPs connect families with resources to meet their physical, emotional, and financial needs. Communicating

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[3] *Model Standards for Serving Victims and Survivors of Crime*, OFF. FOR VICTIMS OF CRIMES, https://ovc.ojp.gov/sites/g/files/xyckuh226/files/model-standards/5/glossary.html (last visited Aug. 5, 2020).

[4] *See Victim-Centered Approach*, *Human Trafficking Task Force e-Guide*, OFF. FOR VICTIMS OF CRIME TRAINING & TECH. ASSISTANCE CTR., https://www.ovcttac.gov/taskforceguide/eguide/1-understanding-human-trafficking/13-victim-centered-approach/ (last visited Aug. 13, 2020).

[5] *Trauma and Shock*, AM. PSYCH. ASS'N, https://www.apa.org/topics/trauma (last visited Aug. 12, 2020).

[6] *See Infographic: 6 Guiding Principles to A Trauma-Informed Approach*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/cpr/infographics/6_principles_trauma_info.htm (last visited Aug. 5, 2020).

honestly when information may be difficult for families to hear demonstrates respect. Ensuring regular updates creates connectivity and reminds families of the deep concern that is felt for their loved one.

During missing persons investigations, any contact with families must be informed by the cultural and community context of the victim and family.[7] Being culturally responsive requires studying, acknowledging, and implementing strategies that reflect understanding of cultural norms and expectations for each tribal community. Law enforcement and VSPs who are not familiar should be briefed before working in the community to ensure respectful interactions so that misunderstandings do not negatively impact victim experiences or investigative efforts.

Mistrust of the federal government is the result of generations of broken promises. A perception remains that there is a disparity in resources and scale of response if decisions are impacted by bias or other unknown factors. The chances of creating trust are increased with the use of a protocol or triage model to objectively assess risk factors and circumstances to respond and deploy resources. It is important for families to know how and why some decisions are made. VSPs can provide information in a way that is transparent and accountable.

Resilience is the ability to adapt to adversity, trauma, and tragedy.[8] Resiliency describes the strength of American Indians and Alaska Natives (AI/AN) who have suffered historical and generational trauma. Individuals may also have experienced victimization, which increases vulnerability to go missing or become a victim of crime. The cumulative effect of these experiences impacts how people process and experience a missing loved one. Native people have systems of helping one another and traditional practices that bring comfort to those in distress. While there is great suffering, there is also deep and abiding strength and resilience.

Understanding the role of family and kinship is imperative in providing victim services. It is also important to have information

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[7] *See generally* NAT'L RES. CTR. ON HISPANIC CHILD. & FAMILIES, DEVELOPING CULTURALLY RESPONSIVE APPROACHES TO SERVING DIVERSE POPULATIONS: A RESOURCE GUIDE FOR COMMUNITY-BASED ORGANIZATIONS (2017)

[8] *Building Your Resilience*, AM. PSYCH. ASS'N., https://www.apa.org/topics/resilience (last visited Aug. 18, 2020).

about the family's belief system and connection to tribal or community practices, which may vary amongst family members and generations. Honoring cultural traditions, ceremonies, belief systems, and family requests are a VSP priority. Specific attention should be paid to the handling of remains and personal effects in addition to respecting the family's privacy. VSPs should apply culturally responsive practices in the delivery of services and provision of resources for families.[9]

III. Victim service programs

The composition of VSPs and how they collaborate varies based upon availability of resources, the location where the person went missing, historical relationships, interagency agreements, geography, and case circumstances. It is essential that VSPs support one another and create seamless services while leveraging all available resources to support families. Systems-based VSPs must also afford crime victims' services and rights under the Victims' Rights and Restitution Act (VRRA) (34 U.S.C.A. § 20141)[10] and the Crime Victims' Rights Act (CVRA) (18 U.S.C. § 3771).[11] Tribal victims' rights statutes are community specific and also apply to the provision of victim services. Some of the many programs providing services in missing person cases in tribal communities are described below:

A. Tribal Victim Services

Tribal Victim Services (TVS) programs are vital, comprehensive, community-based services that ensure survivors, families, and communities are supported and heard. TVS vary greatly throughout AI/AN communities; however, most programs provide services for victims of domestic violence, dating violence, sexual abuse, and stalking. The majority of programs include some community outreach and education. A few very comprehensive TVS programs include elder services, sexual assault examinations, batterers' intervention

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[9] *See generally* CAROLE WARSHAW, ERIN TINNON & CATHY CAVE, TOOLS FOR TRANSFORMATION: BECOMING ACCESSIBLE, CULTURALLY RESPONSIVE, AND TRAUMA-INFORMED ORGANIZATIONS, NAT'L CTR. ON DOMESTIC VIOLENCE, TRAUMA & MENTAL HEALTH (2018)

[10] 34 U.S.C.A. § 20141.

[11] 18 U.S.C. § 3771; *Crime Victims' Rights Ombudsman*, U.S. DEP'T OF JUST., https://www.justice.gov/usao/resources/crime-victims-rights-ombudsman (last visited Aug. 5, 2020).

programs, supervised safe child visitation, Multi-Disciplinary Team (MDT) coordination, and prevention efforts.

TVS is the central point in most communities for families seeking support, advocacy, and access to resources. In some locations, TVS existed long before federal victim services were available. Tribal VSPs are often from the tribal community and have extensive experience in providing services in victim-centered, trauma-informed, and culturally responsive ways. These strengths in serving victims make TVS key partners in developing programs and protocols.

Many TVS programs are community-based, and these providers may have the ability to offer confidentiality except as otherwise required by applicable reporting statutes. Alternatively, TVS may also be systems-based and be housed in a law enforcement or prosecution setting and, are therefore, governed by applicable discovery and disclosure mandates. These tribal VSPs provide victim services in the criminal justice system similar to federal VSPs.

Sources of funding may place limitations on the services that can be provided by community-based TVS programs in cases of missing persons. Since a person may be missing without being a victim of a crime, it may impact the ability of tribal VSPs to provide services. TVS may only be able to provide services for tribal members, those identified as primary or secondary victims of certain types of crime, or for a limited duration.

B. Bureau of Indian Affairs Victim Assistance Program

The BIA Victim Assistance Program was established to provide victim services and technical assistance to federally recognized Indian tribes and communities within their law enforcement jurisdictions.[12] The BIA fills a gap in victim services at both tribal and federal levels, including supporting victims in both court systems. Field BIA VSs provide direct services to all crime victims identified by law enforcement, including victims and families in cases of missing persons when reported or when a crime is discovered. VSs can immediately assist law enforcement and families in completing missing person information forms for entry into the National Criminal

[12] *Victim Assistance*, OFF. OF JUST. SERVS., BUREAU OF INDIAN AFFAIRS, https://www.bia.gov/bia/ojs/victim-assistance (last visited Aug. 5, 2020).

Information Center (NCIC) database.[13] VSs communicate closely with families and their agents while providing victims with case updates about investigations. VSs provide emotional support, counseling referrals, transportation, court accompaniment, and other services as needed.

BIA VSs use their personal knowledge and cultural understanding to promote resiliency for families. VSs encourage self-determination while providing choices for traditional and non-traditional resources that contribute to healing. BIA VSs collaborate with the FBI, USAOs, and tribal VSPs in addition to MDT members.

C. Federal Bureau of Investigation Victim Services Division

The FBI Victim Services Division has field FBI VSs assigned to Indian country who provide direct services for victims and their families, Child and Adolescent Forensic Interviewers (CAFI) who interview child victims and witnesses, and child victim program coordinators who provide specialized guidance on services for child victims and witnesses.[14] VSs provide a wide array of direct victim services for families of missing persons while working in partnership with agents investigating cases. VSs also provide assistance when the FBI Child Abduction Rapid Deployment (CARD) team is requested by a local jurisdiction to assist in the investigation of a missing child. VSs may also assist other VSPs or local jurisdictions if assistance is requested or local resources are not available. Direct victim services include crisis intervention, support, needs assessment, referrals to resources, and notification about the case. FBI VSs work collaboratively with law enforcement, other VSPs, and MDT partners to coordinate services in a wrap-around approach to meeting victim needs. If charges are filed, services transition to the USAO or the tribal prosecution. VSPs advocate a team approach to supporting the needs of victims and cases.

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[13] *See generally National Crime Information Center (NCIC)*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/services/cjis/ncic (last visited Mar. 4, 2021).

[14] *Victim Services*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/resources/victim-services (last visited Mar. 4, 2021).

D. United States Attorney's Office Victim–Witness Assistance Personnel

USAO VSPs provide assistance and services to crime victims and their families who are involved in the federal criminal justice system. USAO VSPs, like other covered Department employees, must comply with the Attorney General (AG) Guidelines for Victim and Witness Assistance, the VRRA, and CVRA.[15] The AG Guidelines apply to Department personnel "who are engaged in or support investigative, prosecutorial, correctional, or parole functions within the criminal justice system,"[16] and provide guidance on the treatment of victims involved in the criminal justice system. USAOs are responsible for implementing statutory responsibilities in each district. USAO VSPs work collaboratively with other VSPs when cases are received by the USAO. These services may include safety planning, witness security services, relocation, travel and lodging coordination for out-of-town victims and witnesses, court accompaniment, emotional support, crisis response, notification services, processing of witness vouchers, restitution coordination, interpreter and translation services, forensic interviewing, and referrals for counseling, housing, transportation, crime victims' compensation, and medical or mental health needs.

IV. Victim services in missing person cases

The victim services response must be fluid and adaptable depending on the situation, resources, and needs. The role of VSPs varies depending on factors such as the age of the missing person, the circumstances under which the person is missing, if the person is missing from tribal land, the vulnerabilities of the missing person, and sometimes, whether the person is a victim in an existing or previous case. Regardless of who interacts with families, they need a direct point of contact for the investigation, for case updates, and to provide leads or information.

Victim services are traditionally provided after there has been a determination that a crime may have occurred. In missing persons investigations, VSPs provide direct services to enable family

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[15] U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE art. I.B.3 (2012) [hereinafter A.G. GUIDELINES].
[16] *Id.*

participation in the investigation while also providing operational support for law enforcement.

VSPs can respond at any point in an investigation. In a best practice MDT approach, VSPs are notified at the outset of a report involving a missing person. Team coordination and delivery of services can be individualized for any circumstance. VSPs assist law enforcement with understanding vulnerabilities, victimology, and historical context in addition to mobilizing other team members to gather information. The perspective of the VSP helps law enforcement understand the needs of families and to coordinate efforts in a way that supports both the investigation and the victims.

A. Initial response, needs, and resources

During initial contact with families, VSPs explain their role and boundaries, including the limits of confidentiality and how information is shared with law enforcement. Being honest and transparent with families about roles and expectations is critical to establishing trust.

While building rapport, VSPs learn about the missing person, including health needs or disabilities, along with family history such as caregiver relationships and legal next-of-kin. VSPs gather information about support systems, strengths, and cultural, spiritual, and religious beliefs while assessing family needs.

VSPs have an understanding and awareness of the varying impacts families face when a loved one is missing and are cognizant of trauma impacting people in different ways. There may be increased financial hardship resulting from lost income when the missing person or family members are unable to work. VSPs link families with resources for basic needs assistance, counseling, and other referrals as needed. Peer support is a specific resource that involves linking individuals with people who have similar shared experiences of missing family members for support and assistance navigating systems.

Additionally, VSPs provide education about the investigative process, information about search efforts or anticipated next steps, and any approved case updates. VSPs create a predictable flow of information for families, begin to manage expectations, and plan to mobilize families quickly if there is an acute case event.

VSPs also provide operational support to the investigation that may include coordinating forensic interviews of children or interviews of family members or witnesses. Emotional support is provided during collection of scent items, DNA collection, or ante-mortem interviews so

that investigators can focus on completing tasks. VSPs serve as a liaison to the case and provide updates for families, inform investigators about family requests, and assist with preparing for official case briefings. VSPs also help ensure compliance with crime victims' rights' statutes if law enforcement determines a crime occurred.

B. Victim services in the recovery of missing persons

VSPs plan for all possible outcomes from the outset of an investigation. The missing person may be recovered alive, recovered deceased, or the case may transition to a long-term missing person investigation. It is never known if or how quickly an investigation may lead to recovery, thus requiring adaptability in the delivery of victim services.

1. Missing persons recovered alive

When a missing person is recovered alive, considerations are made to address the person's needs, to notify the person's family, if appropriate, and to plan for reunification. Reunification considerations include the amount of time that someone has been missing, whether it is an adult or child, whether a crime or victimization occurred, the reason the person was missing, relationships with family and support systems, any trauma response or presenting medical needs, and the impact of media/social media. VSPs plan for privacy, support, medical care, possible forensic examinations, and interviews and provide resources for identified needs.

Protection of privacy for AI/AN who were missing is critical during reunification. All justice system personnel must understand that sensitive case details about victimization must be protected because the victim's identity is known. In other cases, the details of the crime may be known while the victim's identity is private. Information should only be shared with those who are legally entitled to receive it.

2. Missing persons recovered deceased

"For families, a death notification is the start of life without their loved one . . . . It is an unforgettable moment that requires information delivered in a compassionate, professional, and dignified

manner."[17] An official death notification provided by law enforcement personnel accompanied by a VSP should occur. Every person remembers when, where, how, and by whom they were told about the death of their family member. It forever impacts their experience. Respect and dignity are shown by planning for death notifications that may need to be provided by teams simultaneously in multiple locations.

VSPs notify families about case updates, address privacy, and provide emotional support while also communicating family requests, concerns, and questions to investigators. Legal next-of-kin are notified about personal effects that may be held as evidence and facilitate the return of items in the condition that is requested by the family at the earliest opportunity in the investigation. VSPs provide referrals for resources such as burial assistance, repatriation of remains, counseling, and grief support. VSPs may also assist tribal leaders, school personnel, and local agencies if assistance is requested for other deeply impacted community populations.

C. Victim services in long-term missing person cases

Families should never feel left behind or forgotten. The transition from an acute investigation to a long-term missing case is devastating for families. Nothing is more important than their missing loved one, and victims continue to have hope that their loved one will be found. Law enforcement and VSPs should work together to update families before, during, and after transitions to answer questions, to hear concerns, and to foster transparency.

In long-term investigations, continuity requires a communication plan that includes points of contact for both law enforcement and family members. Investigators need to know how the family wants case updates, including to whom and how often. As needs change, VSPs refer families to additional resources for specialized assistance in a long-term missing person case.

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[17] Press Release, Pennsylvania State Univ., Penn State Helps FBI Create Training for Compassionate Death Notifications (Apr. 23, 2015).

V. Victim services in criminal justice system

Missing persons' investigations may lead to prosecution if a crime occurred. Crimes may include kidnapping, human trafficking, sexual assault, homicide, drug offenses, or other violations of law. In some circumstances, there may be potential for concurrent tribal or federal prosecution, or it could be that the state has sole jurisdiction depending on the circumstances. Services for victims should be consistent and seamless regardless of jurisdiction.

A. Assistance during federal prosecution

The USAO Victim–Witness (VW) Assistance Unit provides services for victims and witnesses of crimes during the prosecution of criminal cases while ensuring compliance with the AG Guidelines. USAO VSPs focus on the needs of families while collaborating with federal and tribal providers during the transition from investigation to prosecution. VSPs collaborate with and support the Department attorneys assigned to investigate and prosecute each case. VSPs and Department attorneys must use their "best efforts" to ensure compliance with the CVRA.[18]

The criminal justice system is a complex, intimidating process that requires support for victims who are navigating federal court after life altering experiences. The legal process may take years to obtain full resolution and involve hearings, written legal briefs, rulings on motions, trials or guilty pleas, sentencing if there is a conviction, and sometimes, appeals. USAO VSPs provide important notifications about case events and developments throughout the prosecution. VSPs provide emotional support for victims, referrals for services, assist with attendance and participation in court events, and provide court accompaniment.

Under the CVRA, crime victims have the reasonable right to confer with the attorney for the government in the case regarding major decisions, such as dismissals, release of the accused, plea negotiations, and pretrial diversion.[19] VSPs arrange meetings for victims with Department attorneys who can answer questions and hear concerns. Many factors impact charging and plea decisions made by a USAO.

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[18] A.G. GUIDELINES, *supra* note 16, at art. V.B.1.

[19] 18 U.S.C. § 3771(a)(5); *see also* A.G. GUIDELINES, *supra* note 16, at art. V.G.

Communication with victims and families ensures that they are fully included in the process while also being afforded their rights.

If there is a trial and a victim is subpoenaed to testify, VSPs or other USAO personnel coordinate travel, which may include payment for lodging, mileage, and per diem. If a victim–witness is traveling with family members who are not subpoenaed to testify, VSPs may be able to seek alternative resources to assist with travel expenses. During trial, VSPs prepare families for evidence that will be presented that may be particularly difficult for the family to see or hear. This preparation reflects an understanding of how families would be impacted if they were to hear this information for the first time in court. Victims are then able to make individual decisions about how they want to receive the information and participate.

If there is a finding of guilt by a guilty plea or verdict, a pre-sentence report is prepared by a United States Probation Officer (USPO) for the federal judge who will sentence the defendant. Under the CVRA, victims have the right to be heard, which is often satisfied through the submission of a written victim impact statement. One beneficial practice may be for a USAO VSP, in consultation with the assigned Department attorney, to arrange an in-person meeting with the USPO regarding the impact the crime had on their family. This process allows families to share grief, loss, or other difficult impacts in person.

Restitution is one of the many restorative tools utilized by the criminal justice system. USAO VSPs assist victims in providing detailed information about expenditures related to the crime, payments made by insurance companies or crime victims' compensation, and funeral, medical, or counseling expenses. It is also common for the USPO to consider restitution in its recommendation to the court.

In federal court, the victim or family representative has the right to be reasonably heard at sentencing in accordance with the CVRA.[20] The USAO VSP prepares victims and families for the sentencing hearing by explaining the process, providing information about sentencing guidelines, and offering assistance with how to prepare a statement. VSPs accompany families to court and provide emotional support during victim impact statements, when victims tell judges

[20] 18 U.S.C. § 3771(a)(4).

about how the crime has impacted them, their family, and their community.

USAO VSPs understand that a prosecution can take a toll on families as they deal with the continued ups and downs of the criminal justice system and the frustrations that come with continuances or difficult rulings. USAO VSPs make best efforts to provide victim-centered services and resources that support victims of crime during the criminal justice process.

VI. Conclusion

Families face the unimaginable when their loved one is missing. They may wait hopefully while feeling helpless to change a situation in which they have no control. They may wait anxiously for news of recovery while fearing bad news from investigators. Nothing ever replaces the traumatic loss of a loved one. Parents wonder how the unimaginable could have happened to their child. Children are left in anguish without a parent. They mourn when they must bury a family member. Families may suffer the ambiguous nature of loss when no one comes home and questions remain unanswered long-term. These families have no opportunity to be reunited or to pay their respects through a funeral because their missing loved ones' whereabouts remain unknown.

VSPs support families and the investigation while being a liaison to the case. Involving VSPs at the earliest opportunity in a missing person case ensures that families are central to the process, supported throughout the investigation, and their needs are addressed. Victims are counting on us to listen, to remember their needs, to work together, and to never forget their loved ones.

About the Authors

Michele L. Stewart has been an FBI Victim Specialist assigned to the Salt Lake City Division—Billings, Montana, Resident Agency since 1999. Much of her work is on the Crow and Northern Cheyenne Reservations, where she provides direct services for crime victims. Stewart holds Bachelor of Arts degrees in psychology and sociology/anthropology from Rocky Mountain College and a Master of Social Work degree from Eastern Washington University. She is a licensed clinical social worker. Stewart has been a therapist, a school social worker, and an adjunct college professor. She has published articles as a co-author on cross-cultural perspectives on outpatient

sexual abuse treatment for both victims and offenders in tribal communities and culturally modified personal safety education programs for American Indian children. Stewart received the 2018 Attorney General's Award for Exceptional Service in Indian Country; a 2018 Montana Attorney General's Award; a 2013 FBI Director's Award for Victim Assistance; and a U.S. Attorney's Office–District of Montana Compassionate Service Awards in 2018, 2011, and 2000. Stewart is an enrolled member of the Crow Tribe of Montana.

Tiffany Mow was the Director of the Victim Services Division for the National Missing and Unidentified Persons System (NamUs), a National Institute of Justice funded program managed through a cooperative agreement with the University of North Texas Center for Human Identification. Mow joined the NamUs team in March 2019 with over 18 years of experience working with individuals and families in crisis. Before joining NamUs, Mow worked for a Texas local mental health authority, where she served as the Director of Crisis Services, the Suicide Prevention Coordinator, and the Disaster Coordinator. She holds a Bachelor of Science in Criminal Justice, a Bachelor of Science in Sociology, and a Master of Public Administration from Tarleton State University.

Sharon Vandever is a Navajo born of the Red Running Into the Water People born for the Black Wooded Streaked people and was raised on the Navajo Reservation in New Mexico. She earned a Bachelor of Social Work degree at New Mexico State University. Vandever worked for Navajo Social Services before working as an evidence technician/victim advocate for the Navajo Police. She worked directly with criminal investigators while assisting with evidence collection and storage. Vandever gained critical knowledge of criminal justice systems and victims' rights, which she utilized during home visits with victims where she provided direct victim services. She later worked for Navajo Nation Social Services as a child protective service social worker investigating child abuse and presenting cases in court. In 1997, Vandever became a victim–witness advocate at a United States Attorney's Office (USAO). While this position required work in Albuquerque, she was able to provide services to her people while their cases proceeded through federal court. Vandever continues in her life-long work advocating for families as a USAO supervisory victim–witness specialist. In 2012 and 2009, Vandever was honored with a U.S. Attorney Award in the District of New Mexico.

Savannah Joe is a Victim–Witness Advocate with the United States Attorney's Office (USAO) for the District of New Mexico, where she uses her extensive experience providing direct services for crime victims to advocate for them during the prosecution of federal cases. Joe previously served as a BIA victim specialist at the Ute Mountain Agency in Colorado and Utah, where she provided direct victim services from the outset of a crime occurring and continued support and comprehensive services throughout the criminal justice process. She previously worked as the Court Assessment Coordinator for BIA Office of Justice Services, Tribal Justice Support in Albuquerque and a training technician for BIA OJS U.S. Indian Police Academy. Joe was awarded the 2020 EOUSA Director's Award for Superior Performance in Indian Country, the 2018 U.S. Attorney's Award of Excellence in the District of Colorado, the 2107 BIA OJS Recognition of Exceptional Service Commendation, and a BIA Indian Police Academy Recognition of Exemplary Services. Joe is an enrolled member of the Navajo Nation, born into the Mexican Clan (maternal) and the Towering House Clan (paternal).

Corrine Oqua Pi Povi Sanchez of San Ildefonso Pueblo is Executive Director of Tewa Women United. She received her Bachelor of Arts in Environment, Technology and Society from Clark University, her Master of Arts in American Studies with a minor in Health Education from the University of New Mexico, and her doctorate in Justice Studies from Arizona State University. She is trained in sexual assault intervention and prevention, having worked in this field for over 20 years. Sanchez was one of 16 visionary leaders across the country selected as the first cohort of the Move to End Violence. She was selected in 2016 for the *Stepping Into Power* Fellowship of Forward Together, a movement building fellowship for Reproductive Justice. Sanchez currently serves on the National Sexual Violence Resource Center's Advisory Council, the Community Advisory Board for the Master's in Public Policy at the University of New Mexico, and is a board member of the Attach Your Heart Foundation. Most recently, Sanchez was selected to serve on the Governor of New Mexico's Advisory Council on Racial Justice.

Kathy Howkumi is an enrolled tribal member from the Pueblo of Nambe (Tewa) with over 28 years of experience advocating for the protection of Native women and children. She began her advocacy in 1992 as her tribe's first elected Tribal Council woman, where she also served as Secretary. Since 2012, Howkumi has been employed by the

DOI/BIA Office of Justice Services, currently serving as Acting National Coordinator for the Victim Assistance Program, where she also contributes to national initiatives. As a Department of Justice Office on Violence Against Women (OVW) Tribal Program Manager, Howkumi worked on national policy, grants, and funding for tribes. Howkumi received the 2009 Special Achievement Award presented by AG Holder for Meritorious Acts of Service; the 2009 DOJ OVW Special Act Award for extraordinary contributions for Tribal Government Recovery and Reinvestment Act; the 2018 Advocacy in Action Service Award from the New Mexico Crime Victims Reparation; and the 2019 BIA/OJS Director's Award for exemplary service, conduct, or performance.

Paula Bosh holds a Bachelor of Social Work degree from Minot State University and a master's degree in psychology from Walden University. Since 2003, Bosh has been a victim specialist in the Minot Resident Agency of the FBI's Minneapolis Division, where she works with victims of federal crimes, including the Fort Berthold and Turtle Mountain Indian Reservations. Bosh previously worked as a care coordinator and supervisor for a wraparound program serving children with emotional, behavioral, and mental health disorders and their families, and with both the state's attorney's office and the Domestic Violence Crisis Center as a victim advocate. Bosh received the 2006 FBI Directors Award for Distinguished Service to Victims of Crime for services to victims of the Red Lake School shooting, the 2010 National Children's Advocacy Center "Outstanding Service Award—Victim Advocacy," and the 2018 U.S. Attorney's Office District of North Dakota Legacy Award for services to victims of crime.

Robyn Simmons has been a BIA victim specialist assigned to the Mescalero Agency in New Mexico since 2011. The Mescalero Apache Tribe did not have a victim services program before her position. Simmons earned a Master of Social Work degree from New Mexico State University and a Master of Legal Studies degree from Oklahoma University. She is also a graduate of the New Leadership New Mexico program 2011. Throughout her tenure with the BIA, she received United States Attorney's Office District of New Mexico Continued Appreciation Awards in 2013 and 2014; the Award for Outstanding Service on Behalf of Victims of Crime 2012; the "Heroes with Heart" Award 2012. Simmons is an enrolled member of the Mescalero Apache Tribe.

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Criminal Jurisdiction in Indian Country

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I. Introduction

Criminal jurisdiction in Indian country can be complex depending on where an incident occurs, whether the defendant or victim is an Indian, the type of crime alleged, treaty provisions, various state and federal court decisions, and federal regulations. Professor Robert Clinton described it as a "jurisdictional maze."[1]

This complexity can present serious problems for law enforcement in Indian country from dispatch and initial investigation to court room prosecution. A tribal, federal, or state officer may be needed to adequately investigate and respond to a crime primarily because initial responders may not have the authority to investigate fully, book a suspect, or cite and release offenders. The crime might have to be filed in tribal, state, or federal court, or concurrently filed among them. Officials may be uncertain about whether the perpetrator or victim is an Indian—uncertain as a matter of both law and fact. Officials may also be uncertain about whether the location of the incident is *Indian country*. In some of these cases, the uncertainty may remain until a federal or state appellate court decides the issue many years after the incident occurred.

In addition to understanding the complexity of Indian country criminal jurisdiction, it is important for prosecutors to have at least a basic familiarity with the historical development of Indian country criminal jurisdiction. This familiarity is worthwhile to gain an understanding of how and why different prosecutors and law enforcement officials from various jurisdictions exercise authority in Indian country. It is also important for an understanding of how exercising that authority may be perceived by American Indian citizens and Indian law practitioners.

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[1] Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 504 (1976).

II. Historical development: the treaty period

Shortly after the United States came into existence, and while the Revolutionary War was still raging, the federal government entered into treaties with tribal nations. These early treaties often included provisions related to handling crimes committed by a citizen of one tribal nation against a citizen of another tribal nation.[2] They also addressed the right of tribal nations to punish non-Indians attempting to live or hunt on Indian land.[3] These treaty terms appear to indicate that both sovereigns had an understanding that tribal nations had inherent authority at least concurrent with that of the United States to punish non-Indians for acts occurring on their lands. *Oliphant v. Suquamish Indian Tribe*, however, interprets these settlement provisions as "a means of discouraging non-Indian settlements on Indian territory," rather than as a recognition of inherent tribal sovereignty.[4] The Court in *Oliphant* does not discuss why it viewed discouragement and inherent authority as mutually exclusive explanations or how the continued exercise of authority over non-Indians by tribal nations could have been anything other than a continued exercise of inherent authority.

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[2] *See, e.g.*, Treaty with the Delawares art. IV, Sept. 17, 1778, 7 Stat. 13 ("For the better security of the peace and friendship now entered into by the contracting parties, . . . neither party shall proceed to the infliction of punishments on the citizens of the other, otherwise than by securing the offender . . . by imprisonment, . . . till a fair and impartial trial can be had by judges or juries of both parties . . . .").

[3] *See, e.g.*, Treaty with the Wyandot, etc. art. V, Jan. 21, 1785, 7 Stat. 16 ("If any citizen of the United States . . . shall attempt to settle on any of the lands allotted[,] . . . such person shall forfeit the protection of the United States, and the Indians may punish him as they please"); *see also* Treaty with the Wyandot, etc. art. VI, Aug. 3, 1795, 7 Stat. 49 ("If any citizen of the United States . . . shall presume to settle upon the lands now relinquished by the United States, such citizen . . . shall be out of the protection of the United States; and the Indian tribe . . . may drive off the settler, or punish him in such manner as they shall think fit . . . ."); Treaty with the Chickasaw art. IV, Jan. 10, 1786, 7 Stat. 24 (similar language); Treaty with the Choctaw art. IV, Jan. 3, 1786, 7 Stat. 21 (similar language); Treaty with the Cherokee art. V, Nov. 28, 1785, 7 Stat. 18 (similar language).

[4] 435 U.S. 191, 197–98, 199 n.8 (1978), *superseded by statute on other grounds as stated in* United States v. Lara, 541 U.S. 193 (2004).

In 1790, seven years after the Revolutionary War ended, federal jurisdiction was extended to non-Indians committing crimes against Indians in Indian country.[5] Treaty provisions at this time included the authorization of territorial and state governments to prosecute Indians for serious offenses against non-Indians.[6]

After 1796, treaties between tribal nations and the United States excluded the recognition that tribal nations had exclusive criminal jurisdiction over non-Indians dwelling on their lands. The trend was away from a sovereignty-based notion of criminal jurisdiction and toward a citizen-based notion.[7]

In 1817, Congress adopted the General Crimes Act (GCA), which extended federal criminal jurisdiction over interracial crimes committed in Indian country.[8] While the statute is typically viewed as an act governing non-Indian criminal conduct, by its terms, the act applies to both Indian and non-Indian defendants. The law, however, does not apply if an Indian has already been punished by the laws of a tribe or if a treaty provision prevents it. This is not unlike modern federal criminal laws that assert federal jurisdiction over activities of foreigners in foreign countries.[9]

In 1825, Congress passed the Federal Crimes Act,[10] a precursor to the Assimilative Crimes Act (ACA).[11] The ACA makes state law applicable to unlawful conduct occurring on federal lands, including Indian country, when the conduct is not otherwise punishable by a

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[5] *See* Trade and Intercourse Act of 1790, ch. 33, secs. 5–6, 1 Stat. 137, 138, amended by Trade and Intercourse Act of 1796, ch. 30, secs. 2–12, 1 Stat. 469, 470–72 (expressly defining crimes and sentences covered by the 1790 act).

[6] *See* Treaty with the Choctaw arts. VI, VIII, Sept. 27, 1830, 7 Stat. 333; Treaty with the Wyandot, etc. art. V, Jan. 9, 1789, 7 Stat. 28.

[7] *See* Treaty with the Quapaw art. 4, Aug. 24, 1818, 7 Stat. 176; Treaty with the Delawares art. 14, May 6, 1854, 10 Stat. 1048; Robert N. Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 954 (1975).

[8] 18 U.S.C. § 1152.

[9] *Cf.* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (discussing the boundaries of when federal jurisdiction may be asserted over foreigners and their actions in a foreign nation).

[10] Act of Mar. 3, 1825, ch. 65, 4 Stat. 115.

[11] Act of June 6, 1940, ch. 241, 54 Stat. 234; *see* Williams v. United States, 327 U.S. 711, 721 (1946).

federal statute.[12] The interplay between the GCA and the ACA generally makes crimes occurring in Indian country involving non-Indians against Indians subject to federal prosecution based on state criminal law.[13] It was also in 1825 when 12 treaties were negotiated over four months that expressly limited tribal exercise of criminal jurisdiction over non-Indians.[14]

Throughout most of the 1800s, courts recognized that states had no jurisdiction over crimes committed in Indian country.[15] Starting in 1861, Congress began inserting provisions into state enabling acts explicitly prohibiting state extension of jurisdiction into Indian country.[16]

In 1871, Congress ceased making treaties with tribal nations.[17] Until the treaty period ended, federal statutes regarding Indian country jurisdiction largely reflected commonly negotiated, nation-to-nation treaty provisions.[18]

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[12] *See generally* 18 U.S.C. § 13.

[13] *See* Act of June 6, 1940, Ch. 241, 54 Stat. 234.

[14] *See* Treaty with the Makah Tribe art. 5, Oct. 6, 1825, 7 Stat. 282; Treaty with the Pawnee Tribe art. 5, Sept. 30, 1825, 7 Stat. 279; Treaty with the Crow Tribe art. 5, Aug. 4, 1825, 7 Stat. 266; Treaty with the Mandan Tribe art. 6, July 30, 1825, 7 Stat. 264; Treaty with the Belantse-Etoa or Minitaree Tribe art. 6, July 30, 1825, 7 Stat. 261; Treaty with the Arikara Tribe art. 6, July 18, 1825, 7 Stat. 259; Treaty with the Hunkpapa Band of the Sioux Tribe art. 5, July 16, 1825, 7 Stat. 257; Treaty with the Cheyenne Tribe art. 5, July 6, 1825, 7 Stat. 255; Treaty with the Sioune and Oglala Tribes art. 5, July 5, 1825, 7 Stat. 252; Treaty with the Teton, Yancton, and Yanctonies Bands of the Sioux art. 5, June 22, 1825, 7 Stat. 250; Treaty with the Ponca art. 5, June 9, 1825, 7 Stat. 247; Treaty with the Kansa art. 10, June 3, 1825, 7 Stat. 244.

[15] *See* Worcester v. Georgia, 31 U.S. 515, 561 (1832) ("The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of [C]ongress."), *abrogated as recognized in* Nevada v. Hicks, 533 U.S. 353, 361–62 (2001).

[16] *See, e.g.*, Enabling Act of the Kansas Territory, ch. 20, sec. 1, Jan. 29, 1861, 12 Stat. 126, 127.

[17] 25 U.S.C. § 71.

[18] *See* Clinton, *supra* note 7, at 957–58.

III. Historical development: after the treaty period (1870–1950)

In 1881, the U.S. Supreme Court extended exclusive criminal jurisdiction to states over criminal activity in Indian country involving only non-Indians.[19] This principle is commonly referred to as the *McBratney* rule.

In 1883, the U.S. Supreme Court decided *Ex parte Kan-gi-shun-ca*, which involved the murder of one Brule Sioux Indian, Spotted Tail, a well-respected Chief, by Kan-gi-shun-ca, commonly known as Crow Dog.[20] The murder occurred in Indian country. Crow Dog was tried and convicted in territorial court. He moved to dismiss the conviction because the alleged crime involved an Indian against another Indian, which is expressly excepted from federal jurisdiction in the GCA.[21] The prosecution alleged that, despite the language of that Act, the exception was effectively repealed by the language of a treaty with the tribe.[22] The Supreme Court held that nothing in the treaty expressly repealed the Act and that the territorial court did not otherwise have jurisdiction to prosecute Crow Dog as his case fell within the GCA exception.[23]

Before prosecutors brought an action against Crow Dog in federal court, the Brule Sioux Nation resolved the case in accordance with the tribe's customary law. Pursuant to custom and tradition, the families of both Spotted Tail and Crow Dog agreed that Crow Dog would provide Spotted Tail's dependents with reparations.[24]

In reaction to the decision in *Kan-gi-shun-ca*, Congress passed the Major Crimes Act (MCA).[25] That Act originally created federal jurisdiction over seven serious felonies in Indian country.[26]

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[19] *See* United States v. McBratney, 104 U.S. 621, 624 (1881); Draper v. United States, 164 U.S. 240, 247 (1896); Solem v. Bartlett, 465 U.S. 463, 465 n.2 (1984).
[20] 109 U.S. 556, 557 (1883).
[21] *See id.* at 558.
[22] *See id.* at 562.
[23] *See id.* at 571–72.
[24] VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 168–71 (6th ed. 1983).
[25] *Id.* at 11; 18 U.S.C. § 1153.
[26] 18 U.S.C. § 1153(a).

Practitioners should be aware that some people in Indian country believe that Congress' adoption of the MCA was racially motivated.[27] The congressional record reflects the belief by some in Congress at the time that the tribe's resolution of the matter in accordance with their customary law amounted "to no law at all."[28] For example, Representative Cutcheon, sponsor of the Act stated:

> Thus Crow Dog went free. He returned to his reservation, feeling, as the Commissioner says, a great deal more important than any of the chiefs of his tribe. The result was that another murder grew out of that—a murder committed by Spotted Tail, jr., upon White Thunder. And so these things must go on unless we adopt proper legislation on the subject.
>
> It is an infamy upon our civilization, a disagrace to this nation, that there should be anywhere within its boundaries a body of people who can, with absolute impunity, commit the crime of murder, there being no tribunal before which they can be brought for punishment. Under our present law there is no penalty that can be inflicted except according to the custom of the tribe, which is simply that the "blood-avenger"—that is, the next of kin to the person murdered—shall pursue the one who has been guilty of the crime and commit a new murder upon him. . . .
>
> If . . . an Indian commits a crime against an Indian on an Indian reservation, there is now no law to punish the offense except, as I have said, the law of the tribe, which is just no law at all.[29]

In addition, the Secretary of the Interior, who supported the Act, stated:

> If offenses of this character (the killing of Spotted Tail) [cannot] be tried in the courts of the United States,

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[27] *See, e.g.*, SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 74 (1994).

[28] Keeble v. United States, 412 U.S. 205, 211 (1973) (citing 16 Cong. Rec. 934 (1885)).

[29] *Id.* at 210–11 (quoting 16 Cong. Rec. 934 (1885)) (omission in original).

> there is no tribunal in which the crime of murder can be punished. Minor offenses may be punished through the agency of the 'court of Indian offenses,' but it will hardly do to leave the punishment of the crime of murder to a tribunal that exists only by the consent of the Indians of the reservation. If the murderer is left to be punished according to the old Indian custom, it becomes the duty of the next of kin to avenge the death of his relative by either killing the murderer or some one of his kinsmen . . . .[30]

By extending federal criminal laws to intra-Indian affairs, the MCA intruded on tribal sovereignty in a manner inconsistent with the development of federal Indian criminal law during the treaty period. Many treaties up to that point explicitly preserved exclusive tribal jurisdiction over intra-tribal crimes.[31] In 1886, the U.S. Supreme Court upheld the MCA's constitutionality with a new, court-created doctrine called "plenary power." *United States v. Kagama* justified the existence of such power on the following basis:

> The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is [n]ecessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.[32]

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[30] *Id.* at 211 (quoting 16 Cong. Rec. 935 (1885)) (omission in original).
[31] *See* Treaty with the Creeks, etc. arts. 14–15, Aug. 7, 1856, 11 Stat. 699; Treaty with the Choctaw and Chickasaw arts. 6–7, June 22, 1855, 11 Stat. 611.
[32] 118 U.S. 375, 384–85 (1886).

IV. Historical development: termination era to present

In 1953, Congress enacted Public Law 83-280 (PL 280).[33] Congress passed the law during what is commonly referred to as the Termination Era. Under PL 280, the federal government delegated criminal jurisdiction and limited civil jurisdiction over Indian country to six states: California, Minnesota, Nebraska, Oregon, Wisconsin,[34] and in 1958, Alaska.[35] These states are commonly referred to as "mandatory" PL 280 states. The law also permits non-mandatory states to opt in. Several states took advantage of this provision. These states are commonly referred to as "optional" PL 280 states.[36]

Two weeks before the enactment of PL 280, Congress passed House Concurrent Resolution 108, which declared it should be the policy of the United States to terminate federal supervision over tribes, a policy that resulted in the termination of over 100 tribes and the removal of over a million acres from trust status.[37] PL 280 was a product of that policy.

In 1968, Congress enacted the Indian Civil Rights Act (ICRA).[38] The Act extended certain federal rights to Indians in Indian country that are similar to certain federal constitutional rights not otherwise applicable to the internal affairs of tribes. (Pursuant to *Talton v. Mayes*, tribal governments are not subject to the U.S. Bill of Rights.)[39]

In addition to extending certain rights to Indian country, the ICRA restricted the sentencing power of tribal courts. When originally passed, the Act limited tribal court sentences to six months in jail and a $5,000 fine for any offense. "This limitation effectively eliminate[d] tribal courts from regulating serious criminal activity in Indian country. For all practical purposes, the act indirectly bestow[ed] exclusive jurisdiction on the federal courts in the handling of major

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[33] Act of Aug. 15, 1953, ch 505, Pub. L. No. 83-280, 67 Stat. 588, codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321–26.
[34] *Id*. at § 2(a).
[35] Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545.
[36] *See American Indians and Alaska Natives—Public Law 280 Tribes*, ADMIN. FOR NATIVE AMS. (Mar. 19, 2014).
[37] H.R. Con. Res. 108, 83rd Cong. (1953).
[38] 25 U.S.C. §§ 1301–03.
[39] *See* 163 U.S. 376, 382–84 (1896).

crimes . . . ."[40] This sentencing limitation was disconcerting because federal criminal jurisdiction over serious criminal conduct committed by an Indian in Indian country is limited to crimes that are against non-Indians, subject to any GCA limitations, that involve a crime listed in the MCA or is otherwise a crime under a statute of nationwide applicability. As such, many serious crimes in Indian country may fall outside the federal government's jurisdiction. Felony crimes committed by Indians in Indian country that are not among those listed in the MCA or are not crimes of nationwide applicability, therefore, could only have been treated as misdemeanors within the sole jurisdiction of tribal courts.

In 1986, Congress increased the sentencing authority under the ICRA to one year in jail and a $5,000 fine.[41] Congress reinstated felony sentencing authority in 2010 by passing the Tribal Law and Order Act (TLOA).[42] TLOA allows tribal courts to sentence defendants to up to three years' imprisonment and a $15,000 fine per offense, for a maximum combined sentence of nine years per criminal proceeding.[43] Tribes, however, must guarantee certain rights to defendants, including the right to defense counsel for indigent defendants, to exercise felony sentencing authority.[44]

In 1978, the Supreme Court decided *Oliphant v. Suquamish Indian Tribe*.[45] That case involved two non-Indian residents of the tribe. One defendant, Oliphant, assaulted a tribal police officer and resisted arrest at the Suquamish's annual celebration, Chief Seattle Days,[46] while the other defendant, Belgarde, led police on a high-speed chase that ended with him slamming into a tribal police vehicle.[47] The tribe prosecuted the non-Indians for their crimes. The Supreme Court, however, held that tribes have no criminal jurisdiction over

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[40] DELORIA & LYTLE, *supra* note 24, at 175.
[41] Act of Oct. 27, 1986, Pub. L. No. 99-570, Pt. V, § 4217, 100 Stat. 3207-146.
[42] Act of July 29, 2010, Pub. L. No. 111-211, 124 Stat. 2258, codified at 25 U.S.C. §§ 2801 *et seq*.
[43] Pub. L. No. 111-211, at § 234, 124 Stat. at 2279–80.
[44] *See id.*, 124 Stat. at 2280.
[45] 435 U.S. 191 (1978), *superseded by statute as stated in* United States v. Lara, 541 U.S. 193 (2004).
[46] *Id.* at 194.
[47] *Id.*

non-Indians[48] under what is commonly referred to as the "implicit divesture" doctrine.[49]

In 1990, the Supreme Court held in *Duro v. Reina* that tribal criminal jurisdiction only extended to Indians who were members of that tribe.[50] In response, Congress quickly enacted legislation clarifying that tribes have the inherent sovereign authority to prosecute any Indian, regardless of tribal affiliation.[51] The *Duro* legislation fix was upheld in *United States v. Lara*, in which a majority of the Court held that the implicit divesture doctrine is a pronouncement of federal common law, not constitutional law.[52]

[48] *Id.* at 212.
[49] United States v. Wheeler, 435 U.S. 313, 326 (1978), *superseded by statute as stated in* United States v. Lara, 541 U.S. 193 (2004).
[50] 495 U.S. 676, 685 (1990), *superseded by statute as stated in* United States v. Lara, 541 U.S. 193 (2004).
[51] *See* 25 U.S.C. § 1301(2).
[52] *See* 541 U.S. 193, 199–208.

V. Non-PL 280 jurisdictional chart

The following chart is incomplete due to the complexity of federal Indian criminal jurisdiction generally and is included as a helpful quick reference tool that should be treated accordingly.

ACCUSED	VICTIM	JURISDICTION	BASIS/STATUTES
Indian	Indian/ victimless*	Tribe; sometimes concurrent with feds if MCA applies or Indian Gaming Regulatory Act (IGRA) applies	Tribal Sovereignty; MCA; IGRA
Indian	Non-Indian	Tribe; sometimes concurrent with feds if MCA or GCA applies	Tribal sovereignty; MCA; GCA; ACA
Non-Indian	Indian	Exclusively feds unless special domestic violence criminal jurisdiction per ICRA has been implemented by tribe	GCA; ACA; *Oliphant*; ICRA
Non-Indian	Non-Indian/ victimless	Exclusively state	*McBratney*; *Draper*; *Solem*; *Oliphant*
Anyone	Anyone	Federal jurisdiction if a crime of nationwide applicability (e.g. Habitual DV Offender statute)	Specific federal statute

VI. The Major Crimes Act

Federal courts have jurisdiction over Indians who commit a crime specifically enumerated in the MCA.[53] Federal jurisdiction under this

* It is also possible for federal jurisdiction to apply under the General and Assimilative Crimes Act when there is an Indian/Victimless crime and the tribe has not sought to prosecute the accused.

[53] 18 U.S.C. § 1153.

statute is exclusive of state jurisdiction.[54] While not yet directly decided by the U.S. Supreme Court, federal jurisdiction is concurrent with tribal nations.[55] The offenses listed in the act are mostly defined by federal statute. The few listed offenses that are not defined by federal statute are defined in accordance with state law.[56]

In *United States v. Antelope*, the Supreme Court upheld the disparity in treatment between an Indian prosecuted under the MCA and the same Indian being prosecuted for the same crime under state law.[57] In *Antelope*, the defendant was charged with felony murder under the MCA.[58] If prosecuted under Idaho law, the defendant would not have been subject to a felony murder charge; the state did not have a felony murder statute enacted at the time.[59] The court held that the Act's reliance on Indian status was not an impermissible racial classification; rather, the Indian-specific designation was primarily a political designation.[60]

A. Crimes that fall within the MCA

- Murder;[61]
- Manslaughter;[62]
- Kidnapping;[63]
- Maiming;[64]
- Felony under chapter 109A (sex crimes);[65]

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[54] *See* United States v. John, 437 U.S. 634, 651 (1978).
[55] *See Duro*, 495 U.S. at 680 n.1; Wetsit v. Stafne, 44 F.3d 823, 825 (9th Cir. 1995); United States v. Young, 936 F.2d 1050, 1055 (9th Cir. 1991), *overruled on other grounds by* United States v. Vela, 624 F.3d 1148 (9th Cir. 2010); United States v. Gallaher, 624 F.3d 934, 942 (9th Cir. 2010); United States v. Arcoren, No. CR. 89-30049, 1999 WL 638244, at *6 (D.S.D. 1999).
[56] 18 U.S.C. § 1153(b).
[57] 430 U.S. 641, 649 (1977).
[58] *Id.* at 643.
[59] *Id.* at 644, 644 n.5.
[60] *Id.* at 646–47.
[61] 18 U.S.C. § 1111.
[62] 18 U.S.C. § 1112.
[63] 18 U.S.C. § 1201.
[64] 18 U.S.C. § 114.
[65] 18 U.S.C. §§ 2241–2248

- Incest—defined by state statute;
- A felony assault under section 113;[66]
- Assault against an individual who has not attained the age of 16 years;
- Felony child abuse or neglect—defined by state statute;
- Arson;[67]
- Burglary—defined by state statute;
- Robbery;[68] and
- Felony level theft.[69]

VII. The General Crimes Act and Assimilative Crimes Act

The GCA extends the "general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States . . . to the Indian country."[70] Consequently, criminal laws applicable to federal enclaves also apply to Indian country, even if the offense involves a crime by an Indian against a non-Indian.[71]

There are three statutory exceptions to extending jurisdiction under section 1152.[72] First, it does not apply to an Indian committing a crime against another Indian.[73] Second, it does not apply to any crime committed by an Indian when the Indian has been punished by a tribe.[74] Third, it does not apply where a treaty gives exclusive

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[66] 18 U.S.C. § 113.
[67] 18 U.S.C. § 81.
[68] 18 U.S.C. § 2111.
[69] 18 U.S.C. § 661.
[70] 18 U.S.C. § 1152.
[71] United States v. Markiewicz, 978 F.2d 786, 797–98 (2d Cir. 1992); United States v. Young, 936 F.2d 1050, 1055 (9th Cir. 1991), *overruled on other grounds by* United States v. Vela, 624 F.3d 1148 (9th Cir. 2010); United States v. Wheeler, 435 U.S. 313, 330 n.30 (1978), *superseded by statute as stated in* United States v. Lara, 541 U.S. 193 (2004); Stone v. United States, 506 F.2d 561, 563 (8th Cir. 1974).
[72] 18 U.S.C. § 1152.
[73] *Id.*
[74] *Id.*

jurisdiction over the crime to a tribe.[75] The *McBratney* rule provides a fourth exception for crimes involving only non-Indians.[76]

Because the GCA extends crimes of nationwide applicability to Indian country, it effectively extends the ACA. The provisions of 18 U.S.C. § 13 apply state law to crimes committed on federal lands, including Indian country, when no federal criminal statute covers the crime.[77] Whether a particular crime is covered by federal law, however, is not always clear.[78]

The effect of the interplay between the GCA and the ACA is that many offenses involving non-Indians against Indians in Indian country can be prosecuted in federal court applying relevant state law. Unfortunately, because assault is covered by a specific federal statute,[79] an application of the ACA is precluded, and as a result, domestic violence cases are often only punishable by twelve months in jail. There are, however, other federal statutes that apply to the territorial jurisdiction of the United States that cover serious domestic violence assaults, such as those involving substantial bodily injury or strangulation under 18 U.S.C. 113(a), which also apply to Indian country.

VIII. Crimes of general applicability

Because the GCA specifically applies only to federal enclave laws, federal crimes that apply regardless of where the crime is committed are not subject to the GCA's three statutory limitations. And because crimes of general applicability apply to everyone regardless of location, the *McBratney* rule does not come into play.

The Ninth Circuit, however, has held that there are three exceptions for applying crimes of general applicability to Indian country. Crimes of general applicability will not apply if (1) the law touches "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed

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[75] *Id.*
[76] *See supra* Section III.
[77] 18 U.S.C. § 13.
[78] *Compare* Williams v. United States, 327 U.S. 711, 719–25 (1946) (involving sex crimes with differing ages of consent—covered), *with* Fields v. United States, 438 F.2d 205, 207–08 (2d Cir. 1971) (involving a charge of shooting with intent to kill under state law despite the terms of the federal assault statute at 18 U.S.C. § 113—not covered).
[79] 18 U.S.C. § 113.

by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations."[80]

The Second Circuit, in *Markiewicz,* held that only federal criminal statutes of nationwide applicability that reflect a peculiarly federal interest apply to Indians in Indian country.[81] The Ninth Circuit, on the other hand, explicitly rejected this analysis in *United States v. Begay*.[82] The U.S. Supreme Court has not yet addressed this circuit split.

A. Common crimes of general applicability in Indian country

- Domestic assault by a habitual offender;[83]
- Interstate domestic violence—applies to Indian country;[84]
- Interstate stalking—applies to Indian country;[85]
- Interstate violation of a protection order—applies to Indian country;[86]
- Assault on a federal officer;[87]
- Failure to register as a sex offender (applies explicitly to Indian country);[88]
- Receipt or distribution of child pornography;[89]
- Possession of child pornography;[90]

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[80] United States v. Farris, 624 F.2d 890, 893–94 (9th Cir. 1980), *superseded by statute on other grounds as stated in* Solis v. Matheson, 563 F.3d 425 (9th Cir. 2009).
[81] United States v. Markiewicz, 978 F.2d 786, 798–99 (2d Cir. 1992).
[82] 42 F.3d 486, 498 (9th Cir. 1994).
[83] 18 U.S.C. § 117.
[84] 18 U.S.C. § 2261.
[85] 18 U.S.C. § 2261A.
[86] 18 U.S.C. § 2262.
[87] 18 U.S.C. § 111.
[88] 18 U.S.C. § 2250(a).
[89] 18 U.S.C. § 2252A(a)(2).
[90] 18 U.S.C. § 2252A(a)(5)(B).

- Transfer of obscene materials to minors;[91]
- Sexual exploitation of children;[92]
- Possession of a firearm offenses;[93]
- Destruction of government—United States—property;[94]
- Distribution and Possession of controlled substances;[95] and
- Sex trafficking.[96]

[91] 18 U.S.C. § 1470.
[92] 18 U.S.C. § 2251.
[93] 18 U.S.C. § 922 *et seq.*
[94] 18 U.S.C. § 1361.
[95] 21 U.S.C. §§ 841, 844.
[96] 18 U.S.C. §1591.

IX. PL 280 jurisdictional chart

The following chart is incomplete due to the complexity of federal Indian criminal jurisdiction generally and is included as a helpful quick reference tool that should be treated accordingly.

ACCUSED	VICTIM	JURISDICTION	BASIS/STATUTES
Indian	Indian/Victimless	Tribe; mandatory PL 280 states have jurisdiction, but not feds (unless TLOA exercised); in optional PL 280 states, both the state (subject to state statute) and the feds have jurisdiction	Tribal sovereignty; 18 U.S.C. § 1162; 25 U.S.C. § 1321; state authorizing statute
Indian	Non-Indian	Tribe; mandatory PL 280 states have jurisdiction, but not feds (unless TLOA exercised); in optional PL 280 states, both the state (subject to state statute) and the feds have jurisdiction	Tribal sovereignty; 18 U.S.C. § 1162; 25 U.S.C. § 1321; state authorizing statute
Non-Indian	Indian	Mandatory PL 280 states have exclusive jurisdiction (unless TLOA exercised, VAWA 2013 implemented); in option states, the state, feds, and tribes (if VAWA 2013 applies and implemented) have jurisdiction	18 U.S.C. § 1162; 25 U.S.C. § 1321; VAWA 2013
Non-Indian	Non-Indian/ victimless	Exclusively state	*McBratney*; *Draper*; *Solem*; *Oliphant*
Anyone	Anyone	Federal jurisdiction if a crime of nationwide applicability or federal law otherwise applies	Specific federal statute

X. PL 280

PL 280 is a federal law enacted in 1953 and codified at 18 U.S.C. § 1162. Generally, this law confers criminal jurisdiction over Indian country to the state in certain circumstances. State jurisdiction under PL 280 is concurrent with that of tribal nations.[97]

States falling within section 1162(a) are considered "mandatory" PL 280 states because all Indian country in a listed state is subject to state criminal jurisdiction.[98] There are statutory exceptions to state jurisdiction in the mandatory PL 280 states, such as the Annette Islands of the Metlakatla Indian community in Alaska, the Red Lake Reservation in Minnesota, and the Warm Springs Reservation in Oregon.[99] The MCA and the GCA do not apply in mandatory PL 280 states.[100] The only exception to state jurisdiction being exclusive of federal jurisdiction in mandatory PL 280 states is when the federal government has asserted concurrent authority with the state and tribes pursuant to the TLOA's amendments to PL 280.[101]

PL 280 also grants authority to other states to assume criminal jurisdiction over Indian country.[102] States asserting jurisdiction under this section of PL 280 are referred to as "optional" PL 280 states. Unlike mandatory PL 280 states, the MCA and GCA apply to optional PL 280 states because there is no statutory provision in section 1321 that is equivalent to 18 U.S.C. § 1162(c), which made state jurisdiction exclusive of federal jurisdiction in mandatory PL 280 states.[103] In addition, some optional PL 280 states, like Washington, chose not to assert full jurisdiction over Indian country.[104] This limited assertion of

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[97] *See* Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 561 (9th Cir. 1991); Confederated Tribes of Colville Reservation v. Okanogan Cty., 945 F.2d 1138, 1140 n.4 (9th Cir. 1991); *see also* Cabazon Band of Mission Indians v. Smith, 34 F. Supp. 2d 1195 (C.D. Cal. 1998).
[98] 18 U.S.C. § 1162(a).
[99] *Id*.
[100] 18 U.S.C. § 1162(c).
[101] 18 U.S.C. § 1162(d).
[102] 25 U.S.C. § 1321(a)(1).
[103] *See* United States v. High Elk, 902 F.2d 660, 661 (8th Cir. 1990) (per curiam); Assumption of Concurrent Federal Criminal Jurisdiction in Certain Areas of Indian Country, 76 Fed. Reg. 29675 (proposed May 23, 2011).
[104] *See* WASH. REV. CODE ANN. § 37.12.010.

jurisdiction by optional PL 280 states has been upheld by the U.S. Supreme Court.[105]

Comparing the statutory scheme of 18 U.S.C. § 1162(c) with 25 U.S.C. § 1321 indicates that state exercise of criminal jurisdiction in mandatory PL 280 states is exclusive of federal jurisdiction, but concurrent under optional PL 280 states. Subsection (c) in 18 U.S.C. § 1162 is explicit in removing federal jurisdiction, while such language is absent in 25 U.S.C. § 1321. This analysis is particularly true if the tribal cannons of construction are invoked to interpret ambiguous statutes in favor of tribes.[106] *High Elk* is consistent with this reading of the federal statutes, as is the Department of Justice's (Department) position reflected in 76 Fed. Reg. 29675,[107] and this reading is also the position favored by *Cohen's Handbook of Federal Indian Law*.[108] But in the unpublished decision of *United States v. Johnson*, a district court held that state jurisdiction was exclusive of the federal government in an optional PL 280 state.[109] In that case, the defendant cited to several federal court decisions for the proposition that state jurisdiction under PL 280 was exclusive of the federal government; however, each of those cases deal with mandatory PL 280 states.[110]

Originally, PL 280's grant of authority to optional states to assert authority did not require the consent of the affected tribes. In 1968, consistent with the newly adopted federal policy of self-determination and pursuant to the ICRA, the United States amended PL 280 to

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[105] *E.g.*, Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 481–82 (1979).

[106] Alaska Pac. Fisheries Co. v. United States, 248 U.S. 78, 89 (1918) ("[S]tatutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians.").

[107] Assumption of Concurrent Federal Criminal Jurisdiction in Certain Areas of Indian Country, 76 Fed. Reg. 29675 (proposed May 23, 2011).

[108] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.04[3][d][i] (Nell Jessup Newton et al. eds., LexisNexis 2005).

[109] CR80-57MV (W.D. Wash. May 13, 1980) (Order on Defendant's Motion to Dismiss).

[110] Anderson v. Gladden, 293 F.2d 463 (9th Cir. 1961) (Oregon); Quechan Tribe of Indians v. Rowe, 350 F. Supp. 106 (S.D. Cal. 1972) (California); United States v. Brown, 334 F. Supp. 536 (D. Neb. 1971) (Nebraska).

require optional states to obtain tribal consent before asserting jurisdiction in Indian country.[111]

The tribal consent provision requires a majority vote of a tribe's citizens.[112] The consent limitation was not retroactive, leaving intact jurisdiction assumed by states before the amendment's passage.[113] With regard to Indian country created after 1968, however, optional PL 280 states are likely required to obtain consent before asserting jurisdiction over after-acquired Indian country lands.[114]

Pursuant to 25 U.S.C. § 1323(a), the United States can accept a retrocession of jurisdiction from a state of all or any measure of the jurisdiction conferred to the state under PL 280.[115] Executive Order 11435 grants the Secretary of the Interior the power to exercise all authority granted in 25 U.S.C. § 1323(a), but it is only effective through publication in the Federal Register after consulting with the U.S. Attorney General.[116] Some tribes have since sought and obtained state retrocession of PL 280 jurisdiction.[117]

In 12 states, state criminal jurisdiction applies to Indian country pursuant to laws other than PL 280. In these states, the PL 280 analysis often applies. Some of the enabling statutes confer state jurisdiction as if it were conferred under PL 280 or have language

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[111] 25 U.S.C. § 1321(a); Carole Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535, 546, 549 (1975).
[112] 25 U.S.C. § 1326.
[113] 25 U.S.C. § 1323(b) (indicating "such repeal shall not affect any cession of jurisdiction made . . . prior to its repeal").
[114] *Cf.* State v. Squally, 132 Wash. 2d 333, 341–43 (Wash. 1997) (en banc) (the court's analysis presumes after acquired property requires tribal consent, however, it concluded a broadly worded 1957 tribal resolution amounted to consent for the imposition of state jurisdiction over after acquired property); State v. Cooper, 130 Wash. 2d 770, 781 n.6 (Wash. 1996) (en banc) ("We assume, without deciding, that the subsequent establishment of a new Indian reservation vitiates the pre-existing RCW 37.12.010 assumption of state jurisdiction . . . ."); M. Brent Leonhard, *Returning Washington PL 280 Jurisdiction to its Original Consent-Based Grounds*, 47 GONZ. L. REV. 663, 691 (2011).
[115] 25 U.S.C. § 1323(a).
[116] Exec. Order No. 11,435, 33 Fed. Reg. 17339 (Nov. 21, 1968).
[117] *See, e.g.*, Umatilla Indian Reservation; Oregon's Acceptance of Retrocession of Jurisdiction, 46 Fed. Reg. 2195-02 (Jan. 8, 1981) (involving retrocession of "all criminal jurisdiction exercised by the State of Oregon over the Confederated Tribes of the Umatilla Indian Reservation").

similar to that of PL 280. This language can cause confusion in so far as a distinction may not be made in the enabling statute between whether state jurisdiction is conferred as if it were a mandatory or optional PL 280 state.[118] Regardless, the Department has taken the position that, with the exception of the mandatory PL 280 states listed in 18 U.S.C. § 1162, federal jurisdiction under the MCA and the GCA is concurrent with states.[119]

For a detailed list of PL 280 and similarly affected non-PL 280 states, along with relevant legislation, case law, and a list of affected tribes, visit the Tribal Jurisdiction section of the Walking on Common Ground website.[120] It should be noted that some tribes straddle more than one state—for example, the Navajo tribe, the Standing Rock tribe, the Lake Traverse tribe, and the Washoe tribe. This may result in a different jurisdictional analysis depending on which part of a tribe's Indian country land a crime was committed. It should also be noted that tribes in Maine are uniquely different due to both federal and state claims settlement acts.[121]

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[118] *Compare* United States v. Burch, 169 F.3d 666, 669–70 (10th Cir. 1999) (holding state jurisdiction exclusive of federal jurisdiction), *with* United States v. High Elk, 902 F.2d 660, 661 (8th Cir.1990) (per curiam) (holding state jurisdiction is concurrent with federal jurisdiction).

[119] Assumption of Concurrent Federal Criminal Jurisdiction in Certain Areas of Indian Country, 76 Fed. Reg. 29675 (proposed May 23, 2011).

[120] *Jurisdiction*, WALKING ON COMMON GROUND, http://www.walkingoncommonground.org/state.cfm?topic=25&state= (last updated Feb. 16, 2010).

[121] *See* Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, 94 Stat. 1785 (1980); 30 ME. REV. STAT. ANN. tit. 30, § 6205.

The following is a chart of relevant states and where they fall within the PL 280 matrix (due to the complexity and number of acts effecting Indian country jurisdiction, the chart may be incomplete):

MANDATORY PL 280	OPTIONAL PL 280	SIMILARLY AFFECTED	NON-AFFECTED
Alaska	Washington	Colorado	Alabama
California	Idaho	Connecticut	Arizona
Minnesota	Florida	Iowa	Louisiana
Nebraska	Montana (CSKT only)	Kansas	Michigan
Oregon		Maine (Passamaquoddy and Penobscot; see 25 USC § 1725; 30 MRS § 6205)	Mississippi
Wisconsin		Massachusetts	Montana
		New York	Nevada
		North Dakota	New Mexico
		Rhode Island	North Carolina
		South Carolina	Oklahoma
		Texas	South Dakota
		Utah	Wyoming

XI. Reauthorization of the Violence Against Women Act of 2013

The reauthorization of the Violence Against Women Act of 2013 (VAWA 2013) amended the ICRA to recognize, in certain limited circumstances, the inherent power of tribal nations to exercise special domestic violence criminal jurisdiction over non-Indian domestic violence, dating violence, and violations of protection orders.[122]

In addition to the definitional restrictions on the exercise of inherent criminal jurisdiction over non-Indians, VAWA 2013 also imposes jurisdictional limitations. The authority does not extend to crimes

[122] 25 U.S.C. § 1304.

where neither the defendant nor the alleged victim is an Indian.[123] Criminal jurisdiction is also limited to defendants who either reside in or are employed in the Indian country of the participating tribe or are a spouse or dating partner of either a member of the participating tribe or a member of another tribe who resides in the Indian country of the participating tribe.[124] Protection order prosecutions are further limited to orders that are consistent with 18 U.S.C. § 2265 where the violation involves that part of an order that "prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to another person."[125]

Any tribe opting to exercise special domestic violence criminal jurisdiction (SDVCJ) under VAWA 2013 must also afford the defendant certain enumerated rights. These rights include all rights under the ICRA afforded anyone else, all rights afforded defendants facing enhanced sentencing under the TLOA, and tribes must ensure that any impartial jury "reflect[s] a fair cross section of the community[] and do[es] not systematically exclude any distinctive group in the community, including non-Indians."[126]

XII. Indian country defined

"Indian country," for purposes of criminal jurisdiction, is defined in 18 U.S.C. § 1151 and generally refers to:

- "[A]ll land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation";
- "[A]ll dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state"; and

[123] 25 U.S.C. § 1304(b)(4)(A).
[124] 25 U.S.C. § 1304(b)(4)(B).
[125] 25 U.S.C. § 1304(c)(2).
[126] 25 U.S.C. § 1304(d).

- "[A]ll Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."[127]

Consequently, the core types of land that constitute Indian country are Indian reservations, dependent Indian communities, and Indian allotments. These terms are not defined by statute. Each of these terms, however, are terms of art in Indian law, and while they are sometimes used loosely and interchangeably by courts with the term "Indian country," the terms refer to specific types of land. The types of land are not identical, although it appears that in certain circumstances a parcel of land may fall into more than one category.

XIII. Indian reservations

Pursuant to 18 U.S.C. § 1151(a), Indian country includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent."[128] The term "Indian reservation" is not defined in the statute, but it is an established term of art originally used in the MCA before its amendment in 1948.[129] At one point, the term "Indian reservation" referred to land tribes reserved for themselves when they ceded other lands to the federal government by treaty and over which they never extinguished title.[130] In the mid-1800s, the term began to be used in a manner that included lands held in the public domain that are reserved for Indian use and benefit.[131]

Indian reservation land includes non-contiguous tribal lands that are held in trust by the federal government for the benefit of an Indian tribe. Consequently, lands such as tribal fishing sites are included within the scope of an Indian reservation.[132] Land set aside for another purpose, however, even if used for the benefit of a tribe, is

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[127] 18 U.S.C. § 1151.
[128] 18 U.S.C. § 1151(a).
[129] *See* Act of Mar. 3, 1885, § 9, 23 Stat. 362, 385.
[130] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 108, at § 3.04[c][ii]; *see* Donnelly v. United States, 228 U.S. 243, 269 (1913).
[131] *See Donnelly*, 228 U.S. at 269.
[132] United States v. Sohappy, 770 F.2d 816, 822–23 (9th Cir. 1985); *see* United States v. John, 437 U.S. 634, 649 (1978); United States v. Pelican, 232 U.S. 442, 445 (1914).

not an Indian reservation.[133] Presently, the term "Indian reservation" generally refers to federally protected Indian tribal lands regardless of origin.[134]

The U.S. Supreme Court has held that land declared by Congress to be held in trust by the federal government for the benefit of Indians is a reservation for purposes of criminal jurisdiction.[135] Similarly, the U.S. Supreme Court has held that land "validly set apart for the use of the Indians as such, under the superintendence of the government" is reservation land.[136]

Trust land is land set aside for the benefit of a tribe or individual Indian "with the fee in the United States."[137] Failure to use the term "trust" or "reservation" in legislation that sets aside land for the benefit of tribes does not affect whether it is Indian reservation land. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, the U.S. Supreme Court stated,

> [No] precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges. . . . [W]e [have] stated that the test for determining whether land is Indian country does not turn upon whether that land is denominated "trust land" or "reservation." Rather, we ask whether the area has been "validly set apart for the use of the Indians as such, under the superintendence of the Government."[138]

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[133] *See* United States v. Myers, 206 F. 387, 391–92 (8th Cir. 1913) (ceded land set aside for general educational purposes of the Oklahoma territory is not Indian country even if actually used as an Indian boarding school); United States v. M.C., 311 F. Supp. 2d 1281, 1295 (D.N.M. 2004) (land transferred to the Department of the Interior specifically for the use of the Bureau of Indian Affairs, rather than an Indian tribe, is not Indian country even though the BIA used some of those lands for use as an Indian school).

[134] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 108, at § 3.04[c][ii].

[135] *John,* 437 U.S. at 649.

[136] *Pelican*, 232 U.S. at 449 (the term "Indian country" used when describing both lands set aside for use by Indians—reservation lands—and lands allotted to individual Indians—allotted lands).

[137] United States v. West, 232 F.2d 694, 697 (1956) (quoting United States v. Creek Nation, 295 U.S. 103, 109 (1935)).

[138] 498 U.S. 505, 511 (1991) (cleaned up).

In *United States v. Sohappy*, when holding that the Celilo Treaty fishing site was an Indian reservation, the Ninth Circuit noted that one tract was purchased "*in trust . . . for the use of* the [*amici* tribes]," while another tract was transferred to the Secretary of Interior "*for the use and benefit of* [the *amici* tribes]."[139]

The common law definition of an "Indian reservation" was arguably expanded by 18 U.S.C. § 1151(a) to include "all land . . . notwithstanding the issuance of any patent." These additional terms effectively include all federal land located within Indian reservations that are reserved, not for the benefit of Indians, but for an independent federal governmental purpose. In addition, and contrary to the pre-1948 developed common law, the definition includes all unrestricted fee simple lands lying within an Indian reservation.[140]

Another issue that can arise regarding Indian reservations is a reservation that has been disestablished or diminished. The seminal case on this issue is *Solem v. Bartlett*.[141] When assessing whether Congress diminished or disestablished a given reservation, *Solem* sets out three primary factors to be considered in diminishing order of importance: statutory text, historical context surrounding passage, and evidence of intent based on later occurring events.[142]

The text of a statute is the most probative evidence of Congress' intent.[143] If the text doesn't resolve the question, you look to the circumstances surrounding its passage, which must "unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink."[144] Under *Solem*, the final factor, involving demographic history of the area and how the federal government and states treated the area after passage of an act, provided "some evidentiary value" in assessing Congress' intent.[145] The Supreme Court, however, has never found a reservation diminished or disestablished based only on this final factor and, after

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[139] 770 F.2d 816, 822–23 (9th Cir. 1985); *see* United States v. Roberts, 185 F.3d 1125, 1131 (10th Cir. 1999).
[140] *See* Clairmont v. United States, 225 U.S. 551, 558 (1912); Dick v. United States, 208 U.S. 340 (1908); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 108, at § 3.04[c][ii].
[141] 465 U.S. 463 (1984).
[142] *Id.* at 470–72.
[143] Hagen v. Utah, 510 U.S. 399, 411 (1994).
[144] *Solem*, 465 U.S. at 471; Nebraska v. Parker, 136 S. Ct. 1072, 1080 (2016).
[145] *Solem*, 465 U.S. at 471; *Parker,* 136 S. Ct. at 1081.

McGirt v. Oklahoma,[146] it is likely no longer considered an independent factor in determining congressional intent and should be relegated to the dustbin of history.

McGirt v. Oklahoma dealt with whether the Creek Nation reservation, as established by treaty, remained a reservation despite the state and federal government historically treating it as diminished or disestablished. The consequences of finding the Creek Nation treaty reservation remains intact has a significant impact on how crimes in Oklahoma are treated. Most of the eastern part of Oklahoma is within the boundary of a treaty reservation, including the city of Tulsa, and for over 100 years, the state and federal government have acted as if no reservation existed. Despite this, Justice Gorsuch wrote the following on behalf the majority in regard to the third *Solem* factor:

> In the end, only one message rings true. Even the carefully selected history Oklahoma and the dissent recite is not nearly as tidy as they suggest. It supplies us with little help in discerning the law's meaning and much potential for mischief. If anything, the persistent if unspoken message here seems to be that we should be taken by the "practical advantages" of ignoring the written law. How much easier it would be, after all, to let the State proceed as it has always assumed it might. But just imagine what it would mean to indulge that path. A State exercises jurisdiction over Native Americans with such persistence that the practice seems normal. Indian landowners lose their titles by fraud or otherwise in sufficient volume that no one remembers whose land it once was. All this continues for long enough that a reservation that was once beyond doubt becomes questionable, and then even farfetched. Sprinkle in a few predictions here, some contestable commentary there, and the job is done, a reservation is disestablished. None of these moves would be permitted in any other area of statutory interpretation, and there

[146] 140 S. Ct. 2452 (2020).

> is no reason why they should be permitted here. That would be the rule of the strong, not the rule of law.[147]

XIV. Dependent Indian communities

The term "dependent Indian community" derives from two U.S. Supreme Court decisions: *United States v. Sandoval*[148] and *United States v. McGowan*.[149] The notion of a dependent Indian community can be confusing because when both the notion of an Indian reservation and a dependent Indian community were evolving through development of the common law, some of their elements began to overlap to the point that many dependent Indian communities may now also be considered Indian reservation lands.[150]

Sandoval involved an application of federal law that prohibits the introduction of alcohol into Indian country with regard to certain lands of the Santa Clara Pueblo. The Santa Clara Pueblo land at issue was communally owned in fee simple absolute by the tribe.[151] The land was obtained through grants from Spain, which were later confirmed by the U.S. government.[152] In determining that the land in question was Indian country, the *Sandoval* court stated:

> It also is said that such legislation cannot be made to include the lands of the Pueblos, because the Indians have a fee simple title. It is true that the Indians of each pueblo do have such a title to all the lands connected therewith, excepting such as are occupied under Executive orders, but it is a communal title, no individual owning any separate tract. In other words, the lands are public lands of the pueblo, and so the situation is essentially the same as it was with the Five Civilized Tribes, whose lands, although owned in fee under patents from the United States, were adjudged subject to the legislation of Congress enacted in the exercise of the government's guardianship over those

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[147] *Id.* at 2474.
[148] 231 U.S. 28 (1913).
[149] 302 U.S. 535 (1938).
[150] *See* United States v. Azure, 801 F.2d 336, 339 (8th Cir. 1986); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 108, at § 3.04[c][i].
[151] *Sandoval*, 231 U.S. at 39.
[152] *Id.*

> tribes and their affairs. Considering the reasons which underlie the authority of Congress to prohibit the introduction of liquor into the Indian country at all, it seems plain that this authority is sufficiently comprehensive to enable Congress to apply the prohibition to the lands of the Pueblos.[153]

Notably, the title to the land in question was held in fee simple absolute rather than in trust or otherwise actively set aside for the use of the tribe by the federal government. This factor may be what distinguishes the land as a dependent Indian community rather than an Indian reservation.

United States v. McGowan involved the land status of the Reno Indian colony, which was land set aside for various "needy" Indians scattered throughout Nevada over which the federal government exercised superintendence.[154] The *McGowan* court found that the Reno Indian colony constituted Indian country. The court cited *Sandoval* for its discussion of dependent Indian communities and went on to state:

> This protection is extended by the United States "over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state."
>
> The fundamental consideration of both Congress and the Department of the Interior in establishing this colony has been the protection of a dependent people. Indians in this colony have been afforded the same protection by the government as that given Indians in other settlements known as "reservations." Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out, and it is immaterial whether Congress designates a settlement as a "reservation" or "colony." In the case of *United States v. Pelican*, 232 U.S. 442, 449 [citation omitted], this Court said:

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[153] *Sandoval*, 231 U.S. at 48 (citations omitted).
[154] *McGowan*, 302 U.S. at 537.

> "In the present case, the original reservation was Indian country simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the government."
>
> The Reno Colony has been validly set apart for the use of the Indians. It is under the superintendence of the government. The government retains title to the lands which it permits the Indians to occupy. The government has authority to enact regulations and protective laws respecting this territory.[155]

Notably, the land in question was not set aside for a specific Indian nation or group of Indian nations. Rather, it was set aside for a conglomerate of individual Indians spread throughout Nevada who were otherwise without a homeland.[156] This rationale may have been a factor that distinguished the land from an Indian reservation.

More recently, the U.S. Supreme Court has held that, in order to be a dependent Indian community, at least two requirements must be met: There must be a federal set-aside of the land in question for the use of Indians as Indian land, and there must be federal superintendence over those lands.[157] According to *Venetie*, the federal set-aside requirement ensures that there is an Indian community, and the superintendence requirement ensures the community is sufficiently dependent on the federal government.[158] The land in question in *Venetie* was explicitly removed from reservation status when Congress enacted the Alaska Native Claims Settlement Act (ANCSA).[159]

If these criteria are considered necessary and sufficient conditions for a dependent Indian community, it also appears that these elements are often sufficient to qualify land as Indian reservation land—at least insofar as the land set aside for Indian use is accomplished by the terms of a treaty, an executive order, or a federal statute, which the *Venetie* court also appears to require for

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[155] *Id.* at 538–39 (footnotes omitted).
[156] *Id.* at 537.
[157] Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 530 (1998).
[158] *Id.* at 531.
[159] *Id.* at 521; 43 U.S.C. § 1601(b) ("[T]he settlement should be accomplished . . . without creating a reservation system or lengthy wardship or trusteeship . . . .").

establishing a dependent Indian community.[160] If *Venetie* is not further refined or explained, it may be that Indian reservations and dependent Indian communities are largely a distinction without a difference.[161] Nonetheless, the *Venetie* court stated that the term dependent Indian community "refers to a limited category of Indian lands that are neither reservations nor allotments."[162] In *Venetie*, the court makes a meaningful distinction due to the express language in the ANSCA that removed the land's former reservation status.[163] The land at issue in *Venetie*, however, was not deemed a dependent Indian community either, both for lack of a federal set-aside and for lack of federal superintendence.[164]

XV. Indian allotments

The federal statutory definition of "Indian country" includes "Indian allotments."[165] As with the term "Indian reservation," "Indian allotment" is a well-defined term of art in federal Indian law. At common law, an Indian allotment was deemed part of "Indian country."[166] Federal common law defines an Indian allotment as land owned by individual members of a tribe that is held in trust by the federal government or otherwise has a restriction on alienation.[167] The federal statute includes Indian allotments within the definition of Indian country, separate and apart from Indian reservations. The two terms are not identical. Just because a piece of land is an Indian allotment does not mean it is an Indian reservation. Likewise, land within an Indian reservation may not be an Indian allotment.

There are two types of Indian allotments: restricted fee allotments and trust allotments. With restricted fee allotments, the individual

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[160] *Native Village of Venetie Tribal Gov't*, 522 U.S. at 531 n.6.
[161] *See* United States v. Roberts, 185 F.3d 1125, 1133 (10th Cir. 1999) ("[T]he relationship between informal reservations and dependent Indian communities is not entirely clear under current case law.").
[162] *Native Village of Venetie Tribal Gov't*, 522 U.S. at 527.
[163] *Id.* at 524.
[164] *Id.* at 532.
[165] 18 U.S.C. § 1151(c).
[166] Clairmont v. United States, 225 U.S. 551, 558 (1912); United States v. Sutton, 215 U.S. 291, 294–95 (1909).
[167] *See* United States v. Ramsey, 271 U.S. 467, 470 (1926); United States v. Pelican, 232 U.S. 442, 447 (1914); *see also* United States v. Jackson, 280 U.S. 183, 192 (1930).

Indian holds the land in fee, but the government has restrained the ability to alienate the land without its consent; with trust allotments, the government holds the fee title, but the land is set aside specifically for the benefit of the Indian allotee.[168] While this distinction may once have been viewed as important, it does not appear to have an effect on modern federal Indian criminal jurisprudence.

The impact of 18 U.S.C. § 1151(c)—defining Indian allotments as falling within the scope of Indian country—is precisely in circumstances where an Indian allotment is *not* part of Indian reservation lands. There are many circumstances in which this can occur. Public domain allotments and Alaska Native allotments are among the many examples.[169] With one exception, there are no reservations in Alaska;[170] however, there certainly can be Indian allotments.[171] Disestablished reservation lands are another circumstance in which this issue arises. A reservation may be disestablished at a certain point in time, but this disestablishment does not eliminate the trust status of individual allotments previously within the Indian reservation.[172] Before 1976, the federal statutes included an Indian homesteading law that could create such allotments outside of an Indian reservation.[173] Fee lands purchased for individual Indians and converted to trust are also of this type.[174]

XVI. An Indian for purposes of jurisdiction

Typically, it is easy to determine who is an Indian for purposes of jurisdiction because the typical situation involves a member of a federally recognized Indian tribe who has some degree of Indian blood quantum. The determination can be difficult, however, when the person in question is not a member of a federally recognized tribe.

Instead of being a simple issue of political designation, determining who is an Indian for purposes of jurisdiction is ultimately an issue of both racial classification and political recognition. In *United States v.*

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[168] *See Ramsey*, 271 U.S. at 470–71; *see also Jackson*, 280 U.S. at 192.
[169] *See* 25 U.S.C. §§ 334, 336.
[170] Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 520 (1998).
[171] Alaska Native Allotment Act of 1906, 34 Stat. 197 (repealed in 1971).
[172] *See* Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 615 n.48 (1977); DeCoteau v. Dist. Cty. Ct. for the Tenth Jud. Cir., 420 U.S. 425, 427 n.2, 446 (1975).
[173] *See* Act of July 4, 1884, ch. 180, 23 Stat. 76.
[174] *See* Tacoma v. Andrus, 457 F. Supp. 342, 346 (D.D.C. 1978).

Rogers, the U.S. Supreme Court upheld the federal murder conviction of a person who had no Cherokee blood quantum, but whom the Cherokee tribe adopted and recognized as a member of its tribe.[175] The defendant maintained that there was no federal jurisdiction because both he and the victim were members of the Cherokee nation, despite having no blood quantum.[176] The Court explained that the exception for Indians dealt with "those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally,[ ] of the family of Indians . . . ."[177]

Consequently, race is a critical factor in determining who is an Indian in the criminal context. Modern courts have distilled a two-pronged test for "Indian" status where no specific statutory definition applies: "(1) the degree of Indian blood; and (2) tribal or governmental recognition as an Indian."[178] This question is highly fact driven and can be treated differently in different jurisdictions.[179] Actual tribal membership is not dispositive.[180] Nonetheless, the U.S. Supreme Court, in *United States v. Antelope*, held that the MCA is not based on impermissible racial classifications.[181]

Canadian First Nations are not federally recognized tribes, and as such, their members are not Indians under 18 U.S.C. § 1152 or 18 U.S.C. §1153 unless they otherwise meet the *Broncheau* test.[182]

XVII. No double jeopardy

In cases where the conduct of an Indian in Indian country triggers not only a violation of tribal law, but also a violation of federal law,

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[175] 45 U.S. 567 (1846).
[176] *Id.* at 567–68.
[177] *Id.* at 573.
[178] United States v. Broncheau, 597 F.2d 1260, 1263 (9th Cir. 1979) (citations omitted).
[179] *Compare* United States v. Pemberton, 405 F.3d 656, 660 (8th Cir. 2005) (focusing on self-identification as an Indian rather than on government identification), *with* St. Cloud v. United States, 702 F. Supp. 1456, 1461–62 (D.S.D. 1988) (focusing on government recognition, benefits received, and social recognition).
[180] *See* United States v. Bruce, 394 F.3d 1215, 1224–25 (9th Cir. 2005); *Ex parte* Pero, 99 F.2d 28, 31 (7th Cir. 1938).
[181] 430 U.S. 641, 645 (1977).
[182] *See, e.g.*, LaPier v. McCormick, 986 F.2d 303, 304–05 (9th Cir. 1993).

prosecution can occur in both the tribe's court for violation of the tribe's law and the federal court for violation of the federal law. The federal government and tribal governments are separate sovereigns. For this reason, dual prosecution does not constitute double jeopardy.[183]

Regardless, subsequent federal prosecution of a case that has been prosecuted by a tribal nation should not be undertaken unless there is a compelling federal interest.[184] Appropriate factors to consider in making this determination include the limitation on tribal sentencing power given the seriousness of the offense.[185] Consideration should also be given to the tribal nation's desire, or lack thereof, to pursue federal charges.

About the Author

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[183] *E.g.*, United States v. Wheeler, 435 U.S. 313 (1978).
[184] *Cf.* JUSTICE MANUAL 9-2.031 (Petite Policy).
[185] *Id.*

Violent Crime in Indian Country and the Federal Response

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Domestic violence, sexual assault, and child abuse in tribal communities are significant issues, and they have deservedly received greater attention by the public, the criminal justice and social service systems, and the medical community during the past two decades. Some of these crimes are at the root of missing indigenous person cases. A person who suffers abuse for years at the hands of a loved one may choose to disappear to escape the violence.

This article covers some of the most frequently used federal charges to address domestic violence, sexual assault, and related crimes occurring in Indian country. Additionally, it covers the responsibilities of U.S. Attorneys' Offices (USAOs) and the Department of Justice (Department) to federally recognized Indian tribes. The article also addresses amendments to federal law that provide some tribes with the ability to charge non-Indians in tribal court for violations of certain domestic violence crimes.

I. Victimization rates in American Indian and Alaska Native populations

American Indians/Alaska Natives (AIANs) experience much higher rates of victimization than the rest of the population. Recent studies suggest that American Indian women are 2.5 times more likely than the national average to experience certain violent crimes, such as nonfatal strangulation.[1] Therefore, it is important for criminal justice and social service personnel responding to crimes in tribal communities to be knowledgeable of the types and frequency of abuse perpetrated on the first Americans. In addition, everyone must be mindful of the painful experiences Native Americans suffered at the hands of the federal government and state governments: forced

[1] *See* United States v. Lamott, 831 F.3d 1153, 1154 (9th Cir. 2016).

removal from their ancestral homelands, boarding school, slavery, and sexual abuse.[2]

Throughout the past decade, the National Institute of Justice (NIJ) dedicated many resources to researching and evaluating the rate and types of violence perpetrated against AI/ANs. Results from a NIJ funded study, researched and written by Andre Rosay, PhD., Director of the Justice Center at the University of Alaska-Anchorage, were released in 2016. The study shows that AI/AN women and men suffer violence at alarmingly high rates and are often unable to receive services that could help them.[3]

Given the exposure to such high rates of trauma, it is not surprising that research documents higher rates of related behavioral health concerns across Indian country, including alcohol and substance abuse, mental health disorders, suicide, violence, and behavior-related chronic diseases.[4]

A. Indian country law enforcement initiative

On January 11, 2010, then-Deputy Attorney General (DAG) David Ogden issued a memorandum to all U.S. Attorneys with districts that included Indian country declaring that "public safety in tribal communities is a top priority for the Department of Justice."[5]

The DAG noted a number of challenges confronting tribal criminal justice systems: scarce law enforcement resources, geographic isolation, the vast size of reservations, and insufficient federal and state resources dedicated to Indian country.[6] Yet, "[d]espite these challenges, tribal governments have the ability to create and institute

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[2] Benjamin Thomas Greer, *Hiding Behind Tribal Sovereignty: Rooting Out Human Trafficking in Indian Country*, 16 J. GENDER RACE & JUST. 453, 455–59 (2013) (covering human trafficking in Indian Country and jurisdictional obstacles to law enforcement).

[3] André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, 277 NAT'L INST. JUST. J. 38 (2016).

[4] AMANDA LECHNER ET AL., ADDRESSING TRAUMA IN AMERICAN INDIAN AND ALASKA NATIVE YOUTH 1 (2016).

[5] Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Just. to United States Attorneys with Districts Containing Indian Country 1 (Jan. 11, 2010).

[6] *Id.* at 2.

successful programs when provided with the resources to develop solutions that work best for their communities."[7]

In an effort to advance the work of the United States in Indian country, the DAG memorandum directed that (1) every USAO with Indian country in its district, in coordination with its law enforcement partners, engage at least annually in consultations with the tribes in that district; and (2) "[e]very newly confirmed U.S. Attorney in such districts . . . should conduct a consultation with tribes in his or her district and develop or update the district's operational plan within eight months of assuming office."[8]

The DAG memorandum has several important paragraphs dedicated to violence against women and children in tribal communities.[9] The DAG directed "every U.S. Attorney to pay particular attention to violence against women, and to work closely with law enforcement to make these crimes a priority."[10]

The subject matter of each district's plan will vary depending on whether the district is a PL 280 jurisdiction (criminal jurisdiction delegated by statute to the state) or non-PL 280 jurisdiction (the federal government has jurisdiction in Indian country depending on the Indian/non-Indian status of the suspect and victim and the type of crime committed), the number of tribes in the district, and the unique history and resource challenges of the tribes.[11] Districts were instructed, however, that operational plans should include topics such as "a plan to develop and foster an ongoing government-to-government relationship; a plan to improve communications . . . [, and] a plan to initia[lize]" a tribal Special Assistant U.S. Attorney program.[12]

Federal law requires all USAOs with Indian country responsibility to have at least one designated tribal liaison who serves as the primary point of contact for tribes in the district.[13] Tribal liaisons often coordinate and train law enforcement agents investigating violent crime and sexual abuse cases in Indian country, as well as

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[7] *Id.*
[8] *Id.* at 3.
[9] *See id.* at 4–5.
[10] *Id.* at 5.
[11] *PL 280* refers to Act of Aug. 15, 1953, ch. 505, Pub. L. No. 83-280, 67 Stat. 588.
[12] *Id.* at 3.
[13] 25 U.S.C. § 2810.

Bureau of Indian Affairs criminal investigators and tribal police presenting cases in federal court.[14]

B. Principles for working with federally recognized Indian tribes

In December 2014, the Attorney General issued guidelines stating principles for working with federally recognized Indian tribes. These guidelines apply to all Department personnel working in Indian country. The overarching principles, as directed by the Attorney General, are as follows:

- The Department of Justice honors and strives to act in accordance with the general trust relationship between the United States and tribes.
- The Department of Justice is committed to furthering the government-to-government relationship with each tribe, which forms the heart of [its] federal Indian policy.
- The Department of Justice respects and supports tribes' authority to exercise their inherent sovereign powers, including powers over both their citizens and their territory.
- The Department of Justice promotes and pursues the objectives of the United Nations Declaration on the Rights of Indigenous Peoples.
- The Department of Justice is committed to tribal self-determination, tribal autonomy, tribal nation-building, and the long-term goal of maximizing tribal control over governmental institutions in tribal communities, because tribal problems generally are best addressed by tribal solutions, including solutions informed by tribal traditions and custom.[15]

The Attorney General's guidelines for working with federally recognized tribes also addresses Department efforts concerning law enforcement and the administration of justice in tribal communities,

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[14] *Id.*

[15] Attorney General Guidelines Stating Principles for Working with Federally Recognized Indian Tribes, 79 Fed. Reg. 73905 (Dec. 12, 2014).

priorities for U.S. Attorneys' Offices and the Federal Bureau of Investigation (FBI):

> - The Department of Justice is committed to helping protect all Native Americans from violence, takes seriously its role in enforcing federal criminal laws that apply in Indian country, and recognizes that, absent the Department's action, some serious crimes might go unaddressed.
> - The Department of Justice prioritizes helping protect Native American women and children from violence and exposure to violence, and works with tribes to hold perpetrators accountable, to protect victims, and to reduce the incidence of domestic violence, sexual assault, and child abuse and neglect in tribal communities.[16]

II. Federal crimes frequently used in domestic violence crimes

Chapter 7 of Title 18 is the portion of the U.S. Code concerned with assaults occurring within the maritime and territorial jurisdiction of the United States. While these criminal offenses are not specifically labeled as "domestic violence" crimes, they are frequently used in federal court to charge acts of domestic assault or violence occurring in Indian country, as defined by 18 U.S.C. § 1151. As of March 2013, all felony offenses in 18 U.S.C. § 113 are included in the Major Crimes Act, 18 U.S.C. § 1153. This means that an Indian person who commits a felony assault listed in section 113 against another Indian in Indian country (in a non-PL 280 jurisdiction) can be charged in federal court. The federal court has jurisdiction concurrent to the tribe's own jurisdiction to bring charges against the defendant.

As a practice pointer, it is strongly encouraged that Assistant U.S. Attorneys (AUSAs) drafting indictments for violations of 18 U.S.C. § 113 incorporate into the charging language the Indian or non-Indian status of the defendant and victim and the relationship between the defendant and victim.

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[16] *Id.*

A. Assault by striking, beating, or wounding: 18 U.S.C. § 113(a)(4)

In the federal criminal code, there is no misdemeanor crime of domestic assault or domestic violence. Instead, AUSAs charge the offense of assault by striking, beating, or wounding.[17] This crime is punishable by up to one year imprisonment and/or a fine.[18] Many circuits hold that this offense is the equivalent of simple battery and that physical contact is a necessary element.[19] In *United States v. Guilbert*, the Eleventh Circuit decided that assault by striking, beating, or wounding was equivalent to simple battery, which "requires neither a particular degree of severity in the injury nor that type of specific intent which characterizes the more serious offenses under Section 113."[20]

It is important to note that, because this crime is not a felony, it is not included in the Major Crimes Act.[21] Therefore, this charge is only applicable when the offender is non-Indian and the victim is Indian or where the offender is Indian and the victim is non-Indian and the offender has not been punished for the offense in tribal court.[22] The charge, however, may be used as a lesser included offense with an Indian defendant. In *Keeble v. United States*, the Supreme Court held that an Indian defendant charged with an offense under 18 U.S.C. § 1153 was entitled to request and receive an instruction on a lesser included offense not enumerated in the Major Crimes Act, even though he could not have been charged with such an offense in the first instance.[23] The Court said that this result was compelled by 18 U.S.C. § 3242, which provides that Indians charged with violations of 18 U.S.C. § 1153 "shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States."[24]

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[17] 18 U.S.C. § 113(a)(4).
[18] *Id.*
[19] *See, e.g.*, United States v. Herron, 539 F.3d 881, 886 (8th Cir. 2008); United States v. Pierre, 254 F.3d 872, 875 (9th Cir. 2001); United States v. Guilbert, 692 F.2d 1340, 1345 (11th Cir. 1982).
[20] 692 F.2d at 1344.
[21] 18 U.S.C. § 1153.
[22] *See* 18 U.S.C. § 1152.
[23] 412 U.S. 205 (1973).
[24] 18 U.S.C. § 3242.

If the jury returns a guilty verdict for the lesser offense, the court has jurisdiction to impose a sentence for the lesser offense even though it would not have had jurisdiction over the offense initially. The rationale is that this result must have been intended by the Supreme Court when it handed down the ruling in *Keeble*.[25]

B. Assault resulting in substantial bodily injury: 18 U.S.C. § 113(a)(7)

It is a federal crime for a person to commit an assault that results in a substantial bodily injury to a spouse, intimate partner, or dating partner, or an individual who has not attained the age of 16 years' old.[26] Historically, this offense pertained only to cases with a victim less than 16. The law, however, was amended in 2013, expanding the class of victims covered to include spouses, intimate partners, and dating partners, in addition to individuals who have not attained the age of 16.[27] The definitions of "dating partner" and "spouse or intimate partner" are found in 18 U.S.C. § 2266.[28] For purposes of section 113(a)(7), "'substantial bodily injury' means bodily injury which involves a temporary but substantial disfigurement or a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty."[29]

The Ninth Circuit Court of Appeals has addressed the issue of whether there was sufficient evidence to find that substantial bodily injury occurred.[30] In *United States v. Abrahamson*, the defendant inflicted substantial bruising and swelling upon a three-year-old child when he slapped the child in the face.[31] The child's physician testified that the child suffered from temporary hearing loss because of this slap and that substantial injury occurred.[32] Additionally, the court

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[25] *See* United States v. Bowman, 679 F.2d 798, 799 (9th Cir. 1982); United States v. John, 587 F.2d 683, 685 (5th Cir. 1979); United States v. Felicia, 495 F.2d 353, 355 (8th Cir. 1974).
[26] 18 U.S.C. § 113(a)(7).
[27] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54, 124 (2013).
[28] *Id.* at 121.
[29] 18 U.S.C. § 113(b)(1)(A)–(B) (cleaned up).
[30] United States v. Abrahamson, 285 F. App'x 480 (9th Cir. 2008) (not precedential).
[31] *Id.* at 481.
[32] *Id.*

held that section 133(a)(7) was not as vague as the defendant claimed, and any person of reasonable intelligence would know that striking a three-year old was not lawful conduct.[33] The court, regarding vagueness, held that "[t]he statute at issue here, 18 U.S.C. § 113, is not void for vagueness simply because Abrahamson might not have realized that his criminal conduct was severe enough to rise to the level of felony assault."[34]

The Ninth Circuit Court of Appeals again addressed the issue of the sufficiency of the evidence as to whether a substantial bodily injury occurred in *United States v. Rowe*.[35] In *Rowe*, the court held "that the victim's injuries—which included two small vaginal hemorrhages that caused bloody discharge for at least two days, anal lacerations and pain while urinating and defecating—were substantial as defined" in section 113(b)(1)(A)–(B).[36] In addition to those injuries, various courts have found that other injuries rise to the level of a substantial bodily injury.[37]

C. Assault resulting in serious bodily injury: 18 U.S.C. § 113(a)(6)

It is a federal crime for a person to commit an assault that results in serious bodily injury (ARSBI).[38] To establish ARSBI, the government must prove (1) an intentional assault through striking or wounding that (2) results in the infliction of serious bodily injury.[39] For purposes of section 113(a)(6), "serious bodily injury" is defined under

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[33] *Id*.
[34] *Id*.
[35] 213 F. App'x 588 (9th Cir. 2006) (not precedential).
[36] *Id*. at 591.
[37] *See* United States v. Brown, 287 F.3d 684 (8th Cir. 2002) (finding that a skull fracture to a child, burning a child's face, and biting a child all rose to the level of a substantial bodily injury); United States v. Looking, 156 F.3d 803 (8th Cir. 1998) (finding that a victim was sexually assaulted resulting in substantial bodily injury such as vaginal and anal bruising, skull fractures, retinal hemorrhaging (resulting in complete blindness to victim right eye), and suffering a stroke (resulting in partial paralysis and delay in fine motor skills)); United States v. Preston, No. 06-cr-00219, 2006 WL 2724054 (D. Colo. Sept. 22, 2006) (finding severe burning to the hands of a child constituted a substantial bodily injury).
[38] 18 U.S.C. § 113(a)(6).
[39] United States v. Iron Hawk, 612 F.3d 1031, 1036 (8th Cir. 2010).

18 U.S.C. § 1365(h)(3).[40] Section 1365(h)(3) defines "serious bodily injury" as a bodily injury that may involve any of the following: "a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty."[41] It is important to note that the statutory definition in section 1365 differs from the Guidelines definition in U.S.S.G. § 1B1.1 (excluding substantial risk of death).[42]

The Eighth Circuit has held that the jury should decide whether the government proved beyond a reasonable doubt that serious bodily injury resulted from the assault.[43] In *United States v. Demery*, the defendant threw a knife at the victim that nearly severed the victim's finger.[44] On appeal, the defendant claimed there was insufficient evidence to prove the victim suffered serious bodily injury.[45] The court of appeals held the district court properly instructed the jury about what constitutes a serious bodily injury.[46] Both the evidence of the nearly severed finger and the permanent impairment in that finger were sufficient for a reasonable jury to determine a serious bodily injury occurred.[47] Whether a bodily injury was "serious" is also a question of fact for the jury.[48] In *United States v. Morrison*, the defendant struck the victim twice on the head with a baseball bat.[49] At trial, the victim showed the jury the scar on his forehead and testified about ongoing problems that resulted from the assault.[50] The court stated it was a question of fact for the jury to determine whether the injury was serious and affirmed the district court's decision that there was sufficient evidence for a reasonable jury to conclude that the injury was serious.[51]

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[40] 18 U.S.C. § 113(b)(2); *see also* United States v. Steele, 550 F.3d 693, 703 (8th Cir. 2008).
[41] 18 U.S.C. § 1365(h)(3)(A)–(D) (cleaned up).
[42] *See, e.g.*, United States v. Roy, 408 F.3d 484, 494 (8th Cir. 2005).
[43] United States v. Demery, 980 F.2d 1187, 1189–90 (8th Cir. 1992).
[44] *Id.* at 1188.
[45] *Id.* at 1189.
[46] *Id.* at 1190.
[47] *Id.*
[48] United States v. Morrison, 332 F.3d 530, 533 (8th Cir. 2003).
[49] *Id.* at 532.
[50] *Id.* at 533.
[51] *Id.*

Serious bodily injury is "something more than slight bodily injury, but not necessarily life threatening injury."[52] In *United States v. Two Eagle*, the defendant shot three people, and the jury found that the injuries met the standard of serious bodily injury.[53] Two of the victims' injuries included broken legs, requiring surgery and casts, and causing ongoing difficulty running; the other victim was shot in the ear and suffered significant blood loss and some hearing loss, leaving him with a permanent scar.[54] The court stated that a serious bodily injury deals with an action that has a grave and serious nature.[55] The injury, however, "does not require a high probability of death."[56]

Here are some specific injuries juries found were serious bodily injuries: gunshot wounds;[57] a stab wound substantially penetrating the body;[58] a nearly severed little finger;[59] two strikes to the head with a bat that "hurt" and "dazed" the victim and resulted in numbness, a scar on the head, and recurring vision and pain issues;[60] teeth bites to the skin;[61] a potential for serious infection;[62] and a scalp laceration, inter-cranial bleeding, a fractured nose, and a fractured orbital socket.[63] In *Rainbow*, the Eighth Circuit held that expert testimony is not necessary to label an injury as a serious bodily injury.[64] Recently, the Sixth Circuit held that serious bodily injury does not mean the government must prove the victim experienced interminable pain or a lengthy stay at a hospital.[65]

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[52] United States v. Two Eagle, 318 F.3d 785, 791 (8th Cir. 2003).
[53] *Id*. at 791–92.
[54] *Id*. at 792.
[55] *Id*. at 791.
[56] *Id*. (citing United States v. Moore, 846 F.3d 1163, 1166 (8th Cir. 1988)).
[57] United States v. Jourdain, 433 F.3d 652, 657 (8th Cir. 2006).
[58] United States v. Desormeaux, 952 F.2d 182, 187 (8th Cir. 1991).
[59] *Demery*, 980 F.2d at 1189–90 (the injury was described as a permanent impairment of movement and sensation).
[60] *Morrison*, 332 F.3d at 533.
[61] *Moore*, 846 F.2d at 1165–66.
[62] *Id*. at 1165.
[63] United States v. Rainbow, 178 F. App'x 622, 625 (8th Cir. 2006) (not precedential).
[64] *Id*.
[65] United States v. Frazier, 769 F. App'x 268 (6th Cir. 2019) (not precedential) (holding that the victim was in "extreme physical pain" because of his weeklong loss of vision of his right eye amounted to a protracted "impairment of the function of a bodily member or organ").

D. Assault with a dangerous weapon: 18 U.S.C. § 113(a)(3)

It is a federal crime for a person to commit an assault with a dangerous weapon with the intent to do bodily harm. To establish assault with a dangerous weapon, the government must prove (1) the victim was intentionally assaulted through striking, wounding, or a display of force that reasonably put the victim in fear of immediate bodily harm; (2) the use of a dangerous weapon; and (3) an intent to inflict bodily injury.[66] It should be noted that the Violence Against Women Reauthorization Act of 2013 (VAWA 2013) amended this offense by deleting the phrase "without just cause or excuse."[67]

In *United States v. LeCompte*, the Eighth Circuit Court of Appeals held that the term "dangerous weapon" has a broad definition that includes hands and fists.[68] In *LeCompte*, the defendant held a rock above the victim's head as he kicked and threatened her.[69] Later, while the victim was in the shower, the defendant threw the phone at her, but the phone did not make contact with the victim.[70] Even though the rock and phone did not physically touch the victim, his kicks and fists did, and the court held that 18 U.S.C. § 113(a)(3) requires only that the government present sufficient evidence that the defendant used an object capable of inflicting bodily injury.[71] Thus, the court held that the government's evidence regarding the rock and the phone was sufficient to sustain the conviction.[72] What constitutes a dangerous weapon is a question for the jury.[73] In *Moore*, an assault took place between an inmate and federal correction officers, and the inmate bit the officers.[74] The court stated that it is up to the jury to determine what constitutes a "deadly and dangerous weapon" because

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[66] 18 U.S.C. § 113(a)(3); United States v. LeCompte, 108 F.3d 948, 952 (8th Cir. 1997).
[67] 127 Stat. at 124 [hereinafter VAWA 2013].
[68] *LeCompte*, 108 F.3d at 952.
[69] *Id.* at 950.
[70] *Id.* at 952.
[71] *Id.* at 952–53.
[72] *Id.* at 953.
[73] *See Steele*, 550 F.3d at 699; United States v. Moore, 846 F.2d 1163, 1166 (8th Cir. 1988).
[74] *Moore*, 846 F.2d at 1165.

it is often a question of fact.[75] This question can be difficult to answer because the object does not need to be inherently dangerous or a "weapon" by definition.[76] Thus, it is the capacity of the object to inflict bodily harm, not the nature of the object itself, that makes it a dangerous weapon.[77]

Examples of specific objects that courts found to be dangerous weapons include knives,[78] shod feet,[79] shoes,[80] and a lit cigarette.[81] The Eighth Circuit held that pushing someone with a knife in your hand is sufficient to find assault with a dangerous weapon.[82] Although the defendant claimed the knife was not a dangerous weapon because he did not swing it at one of the victims, the court held that the fact that he was holding it while pushing the victims was enough evidence to call the knife a dangerous weapon.[83]

The Eighth Circuit held that parts of the body may be dangerous weapons under appropriate circumstances.[84] In *Moore*, the facts of which are explained above, the court held that the defendant's teeth constituted a dangerous weapon.[85] More recently, however, the Ninth Circuit held that the mere use of a body part did not constitute the use of a dangerous weapon.[86] In this case, a fight broke out in a federal correctional institution, and the defendant grabbed the victim's ankles and pulled his feet out from under him, causing his body to hit the concrete floor.[87] The jury found that the defendant used his hands—not the concrete floor—as a dangerous weapon.[88] The court stated that the statute itself does not allow for that interpretation of what constitutes a dangerous weapon.[89] The court explained that there are

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[75] *Id.* at 1166.
[76] *Id.*
[77] *Id.*
[78] United States v. Center, 750 F.2d 724, 726 (8th Cir. 1984).
[79] *Steele*, 550 F.3d at 699.
[80] United States v. Bravebull, 896 F.3d 897, 899 (8th Cir. 2018).
[81] United States v. Peneaux, 432 F.3d 882, 890 (8th Cir. 2005).
[82] United States v. Hollow, 747 F.2d 481, 482–83 (8th Cir. 1984).
[83] *Id.* at 482–83.
[84] *Moore*, 846 F.2d at 1166–67.
[85] *Id.* at 1167.
[86] United States v. Rocha, 598 F.3d 1144, 1157 (9th Cir. 2010).
[87] *Id.* at 1146–47.
[88] *Id.* at 1153.
[89] *Id.* at 1157.

three separate elements in section 113(a)(3): "(1) an assault, (2) the use of a dangerous weapon, and (3) the intent to do bodily harm."[90] The court reasoned that "[i]f the assault is made with the intent to do bodily harm, it appears that *every* assault with intent to do bodily harm would satisfy" the statute without showing the use of a dangerous weapon.[91] The court pointed out that there are other statutes, such as 18 U.S.C. §§ 113(a)(4), (5), and (6), that account for assaults without a dangerous weapon.[92] If section 113(a)(3) were to include body parts as dangerous weapons, there would be no distinction between sections 113(a)(3), (4), (5), and (6).[93]

E. Domestic assault by a habitual offender: 18 U.S.C. § 117

By enacting the 2005 version of the Violence Against Women Act, Congress created the new federal crime of domestic assault by a habitual offender, codified at 18 U.S.C. § 117. This statute is a powerful tool and an offense frequently charged by prosecutors working to hold serial batterers in Indian country accountable for their violence. It provides:

> Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction—
>
> (1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner, or against a child of or in the care of the person committing the domestic assault; or
>
> (2) an offense under chapter 110A,
>
> shall be fined under this title, imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results from violation under

[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*

> this section, the offender shall be imprisoned for a term of not more than 10 years.[94]

Accordingly, VAWA expressly provides that tribal court convictions can serve as predicate offenses for a habitual domestic violence case prosecuted in federal court. The difference between the right to counsel in tribal court as required by the Indian Civil Rights Act and the requirement for indigent representation per the Sixth Amendment of the U.S. Constitution, however, have resulted in a number of appellate challenges when federal prosecutors relied on tribal court convictions as predicates for a federal prosecution under section 117.[95]

The Indian Commerce Clause[96] and the Treaty Clause[97] give "Congress . . . broad power to regulate tribal affairs and limit or expand tribal sovereignty."[98] "Pursuant to this authority, Congress passed the Indian Civil Rights Act" (ICRA) in 1968.[99] The ICRA imposes procedural due process protections for criminal defendants charged in tribal court.[100] In many respects, the ICRA closely mirrors the Bill of Rights in the U.S. Constitution. There are, however, some differences. One significant difference is the right to counsel for indigent defendants. The ICRA provides that, in tribal court, defendants have the right to the assistance of counsel for their defense, but the cost of hiring an attorney is the defendant's responsibility.[101] The ICRA only requires the appointment of law-trained, licensed counsel for an indigent defendant when an Indian person faces more than one year's imprisonment or when a non-Indian defendant is charged with dating violence, domestic violence, or violating a personal protection order in a tribal court that is exercising special domestic violence criminal jurisdiction.[102] This contrasts with U.S. Supreme Court precedent holding that "federal

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[94] 18 U.S.C. § 117(a).
[95] United States v. Cavanaugh, 643 F.3d 592, 595 (8th Cir. 2011); United States v. Long, 870 F.3d 741 (8th Cir. 2017); United States v. Shavanaux, 647 F.3d 993 (10th Cir. 2011).
[96] U.S. CONST. art. I, § 8, cl. 3.
[97] *Id.* at art. II, § 2, cl. 2.
[98] *Cavanaugh*, 643 F.3d at 595.
[99] *Id.* (citing Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified at 25 U.S.C. §§ 1301–04)).
[100] *See* 25 U.S.C. § 1302.
[101] 25 U.S.C. § 1302(a)(6).
[102] 25 U.S.C. §§ 1302(c), 1304.

and state courts cannot constitutionally impose *any* term of incarceration at the time of a conviction unless a defendant received or validly waived the right to counsel."[103]

In the absence of appointing a law-trained, licensed attorney, many tribal courts over the years provided indigent defendants representation via "lay advocates" or "lay counsel." It is unlikely that lay counsel or lay advocates attended law school or are licensed by a state bar association, but they may be licensed by a tribal bar association, depending on that association's requirements. For example, the Navajo Nation has its own bar association and rigorous requirements for admission to the Navajo Nation Bar Association (NNBA); however, the NNBA does not require members of an Indian tribe to be graduates of an accredited law school.[104] Contrast this practice with an indigent defendant charged in a western or Anglo court, where an indigent defendant facing incarceration is provided a licensed attorney at the expense of the jurisdiction bringing the charges.[105] With that said, a number of tribal courts do provide law-trained, licensed attorneys for all criminal defendants, Indian or non-Indian.

In *United States v. Bryant*, the defendant was an enrolled member of the Northern Cheyenne Tribe in Montana.[106] Bryant was charged with two counts under section 117 after admitting to assaulting his then-girlfriend and another woman on more than one occasion in 2011.[107] Bryant moved to dismiss the indictment, arguing the Sixth Amendment right to counsel prohibited the use of his uncounseled tribal court misdemeanor convictions as predicate offenses for a section 117 prosecution.[108] The district court denied Bryant's

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[103] *Cavanaugh*, 643 F.3d at 596 (citing Gideon v. Wainwright, 372 U.S. 335 (1963) and Scott v. Illinois, 440 U.S. 367 (1979)).

[104] *Bylaws*, NAVAJO NATION BAR ASSOCIATION, https://www.navajolaw.info/bylaws (last visited May 8, 2020).

[105] *See, e.g.*, Strange v. James, 323 F. Supp. 1230 (D. Kan. 1971) (finding it unconstitutional for a state statute to require an indigent defendant to repay state for legal services).

[106] United States v. Bryant, 136 S. Ct. 1954, 1963 (2016).

[107] *Id.* at 1957.

[108] *Id.* at 1964.

motion.[109] Bryant entered a conditional guilty plea and appealed his convictions to the Ninth Circuit.[110]

The Ninth Circuit held that Bryant's tribal court convictions were not constitutionally infirm because the Sixth Amendment right to counsel does not apply in tribal court.[111] The court went on to hold that, "had the convictions been obtained in state or federal court, they would have violated the Sixth Amendment because [the defendant] had received [a] sentence[] of imprisonment" without the assistance of a court-appointed lawyer.[112] The Ninth Circuit, citing to its earlier decision in *United States v. Ant*,[113] held that "tribal court convictions may be used in subsequent [federal] prosecutions only if the tribal court guarantees a right to counsel that is, at minimum, coextensive with the Sixth Amendment right."[114] The decision by the Ninth Circuit in *Bryant* created a circuit split.

In 2015, the U.S. Supreme Court granted certiorari in *Bryant* and reversed the Ninth Circuit's decision.[115] The Supreme Court noted that Bryant had a record of over 100 tribal court convictions, including five domestic abuse convictions.[116] Importantly, a number of his domestic abuse convictions in tribal court were particularly violent, including assault with a beer bottle, strangulation, and bloodying a victim and breaking her nose.[117] During the tribal court proceedings, Bryant was indigent and did not receive court-appointed counsel.[118] Bryant acknowledged, however, that his proceedings in tribal court complied with the ICRA, and his convictions in tribal court were valid.[119] Moreover, Bryant never sought habeas relief in federal court following any of his tribal court convictions.[120]

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[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] 882 F.2d 1389 (9th Cir. 1989).
[114] *Bryant*, 136 S. Ct. at 1964.
[115] *Id.* at 1954.
[116] *Id.* at 1963.
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*

The Supreme Court relied on *Nichols v. United States*[121] and ruled that Bryant's prison sentence following his conditional guilty plea to section 117(a) was a punishment for the domestic assaults committed in 2011, not his prior convictions in tribal court.[122] Bryant argued that issues of reliability underlay the Court's previous right-to-counsel decisions.[123] The Court responded that it saw "no reason to suppose that tribal-court proceedings are less reliable when a sentence of a year's imprisonment is imposed" versus when a mere fine is the punishment.[124] Bryant also raised a Fifth Amendment Due Process Clause argument as a reason why tribal court convictions should not be used as predicates in federal court.[125] The Supreme Court dismissed this argument as well, finding that tribes are bound by the ICRA, which requires that tribes afford a defendant due process of law.[126] The Supreme Court, in a unanimous decision, held that, "[b]ecause Bryant's tribal-court convictions occurred in proceedings that complied with ICRA and were therefore valid when entered, use of those convictions as predicate offenses in a § 117(a) prosecution does not violate the Constitution."[127]

This federal crime is applicable to offenses in non-PL 280 and PL 280 jurisdictions. And, unlike the need to prove Indian status in many Indian country prosecutions, this statute does not require that either the perpetrator or the victim be Indian.[128] Accordingly, Indian or non-Indian status is irrelevant. "Jurisdiction under § 117 is derived from the location where the alleged offense occurred, specifically Indian country."[129]

Recently, several defendants in section 117 prosecutions argued their prior convictions under state or tribal law did not qualify as convictions for offenses that would be assaults under the categorical approach. Under the categorical approach, federal courts consider only

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[121] 511 U.S. 738 (1994).
[122] *See Bryant*, 136 S. Ct. at 1965.
[123] *Id.*
[124] *Id.*
[125] *Id.* at 1966.
[126] *Id.*
[127] *Id.*
[128] United States v. Unzueta, No. 20-20121, 2020 WL 2733890, at *2 (E.D. Mich. May 26, 2020).
[129] *Id.*

the elements of the offense—not the facts underlying the conviction—and compare those elements to the relevant federal definition.[130]

District courts looking at the issue have reached different conclusions. A Nebraska district court applied the circumstance-specific approach.[131] But two district court judges in the Western District of Washington rejected a wholly circumstance-specific approach. Instead, those judges adopted a "hybrid" approach, relying on Supreme Court precedent interpreting a different domestic violence law.[132]

Under the *Hayes* hybrid approach, a court applies the categorical approach at the pre-trial stage to determine whether the defendant has "at least two final convictions in federal, state, or tribal court for offenses that are categorical matches to 'any assault, sexual abuse, or serious violent felony' as defined by federal law."[133] If the answer is yes, the government must then prove at trial (or the defendant must admit) facts sufficient for a jury to determine "beyond a reasonable doubt that the victim of each alleged predicate offense was a 'spouse'" or otherwise satisfies the statute's domestic-relationship element.[134] Applying that approach, the district court in *Cline* determined that convictions under one tribe's code qualified as assaults, while the court in *Casey* held that convictions under a different tribal code did not qualify as section 117 predicates and, thus, granted the defendant's motion to dismiss.

F. Strangulation and suffocation: 18 U.S.C. § 113(a)(8)

Police and prosecutors are learning what survivors of non-fatal strangulation have known for years: "Many domestic violence offenders and rapists do not strangle their partners to kill them; they strangle them to let them know they can kill them—any time they

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[130] *See, e.g.*, Mathis v. United States, 136 S. Ct. 2243, 2248 (2016).
[131] *See* United States v. Morris, No. 18-cr-260, 2019 WL 1110211, at *2 (D. Neb. Mar. 11, 2019) (basing that conclusion on the decision in United States v. Drapeau, 827 F.3d 773 (8th Cir. 2016)).
[132] United States v. Cline, No. cr-19-0023, 2020 WL 1862595 (W.D. Wash. Apr. 14, 2020); United States v. Casey, No. 20-cr-0020, 2020 WL 1940446 (W.D. Wash. Apr. 22, 2020).
[133] *Cline*, No. cr-19-0023, 2020 WL 1862595, at *3.
[134] *Id.*

wish."[135] There are clear reasons why strangulation assaults, particularly in an intimate partner relationship, should be a separate felony offense and taken seriously at sentencing.

Despite the lethal and predictive nature of these assaults, the largest non-fatal strangulation case study ever conducted to date, the San Diego Study, found that most cases lacked physical evidence or visible injury of strangulation.[136] "[O]nly fifteen percent of the victims had a photograph of sufficient quality to be used in court as physical evidence of strangulation," and no symptoms were documented or reported in sixty-seven percent of the cases.[137] The San Diego Study found major signs and symptoms of strangulation that corroborated the assaults, but little visible injury.[138]

Studies show that 23 to 68% of women who are victims of intimate partner violence experienced strangulation assault by a male partner in their lifetime.[139] Furthermore, a strong correlation exists between strangulation and other types of domestic abuse. In a study of 300 strangulation cases, a history of domestic violence existed in 89% of the cases, and children were present during at least 41% of the incidents.[140]

This correlation is disturbing, especially in the context of Indian country, where violent crime rates can far exceed those of other American communities. Some tribes have experienced rates of violent crime over ten times the national average.[141] Reservation-based and clinical research show very high rates of intimate partner violence against American Indians and Alaska Native women.[142]

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[135] Casey Gwinn, *Strangulation Laws*, *in* RESPONDING TO STRANGULATION IN ALASKA: GUIDELINES FOR LAW ENFORCEMENT HEALTH CARE PROVIDERS ADVOCATES AND PROSECUTORS 7, 7 (Gael Strack & Casey Gwinn eds. n.d.).
[136] Gael B. Strack, et al., *A Review of 300 Attempted Strangulation Cases Part I: Criminal Legal Issues*, 21 J. EMERGENCY MED. 303, 303 (2001).
[137] *Id.* at 305–06.
[138] *See id.*
[139] *See* Lee Wilbur et al., *Survey Results of Women Who Have Been Strangled While in an Abusive Relationship*, 21 J. EMERGENCY MED. 297, 297–302 (2001).
[140] Strack, *supra* note 136, at 305–06.
[141] RONET BACHMAN, ET AL., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN 5 (2008).
[142] *Id.*

Police, prosecutors, and medical providers across the country have begun to appreciate the inherent lethality risks for strangulation and suffocation crimes. The overwhelming majority of states and some Indian tribes have enacted strangulation-specific laws that range from misdemeanor offenses to felonies.[143] Because domestic violence and sexual assault remains primarily a matter of state, local, and tribal jurisdiction, the federal government historically lacked jurisdiction over some intimate partner violence crimes. The VAWA 2013 changed that by providing the federal government with additional statutory tools to prosecute intimate partner violence.[144] With the passage of the VAWA 2013, Congress recognized the gravity of strangulation and suffocation crimes and, accordingly, amended the federal assault statute to include a specific charge of assault or attempted assault by strangulation or suffocation.[145] This important change in the law became effective March 7, 2013.[146]

Under section 113, it is now possible to prosecute perpetrators in Indian country for the specific offenses of strangulation and suffocation. Section 113(a) provides:

> Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an . . . . [a]ssault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate, [shall be punished] by a fine under this title, imprisonment for not more than 10 years, or both.[147]

In this section, the term "strangling" means "intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim."[148]

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[143] *See* Training Institute on Strangulation Prevention, *Legislation Map*, ALLIANCE FOR HOPE INTERNATIONAL, https://www.strangulationtraininginstitute.com/resources/legislation-map/ (last visited May 21, 2020).
[144] Pub. L. No. 113-4, 127 Stat. 54.
[145] 18 U.S.C. § 113.
[146] *Id.*
[147] 18 U.S.C. § 113(a)(8).
[148] 18 U.S.C. § 113(b)(4).

The definitions of spouse, intimate partner, and dating partner are found in 18 U.S.C. § 2266.

Before the passing of VAWA 2013, strangulation cases were typically prosecuted as an ARSBI pursuant to 18 U.S.C. § 113(a)(6). ARSBI is punishable by a fine, imprisonment for not more than 10 years, or both.[149]

It is important to note that section 113(a)(8) only addresses situations where the victim is the spouse, intimate partner, or dating partner of the defendant. Consequently, a defendant who commits a strangulation offense outside this context will not be charged in federal court with a violation of section 113(a)(8). Instead, prosecutors should look to ARSBI, attempted murder, or murder, depending on the facts.

While this new charging tool is frequently used by federal prosecutors to combat violent crime in Indian country, there are few appellate decisions interpreting the statute. The most significant reported opinion to date is *United States v. Lamott*.[150] Lamott and his victim, both Native Americans, were living on the Blackfeet Indian Reservation in Montana at the time of the offense.[151] The couple had been out with friends, and Lamott was drinking.[152] Lamott became jealous of the attention one of the victim's friends paid to the victim at the party.[153] When the couple returned to Lamott's house, he strangled the victim multiple times, including one episode that left her unconscious.[154] The prosecutor charged Lamott with one count of assault by strangulation under 18 U.S.C. § 113(a)(8) and one count of ARSBI under 18 U.S.C. § 113(a)(6).[155] After a two-day jury trial, Lamott was convicted on the charge of assault by strangulation.[156] The jury hung on ARSBI, and it was dismissed.[157] Lamott was sentenced to 32 months' imprisonment.[158]

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[149] 18 U.S.C. § 113(a)(6).
[150] 831 F.3d 1153 (9th Cir. 2016).
[151] *Id.* at 1155.
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Id.*

On appeal, Lamott argued the trial court erred when it instructed the jury to disregard evidence of his voluntary intoxication.[159] Lamott argued this was reversible error because assault by strangulation is a specific intent crime.[160] Accordingly, the court had to determine if assault by strangulation is a specific or general intent crime. The Ninth Circuit first looked to the text of the statute and found that "[t]he statute does not specify a mens rea requirement."[161] The court also noted that only the first three crimes in the federal assault statute include the words "with intent to" and that the strangulation part of the statute does not include this language.[162] In addition, the federal statute provides that the crime of "strang[ulation] can be done knowingly, or even recklessly, and because the definition explicitly disclaims the requirement of 'any intent to kill or protractedly injure,' it is not likely Congress intended" the federal assault statute to require specific intent.[163] Moreover, the legislative history indicates that Congress intended that general—not specific—intent is required.[164] Accordingly, the Ninth Circuit found that assault by strangulation is a general intent crime and that Lamott's voluntary intoxication was not relevant.[165] The trial court did not err by instructing the jury to disregard it.[166]

Lamott also argued the jury was improperly instructed to determine whether he "wounded," rather than "assaulted," the victim.[167] The prosecutor asked that the jury be instructed that, in order to convict, the jury must find "the defendant assaulted [the victim] by intentionally striking or wounding her . . . [and] the defendant did so by strangling" the victim.[168] Lamott did not object to this proposed instruction but argued on appeal that the court should have instructed the jury to determine whether "the defendant intentionally assaulted [the victim] by strangling her."[169] The appellate court

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[159] *Id.* at 1156.
[160] *Id.*
[161] *Id.*
[162] *Id.* at 1156–57.
[163] *Id.* at 1157.
[164] *Id.* at 1158.
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.* (omission in original) (second alteration in original).
[169] *Id.*

agreed that the use of the word "assaulted," instead of "wounded," would have more closely tracked the statute and the indictment, but the court disagreed about whether the instruction changed the outcome of the trial.[170] It stated that "[t]he district court's inclusion of the word 'wounded' may have been superfluous, but if anything, the inclusion of 'wounded' in the instruction required that the government meet a *higher* burden than was necessary because section (a)(8) does not require proof of a wound or injury."[171] Lamott's conviction was affirmed.[172]

III. Using uncounseled tribal court convictions in federal court

A. Gun Control Act

A tribal court misdemeanor domestic violence conviction can serve as a predicate offense for federal Gun Control Act violations. Since 1996, when Congress passed the Lautenberg Amendment, it has been illegal

> for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.[173]

The Eight Circuit recently weighed in on this issue in *United States v. Long*.[174] Michael Lee Long, Jr., was convicted by a jury in 2015 for multiple charges resulting from an incident at a gas station and convenience store on the Rosebud Sioux Indian Reservation in South Dakota.[175] The victim was riding in a vehicle with family members when they stopped at a gas station and convenience store.[176] Long got in line behind the victim and made a derogatory remark, then the

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[170] *Id.*
[171] *Id.* at 1159.
[172] *Id.*
[173] 18 U.S.C. § 922(g)(9).
[174] 870 F.3d 741 (8th Cir. 2017).
[175] *Id.* at 743–44.
[176] *Id.* at 744.

victim told Long she did not want to speak with him.[177] After the victim completed her purchase, she went back to her car, called the police, and reported that Long was harassing her.[178] She got out of the car to get his license plate number, which enraged Long.[179] He opened the passenger door of the car the victim was in, pulled a gun, and pointed it at the victim's head.[180] The driver put the car in gear, and the vehicle hit Long as it sped away.[181] Long then opened fire on the car.[182]

Among other crimes, Long was charged with a violation of 18 U.S.C. § 922(g)(9).[183] Long moved to dismiss this charge, arguing his underlying tribal court conviction for domestic violence was obtained without counsel and, as such, did not qualify as a predicate offense as required by 18 U.S.C. § 921(a)(33)(B)(i).[184] Long pleaded guilty to a domestic abuse charge in the Rosebud Tribal Court in 2011.[185] During that proceeding, he was represented by counsel who did not attend law school and was not a licensed attorney.[186] The district court denied his motion, and Long raised the issue again on appeal to the Eighth Circuit.[187]

The Eighth Circuit stated that section 922(g)(9) provides that a person convicted in any court of a misdemeanor crime of domestic violence is prohibited from purchasing or possessing a firearm or ammunition.[188] But "[a] person shall not be considered to have been convicted of such an offense unless the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case."[189] The Eighth Circuit found that the phrase "right to counsel" refers to the right to counsel as it existed in the

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[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.* at 743.
[184] *Id.* at 745.
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] 18 U.S.C. § 921(a)(33)(B)(i)(I) (cleaned up).

predicate misdemeanor case.[190] The court also cited to *Bryant* and reiterated that the Sixth Amendment does not apply to proceedings in tribal court.[191] The court further noted that, pursuant to the ICRA, an Indian defendant in tribal court is entitled to appointed counsel only when he or she will be sentenced to greater than one year's imprisonment.[192] In his domestic assault case, Long received a sentence of 365 days, with 305 days suspended.[193] Thus, any right to counsel he had had to come from the Rosebud Sioux Law and Order Code, which the court reported "allows both professional attorneys and lay counsel to practice in tribal court."[194] In affirming Long's conviction, the court found that Long presented no evidence that his counsel in the 2011 domestic assault case was not admitted to practice as lay counsel in tribal court, holding that "[b]ecause lay counsel are admitted to practice before the tribal court, we conclude that Long was represented by counsel in the tribal-court proceeding within the meaning of 18 U.S.C. § 921(a)(33)(B), and that his conviction there thus constituted a valid predicate offense under 18 U.S.C. § 922(g)(9)."[195]

Note that, in *Rehaif v. United States*, the U.S. Supreme Court held that, "in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm."[196]

B. Using tribal court convictions when computing federal sentencing guidelines

"When contemplating and structuring . . . a departure [under section 4A1.3], the district court should consider both the nature and extent of a defendant's criminal history."[197] An upward departure under U.S.S.G. § 4A1.3 is warranted "[i]f reliable information indicates that

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[190] *Long*, 870 F.3d at 746 (citing United States v. First, 731 F.3d 998, 1003 (9th Cir. 2013)).
[191] *Id.* at 746–47 (citing United States v. Bryant, 136 S. Ct. 1954, 1958 (2016)).
[192] *Id.* at 747.
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] 139 S. Ct. 2191, 2200 (2019).
[197] United States v. Hacker, 450 F.3d 808, 812 (8th Cir. 2006).

the defendant's criminal history category substantially under-represents the seriousness of [his] criminal history or the likelihood that [he] will commit other crimes."[198] Section 4A1.3(a)(2)(A) "provides that an upward departure may be based on information concerning '[p]rior sentence(s) not used in computing the criminal history category (*e.g.*, sentences for foreign and tribal offenses).'"[199]

"Stoney End of Horn was convicted . . . on four counts of sexual abuse of a minor and one count of assault resulting in serious bodily injury . . . ."[200] He was sentenced to concurrent terms of 293 months' imprisonment for each count of sexual abuse and another concurrent sentence of 120 months' imprisonment for the assault.[201] On appeal, End of Horn

> dispute[d] the district court's decision to depart upward from the advisory guideline range of 151 to 188 months to a sentence of 293 months. The district court cited four separate provisions in support of its upward departure: USSG § 4A1.3 (inadequacy of criminal history category), § 5K2.1 (conduct resulting in death), § 5K2.8 (extreme conduct), and § 5K2.21 (dismissed and uncharged conduct).[202]

In part, End of Horn challenged the court's scoring of his tribal court convictions pursuant to section 4A1.3.[203] The sentencing court cited multiple previous convictions for which the defendant received no criminal history points, five convictions in state court, six convictions in tribal court, and one military conviction.[204] The Eighth Circuit found that tribal offenses are a proper basis for an upward departure and that the district court did not abuse its discretion in relying on U.S.S.G. § 4A1.3(a)(2)(A).[205] While "many of the uncounted offenses in

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[198] U.S. SENTENCING GUIDELINES MANUAL § 4A1.3(a)(1) (U.S. SENTENCING COMM'N 2004) [hereinafter U.S.S.G.].
[199] United States v. King, 627 F.3d 321, 323 (8th Cir. 2010) (quoting U.S.S.G. § 4A1.3) (alteration in original).
[200] United States v. Stoney End of Horn, 829 F.3d 681, 683 (8th Cir. 2016).
[201] *Id.* at 683.
[202] *Id* at 688.
[203] *Id.*
[204] *Id.*
[205] *Id.*

state and tribal courts were driving offenses, 'even offenses which are minor and dissimilar to the instant crime may serve as evidence of the likelihood of recidivism if they evince the defendant's incorrigibility.'"[206]

IV. Crimes of general federal applicability

Federal law also contains a separate category of crimes known as crimes of general applicability, which fall under federal criminal jurisdiction no matter where they occur and no matter who perpetrates them. These crimes affect either interstate commerce or a federal interest and draw their authority from individual statutes. They are not subject to the exception in the General Crimes Act for crimes perpetrated by an Indian against an Indian or to the laws covered under PL 280. Courts have held, however, that the federal government maintains criminal jurisdiction over crimes of general applicability.[207] The court in *Begay* also noted that federal criminal laws apply to Indians unless abrogated by treaty.[208]

The offenses in Chapter 110 of Title 18 are crimes of general applicability. Many of these Chapter 110 crimes have the word "interstate" in the title. This may lead the casual reader to believe that there must be an element of interstate travel required to charge these offenses. A closer reading of the statutes, however, shows that intrastate travel that crosses in or out of Indian country is also a violation of federal law. Currently, USAOs do not receive many referrals for these crimes. They may, however, be a powerful tool to hold an offender accountable.

A. Interstate travel to commit domestic violence: 18 U.S.C. § 2261

1. 18 U.S.C. § 2261(a)(1)

It is a federal crime for a person to cross a state or foreign boundary or enter or leave Indian country or be "present within the special maritime and territorial jurisdiction [(SMTJ)] of the United States

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[206] *Id.* (citing United States v. Agee, 333 F.3d 864, 867 (8th Cir. 2003)).
[207] *See* United States v. Begay, 42 F.3d 486, 299 (9th Cir. 1994) (extending federal jurisdiction and holding that "a federal criminal statute of nationwide applicability . . . applies equally to everyone everywhere within the United States, including Indians in Indian country").
[208] *Id.*

with the intent to kill, injure, harass or intimidate" that person's intimate partner or dating partner "when in the course of or as a result of such travel" the defendant commits or attempts to commit a violent crime.[209] Therefore, to establish interstate travel to commit domestic violence under 18 U.S.C. § 2261(a)(1), the government must prove that a person (1) crossed state lines or entered or left Indian country; (2) with the intent to kill, injure, harass, or intimidate; and (3) that the person committed or attempted to commit a crime of violence against their spouse, intimate partner, or dating partner.[210] The law requires specific intent to commit domestic violence at the time of travel.[211] The term "intimate partner" includes a spouse, a former spouse, a past or present cohabitant (as long as the parties cohabitated as spouses), and parents of a child in common.[212] The term "dating partner" (added in the 2005 VAWA Amendments) refers to a person who is or has been in a social relationship of a romantic or intimate nature with the abuser.[213] Factors to consider in making this determination include the length of the relationship, the type of the relationship, and the frequency of the interaction between the persons involved in the relationship.[214]

The Sixth Circuit has held that a jury may infer the requisite intent from the totality of the circumstances surrounding the commission of the prohibited act under 18 U.S.C. § 2261(a)(1).[215] In an interstate domestic violence case, the Sixth Circuit held that the jury could have inferred that the defendant crossed state lines with the intent to harm the victim from evidence of the history of their relationship, a threatening phone call made a month earlier, the defendant's statement to a relative the night of the violent attack, and the defendant's use of derogatory names toward the victim while she called 911.[216] As a result, the Sixth Circuit rejected the defendant's

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[209] 18 U.S.C. § 2261(a)(1).
[210] United States v. Blackthorne, 378 F.3d 449, 454 (5th Cir. 2004); *see also* 18 U.S.C. § 2261(a)(1).
[211] *Blackthorne*, 378 F.3d at 455.
[212] 18 U.S.C. § 2266(7).
[213] 18 U.S.C. § 2266(10).
[214] *Id.*
[215] United States v. Utrera, 259 F. App'x 724, 732 (6th Cir. 2008) (not precedential).
[216] *Id.*

claim and held that the government met its burden to provide sufficient evidence to support a conviction.[217]

The Fourth Circuit has ruled that federal venue statute 18 U.S.C. § 3237(a) determines the proper venue for a violation of 18 U.S.C. § 2261(a)(1).[218] In a death penalty case, the defendant was convicted of traveling across state lines to murder his girlfriend and firebomb her apartment.[219] On appeal, the Fourth Circuit rejected the defendant's claim that the case should have been tried in the state where the violent crime was committed, saying that direct violations of 18 U.S.C. § 2261(a)(1), which does not contain a separate venue provision, can be tried where the traveling occurred.[220] Section 3237(a) provides that "any offense . . . begun in one district and completed in another . . . may be . . . prosecuted in any district in which such offense was begun, continued, or completed."[221] Because the offense consisted of traveling and committing a violent act, the venue was proper as tried.[222]

The Fourth Circuit also considered the definition of "intimate partner" under 18 U.S.C. § 2261(a)(1) in the case.[223] Although the case pre-dated the 2005 VAWA Amendments, it provided factors for finding an intimate partner relationship.[224] During the trial, the jury heard testimony that the defendant and the victim dated before they moved in together and that they lived in an apartment the victim rented for the first time when they moved in together.[225] A neighbor testified that the defendant often drove the victim's car, taking her to and from work.[226] Other witnesses testified that the victim later wanted to break up because of fighting and the defendant was too possessive.[227] Police officers responded to calls about fighting at the apartment when the victim threatened to end the relationship, and the jury also heard testimony that, after the breakup, the defendant

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[217] *Id.*
[218] United States v. Barnette, 211 F.3d 803, 813 (4th Cir. 2000).
[219] *Id.* at 810.
[220] *Id.* at 813.
[221] *Id.* (citing 18 U.S.C. § 3237(a)).
[222] *Id.* at 813.
[223] *Id.* at 814.
[224] *Id.* at 814–15.
[225] *Id.* at 814.
[226] *Id.*
[227] *Id.*

still loved the victim and was preoccupied with her.[228] On appeal, the Fourth Circuit held that those details could form the basis for a finding of an intimate relationship, although the defendant and the victim were not married.[229] The Fourth Circuit affirmed the defendant's conviction while vacating the death penalty on other grounds.[230]

2. 18 U.S.C. § 2261(a)(2)

It is a federal crime to cause an intimate partner or dating partner to cross state or foreign boundaries or "enter or leave Indian country by force, coercion, duress, or fraud, and . . . in the course of, as a result of, or to facilitate such conduct or travel," attempt or commit a crime of violence.[231] To establish a violation under 18 U.S.C. § 2261(a)(2), the government must prove that (1) the defendant and the victim are spouses or intimate partners; (2) that the defendant caused the victim to cross a state line or to enter or leave Indian country through force, coercion, duress, or fraud; and (3) that the defendant committed or attempted to commit a crime of violence against the victim.[232] This subsection does not require specific intent to cause the spouse or intimate partner to travel interstate.[233] It does, however, require proof that the interstate travel resulted from force, coercion, duress, or fraud.[234]

The Fourth Circuit has established that, under 18 U.S.C. § 2261(a)(2), the words "force, coercion, or duress" require that the victim is a non-consenting participant in the interstate travel.[235] The Fourth Circuit held that coercion or duress exists when "an individual is subject to actual or threatened force of such a nature as to induce a well-founded fear of impending death or serious bodily harm from which there is no reasonable opportunity to escape."[236]

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[228] *Id.* at 814–15.
[229] *Id.* at 815.
[230] *Id.* at 826.
[231] 18 U.S.C. § 2261(a)(2).
[232] United States v. Helem, 186 F.3d 449, 456 (4th Cir. 1999); *see also* 18 U.S.C. § 2261(a)(2).
[233] *Helem*, 186 F.3d at 454.
[234] *Id.* at 455.
[235] *Id.* at 456.
[236] *Id.*

The Sixth and Ninth Circuits have agreed with that definition and have further considered ideas of what constitutes a non-consenting participant.[237]

Most recently, the Ninth Circuit held that coercion did not mean a defendant must physically control or have constant oversight of his victim.[238] In affirming a defendant's conviction under section 2261(a)(2), the Ninth Circuit interpreted the words of the statute as meaning that an oppressor can undermine a victim's will to escape by a variety of means, "including threats of reprisal or psychological conditioning."[239] The court held that a jury must assess opportunities to escape "from the perspective of a reasonable person in the victim's position, considering all of the circumstances, including the victim's gender."[240] In this case, the defendant repeatedly beat, raped, humiliated, and threatened the victim with retribution against her family.[241] The victim feared being implicated for harboring a fugitive, and weakened from hunger and injuries, she did not think she could outrun the defendant.[242] Based on these factors, the Ninth Circuit held that a jury could have determined that a woman in the victim's position had no reasonable opportunity to escape her oppressor.[243]

B. Interstate stalking: 18 U.S.C. § 2261A

The interstate stalking law was enacted in 1996; it was amended in 2000 and 2005 and now provides that it is a federal crime to cross a state or foreign boundary,

> or enter[] or leave[] Indian country, with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, and in the course of, or as a result of, such travel . . . [the defendant] places that person in reasonable fear of the death of, or serious

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[237] United States v. Dowd, 417 F.3d 1080 (9th Cir. 2005); United States v. Baggett, 251 F.3d 1087 (6th Cir. 2001).
[238] *Dowd*, 417 F.3d at 1087.
[239] *Id.*
[240] *Id.* at 1088–89.
[241] *Id.* at 1089.
[242] *Id.*
[243] *Id.*

> bodily injury to . . . ; or causes . . . substantial emotional distress to [that] person,

a member of that person's immediate family, or intimate partner of that person.[244] To establish interstate stalking under 18 U.S.C. § 2261A, the government must prove (1) the defendant crossed a state or foreign boundary or entered or left Indian country; (2) "with the intent to kill, injure, harass, [or] intimidate" a person; (3) placed a person under surveillance through computer service or electronic communication "with the intent to kill, injure, harass, [or] intimidate"; and (4) placed the person, "a spouse or intimate partner of that person," or an immediate family member of that person in reasonable fear of death, serious bodily injury, or substantial emotional distress.[245] The law requires specific intent to violate this subsection at the time of inter-jurisdictional travel. The term "immediate family" includes a spouse, parent, sibling, child, or any other person living in the same household and related by blood or marriage.[246]

The Violence Against Women Act of 2000 created an additional crime of cyberstalking. This statute, amended in 2005, now provides that it is a federal crime to use the mail, or any interactive computer service, or any facility of interstate commerce (including the internet), "with the intent to [(1)] kill, injure, harass, [or] intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate," or cause substantial emotional distress to a person in another state or tribal jurisdiction or within the SMTJ of the United States; or (2) place a person in another state or tribal jurisdiction or within the SMTJ of the United States in reasonable fear of death or serious bodily injury to that person or a member of that person's immediate family.[247]

Under both prongs of the statute, the defendant must engage in a course of conduct that places the stalking victim in reasonable fear of death or serious bodily injury or cause substantial emotional distress to that person, her immediate family, or her intimate partner.[248] A single communication is not sufficient. The statute defines "course of

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[244] 18 U.S.C. § 2261A(1).
[245] *Id.*
[246] 18 U.S.C. § 115(c)(2).
[247] 18 U.S.C. § 2261A(2).
[248] 18 U.S.C. § 2261A(1)(B)–(2)(B).

conduct" as a "pattern of conduct composed of 2 or more acts, evidencing a continuity of purpose."[249]

In 2011, the First Circuit made it clear that a defendant can violate the interstate stalking statute if the interstate travel itself places the targeted victim within a reasonable fear of harm.[250] Rejecting the defendant's claims that 18 U.S.C. § 2261A applies only when some injuring or harassing act takes place during or after the interstate travel, the First Circuit interpreted the disjunctive "in the course of, or as a result of" in the statute as meaning that Congress intended to criminalize two types of acts.[251] First, a defendant can engage in interstate stalking if the defendant's conduct "in the course of" traveling across state lines places a targeted victim in fear of harm.[252] Second, a defendant can engage in interstate stalking by traveling across state lines with the intent to harm or harass another and, as a result of that travel, places the targeted victim in reasonable fear of harm.[253] The reasonableness of the target's fear must be viewed in light of previous events.[254] In this case, the defendant traveled from Michigan to Puerto Rico, where his wife and son had moved, but was arrested at the airport in Puerto Rico.[255] Before the trip, the defendant sent several e-mails that the First Circuit found could be reasonably regarded as threats against his wife and son.[256] Based on these factors, the court affirmed the lower court's decision that the putative victims had a reasonable basis for apprehension and that the defendant traveled to Puerto Rico with the intent to harm or harass them.[257]

In 2010, the Sixth Circuit held that a defendant can engage in interstate stalking even though the travel across state lines is motivated only in part by the requisite intent under the statute.[258] In this case, the defendant was convicted of interstate stalking resulting

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[249] 18 U.S.C. § 2266(2).
[250] United States v. Walker, 665 F.3d 212, 225 (1st Cir. 2011).
[251] *Id.*
[252] *Id.*
[253] *Id.*
[254] *Id.*
[255] *Id.*
[256] *Id.*
[257] *Id.* at 225–26.
[258] United States v. Moonda, 347 F. App'x 192, 199–200 (6th Cir. 2009) (not precedential).

in death, among other charges.[259] On appeal, the defendant claimed she did not meet the requisite intent because the purpose of her trip from Pennsylvania to Ohio was to look at a house.[260] In rejecting the defendant's claim and affirming her conviction, the Sixth Circuit held that 18 U.S.C. § 2261A "criminalizes interstate travel with '*intent* to kill, injure, [or] harass,' not interstate travel with the *sole purpose* to kill, injure, or harass."[261] The court compared the interstate stalking statute to the similar intent requirement in the murder-for-hire statute,[262] under which the court "held that '[t]he fact that travel is motivated by two or more purposes, some of which lie outside the ambit of the Travel Act, will not preclude conviction under the Act if the requisite . . . intent is also present.'"[263]

C. Interstate travel to violate an order of protection: 18 U.S.C. § 2262

1. 18 U.S.C. § 2262(a)(1)

This law prohibits interstate or foreign travel or travel into and out of Indian country "with the intent to engage in conduct that violates the portion of a [valid] protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person."[264] To establish a violation of this statute, the federal government must demonstrate that a person had the specific intent to violate the relevant portion of the protection order at the time of interstate travel and that a violation actually occurred.[265] This statute does not require an intimate partner relationship (although this relationship may be required by the state or other governmental body issuing the order), nor does it require bodily injury. It is also a federal crime to violate this statute within the SMTJ of the United States.[266] Therefore, to show a violation of 18 U.S.C. § 2262(a)(1), the government must prove

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[259] *Id.* at 194.
[260] *Id.* at 199–200.
[261] *Id.* at 200 (alteration in original).
[262] 18 U.S.C. § 1958.
[263] *Moonda*, 347 F. App'x at 200 (quoting United States v. Degan, 229 F.3d 553, 557 (6th Cir. 2000)) (alteration in original) (omission in original).
[264] 18 U.S.C. § 2262(a)(1).
[265] *See id.*
[266] *Id.*

that (1) the defendant crossed a state line or entered or left Indian country; (2) intended to violate a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury; or (3) engaged in such conduct in the jurisdiction where the protection order was issued.[267]

The Sixth Circuit explained that the requisite intent to violate a protection order under 18 U.S.C. § 2262(a)(1) may be, and often must be, inferred from circumstantial evidence.[268] In affirming the defendant's conviction for traveling across state lines with the intent to violate a protection order, the Sixth Circuit looked at the government's proof: The defendant's travel from Arkansas to Tennessee; the defendant's past violent and threatening behavior toward the victim; the presence of a handgun and ammunition in the defendant's truck; the defendant's threatening behavior at the victim's parents' house; and a "pattern of stalking" the home of the victim's parents.[269] The court noted that at least one other circuit has held that a defendant's behavior in violating the protection order can provide circumstantial evidence of his intent to cross the state line.[270] In addition, the Second Circuit rejected the defendant's claim "that the restraining order issued . . . [was] not a 'protection order' within the meaning of [18 U.S.C.] § 2266 because it was" issued by the clerk, not the court.[271] The court held that an order pre-signed by a judge is considered issued by a court even though it is disseminated automatically by a clerk upon request in a domestic relations case.[272]

2. 18 U.S.C. § 2262(a)(2)

It is a federal crime to cause a person to cross state or foreign lines

> or to enter or leave Indian country by force, coercion, duress, or fraud, and in the course of, as a result of, or to facilitate such conduct or travel[, engage[] in conduct that violates the portion of a protection order that

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[267] United States v. Casciano, 124 F.3d 106, 110 (2d Cir. 1997); *see also* 18 U.S.C. § 2262(a)(1).
[268] United States v. Young, No. 98-6081, 2000 WL 222590, at *3 (6th Cir. Feb. 15, 2000) (not precedential).
[269] *Id.*
[270] *Id.* (citing United States v. Von Foelkel, 136 F.3d 339 (2d Cir. 1998)).
[271] *Id.* at *2.
[272] *Id.*

> prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person.[273]

This subsection does not require a showing of specific intent to cause another person to travel interstate.[274] It does, however, require proof that the interstate travel resulted from force, coercion, duress, or fraud.[275] The federal government must also prove that a person violated the relevant portion of the protection order.[276] Therefore, to show a violation of 18 U.S.C. § 2262(a)(2), the government must prove (1) that the defendant caused another person to cross a state or foreign line or to enter or leave Indian country; (2) through force, coercion, duress, or fraud; (3) engaged in conduct that violates a protection order that prohibits violence, threats, or harassment; or (4) engaged in such conduct in the jurisdiction where the protection order was issued.[277]

The Fourth Circuit has made clear that 18 U.S.C. § 2262(a)(2) does not require proof that the defendant harmed the victim after crossing state lines; evidence that defendant injured the victim in the course of forcing her or him across the border suffices.[278] In *Romines*, the defendant was convicted of kidnapping, interstate violation of an order of protection, and interstate transportation of a stolen motor vehicle, and the Fourth Circuit affirmed the lower court's decision.[279] With respect to the violation of 18 U.S.C. § 2262(a)(2), the court found that the defendant injured the victim in the course of forcing her to cross from Tennessee into Virginia by beating, choking, and threatening the victim and her son.[280]

Verifying the terms and validity of the protection order is critical when investigating a potential violation under either section 2262(a)(1) or (a)(2). To assist in this effort, in addition to state

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[273] 18 U.S.C. § 2262(a)(2).
[274] *Young*, No. 98-6081, 2000 WL 222590, at *3.
[275] 18 U.S.C. § 2262(a)(2).
[276] *Young*, No. 98-6081, 2000 WL 222590, at *2.
[277] 18 U.S.C. § 2262(a)(2).
[278] United States v. Romines, No. 96-4838, 1998 WL 110152, at *2 (4th Cir. Mar. 13, 1998) (not precedential).
[279] *Id.* at *1.
[280] *Id.* at *2.

registries, the FBI's National Crime Information Center (NCIC) maintains a "Protection Order File" into which almost all states voluntarily provide, in full or in part, their protection order information. Tribal protection orders may also be entered. This protection order file allows law enforcement and prosecutors to instantaneously verify the existence of protection orders and is an enormous benefit to federal authorities prosecuting criminal cases under section 2262. This file, however, is not the exclusive repository of protection orders, and it should not be assumed that a protection order is invalid if it is not located following a NCIC query. The validity of a protection order is for a judge—not a jury—to determine, and a protection order must provide defendants with sufficient notice to withstand due process challenges.[281]

D. Penalties

Penalties for violations of sections 2261, 2261A, and 2262 hinge on the extent of the bodily injury to the victim. Terms of imprisonment range from five years to life imprisonment if the crime results in the victim's death.[282] The 2005 VAWA amendments added a one-year mandatory term of imprisonment for a defendant convicted of stalking in violation of a temporary, permanent civil, or criminal injunction; restraining order; no-contact order; or other order as defined in 18 U.S.C. § 2266.[283]

E. Sex trafficking: 18 U.S.C. § 1591

Sometimes, victims of domestic violence are trafficked by their partner. The issue of human trafficking, specifically sex trafficking, in Indian country has received increased attention the past couple of years. Multiple jurisdictions in tribal communities may have the legal authority to investigate and prosecute crimes of human trafficking. Many media reports and congressional inquiries have focused on the federal government's role in uncovering and prosecuting these offenses. State and tribal prosecutors, however, may also have the ability to charge and try these cases.

The federal "human trafficking" statute is found at 18 U.S.C. § 1591, and the official title in the federal code is "Sex trafficking of children

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[281] United States v. Casciano, 124 F.3d 106, 110–11 (2d Cir. 1997).
[282] 18 U.S.C. § 2261(b).
[283] 18 U.S.C. § 2261(b)(6).

or by force, fraud, or coercion."[284] The penalty and elements for the offense are the following:

> (a) Whoever knowingly—
>
> (1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or
>
> (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),
>
> knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).
>
> (b) The punishment for an offense under subsection (a) is—
>
> (1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or
>
> (2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had

[284] 18 U.S.C. § 1591.

> attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.[285]

Section 1591 is a crime of general applicability.[286] If the government can prove the crime was committed "in or affecting interstate or foreign commerce," there is no need to consider other bases of jurisdiction, like the General Crimes Act, for crimes occurring in Indian country.[287] When defining interstate or foreign commerce, the U.S. Supreme Court has interpreted Congress's power to regulate activities that involve and affect commerce through the Commerce Clause.[288] Pursuant to the Commerce Clause, Congress has the power to regulate activities that have a substantial effect on interstate commerce.[289] The government need only meet a de minimus standard of commerce to fall under the Commerce Clause.

Courts have created a four-factor test to determine whether a law regulates an activity that has a substantial effect on interstate commerce.[290] The four factors are the following:

> (1) whether the regulated activity is economic in nature; (2) whether the statute contains an 'express jurisdictional element' linking its scope in some way to interstate commerce; (3) whether Congress made express findings regarding the effects of the regulated activity on interstate commerce; and (4) attenuation of the link between the regulated activity and interstate commerce.[291]

Numerous courts have ruled section 1591 constitutional following application of the four-factor test. The *Campbell* court said the following:

> First, commercial sex acts are economic in nature. Second, section 1591 has a jurisdictional element,

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[285] 18 U.S.C. § 1591(a)–(b).
[286] *See* 18 U.S.C. § 1591.
[287] *See id.*
[288] *See* U.S. CONST. art. I, § 8, cl. 3.
[289] *See id.*
[290] United States v. Campbell, 111 F. Supp. 3d 340, 343 (W.D.N.Y. 2015).
[291] *Id.*

> requiring the jury to find that the activity affected interstate commerce. Third, in enacting the [Trafficking Victims Protection Act,] . . . Congress found that "Trafficking in persons substantially affects interstate and foreign commerce." Fourth[,] . . . there is a clear nexus between [the defendant's] intrastate recruiting and obtaining of women to commit commercial sex acts, the interstate aspects of [the defendant's] business, and the interstate market for commercial sex.[292]

Accordingly, the court, in *United States v. Paris,* ruled that Congress had the power to regulate the defendant's intrastate recruiting and obtaining women to perform commercial sex acts.[293]

A critical question for using section 1591 in Indian country is, What activities fall within the definition of interstate commerce? Must the pimp or the victim travel across state lines or in and out of Indian country? Does purely intra-jurisdiction activity meet the legal definition? *United States v. Evans* addressed the issue of whether solely "intrastate" commercial sexual activity could satisfy the interstate-commerce element of section 1591(a)(1).[294] In *Evans*, a 14-year-old girl (Jane Doe) worked in Miami–Dade County as a prostitute for the defendant.[295] "[The defendant] arranged 'dates' for Jane Doe at local hotels."[296] Jane Doe gave all money earned to the defendant.[297] The defendant communicated with the victim using a cell phone.[298] "[The defendant] supplied Jane Doe with condoms for use on the dates."[299] Lifestyle was the most commonly used brand of condom; this brand is produced overseas and imported into Georgia for sale and delivery throughout the United States.[300] Jane Doe was ultimately hospitalized for eleven days and diagnosed with AIDS.[301] After her release from the hospital, Evans contacted Jane Doe via a

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[292] 111 F. Supp. 3d at 345 (third and fourth alteration in original) (omissions in original).
[293] No. 06-CR-64, 2007 WL 3124724, at *8 (D. Conn. Oct. 24, 2007).
[294] 476 F.3d 1176 (11th Cir. 2007).
[295] *Id.* at 1177.
[296] *Id.*
[297] *Id.*
[298] *Id.*
[299] *Id.*
[300] *Id.*
[301] *Id.* at 1177–78.

landline telephone and asked her to work for him again.[302] Jane Doe worked for the defendant until she was hospitalized again for AIDS.[303]

The *Evans* court found that section 1591(a)(1) was constitutional as applied to the defendant's purely intrastate activities.[304] The court said that "[s]ection 1591 was enacted as part of the Trafficking Victims Protection Act of 2000" (TVPA); this act "criminalizes and attempts to prevent slavery, involuntary servitude, and human trafficking . . . particularly of women and children in the sex industry."[305] Importantly, the court highlighted that "Congress found that trafficking of persons has an aggregate economic impact on interstate and foreign commerce."[306] The court stated that Congress's conclusions in this regard were not irrational.[307] Therefore, the *Evans* court concluded that the defendant's enticement of a 14-year-old female to commit intrastate prostitution "had the capacity when considered in the aggregate with similar conduct by others, to frustrate Congress's broader regulation of interstate and foreign economic activity."[308] In short, the defendant's "use of hotels that served interstate travelers and the distribution of condoms that traveled in interstate commerce were further evidence that Evans's conduct substantially affected interstate commerce."[309] This case is often cited to support a broad definition of interstate commerce.

Evans was also charged with a violation of 18 U.S.C. § 2422(b), which criminalizes the actions of anyone who, by "using the mail or any facility or means of interstate or foreign commerce, . . . knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution."[310] The defendant admitted to contacting the victim via cell phone and landline.[311] But on appeal, he argued that the government failed to prove that his intrastate calls were routed through interstate

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[302] *Id.* at 1178.
[303] *Id.*
[304] *Id.*
[305] *Id.* at 1179.
[306] *Id.*
[307] *Id.*
[308] *Id.*
[309] *Id.*
[310] *Id.* at 1180 (alteration in original).
[311] *Id.*

channels.[312] The court disagreed and held that "[t]elephones and cellular telephones are instrumentalities of interstate commerce."[313] This finding, too, may prove important to the prosecutor analyzing whether or not section 1591 is a viable charge for sex trafficking in Indian country.

A review of case law demonstrates that many activities undertaken to promote or support commercial sexual exploitation will meet the standard of "affecting interstate commerce."[314] Moreover, the prosecutor is permitted to argue that even "intrastate," "intra-reservation," and "intra-SMTJ" activities have an aggregate economic impact on interstate and foreign commerce.[315] In fact, it does not appear that there is any case law articulating an activity undertaken to further acts of commercial sexual exploitation that was found not to impact interstate commerce. Thus, human trafficking violations occurring in Indian country or within the SMTJ should always be chargeable as section 1591 offenses crimes. If, however, commerce is inexplicably not implicated, the prosecutor must look to the General Crimes Act[316] to determine if jurisdiction exists to charge the case in federal court. The General Crimes Act limits federal jurisdiction for a violation of section 1591 to either a non-Indian perpetrator and an Indian victim or an Indian perpetrator and a non-Indian victim when the tribe has not already punished the offender for the same offense.[317] In these very specific situations, the United States could prosecute the offender under section 1591 by relying on the incorporation of SMTJ through the General Crimes Act by proving that the crime occurred in Indian country. By doing so, the prosecutor would eliminate the need to prove an interstate nexus.

It is also important to note that, depending on the facts of the case, the county prosecutor or state attorney general's office may have

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[312] *Id.*

[313] *Id.*

[314] *E.g.*, United States v. Young, 955 F.3d 608, 613 (7th Cir. 2020) (reiterating that activities such as advertising for sex placed on the internet, United States v. Horne, 474 F.3d 1004, 1006 (7th Cir. 2007), catering to interstate travelers, Heart of Atlanta Motel, Inc. v. United States 379 U.S. 241, 248 (1964), and condoms manufactured out of state, *Evans*, 476 F.3d at 1179–80, affect interstate commerce).

[315] United States v. Durham, 902 F.3d 1180, 1197–99 (10th Cir. 2018).

[316] 18 U.S.C. § 1151 *et seq.*

[317] 18 U.S.C. § 1152.

jurisdiction to prosecute cases of human trafficking in Indian country. Furthermore, some tribes have human trafficking codes and the ability to prosecute Indian offenders in tribal court. Or, even if the tribe does not have a specific human trafficking code, it may have jurisdiction to prosecute co-occurring crimes like sexual assault.

Human trafficking, and specifically commercial sexual exploitation of children and adults, happens everywhere, including in Indian country and Alaska Native villages. The crimes may not be on the scale of offenses committed in big cities—but the harm done to the victims and the community is just as damaging. Because residents of small towns and tribal communities may be oblivious to the signs of trafficking, cases may be overlooked.

V. Prosecuting domestic violence issues in tribal courts

A. The Indian Civil Rights Act: sentencing provisions

The ICRA was enacted in 1968 to apply certain provisions in the U.S. Constitution to Indian country to guarantee certain rights and protections afforded all other U.S. citizens.[318] The ICRA gave individuals within the tribal court system most, but not all, of the rights enumerated in the Bill of Rights, such as freedom of speech, equal protection of the laws, and protection against unreasonable search and seizure.[319] In section 1302(a)(7), the Act limits sentencing for one offense to no longer than one year imprisonment, no fine greater than $5,000, or both.[320] The law, as originally written, provided limitations of less than six months' imprisonment and limited the fine to under $500; however, this limitation was lessened to its current iteration with the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986.[321] The limitation was further amended by the Tribal Law and Order Act of 2010 (TLOA).[322] TLOA added subsections allowing tribal courts to impose sentences of up to three to nine years' imprisonment, fines up to $15,000, or both for

[318] 25 U.S.C. §§ 1301–04.
[319] *Id.*
[320] 25 U.S.C. § 1302(a)(7).
[321] Pub. L. No. 99-570, 100 Stat. 3207–146.
[322] Pub. L. No. 111-211, 124 Stat. 2261.

certain offenses.[323] Courts may impose the greater sentences if the defendant "(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or (2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States."[324]

The TLOA also amended section 1302 by imposing certain requirements on a tribal government implementing a sentence longer than one year of imprisonment on a defendant. According to section 1302(c), in such cases a tribal court must do the following:

> (1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
>
> (2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.[325]

Section 1302(c)(3) goes on to require that the judge presiding over the criminal proceeding have sufficient training and be licensed to practice law in any U.S. jurisdiction; that the court make public the tribe's criminal laws, rules of evidence, and rules of criminal procedure; and that the court maintain a record of the criminal proceeding.[326]

Finally, the TLOA gives courts imposing a sentence longer than one year the option to require a defendant serve out the sentence in a specific facility or serve an alternative form of punishment.[327]

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[323] *Id.*
[324] 25 U.S.C. § 1302(b)(1)–(2).
[325] 25 U.S.C. § 1302(c)(1)–(2).
[326] 25 U.S.C. § 1302(c)(3).
[327] 25 U.S.C. § 1302(d).

B. Application of *Miranda* warnings to defendants in tribal custody

The federal standard for questioning subjects in custody is *Miranda v. Arizona*.[328] The rationale behind the warning set out in *Miranda* is to uphold the individual's constitutional right to freedom from self-incrimination; however, no such right was incorporated into the ICRA.[329] Instead, the ICRA provides for the appointment of an attorney only if courts impose a sentence of over one year, a fine of $5,000, or both.[330] If the recommended sentence is less than one year or $5,000, the individual may request an attorney at his or her own expense.[331]

In *Massiah v. United States*, the Supreme Court held that a confession elicited from an individual in custody without the assistance of counsel after the individual was indicted was invalid.[332] The Sixth Circuit, in *United States v. Doherty*, analyzed *Massiah* in the context of tribal courts.[333] The court held that the rule in *Massiah* does not apply to cases arising out of tribal courts due to the difference between the provisions governing assistance of counsel in the U.S. Constitution and the ICRA.[334]

Additionally, the District Court of North Dakota considered the effectiveness of tribal *Miranda* warnings in conveying an individual's protected rights in *United States v. Fredericks*.[335] In *Fredericks*, the court held that a tribal law enforcement officer using tribal law to apprise an individual of his rights under the requirements for post-arrest interrogations fulfilled the requirements laid out in *Miranda* when the tribal law differed from the *Miranda* warning only in that the tribal law contained a provision offering an indigent individual an appointed lay advocate rather than an attorney.[336] Tribal Rule 6, the law in question in *Fredericks*, provides that if the individual in custody could not afford counsel, an appointed lay

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[328] 384 U.S. 436, 478–79 (1966).
[329] *See* 25 U.S.C. § 1302(c).
[330] 25 U.S.C. § 1302(a)(7)(A)–(B), (c).
[331] *See* 25 U.S.C. § 1302(a)(6), (b).
[332] 377 U.S. 201, 204 (1964).
[333] 126 F.3d 769, 775 (6th Cir. 1997).
[334] *See id.* at 777.
[335] 273 F. Supp. 2d 1032 (D.N.D. 2003).
[336] *See id.* at 1041.

advocate, defined as "a person who functions as a lay attorney and may serve as a public defender, prosecutor, or legal representative in private cases," would be appointed at the request of the individual.[337] The court found that this provision made the tribal law an effective equivalent to the *Miranda* warning and held that the law was sufficient to apprise an individual of his Fifth Amendment rights.[338]

One lack of provision to note is that the ICRA contains no statute of limitations on habeas corpus review. Under *Jeffredo v. Macarro*, however, the defendant must exhaust tribal remedies before petitioning for review.[339] In the absence of federal law proscribing a statute of limitations, tribal courts set their own statutes of limitations.

C. Tribal court criminal jurisdiction over non-Indian defendants

In *Oliphant v. Suquamish Indian Tribe*, the Supreme Court ruled that tribal courts have no criminal jurisdiction over non-Indian offenders.[340] Therefore, if the victim is Indian, the federal government has exclusive jurisdiction pursuant to the General Crimes Act.[341] And if the victim is non-Indian, the state has exclusive jurisdiction.[342] This jurisdictional framework began to shift with VAWA 2013.[343]

Title IX of VAWA 2013 is titled "Safety for Indian Women."[344] Section 904 of this title, Tribal Jurisdiction over Crimes of Domestic Violence, amended the ICRA.[345] These changes are codified at 25 U.S.C. § 1304. Section 1304(b)(1) states that "the powers of self-government of a participating tribe include the inherent power of

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[337] *Id.*
[338] *Id.*; *see also* United States v. Smith, No. 12-CR-205, 2013 WL 322532, at *4–5 (D.N.D. Jan. 28, 2013) (relying on Tribal Rule 6, holding that tribal authorities do not have to follow the exact provisions outlined in *Miranda* warning, and that an individual's waiver is voluntary, knowing, and intelligent where defendant was "coherent, demonstrated sufficient recollection of events, and appeared in control of his faculties").
[339] 599 F.3d 913, 921 (9th Cir. 2010).
[340] 435 U.S. 191 (1978).
[341] 18 U.S.C. § 1152.
[342] *See* United States v. McBratney, 104 U.S. 621 (1882).
[343] Pub. L. No. 113-4, 127 Stat. 54.
[344] *Id.*
[345] *Id.*

that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons."

A tribe's ability to prosecute a non-Indian offender is limited to violations of "domestic . . . or dating violence . . . occur[ring] in the Indian country of the participating tribe" and violations of a qualifying protection order.[346]

Not all non-Indians are subject to prosecution in tribal court. Congress said, "A participating tribe may not exercise special domestic violence criminal jurisdiction over an alleged offense if neither the defendant nor the alleged victim is an Indian."[347] The tribe will also not have criminal jurisdiction if the defendant lacks sufficient ties to the tribe.[348] Sufficient ties is defined as follows:

> (i) resides in the Indian country of the participating tribe;
>
> (ii) is employed in the Indian country of the participating tribe; or
>
> (iii) is a spouse, intimate partner, or dating partner of—
>
> (I) a member of the participating tribe; or
>
> (II) an Indian who resides in the Indian country of the participating tribe."[349]

In order for a tribal court to prosecute a non-Indian defendant pursuant to special domestic violence criminal jurisdiction, the tribe has to afford the defendant certain due process protections:

> (1) all applicable rights under this Act;
>
> (2) if a term of imprisonment of any length may be imposed, all rights described in section 1302(c) of this title;
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> (3) the right to a trial by an impartial jury that is drawn from sources that—
>
> (A) reflect a fair cross section of the community; and

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[346] 25 U.S.C. § 1304(c)(1)–(2).
[347] 25 U.S.C. § 1304(b)(4)(A)(i).
[348] 25 U.S.C. § 1304(b)(4)(B).
[349] *Id.*

(B) do not systematically exclude any distinctive group in the community, including non-Indians; and

(4) all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.[350]

Section 1302(c), enacted as part of the TLOA,[351] provides to defendants the following rights:

(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and

(2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

(3) require that the judge presiding over the criminal proceeding—

(A) has sufficient legal training to preside over criminal proceedings; and

(B) is licensed to practice law by any jurisdiction in the United States;

(4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and

[350] 25 U.S.C. § 1304(d).
[351] Pub. L. No. 111-211, 124 Stat. 2261.

> (5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.[352]

A tribe's decision to implement special domestic violence criminal jurisdiction does not "create[] or eliminate[] any Federal or State criminal jurisdiction over Indian country."[353] In short, the tribe's exercise of this inherent power is "concurrent with the jurisdiction of the United States, of a State, or of both."[354]

Section 904 of VAWA 2013, special domestic violence criminal jurisdiction, became effective for all tribes two years after its passage; however, Congress, in section 908, created a pilot project for tribes ready before 2015 to provide the required due process protections to non-Indian defendants.[355] Section 908(b)(2) provided that tribes with the required due process protections in place before the March 7, 2015 effective date provided in VAWA 2013 could apply for pilot tribe status.[356] The procedures for a tribe seeking designation as a pilot tribe for purposes of early implementation of special domestic violence criminal jurisdiction are published in the Federal Register.[357]

The first three tribes awarded pilot status were announced on February 12, 2014.[358] The tribes are "[t]he Confederated Tribes of the Umatilla Indian Reservation, [t]he Pascua Yaqui Tribe of Arizona, and [t]he Tulalip Tribes of Washington."[359] To be considered for pilot tribe designation, each interested tribe had to fill out a questionnaire and submit relevant tribal codes, policies, and procedures to the Department of Justice and the Department of Interior for review.[360] These tribes also agreed to post their submitted documents on the Department of Justice's Tribal Justice and Safety webpage so they

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[352] 25 U.S.C. § 1302(c).
[353] 25 U.S.C. § 1304(b)(3)(A).
[354] 25 U.S.C. § 1304(b)(2).
[355] VAWA 2013 § 908.
[356] VAWA 2013 § 908(b)(2).
[357] Pilot Project for Tribal Jurisdiction Over Crimes of Domestic Violence, 78 Fed. Reg. 71645-01 (Nov. 29, 2013).
[358] Pilot Project for Tribal Jurisdiction Over Crimes of Domestic Violence—Announcement of Successful Applications, 79 Fed. Reg. 8487-02 (Feb. 12, 2014).
[359] *Id.* at 8488.
[360] Pilot Project for Tribal Jurisdiction Over Crimes of Domestic Violence, 78 Fed. Reg. at 71646.

could be accessed by other tribes working to implement special domestic violence criminal jurisdiction.[361]

In an effort to assist tribes with their implementation efforts, the Department of Justice's Office on Violence Against Women funded three tribal training and technical assistance providers. The lead technical assistance provider is the National Congress of American Indians (NCAI).[362] The Department also created an Intertribal Technical Assistance Working Group (ITWG).[363] The ITWG is a voluntary working group of tribal representatives who share information and advice "about how tribes may best implement SDVCJ, combat domestic violence, recognize victims' rights and safety needs, and safeguard defendants' rights."[364] Since February 2014, nearly two dozen tribes have fully implemented special domestic violence criminal jurisdiction.[365]

About the Author

Leslie A. Hagen serves as the Department of Justice's (Department) first National Indian Country Training Coordinator. In this position, she is responsible for planning, developing, and coordinating training in a broad range of matters relating to the administration of justice in Indian country. Previously, Ms. Hagen served as the Native American Issues Coordinator for the Executive Office for United States Attorneys (EOUSA). In that capacity, she served as EOUSA's principal legal advisor on all matters pertaining to Native American issues, provided management support to the United States Attorneys' Offices, coordinated and resolved legal issues, and served as a liaison

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[361] *See* U.S. DEP'T OF JUST., *VAWA 2013 Pilot Project*, https://www.justice.gov/tribal/vawa-2013-pilot-project (last visited Feb. 2, 2021).

[362] The resource page for special domestic violence criminal jurisdiction is found at *Welcome to the SDVCJ Resource Center!*, NAT'L CONG. OF AM. INDIANS, http://www.ncai.org/tribal-vawa/resources/sdvcj-resource-center (last visited May 15, 2020).

[363] *Intertribal Technical-Assistance Working Group (ITWG)*, NAT'L CONG. OF AM. INDIANS, http://www.ncai.org/tribal-vawa/get-started/itwg (last visited May 15, 2020).

[364] *Id.*

[365] *See* NAT'L CONG. OF AM. INDIANS, VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 1 (2018) (noting 18 tribes known to be exercising special domestic violence criminal jurisdiction).

and technical assistance provider to Department components and the Attorney General's Advisory Committee on Native American Issues. Ms. Hagen started with the Department as an Assistant United States Attorney in the Western District of Michigan, where she was assigned to Violent Crime in Indian Country and handled federal prosecutions and training on issues of domestic violence, sexual assault, child abuse, and human trafficking affecting the 11 federally recognized tribes in the Western District of Michigan. Before joining the Department, Hagen was both an elected prosecuting attorney and an assistant prosecuting attorney in Michigan.

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Living in a Cruel Limbo: A Guide to Investigating Cold Missing Person Cases

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I. Introduction

One of the most difficult duties of being a police detective is making a death notification. This is true regardless of the manner of death (homicide, suicide, accident, natural, or undetermined). Informing a decedent's next of kin of their demise and the circumstances thereof is a painstaking task for even the most seasoned investigator. Time does not make the death notification process easier either. In other words, if the decedent was separated from his loved ones for one hour or four decades before the death notification, there is still a lot of anguish that comes with the assignment. Several circumstances make this process sensitive, such as the need to balance information gathering with the notification itself. As an example, investigators must ensure they speak with the decedent's actual next of kin and not an unrelated person that was located based on a name similarity or other flawed process. An incorrect death notification is a devastating event. Investigators must also obtain information pertinent to the death investigation process, like the last time the decedent was seen (or heard from) alive. This information gathering process should occur before the actual notification because the investigator may lose the opportunity to obtain accurate information from the next of kin once the notification occurs. Often, loved ones become so distraught, and rightfully so, that accurate information about the decedent may be hard to obtain.

After the death notification is made, the process turns to the "answer phase," where investigators attempt to help families understand how their loved one met his fate. In some cases, this can be done at the time of the notification, but often, all the case facts and circumstances surrounding the death are not known, and additional correspondence is needed. For example, it may be a murder case with an unknown offender, which is completely different from an accidental

death, like a motor vehicle crash, where there is little mystery as to what caused the death.

After the answer phase is complete or near complete comes the "technical phase" that deals with the medico-legal death investigation, the disposition of the decedent's remains, and memorialization. It is necessary for the detective to assist the family with these items to the extent that the family understands the process, knows where their loved one's remains are located, and knows how to obtain them. There may also be responsibilities pertaining to the proper identification of the decedent.

Police detectives and the medico-legal death investigation community (for example, medical examiners and coroners) must understand that the mourning process for the living begins at the death notification, extends through the death investigation, through the memorialization of the remains and final disposition, and beyond. Mourning a loved one's death is a complex process that has many parts and is different for everyone. Some of these differences are relatedness, like a parent losing a child, spiritual beliefs, and much more. Some people can completely overcome the loss of a loved one, while others agonize for the rest of their lives. Mostly, people understand that disease or trauma cause the body to stop working. Understanding this fact may not relieve the pain of losing a loved one, but this realization, along with recognizing one's own humanity, may assist with the coping process. Other items that assist with coping post-memorialization are visiting the grave or viewing the urn containing the ashes, talking with others about the decedent, positive memories about their relationship with the deceased, and having confidence in the death investigation process that provides a foundation for healing.

The death notification and death investigation process is detailed above to show a sharp contrast with the plight of families managing a long-term missing person event in their lives—a situation where a loved one has disappeared for a considerable amount of time without proof of life or death, also referred to as a cold missing person case. In this scenario, none of the above processes can occur. Without any answers, there is no justice, there is no closure, and there is no healing. Family members of long-term missing persons do not have the benefit of knowing what occurred to their loved one; they do not have the benefit of memorialization or post-memorialization coping mechanisms. They cannot go to a grave to pray, or to cry, or to laugh,

or to otherwise have a sense of peace that comes with answers. Families and friends are left alone with their thoughts of what occurred. The possibilities are endless, so the mind runs wild. As a result, people that have a long-term missing person in their lives live in a "cruel limbo"—a state of uncertainty and sense of being forgotten.

The friends and families, especially parents, of long-term missing person are some of the saddest people you could ever meet. Some recount the circumstances surrounding their loved one's disappearance like it happened yesterday, even when the date of last contact was 20, 30, or 40 years ago. These families are faced with decisions that are unnatural and confusing. Such decisions could include whether to keep the contents of a missing child or sibling's bedroom intact after years of silence. Items like clothing and furniture, and other personal affects that may have been insignificant if not for the individual's disappearance. Families struggle with repurposing the room and discarding the contents because it feels like they are throwing out their missing loved one. In other words, they have lost hope. If they retain the room in its current form, they have a place that is frozen in time and is a constant reminder of their grief, even with the bedroom door permanently closed. The overwhelming majority of long-term missing persons did not indicate to their families or friends that they planned on leaving (runaway scenario) or disappeared after an argument or other conflict. They were simply plucked from the earth with very little information as to what happened. This situation leaves families with the gnawing thought that their loved one is deceased and that they are crazy to retain these items for such an extended period. Some parents have related that they would not sell their residences and move away in case their missing child had amnesia for a period, miraculously regained her memory, and returned home to find an empty home or a new family. If true, the missing would feel abandoned and would become lost again. As you can see, the mental and emotional trauma surrounding long-term missing persons is different than the trauma surrounding the death of a loved one, even a murdered family member or friend. To the extent possible, many family and friends of murdered individuals have answers, however grim, as opposed to those who were "plucked from the earth," leaving families in the previously described "cruel limbo."

The existence of long-term missing person cases is not just detrimental to the families and friends suffering from the absence of

their loved ones with so many unanswered questions. Law enforcement and society suffers from these cold cases too. The fact that there are people in society that have disappeared and have not returned or been located over a period of months, years, or decades can have several serious negative consequences for all of us. It can mean that citizens have become drug addicted or are suffering from mental illness, which can lead to homelessness. It can mean that citizens have been forced into sex or labor trafficking. It can also mean that there is an active serial killer or killers in a particular region or throughout the country. Any of these scenarios are serious societal ills that can be helped by proper missing person investigations. Again, it is not just the families that deserve answers as to the fate of their missing loved one; society needs to know what is happening to its citizenry. We need to know so we can put programs in place that assist the drug addicted and mentally ill or so law enforcement can arrest those that would prey on the community. While being a long-term missing person is not illegal, it is an extremely bizarre status and one that communities should not accept. For this, and other reasons, it is imperative that law enforcement implement effective cold case programs throughout the country.

Historically, cold cases, but especially long-term missing person cases, have received little support from government entities and society as a whole. Law enforcement investigations have also been lacking. In the past, families have been told to wait 24, 48, 72, or more hours before reporting a loved one missing. As we know from major case investigations, like a murder, the more time and distance put between police and an offender, the less likely the case will have a successful conclusion. Also, in the past, missing person cases were allowed to be "filed, suspended, or closed" without locating or returning the individual. This is primarily due to some arbitrary passage of time that lends itself to a false assumption that the case is too old to be resolved. In some incidents, the cases were erroneously "purged" from electronic databases. In other incidents, law enforcement accepted witness statements from people who falsely claimed they observed the missing person alive and well, which effectively cancelled the investigation. These previous practices should no longer take place.

Currently, missing person investigations, along with unidentified person cases (a natural associate to missing person investigations), have received more support through funding of organizations like the

National Missing and Unidentified Persons System (NamUs), the University of Northern Texas Center for Human Identification (UNTCHI), and other initiatives, but overall, it is still an underserved field of investigation. This deficiency occurs for several reasons. One, most missing persons return or are located within hours or days of disappearance. This leads to a sort of apathy where society and law enforcement tends to believe that the missing will be back soon. Two, some erroneously believe that long-term missing person cases only affect a small part of the population, mainly the missing's family, and this constituency does not receive much attention. Three, it is not illegal for adults to go missing, and many missing juvenile cases are considered "runaway" scenarios. As we all know, law enforcement's main mandate is the protection of life and property through the enforcement of criminal law. Non-criminal cases become secondary issues. The problem with this mentality is that precious time and evidence could be lost when the missing person does not return or is not immediately located. That is why law enforcement must look at every missing person case as a well calculated crime or by imagining an unidentified corpse on an examination table at the local morgue. The preliminary investigation done today may very well be the only information available to aid in a criminal case or unidentified deceased person case tomorrow, next year, or decades from now. A missing person case, like a murder case, can never close unless the missing returns or is located alive or deceased.

II. New missing person cases

The National Crime Information Center (NCIC), the nationally recognized repository for missing and unidentified persons, reports that, as of December 31, 2019, the system contained 87,438 active missing person records.[1] Juveniles under age 18 account for 30,618 (35%) records, and juveniles under 21 account for 38,796 (44%) records.[2] During 2019, 609,275 missing person records were entered into the NCIC.[3] Missing person records purged during the same period totaled 607,104.[4] There were reasons for these removals: a law

[1] FED. BUREAU INVESTIGATION, 2019 NATIONAL CRIME INFORMATION CENTER (NCIC) MISSING PERSON AND UNIDENTIFIED PERSON STATISTICS (2019).
[2] *Id.*
[3] *Id.*
[4] *Id.*

enforcement agency located the subject; the individual returned home; or the record had to be removed by the entering agency due to a determination that the record was invalid.[5] Also, as of December 31, 2019, there were 8,188 unidentified person records in the NCIC.[6] During 2019, 683 unidentified person records were entered into the system.[7] The records entered in 2019 consisted of 448 (66%) deceased unidentified bodies, 9 (1%) unidentified catastrophe victims, and 226 (33%) living persons who could not ascertain their identities.[8] In 2019, 630 records were canceled or cleared by the entering agency for reasons such as the remains were identified or the record was invalid.[9]

As seen above, missing and unidentified person cases are a large problem for the nation, and there are discrepancies within the reporting. There are 87,438 active missing person records in the NCIC, but only 8,188 unidentified persons in the system.[10] In a 2007 article titled *Missing Persons and Unidentified Remains: The Nations Silent Mass Disaster*, the National Institute of Justice reported approximately 40,000 sets of human remains are held in the evidence rooms of medical examiners (and presumably coroner's offices) throughout the country.[11] The large volume of missing person cases in the country and discrepancies within record reporting lends itself to the need for increased training, familiarization, and standardization of missing person investigations.

Properly investigating a missing person case requires several conventional and contemporary investigative methods consistent with other law enforcement practices and procedures. These methods should be appropriately employed in all missing person cases, regardless of the place of disappearance. In other words, a missing person case that occurs in an urban, suburban, tribal, rural, or other community can benefit from the same or similar investigative tactics. Obviously, population density, crime conditions, current events

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[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] Nancy Ritter, *Missing Persons and Unidentified Remains: The Nation's Silent Mass Disaster*, 256 NAT'L INST. JUST. J. 2 (2007).

unique to a geographic area, cultural differences, and some other items affect any investigation, but the basics remain the same.

For the purposes of this article, being familiar with the culture and cultural practices of native populations can provide "tips or clues" for the successful resolution of missing person cases occurring within specific communities. Having said that, and to reiterate, missing person cases are primarily resolved with conventional and contemporary investigative methods. Training, experience, and the skill set of social service and law enforcement agencies also contribute to successful outcomes.

Please note that this article is not intended to be a missing person policy or procedure manual for any social service organization, law enforcement agency, or other entity. As presented in the previous paragraph, investigative methods for these types of cases are consistent despite geographic location. Local, county, and state laws, however, differ. Agency requirements also differ. The below points are general considerations for any missing person investigation:

- Law enforcement agencies should not consider any report of a missing person to be routine and should assume the missing person needs immediate assistance until an investigation reveals otherwise. This approach is similar to death investigations where detectives should assume the death was a result of a carefully planned murder until the case facts and circumstances prove otherwise.
- Law enforcement agencies should give high priority to missing person investigations and should never require a specific amount of time to pass before initiating an investigation.[12]
- Law enforcement agencies encountering an individual who wishes to report a missing person should render assistance without delay. This can be accomplished by accepting the report via telephone or in person and initiating an investigation. This can also be accomplished by checking the appropriate state electronic missing person repository and the NCIC to learn if the missing person is listed in the system(s) and contacting the originating agency to plan the course of the investigation.

[12] Juvenile Justice and Delinquency Prevention, 42 U.S.C. § 41308(1).

- Law enforcement agencies should immediately determine whether there is a basis to determine the missing person is "high risk." If so, the law enforcement agency should immediately act with an appropriate search and investigation. A high-risk missing person is generally defined as a person whose whereabouts are not known and whose circumstances indicate that the person may be at risk of injury or death.[13] The circumstances indicating that an individual is a high-risk missing person include, but are not limited to, any of the following:
    - The person is missing as a result of a stranger abduction.
    - The person is missing under suspicious circumstances.
    - The person is missing under unknown circumstances.
    - The person is missing under known dangerous circumstances.
    - The person is missing for more than 30 days.
    - The person has already been designated as a high-risk missing person by another law enforcement agency.
    - There is evidence that the person is at risk because:
        - They need medical attention, including but not limited to a person needing prescription medication or presenting dementia-like symptoms.
        - They not have a pattern of running away or disappearing.
        - They may have been abducted by a non-custodial parent.
        - They are mentally impaired or developmentally or intellectually disabled.
        - They are under the age of 21.
        - They have been the subject of past threats or acts of violence.
        - They have eloped from a nursing home.
        - They are a veteran, active duty, or reserve member of the United States armed forces or National Guard and are

[13] *See* 50 ILL. COMP. STAT. 722/10(a)(1).

believed to have a physical or mental health condition related to their service.

- Any other factor that may, in the judgment of the law enforcement official, indicate that the missing person may be at risk.[14]

- In the case of a missing juvenile (under 18 years of age), the law enforcement agency or any person responsible for the child's welfare may contact the National Center for Missing and Exploited Children (NCMEC) for assistance. NCMEC has wonderful resources for these types of investigations in both new and long-term missing juvenile cases. The missing child's cell phone, computer, and social media accounts are important tools in locating the juvenile. Parents must be knowledgeable of their children's friends and social networks so the information can be provided to investigating agencies. Current photographs of the missing child must be obtained for distribution if necessary. Notifications to schools and vital records agencies, like the county clerk, should be made in case there is a request for records from an individual in another jurisdiction—which may occur in a parental abduction case. Missing juveniles from child welfare, family foster care, or other childcare institution are particularly challenging. NCMEC should be promptly notified in these scenarios. Establishing a working relationship with child welfare institutions before missing juvenile cases occur aids in recovering children.
- In the case of missing juveniles or other high-risk missing persons, speedy communication between law enforcement agencies is imperative. The use of flash messages, investigative bulletins, and other messages over police radio and computer systems must be employed quickly. These forms of communication can be extended to social service agencies, hospitals, and other institutions like coroners and medical examiners. Law enforcement agencies should create a public alerts policy, establishing procedures and criteria for utilizing media outlets to assist with certain high-risk missing person cases. Agencies should also be familiar with programs like Amber Alert and Silver Alert. This article is not intended to

[14] *Id.*

provide instructions on abductions or kidnapping, but some investigative methods pertaining to missing and unidentified persons do overlap.

- Consistent correspondence with the reporting person (complainant or other person responsible for the missing's welfare) is a requirement for all missing person cases. This includes frequently re-contacting the reporting person and other witnesses within the first 30 days of the initial report and every 30 days thereafter to determine if any additional information is available. These contacts should be documented and included in the case file.
- Similar to all law enforcement investigations, missing person cases are a mix of conventional investigative methods like interviews, communications, and evidence collection intertwined with scientific processes like biometrics, data analysis, and other forensic disciplines. The primary scientific processes for these types of cases are fingerprints, dental, and DNA. This mirrors the investigative protocols for unidentified deceased person cases. When appropriate, the law enforcement agency investigating a disappearance should begin learning what items of evidence are available and begin situating the items in the appropriate repositories (databases). A missing person's fingerprints, if available, can be attached to missing person entries in electronic databases for future comparison. Antemortem dental records from a missing person can also be obtained and situated appropriately. These types of records can be compared to postmortem dental records for possible inclusionary or exclusionary purposes. Biological samples directly from the missing person or from the missing person's closely related family members can be collected and sent to a lab for genotyping. The resultant DNA profiles can be entered into the Combined DNA Index System (CODIS) for comparison. There are two types of DNA samples that can be utilized:
    - **Direct Reference Samples**—An item likely to contain a biological sample (for example, a toothbrush, a hairbrush, or clothing) from the missing person used to obtain a DNA profile.

- **Family Reference Samples**—A biological sample (for example, a buccal swab) from a blood relative of the missing person used to obtain a DNA profile.

Using direct reference samples and family reference samples requires documentation, like consent forms, so they can be used in state or federal DNA databases, including a Local DNA Index System (LDIS), a State DNA Index System (SDIS), and a National DNA Index System (NDIS).

- Another contemporary process that advances missing person cases is computer science. One such tool is NamUs. NamUs is a national information clearinghouse and resource center for missing, unidentified, and unclaimed person cases across the United States. Funded and administered by the National Institute of Justice and managed through a cooperative agreement with the UNT Health Science Center in Fort Worth, Texas, all NamUs resources are provided at no cost to law enforcement, medical examiners, coroners, allied forensic professionals, and family members of missing persons.[15] NamUs offers a multitude of services to stakeholders involved in missing person cases. Some of these are investigative support (consulting) and training for law enforcement agencies.[16] Others are forensic services like odontology, fingerprint examination, anthropology, and DNA analyses through the UNTCHI.[17] Family DNA collection kits are also provided at no cost.[18]
- A missing person case may only be closed when the missing person is confirmed as returned or located. This includes locating the missing person as deceased. Short of this, law enforcement agencies should keep cases under active investigation. Confirmation means that a law enforcement official viewed the returned or located missing person and learned, to the extent possible, the facts and circumstances surrounding the individual's disappearance. Confirmation can also mean that a deceased person has been properly identified as the missing

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[15] U.S. DEP'T JUST., NATIONAL MISSING AND UNIDENTIFIED PERSONS SYSTEM, https://www.namus.gov/ (last visited Jan. 28, 2021).
[16] *Id.*
[17] *Id.*
[18] *Id.*

person. Exhausting leads and the life expectancy of the missing person should not be reasons for closing a case. The missing person case file and all associated documents and evidence must be retained in perpetuity until the individual has returned or been located. After that, the case file should be retained, consistent with state records laws or until otherwise deemed non-essential.

III. Cold or long-term missing person cases and cold case overview

Cold case investigations are an underserved subfield of policing. Law enforcement's need to resolve cold cases is ever present; however, resources and budgets to solve them are not. Nonetheless, it is incumbent upon law enforcement agencies to actively investigate cases that have gone cold and bring answers and, perhaps, closure to victims and their families.

Many people think about an old, unsolved murder when they hear the term "cold case." Recently, more diplomatic words for cold cases, such as "unresolved cases" or "long term cases," have arisen. Either way, many individuals and agencies define a cold case as a murder that has not been resolved beyond an arbitrary amount of time, like one year, or when all investigative leads have been exhausted. This definition is partially correct, but the idea that the term "cold case" only pertains to a murder is false.

Cold cases also include missing and unidentified persons, undetermined deaths, and sexual assaults. These types of cases—like murder—can never close unless the victims and offenders are identified. A missing person must return or be located, the John Doe identified, and a cause and manner of death established. Exceptions such as sexual assault cases with statutory limitations and requirements exist, but some state legislatures are pausing or extending statutes of limitations for cases with biological evidence.

A. Cold cases are solved in five main ways:

1. Leverage forensic science and technology

Science and computer technology constantly evolve. Advances have increased the ability of law enforcement agencies to gain new information about suspects and victims. Leveraging these resources can be as simple as locating evidence associated with the case and

submitting it to a lab for DNA testing or resubmitting evidence that was previously tested but provided limited data. Other strategies include utilizing federal resources, such as the Federal Bureau of Investigation's (FBI) Next Generation Identification (NGI) System for fingerprints and other biometrics, as well as the NamUs and NCIC off-line searches. Genealogy and phenotyping are two new investigative tools. This is all about utilizing processes that were not available to our predecessors.

2. Recognize relationship changes and time

Time is not typically associated with advancing an investigation, but for some witnesses, time can be helpful. For example, changes in relationships can create an environment where witnesses are more willing to share information. It is important to learn about what your witnesses have been doing since the original incident and to revisit their prior statements. This process can provide opportunities to clarify or gain new information.

3. Exploit information in correctional systems

When reviewing a cold case, determining what the witnesses and suspects have been doing since the original incident is imperative. Suspects may have been charged on a different case for the same or similar crime. Monitoring outgoing jail telephone calls and using confidential informants are conventional investigative methods. To expand these methods, consider meeting with the suspect's current and former cellmates. If the information can further the case, think about seeking a court order to record or "overhear" a conversation with a cooperative inmate and your suspect.

4. Identify investigative errors

Errors occasionally occur during the investigative process. In addition, lack of training, resources, or skill sets may prevent some agencies from following cases to their natural conclusion. There are reasons why these types of cases were not solved the first time. Identifying those reasons can make the difference. Do not hesitate to reach out for help from other agencies, organizations, or individuals that have proven successful. A new set of eyes can change the status of these cases to "cleared and closed."

5. Be persistent

Cases that have gone "cold" will not be resolved unless we continually review them. A person who went missing or was murdered many years ago is no less important than the one who goes missing or is murdered today. Even if not ultimately resolved, bringing cold cases to a "contemporary status" is law enforcement's responsibility and the key to increasing their solvability.[19]

IV. Forming a cold case unit

As established above, and to reiterate, cold cases are defined as unsolved murders, long-term missing or unidentified persons, undetermined deaths, and open sexual assault cases. When viewed from this perspective, forming a cold case unit becomes more plausible and easier to defend from a budgetary standpoint. Additional functions or roles can be added to enhance the unit's mission. These could be complex death investigations, forensic (body) recovery methods, and searching for missing persons where there is a likelihood that the missing is deceased. The unit grows beyond a cold case unit into a forensic services unit, a special investigations unit, or a major case unit when the unit works on the correct cases and is combined with investigative subcategories. This unit title shift often garners more support from decision makers.

When forming a cold case unit, it is important to consider the law enforcement agency's size. This is usually understood as the number of agency personnel, but it can also be the number of citizens the agency serves, considering primary and secondary jurisdictions. For simplicity, this article will use small, medium, and large to describe agency size. Small agencies are those that have less than a dozen incidents that fit the definition of cold cases in this article. Large agencies are major city, county, or state police departments that have thousands of these types of cases. Medium agencies fall in between the small and large agencies.

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[19] JASON P. MORAN, NATIONAL RESOURCE AND TECHNICAL ASSISTANCE CENTER FOR IMPROVING LAW ENFORCEMENT INVESTIGATIONS—BUREAU OF JUSTICE ASSISTANCE, U.S. DEPARTMENT OF JUSTICE AND NATIONAL POLICE FOUNDATION, 5 THINGS YOU NEED TO KNOW ABOUT DEFINING AND SOLVING A COLD CASE.

A. The below items aid in forming a cold case unit:

1. Get organized

Establish your agency's need by forming a comprehensive list of open cold cases. Decision makers need to visualize the problem. Seeing a list of open murders, long-term missing or unidentified person cases, undetermined deaths, and criminal sexual assaults creates a picture. Depending on an agency's size and case management skills, this could be time consuming.

2. Be prepared for a commitment

A cold case unit, regardless of its name, is a long-term endeavor. It is critical that decision makers and unit members understand this commitment. To be effective, cold case investigations must be given the time they deserve. Locating records, evidence, witnesses, and suspects takes time. Conducting backgrounds and evidence testing can be tedious. Travel may be necessary. Depending on the amount of cases, this may mean the unit will exist for several years or become permanent.

3. Dedicated staff

A cold case unit requires dedicated staff. Tasking unit members with investigations or duties unrelated to the ones defined in this series will set the unit up for failure. The assaults, robberies, and murders of today will always take precedence over a cold case. If command staff believe that cold case unit members are available for assignment to a current incident or other cases, the unit members will be pulled away from their assigned duties. The reassignment will cause additional delays and loss of focus on the cold cases.

4. Skill set, experience, and motivation

Cold case unit members must have a mix of experience and skill levels. Decision makers should never force an investigator into this type of unit, nor should the unit be filled with only members near retirement. The unit should be staffed with motivated investigators that display interest in long-term, advanced investigations. In addition to experienced and motivated investigators, consider assigning a dedicated crime analyst to the team. Database style searching, analytics, statistical reporting, and case management are keys to success.

5. Units fit agency size

Large agencies have the resources to staff separate, fulltime units dedicated to unsolved murders, long-term missing or unidentified persons, complex or undetermined deaths, and open sexual assault cases. Medium size agencies are better served by a forensic services style unit as defined in this article. Small agencies should consider utilizing their homicide task forces to investigate these types of cases. Between murder cases, a portion of the taskforce could be activated to work on a cold case. Small agencies should also consider utilizing the services of a consultant. As an example, an active or retired law enforcement officer with demonstrable experience.

B. Cold case unit expectations

Decision makers and unit members must not determine the unit's success through arrests and prosecutions only. Few cold cases go to trial. Unit success must be viewed by completed tasks, families helped, and dignity restored. Successes may be tracked through closing unsolved murders or through reclassification (if appropriate), locating missing persons alive or deceased, identifying Jane Does, and establishing cause and manner of death. Bringing cold cases to a "contemporary status" must be the goal. In short, this means that all conventional investigative methods have been completed and all contemporary investigative methods have been applied. Even if the cases are not solved, they are viable, and they have a chance at closure. This is due in part to all information and evidence being placed in environments where it will continually be compared to other data and other evidence that may further the case. The alternative is to continue to allow these cases to fade away as they collect dust on a shelf where they will not "return or be located" or suffer "a second death." Bringing cases to a contemporary status provides the best opportunity for closure now and in the future.[20]

V. Closing

Missing person cases, whether new or cold, are some of the most important incidents that law enforcement can investigate. While most missing persons return or are located within hours or days of disappearance, the ones that do not are devastating for families and

[20] *Id.*

are symptoms of an unhealthy community. Training and resources need to be provided to social service and law enforcement agencies to aid in resolving these types of cases. While there are technical and philosophical hurdles to forming cold case units, thoughtful decision makers can overcome these issues by recognizing the fact that well-run units are a form of serious crime prevention. When community members are murdered, missing, die with a number as opposed to a name, or are assaulted without resolution, crime conditions thrive. Also, killers (and those contemplating violent acts) must know that they will be pursued until they die. The anxiety of being captured can never ease because there are dedicated investigative groups relentlessly searching for answers and new technologies consistently being developed to aid in that effort. When viewed from this perspective, the technical aspects of forming cold case units become more durable. This leaves the philosophical aspect of supporting cold case initiatives. It must be that a person that went missing or was murdered many years ago is no less important than the one that goes missing or is murdered today—the victim, the family, and our communities deserve resolve. We must not allow families and the community to live in a "cruel limbo".

About the Author

Jason P. Moran is the President of JEMM Consulting, LLC. JEMM Consulting provides consulting and training services to individuals, businesses, associations, and government agencies on certain law enforcement subfields. Some of these subfields are missing or unidentified persons, death investigations, human identification, cold or unresolved cases, and death care industry incidents. Jason is also a member of the Cook County Sheriff's Office, where he has served for 22 years. He currently holds the rank of Lieutenant of Police. In that role, he manages several investigative units, which includes a Human Trafficking and Forensic Services component. The Forensic Services Unit is responsible for the investigation of human identification cases, complex deaths, cold missing person and homicide cases, and death care industry incidents.

Jason has made local and national headlines for leading major investigations and closing several high-profile cold cases. Among these are the Chicago Burr Oak Cemetery Case, the probe into the Cook County Medical Examiner's Office, and the identification of two of the victims of the serial killer John Wayne Gacy. Jason has appeared on

several news programs and has been featured in several documentaries. Recently, he filmed two multiple-part programs on the Discovery ID channel called "Deadly Legacy" and "The Clown and the Candyman." Jason has completed in-depth research and field work regarding the burial of Cook County's indigent, unclaimed, and unidentified. He has served the Cook County Medical Examiner's Office as the vice-chairman of its advisory board and has assisted that office with several items, like the proper handling of unidentified deceased person cases. As a result of his investigations, Jason has worked with county and state officials in drafting legislation regarding public burials and certain forensic methods. He has formed a forensic archaeology team and has conducted approximately 20 exhumations and grave inspections. Jason has received several notable awards for his work. Some of those awards are the International Association of Chiefs of Police 2012 August Vollmer Excellence in Forensic Science Award; the Cook County Crime Stoppers 2015 Excellence in Law Enforcement Award; and the National Criminal Justice Training Center of Fox Valley Technical College 2017 Conference Service Award. He is trained in many investigative sub-categories like forensic archaeology, human/comparative osteology, human identification, and DNA evidence. Jason is an instructor and lecturer. He teaches a death investigation course and a missing/unidentified person course. He has lectured at a 2017 FBI National Academy Regional Meeting, the 2019 International Association of Chiefs of Police Annual Conference and Expo, and a 2021 Unites States Department of Justice Missing and Murdered Indigenous Person Training. Jason has published several articles and presented several webinars for the National Police Foundation on various cold case topics.

American Indian and Alaska Native Knowledge and Public Health for the Primary Prevention of Missing or Murdered Indigenous Persons

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I. Abstract

Violence against American Indian and Alaska Native (AIAN) women, children, two-spirit individuals,[1] men, and elders is a serious

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* Chester L. Antone, Teshia G. Arambula Soloman, Elizabeth Carr, Michele Connolly, Felina Cordova-Marks, Kevin English, Miguel Flores, Jr, Patrisia Gonzales, Tara Ramanathan Holiday, Bette Jacobs, Michelle Kahn-John, Amanda Moreland, Theda New Breast 'Makoyohsokoyi', Ninez A. Ponce, Sharon G. Smith, Antony Stately, Rose Weahkee, Samantha Bent Weber.

[1] "The use of the term two-spirit has been known to facilitate an individual's reconnection with tribal understandings of non-binary sexual and gender identities, as well as traditional spiritual or ceremonial roles that two spirits have held, thus reaffirming their identities . . . ." Jessica H. L. Elm et al., *"I'm in This World for a Reason": Resilience and Recovery Among American Indian and Alaska Native Two-Spirit Women*, 20 J. LESBIAN STUD. 352, 353 (2016) (citing Karina L. Walters et al., *"My Spirit in My Heart": Identity Experiences and Challenges Among American Indian Two-Spirit Women*, 10 J. LESBIAN STUD. 125 (2006); Karina L. Walters et al., *Sexual Orientation Bias Experiences and Service Needs of Gay, Lesbian, Bisexual,*

public health issue. Violence may result in death (homicide), and exposure to violence has lasting effects on the physical and mental health of individuals, including depression and anxiety, substance abuse, chronic and infectious diseases, and life opportunities, such as educational attainment and employment. All communities are affected by some form of violence, but some are at an increased risk because of intergenerational, structural, and social factors that influence the conditions in communities where people live, learn, work, and play. Using a violence prevention public health approach, we discuss the role public health can play in addressing and preventing the prevalence of missing or murdered indigenous persons (MMIP).[2] This paper is written as a public health primer and includes a selective overview of public health and Native public health research. It also includes case studies and Native experts' reflections and suggestions regarding the use of public health knowledge and theory, as well as Native knowledge and cultural practices to combat violence. An effective public health prevention approach is facilitated by complex, contextual knowledge of communities and people, including individual and community risk factors, as well as protective factors in strengthening Native communities and preventing MMIP.

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Author Perspective
Indigenous Framework and Cultural Identity

Indigenous knowledge during responsive cultural practices using ancestral values shows promise in preventing violence and restoring families and communities to balance with solid mental health. Indigenous practices bring ultimate health, healing, wellness, and growth from historical trauma, past and present. Indigenous knowledge is experiential and often called a pathway or journey to self-actualization; many traditional knowledge keepers teach that the longest journey is from your head to your heart. The

Transgendered, and Two-Spirited American Indians, 13 J. GAY & LESBIAN SOC. SERVS. 133 (2001); Alex Wilson, *How We Find Ourselves: Identity Development and Two-Spirit People*, 66 HARV. EDUC. REV. 303 (1996).

[2] The authors recognize that, while the term MMIP is used, this work is complex and evolving. Other terms commonly used may include, but are not limited to, missing or murdered indigenous women (MMIW) and missing or murdered indigenous women, girls, and two-spirit people (MMIWG2S).

incidence of MMIP continues to reflect the reality of indigenous persons' vulnerability and a public health crisis.

Reclaiming rites of passage from birth to grave bring healing to intergenerational trauma. These rites of passage restore beliefs that women are life givers, women are respected, and women are sacred: conducting ceremonies during birthing; naming; first word; first step; transition from girl to womanhood; weddings; motherhood; first grandchild; and other rites of passage for boys, men, and elders that indicate transferring into a solid cultural identity that brings joy and contentment.

Indigenous knowledge is proactive and fortifies the cultural identity of indigenous persons at all ages and becomes a protective factor. Beginning with native language restoration, immersion schools taught with only the language heard while still in diapers, media in the language with English subtitles, sign language, skits in the language, creation stories acted out in the language, colleges taught with bilingual instruction, and acting and drama schools producing historical truths in the language.

Indigenous knowledge brings the teachings of the four seasons, which we mark with ceremonies: equinox solstice, songs to sun and moon rotation, planting, medicinal plant use to treat and prevent illness, water, cleansing, return from war or combat, forgiveness, grief and funeral, gratitude and honoring, traditional and sustainable food, etc.

Indigenous knowledge helps clarify and map out cultural identity with our many community roles: gender, sisterhood, auntie, uncle, grandfather, grandmother, cousin, and other kinship roles that unify the extended family.*

Public health promotes and protects the health of people and the communities where they live, learn, work, and play. To prevent violence, public health seeks to create safe, stable, and nurturing relationships and environments for all people. MMIP affects communities, families, and loved ones, and its victims may be women and girls, children, men, two-spirit individuals, and elders.

Violence is defined as "the intentional use of physical force or power, threatened or actual, against oneself, another person, or against a

* Theda New Breast 'Makoyohsokoyi' (Amskapipikuni [Blackfeet] from The Blackfoot Confederacy), Master Indigenous Trainer/Facilitator, Native Wellness Institute and Board Member, Sovereign Bodies Institute

group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment, or deprivation."[3] Violence, including adverse childhood experiences (ACEs), has a lasting impact on health, spanning injury, disease outcomes, risk behaviors, maternal and child health, mental health problems, and death.[4]

This paper serves as a public health primer to prevent MMIP. MMIP context is provided by weaving public health, research, and applied examples from AIAN experts, best practices in public health, and legal approaches using traditional wisdom and culture. Woven throughout the text, author perspectives are provided as applied examples to contextualize and complement the topics raised based on the individual experiences of several authors.

II. Role of public health in primary prevention of violence

Violence is preventable using a public health approach. Preventing violence from occurring, or primary prevention, may be an effective approach to MMIP. This approach follows a common four-step process (see Figure 1).[5] While these four steps may occur sequentially, the

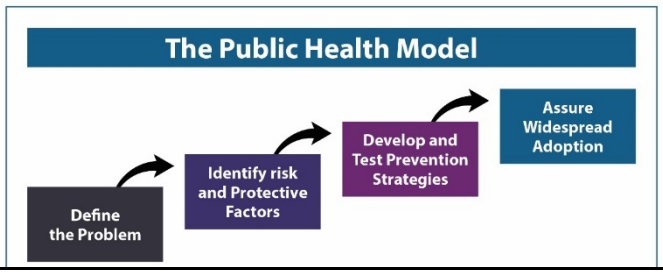

Figure 1. A public health approach to violence prevention

[3] WORLD HEALTH ORG., WORLD REPORT ON VIOLENCE AND HEALTH 4 (Etienne G. Krug et al., eds., 2002).

[4] CTRS. FOR DISEASE CONTROL & PREVENTION, PREVENTING ADVERSE CHILDHOOD EXPERIENCE: LEVERAGING THE BEST AVAILABLE EVIDENCE 8 (2019); CTRS. FOR DISEASE CONTROL & PREVENTION, PREVENTING MULTIPLE FORMS OF VIOLENCE: A STRATEGIC VISION FOR CONNECTING THE DOTS 5 (2016).

[5] *The Public Health Approach to Violence Prevention*, CTRS. FOR DISEASE CONTROL & PREVENTION (last reviewed Jan. 28, 2020), https://www.cdc.gov/violenceprevention/publichealthissue/publichealthapproach.html.

process is cyclical, and steps may be revisited at any point. There is also recognition that risk and protective factors (step 2) for one form of violence impact other forms of violence.[6] Overall, this public health approach offers a framework for asking and answering questions to build successful violence prevention efforts. Violence prevention efforts are often guided by the Social Ecological Model[7] (see Figure 2), which describes how risk factors and opportunities for prevention exist across the social ecology, including at the individual, relationship, community, and broader societal levels.

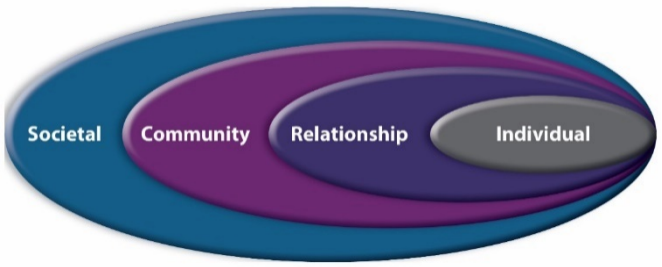

Figure 2. Social Ecological Model of violence prevention

III. Introduction to MMIP data, issues, and complexities

Data are foundational to solving significant public health challenges such as MMIP. This section describes the basic principles of public health data; the most current data available from public health surveillance systems and community-based data advocates; and problems with data, including unique problems experienced only by AIAN, and possible technical solutions to those problems.

There are 574 federally recognized tribes as of August 11, 2020; multiple state-recognized tribes; and urban Indian communities throughout the United States. Contrary to popular belief, about 75% of AIAN live in urban, suburban, and rural settings, not on

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[6] NATALIE WILKINS ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, CONNECTING THE DOTS: AN OVERVIEW OF THE LINKS AMONG MULTIPLE FORMS OF VIOLENCE 5 (2014).

[7] *The Social-Ecological Model: A Framework for Prevention*, CTRS. FOR DISEASE CONTROL & PREVENTION (last reviewed Jan. 28, 2020), https://www.cdc.gov/violenceprevention/publichealthissue/social-ecologicalmodel.html.

reservations, in villages, or in Indian country (federal reservation and/or off reservation trust land, Oklahoma tribal statistical area, state reservation, or federal- or state-designated American Indian statistical area).[8] AIAN people also live 5.5 years less than the general U.S. population (all races).[9] While AIAN people experience broad quality of life issues rooted in structural inequalities, economic adversity, and poor social conditions, AIAN people have persevered and remain resilient.

When we understand the *who*, *what*, *when*, *where*, and *how* associated with violence, we can focus on prevention. Data can demonstrate violence frequency, where it occurs, trends, and who the victims and perpetrators are. The data can be obtained from police reports, medical examiner files, vital records, hospital charts, registries, population-based surveys, and other sources.

Step one in a public health model is to define the problem. One primary problem with data for MMIP is that MMIP are underrepresented in statistics, either because they are not counted in the first place (for example, race is not accurately captured in records of missing or murdered persons) or because race is misclassified in data systems (for example, incorrect race data, tabulation issues), which is a common problem in many public health data systems.[10]

Elected officials and public health decision makers in all jurisdictions need the best data and science for decision making for prioritization and resource allocation.[11] While AIAN persons are

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[8] TINA NORRIS, PAULA L. VINES & ELIZABETH M. HOEFFEL, U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, at 13 (2012).

[9] *Disparities*, INDIAN HEALTH SERV. (Oct. 2019), https://www.ihs.gov/newsroom/factsheets/disparities/.

[10] Lisa Neel, *IHS Signs New Agreement Supporting Information-Sharing to Tribal Organization*, INDIAN HEALTH SERV. (Aug. 23, 2019), https://www.ihs.gov/newsroom/ihs-blog/august2019/ihs-signs-new-agreement-supporting-information-sharing-to-tribal-organization/; Judith Swan et al., *Cancer Screening and Risk Factor Rates Among American Indians,* 96 AM. J. PUB. HEALTH 340 (2006); Linda Burhansstipanov & Delight E. Satter, *Office of Management and Budget Racial Categories and Implications for American Indians and Alaska Natives*, 90 AM. J. PUB. HEALTH 1720 (2000).

[11] *Knowing Tribal Health*, ASS'N OF STATE AND TERRITORIAL HEALTH OFFICIALS, https://www.astho.org/Programs/Health-Equity/Tribal-Health-Primer/ (last visited Aug. 11, 2020).

recognized as a racial minority in the United States, federally recognized tribes are sovereign governmental and political entities.[12] This is important for the way we think about supporting public health policy and programming in Indian country and impacts our approaches to data: AIANs need data representation. Describing basic information and dispelling myths about AIAN demographics is important to preventing MMIP.[13]

The Centers for Disease Control's (CDC) datasets from the National Vital Statistics System (NVSS), the National Violent Death Reporting System (NVDRS), and the National Intimate Partner and Sexual Violence Survey (NISVS) inform MMIP prevention efforts.[14] AIAN people experience disproportionate rates of homicide, sexual violence, stalking, and intimate partner violence.[15] According to 2018 NVSS data, among those aged 1–44 years, homicide was the third leading cause of death among AIAN males and the sixth leading cause among AIAN females. Interpersonal conflicts are common. For example, NVDRS data from 2015 to 2017 show that homicides among AIAN were most often precipitated by arguments (46%), physical fights between two people (26%), intimate partner violence (18%), and problems with a family member (12%) or a friend or associate (12%). A quarter of AIAN homicides in the NVDRS were related to another serious crime (felony incidents).[16] Self-report data collected from adults through the NISVS (2010–2012) indicate that 47.5% of non-Hispanic AIAN women and 40.5% of non-Hispanic AIAN men experienced contact sexual violence, physical violence, and/or stalking

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[12] Jo Carrillo, *Identity as Idiom: Mashpee Reconsidered*, 28 IND. L. REV. 545 (1995); Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974).

[13] NINEZ PONCE ET AL., IMPROVING DATA CAPACITY FOR AMERICAN INDIAN/ALASKA NATIVE (AIAN) POPULATIONS IN FEDERAL HEALTH SURVEYS 11 (2019).

[14] *National Vital Statistics System*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/nchs/nvss/index.htm (last visited Mar. 15, 2021); *National Violent Death Reporting System*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/violenceprevention/datasources/nvdrs/index.html (last visited Mar. 15, 2021); *The National Intimate Partner and Sexual Violence Survey*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/violenceprevention/datasources/nisvs/index.html (last visited Mar. 15, 2021).

[15] CTRS. FOR DISEASE CONTROL AND PREVENTION, CDC WORKS TO ADDRESS VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE PEOPLE.

[16] *Id.*

by an intimate partner during their lifetime.[17] These estimates are likely undercounts of violence AIAN people experience.[18]

IV. Data issues and complexities

Although data are limited, what we know is that MMIP are a growing and sobering concern for families, tribes, communities, and governments. Collecting and using data is standard public health practice for the United States. Because the AIAN population is small and often clustered in remote areas, it tends to be overlooked in national population surveys and vital statistics. Even when AIAN people are included, the numbers are often too small to provide separate estimates. Therefore, AIAN people can be "statistically invisible," limiting the ability to identify or address concerns like MMIP.[19]

The census is the recognized count of AIAN people. The 2010 census found that 5.2 million (1.6%) of the U.S. population reported themselves as being AIAN along with another race, while 2.9 million (0.9%) reported AIAN as their only race. The Bureau of Indian Affairs (BIA) reported during that same time that there were nearly 2 million people enrolled in federally recognized tribes, and the Indian Health Service reported their service population was about 2.1 million.[20] In 2016, according to the American Community Survey, those who reported AIAN as their only race had the highest poverty rate of any racial or ethnic group (21.7% compared to 10%), were more likely to live in homes with more than one person per room (8.5% to 3.4%), and less likely to have a telephone (6.2% to 3.0%) or motor vehicle (13.4%

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[17] SHARON G. SMITH ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2010–2012 STATE REPORT 3 (2017).

[18] RACHEL E. MORGAN & BARBARA A. OUDEKERK, U.S. DEP'T OF JUST., OFFICE OF JUSTICE PROGRAMS, CRIMINAL VICTIMIZATION, 2018 (2019); Hilary N. Weaver et al., *The Colonial Context of Violence: Reflections on Violence in the Lives of Native American Women*, 24 J. INTERPERSONAL VIOLENCE 1552 (2009).

[19] Michele Connolly et al., *Identification in a Time of Invisibility for American Indians and Alaska Natives in the United States*, 35 STAT. J. IAOS 71 (2019); Richard Madden et al., *Indigenous Identification: Past, Present and a Possible Future,* 35 STAT. J. IAOS 23 (2019).

[20] Connolly et al., *supra* note 18.

to 8.7%).[21] Lack of electricity and limited access to broadband presents challenges in reporting and preventing MMIP; a 2014 report found that 14% of reservation households did not have electricity,[22] and a 2019 report found that 65% had broadband internet coverage.[23]

MMIP are not confined to reservations. A 2018 report of the Urban Indian Health Institute identified 506 Missing and Murdered Indigenous Women (MMIW) in 71 cities from 2010 to 2018.[24] Most U.S. MMIP data comes from datasets about violence and crime, which are limited by self-reporting.[25] Numbers are often inferred from data sources that measure violence against women and girls, child abuse, exploited girls and women, suicide, and stalking—known risk factors for MMIP. Data consistency would improve how violence is measured and how often data are collected.

Public health data are commonly reported as rates or percentages. Both the numerator (cases reported) and the denominator (population) have to be verified. Even minor changes can affect rates.[26] For example, if the numerator for MMIP includes persons who are abducted and voluntarily absent (versus just the number who are abducted), it would inflate the number of MMIP. A denominator that includes the number of AIAN persons nationally produces a vastly different MMIP rate than a MMIP rate based on tribal or local numbers; these different rates could lead to inapt policymaking or public health responses.[27] Prevalence over time is also important to

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[21] *Id.*

[22] Laurie Stone, *Native Energy: Rural Electrification on Tribal Lands*, ROCKY MOUNTAIN INST. (June 24, 2014), https://rmi.org/blog_2014_06_24_native_energy_rural_electrification_on_tribal_lands/.

[23] CONSUMER & GOV'T AFFAIRS BUREAU, WIRELESS TELECOMM. BUREAU & WIRELINE COMPETITION BUREAU, FED. COMMC'NS COMM'N, REPORT ON BROADBAND DEPLOYMENT IN INDIAN COUNTRY, PURSUANT TO THE REPACK AIRWAVES YIELDING BETTER ACCESS FOR USERS OF MODERN SERVICES ACT OF 2018 (2019) (report submitted to the Senate Committee on Commerce, Science, and Transportation and House of Representatives Committee on Energy and Commerce).

[24] ANNITA LUCCHESI & ABIGAIL ECHO-HAWK, URBAN INDIAN HEALTH INST., MISSING AND MURDERED INDIGENOUS WOMEN & GIRLS: A SNAPSHOT OF DATA FROM 71 URBAN CITIES IN THE UNITED STATES 6 (2018).

[25] MORGAN & OUDEKERK, *supra* note 17.

[26] Connolly et al., *supra* note 18; Bette Jacobs, *Indigenous Identity: Summary of Future Directions*, 35 STAT. J. IAOS 147 (2019); Ponce et al., *supra* note 13.

[27] Connolly et al., *supra* note 18; Madden et al., *supra* note 18.

consider, as 25 cases in 6 months is different than 25 cases over 10 years. Public health concepts like incidence (the number of new cases) and prevalence (the cumulative number of cases) differ in important ways. Finally, rates are dynamic. Women initially listed as missing may later be found. Numbers and rates need to reflect these changes, along with changes in the local population.

More timely and complete data could help tribes, communities, service providers, law enforcement, and non-profit organizations better address prevention and early intervention approaches for those at risk for and becoming MMIP.[28] Because tribes also need data for governance, longitudinal and trend studies are important for guiding action. In this way, we can better describe and target support for MMIP.

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Author Perspective
State-level surveillance and need for Native and other minority data

Federal health surveys provide nationally representative estimates for the U.S. population, but insights on Native populations are limited because of the small number of Native respondents in probability-based sampling frames and non-collection of tribal affiliation. The small sample size leads to data suppression and aggregation of data and racial/ethnic identity tabulation rules that inaccurately capture the Native population—many of whom are multiracial and also identify as Latinx/Hispanic. State-level surveillance could raise probability-based representation. California, Arizona, and Oklahoma are states with the largest concentrations of American Indian populations, and Alaska has more than 20% of residents who report at least being partially Native.[29] For California, the California Health Interview Survey (CHIS), a continuous survey since 2001, can generate data regarding social risk factors at the individual, family, and

[28] Connolly et al., *supra* note 18; Bette Jacobs et al., *At the Intersection of Health and Justice: How the Health of American Indians and Alaska Natives is Disproportionately Affected by Disparities in the Criminal Justice System*, 6 BELMONT L. REV. 41 (2019); LUCCHESI & ECHO-HAWK, *supra* note 23.
[29] *Native Americans and the U.S. Census: How the Count has Changed*, USA FACTS (updated Jan. 20, 2020), https://usafacts.org/articles/native-americans-and-us-census-how-count-has-changed/.

community levels for Native populations by a multitude of racial/ethnic, non-binary gender, and tribal identities. Using CHIS, women who identify as AIAN report the highest rate (37%) of ever experiencing physical or sexual violence by an intimate partner since age 18.[30] State-level surveillance could be a necessary indigenous knowledge investment to more precisely reflect the primary prevention of MMIP.*

Author Perspective

Tribe-specific public health data are a valid and urgent request. To address critical data gaps, the Albuquerque Area Southwest Tribal Epidemiology Center is dedicating significant resources to provide meaningful data for AIAN tribes, both large and small, through a variety of novel approaches, including oversampling, data linkages, tribally driven surveillance and primary data collection, statistical modeling, geocoding, etc.**

Author Perspective
Why we need and how we use data

Even with limited, oftentimes unreliable, data, the alarming number of reported MMIW is indicative of the devastating impact of a complex legal framework[31] and a failure of systems designed to protect and respond to the intersectionality that Native victims and survivors of violence face. In 2018, the U.S. Commission on Civil Rights released the Broken Promises Report, affirming the need for the federal government to fulfill its trust responsibility with appropriate allocations of resources to tribal nations.[32]

[30] *See AskCHIS*, CAL. HEALTH INTERVIEW SURVEY, http://ask.chis.ucla.edu/AskCHIS/tools/_layouts/AskChisTool/home.aspx#/results (last visited Aug. 11, 2020).

* Ninez Ponce, Professor of Health Policy & Management & Director, UCLA Center for Health Policy Research, University of California Los Angeles, Fielding School of Public Health

** Kevin English, Director, Albuquerque Area Southwest Tribal Epidemiology Center

[31] Exec. Order No. 13,898, 84 Fed. Reg. 66059 (Dec. 2, 2019).

[32] U.S. COMM'N CIV. RIGHTS, BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS (Sheryl Cozart et al. eds.

Indian country faces multiple challenges, including but not limited to: (cross)jurisdictional issues (for example, responsibilities, barriers, communication, and planning); (in)action from governmental officials; and limited resources,[33] leading to increased risk for violence and MMIP. U.S. Representative Tom Cole (Oklahoma) said it best when he stated, "Hunters know where to hunt, fishermen know where to fish and predators know where to prey. And sadly, a disproportionate number of sexual predators have preyed on Indian Country and Native women."[34] While tribal leaders push for restoration of inherent tribal authority, advocates call for more complete and accurate data to fully understand the MMIW crisis.

Without accurate data, it is difficult to educate Congress about MMIP. With accurate data and implementation of the data directives in Executive Order 13898,[35] Congress may better understand the scope of the issue and make informed decisions on what is needed for MMIW prevention.*

V. Shared risk and protective factors

The different forms of violence (for example, intimate partner violence and sexual violence) share similar risk and protective factors that accumulate throughout childhood, adolescence, and adulthood.[36] Recall step two of the public health model: MMIP is interconnected to multiple forms of violence, and knowledge is needed to understand how historic and contemporary risk and protective factors affecting AIAN people may contribute to violence prevention efforts.[37]

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2018) [hereinafter Broken Promises].

[33] *Id.*

[34] *Combating Domestic Violence*, *Weekly Columns*, CONGRESSMAN TOM COLE (Oct. 23, 2019), https://cole.house.gov/media-center/weekly-columns/combating-domestic-violence.

[35] Exec. Order No. 13,898, 84 Fed. Reg. 66059 (Dec. 2, 2019).

* Elizabeth Carr (Sault Ste. Marie Tribe of Chippewa Indians), Senior Native Affairs Advisor, National Indigenous Women's Resource Center

[36] WILKINS ET AL., *supra* note 6.

[37] Rita Ledesma, *The Urban Los Angeles Urban American Indian Experience: Perspectives from the Field*, 16 J. ETHNIC & CULTURAL DIVERSITY SOC. WORK 27 (2007).

Author Perspective

The situation and condition with respect to MMIW is much greater than we currently know. Across the United States, we live in a society that devalues women. There are a host of historical factors and systemic factors that make this condition much worse in tribal communities for Native women and children.[38*]

Social determinants of health (SDOH) or the conditions in the environments where people are born, live, learn, work, play, worship, and age affect violence experiences.[39] Data show how AIAN people may be at increased risk for violence due to high adverse childhood experience (ACE) scores and applicable SDOH. For example, education attainment, a protective factor, is lower for AIAN; only 72% of AIAN students graduate from high school with a regular four-year diploma—this statistic increases to 82% if GED recipients are included. Only one in five (20%) high school graduates age 18–24 enroll in college.[40]

Violence risk factors may include reminders of historical trauma experienced by AIAN populations (for example, loss of land, language, traditions, and respect for traditional ways) that contribute to inequities.[41] Despite inequities, AIAN communities remain resilient

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[38] Jennifer A. Waltman, *Working with Native American Patients & Clients—The 3 C's*, MINN. PSYCH. ASS'N (Sept. 30, 2016), https://www.mnpsych.org/index.php?option=com_dailyplanetblog&view=entry&category=event%20recap&id=161:working-with-native-american-patients-clients-the-3-c-s.

[*] Antony Stately (Ojibwe/Oneida), Chief Executive Officer, Native American Community Clinic

[39] *Development of the National Health Promotion and Disease Prevention Objectives for 2030, Office of Disease Prevention & Health Promotion*, HEALTHYPEOPLE.GOV, https://www.healthypeople.gov/2020/About-Healthy-People/Development-Healthy-People-2030 (last visited Aug. 31, 2020).

[40] *Fast Facts: High School Graduation Rates*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/fastfacts/display.asp?id=805 (last visited Aug. 11, 2020).

[41] Joseph P. Gone et al., *The Impact of Historical Trauma on Health Outcomes for Indigenous Populations in the USA and Canada: A Systematic Review*, 74 AM. PSYCH. 20 (2019); Amy Bombay et al., *The Intergenerational Effects of Indian Residential Schools: Implications for the Concept of Historical Trauma*, 51 TRANSCULTURAL PSYCHIATRY 320 (2014); Teresa N. Brockie et al., *A Framework to Examine the Role of Epigenetics in Health Disparities Among Native Americans*, 2013 NURSING RES. & PRAC. 1 (2013); Teresa Evans-Campbell, *Historical Trauma in American Indian/Native*

and possess cultural and community assets that can protect against violence, including community-mindedness, connection to tribal leaders, tribal language, participation in tribal ceremonies, and spirituality.[42] Effectively identifying and supporting culturally relevant risk and protective factors across varying forms of violence may enhance the public health approach, help develop AIAN programs, and help adapt existing programs for violence prevention.[43] The CDC's violence prevention technical packages are available to help communities make decisions based on the best available evidence.[44]

VI. Violence risk factors affecting AIAN people

AIAN experience disproportionate risk factors for MMIP, which can be traced to the legacy of violence against Native people rooted in the appropriation of lands, including the forced marches from traditional homelands; the capture, trafficking, and enslavement of men, women, and children;[45] and the current struggles of cases being lost within judicial systems.[46] The history of the U.S. government's policies and colonialism's historical context provide a deeper understanding of the

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Alaska Communities: A Multilevel Framework for Exploring Impacts on Individuals, Families, and Communities, 23 J. INTERPERSONAL VIOLENCE 316 (2008).

[42] Michele Henson et al., *Identifying Protective Factors to Promote Health in American Indian and Alaska Native Adolescents: A Literature Review*, 38 J. PRIMARY PREVENTION 5 (2017).

[43] *Technical Packages for Violence Prevention: Using Evidence-Based Strategies in your Violence Prevention Efforts*, CTRS. FOR DISEASE CONTROL & PREVENTION (last reviewed Dec. 6, 2018), https://www.cdc.gov/violenceprevention/pub/technical-packages.html.

[44] *See id.*

[45] *See* Exec. Order No. 13,898, 84 FR 66059 (Dec. 12, 2019); Linford D. Fisher, *Why shall wee have peace to bee made slaves: Indian Surrenderers During and After King Philip's War*, 64 ETHNOHISTORY 91 (2018); ELIAS CASTILLO, A CROSS OF THORNS: THE ENSLAVEMENT OF CALIFORNIA'S INDIANS BY THE SPANISH MISSIONS (2015); ALAN GALLAY, THE INDIAN SLAVE TRADE: THE RISE OF THE ENGLISH EMPIRE IN THE AMERICAN SOUTH 1670–1717 (2003).

[46] Lemyra DeBruyn et al., *Child Maltreatment in American Indian and Alaska Native Communities: Integrating Culture, History, and Public Health for Intervention and Prevention*, 6 CHILD MALTREATMENT 89 (2001).

forces at play and the limited resources that tribal communities have for protecting their citizens from violence, rendering these communities more vulnerable to MMIP.

The U.S. government's ethnocidal policies (for example, federal assimilation, termination, and relocation) and past genocidal policies (for example, military actions, forced relocation) for AIAN people[47] led to historical and intergenerational trauma.[48] The separation and destruction of families and communities by forcing generations of children (against parents' will or willingly) to attend Indian boarding schools modeled on authoritarian, military culture was intended to erase indigenous identity.[49] Many children at these boarding schools experienced physical, sexual, and emotional abuse and neglect.[50] These experiences resulted in the dismantling of Native communities

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[47] *See Colorado: Sand Creek Massacre National Historic Site*, NAT'L PARK SERV., https://www.nps.gov/articles/sandcreek.htm#:~:text=On%20November%2029%2C%201864%2C%20roughly%20700%20federal%20troops,between%20American%20Indian%20tribes%20and%20the%20Federal%20Government (last visited Mar. 10, 2021); ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLE'S HISTORY OF THE UNITED STATES (2014) (discussing impacts of military actions on AIAN populations); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1][a] (Nell Jessup Newton et al. eds., 2012); Lindsey N. Kingston, *The Destruction of Identity: Cultural Genocide and Indigenous Peoples*, 14 J. HUM. RTS. 63 (2015); *Native Voices: Timeline*, U.S. NAT'L LIBR. MED., https://www.nlm.nih.gov/nativevoices/timeline/index.html (last visited Sept. 2, 2020).

[48] Teresa Evans-Campbell et al., *Indian Boarding School Experience, Substance Use, and Mental Health Among Urban Two-spirit American Indian/Alaska Natives*, 38 AM. J. DRUG ALCOHOL ABUSE 421 (2012); Sadie Willmon-Haque & Subia Dolores BigFoot, *Violence and the Effects of Trauma on American Indian and Alaska Native Populations*, 8 J. EMOTIONAL ABUSE 51 (2008); Maria Yellow Horse Brave Heart & Lemyra M. DeBruyn, *The American Indian Holocaust: Healing Historical Unresolved Grief*, 8 AM. INDIAN ALASKA NATIVE MENTAL HEALTH RES. 56 (1998).

[49] Matthew T. Gregg, *The Long-Term Effects of American Indian Boarding Schools*, 130 J. DEV. ECON. 17 (2018); Yellow Horse Brave Heart & DeBruyn, *supra* note 48.

[50] Amory Zschach, *Coalition Seeks Answers about Child Who Went Missing at U.S. Indian Boarding School via United Nations Working Group on Enforced and Involuntary Disappearances*, NAT'L INDIAN CHILD WELFARE ASS'N (May 14, 2019), https://www.nicwa.org/coalition-seeks-answers-about-children-who-went-missing-at-u-s-indian-boarding-school-via-united-nations-working-group-on-enforced-and-involuntary-disappearances/.

and families and the loss of culture, language, pride, and any sense of safety or belonging. Boarding school and non-AIAN foster family experiences are fundamental contributing factors to historical trauma,[51] and their effects (for example, abuse, loss of traditional gender roles, and parenting styles) are not only passed down from generation to generation through stories, but also through epigenetics and role modeling behavior where AIAN people experience higher ACE scores, which leads to increased risk for violence and subsequent adverse health outcomes.[52] These experiences lead to intergenerational trauma affecting future generations' interpersonal relationships, including child abuse and neglect, elder abuse, and violence against women.[53]

In addition to the historical context placing AIAN people at greater risk for experiencing MMIP, social contexts are operating and influencing risk.

> There is an enduring violence generally against women and Native women in society. [MMIP] has been going on for decades or centuries and is not a great secret *if you are looking*. Other background contexts include, but are not limited to, white privilege, sexual conquest of (Native) women, racism and racial ambiguity, gender bias and stereotyping, and misogyny.[54]

The connection between historical trauma, intergenerational trauma, and MMIP is a tangled mix of issues that cross the social ecological model. Trauma influences individual behaviors such as

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[51] Karina L. Walters et al., *Bodies Don't Just Tell Stories, They Tell Histories: Embodiment of Historical Trauma Among American Indians and Alaska Natives*, 8 DU BOIS REV. 179, 179 (2011); G.A. Res. 61/295 (Sept. 13, 2007); Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069.
[52] Brockie et al., *supra* note 40.
[53] William E. Hartmann et al., *American Indian Historical Trauma: Anticolonial Prescriptions for Healing, Resilience, and Survivance,* 74 AM. PSYCH. 6 (2019); Evans-Campbell, *supra* note 40; Yellow Horse Brave Heart & DeBruyn, *supra* note 47.
[54] Centers of Disease Control and Prevention, *Remarks During Centers for Disease Control and Prevention Panel: Changing Directions: Protecting Communities and Preventing Violence*, YOUTUBE (Feb. 13, 2020), https://www.youtube.com/watch?v=0krMSEupljE.

substance misuse and mental health-related issues.[55] Sexual violence is common, starts early, and is costly.[56]

One explanation for missing status may be related to the exploitation and victimization of AIAN persons in the sex trafficking industry, which occurs in urban and rural areas and is well established in literature as occurring near border towns and pipeline construction.[57] Risks may occur across local, tribal, regional, national, and transnational levels. SDOH, including underhousing and overcrowded housing where AIAN people experience extreme poverty and unsheltered homelessness provide many community-level risk factors.[58]

At the societal level, structural and institutionalized policies affecting SDOH have led to complicated jurisdictional issues; issues with the foster care system; lack of emergency services; conflict between tribes and local, state, and federal governments; and a lack of communication between agencies like the local police, the Federal Bureau of Investigation, and tribal police.[59] These complex social systems may be more effective when working collectively and in collaboration to prevent MMIP.

AIAN people are at risk to be missing or murdered because they experience the same factors that put any individual at risk for violence, which is *compounded* by additional risk due to historical trauma, intergenerational trauma and violence experiences, and

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[55] SOVEREIGN BODIES INST., TO' KEE SKUY' SOO NEY-WO-CHEK' I WILL SEE YOU AGAIN IN A GOOD WAY: YEAR 1 PROJECT REPORT ON MISSING AND MURDERED INDIGENOUS WOMEN, GIRLS, AND TWO SPIRIT PEOPLE OF NORTHERN CALIFORNIA 109 (2020).

[56] Cora Peterson et al., *Lifetime Economic Burden of Rape Among U.S. Adults*, 52 AM. J. PREVENTATIVE MED. 691, 691 (2017).

[57] Eliza Macy, *Don't Bite the Hand that Feeds You: Environmental and Human Exploitation Sold as Prosperity*, 9 TAPESTRIES: INTERWOVEN VOICES OF LOCAL & GLOBAL IDENTITIES (2020); *Human Trafficking in the United States: Hearing Before the S. Homeland Security & Gov't Affairs Comm.*, 113th Cong. (2013); NORRIS ET AL., *supra* note 8.

[58] NAT'L CONG. OF AM. INDIANS, SECURING OUR FUTURES (2013).

[59] Exec. Order No. 13,898, 84 Fed. Reg. 66059 (Dec. 2, 2019); ATTORNEY GEN. ADVISORY COMM. ON AM. INDIAN & ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE, ENDING VIOLENCE SO CHILDREN CAN THRIVE (2014).

structural issues rooted in the systemic violence against and devaluation of AIAN.[60]

VII. Protective factors affecting AIAN people

AIAN tribes are diverse and unique in their ceremonies and practices. AIAN people share a common belief that their traditional wisdom is protective, and they seek to alert public health and social justice officials to the immediate need for programs grounded in traditional knowledge, practice, and ceremony to address the issue of MMIP. This primer aligns with the call to action set forth in the *American Indian and Alaska Native Cultural Wisdom Declaration*: to honor culturally relevant public health interventions and the inherent self-determination and resilience of Native people.[61]

Engaging in "strength-based conversations" and connecting to our wisdom teachings enables us to respond to this pressing issue.[62] Native American cultural knowledge, spiritual and ancient healing,

[60] Walters et al., *supra* note 50.

[61] SAMHSA, INDIAN HEALTH SERV. & NAT'L INDIAN HEALTH BOARD, *American Indian and Alaska Native Cultural Wisdom Declaration*, *in* THE NATIONAL TRIBAL BEHAVIORAL HEALTH AGENDA 4 (2016).

[62] *See, e.g., UA Consortium on Gender-Based Violence Announces Innovation Fund Awardees*, THE UNIV. OF ARIZ. COLL. OF SOC. & BEHAV. SCIENCES (July 12, 2019), https://sbs.arizona.edu/news/ua-consortium-gender-based-violence-announces-innovation-fund-awardees (awardees include Patrisia Gonzales whose project, Creating a Rapid Response Network to Address Violence Against Indigenous Women in Tucson, seeks to use an indigenous critical thinking framework to lead workshops with Indigenous students, Native community members, and members from the H.O.N.O.R. collective to strengthen resiliency and healing among Indigenous women).

and health systems have endured the test of time and exist to address the entangled and complex trauma of violence. Wellness, protection, self-determination, and resilience emerge from AIAN teachings.

Traditional wisdom is holistic, and the values and practices are relevant across social ecological model levels. The violence prevention solutions are layered and found by aligning the justice and public health systems to AIAN sacred knowledge. Public health approaches have been shown to be more effective when grounded in a relationship that honors trust and includes culturally relevant health and healing interventions, along with social and legal service initiatives that incorporate the traditional values of respect, responsibility, relevance, and harmony (see Figure 3).[63]

Figure 3. Four AIAN Traditional Values (artwork courtesy of Miguel Flores, Jr., and Michelle Kahn-John) The circle represents the Medicine Wheel and the four directions. The purple heart represents healing, with the four core values of cultural wisdom in the center. Black and white feathers represent dichotomous thinking and dialectics, as sometimes legal and behavioral health do not see eye to eye.

* * *

Author Perspective
What would violence prevention based on AIAN Traditional Values look like

Respect: Through our ancient ceremonies and our daily activities, we hand down stories to each generation that teach us to respect ourselves, one another, and our community. The framework for tribal sovereignty and self-determination is built on trust and demonstrated in criminal justice systems by respecting tribal laws and traditional practices.

Reverence: All of creation is a sacred gift. Life itself is held in great reverence, including elders, women, men, children, and the places from which we emerged, water, land, and air.

[63] Henson et al., *supra* note 41; Daniel Vujcich et al., *Indigenous Youth Peer-Led Health Promotion in Canada, New Zealand, Australia, and the United States: A Systematic Review of the Approaches, Study Designs, and Effectiveness*, 6 FRONTIERS IN PUB. HEALTH 1 (2018).

Interventional approaches would be considerate, kind, and compassionate, and we must be conscious and intentional to avoid re-traumatization as well as offer support.

Responsibility: All of creation is a sacred gift, and our responsibility is to care for it. This includes creating safe environments, homes, schools, workplaces, and tribal lands. Timely investigations and treating victims, offenders, and their families with respect is an important element of the responsibility to care.

Harmony: Indigenous solutions return victims and families back to balance. A victim's non-response is a symptom of trauma. The external forces and the cascading of events is exhaustive and can disable the capacity to respond. Our ceremonies are designed to recover balance that allows for transformation from the effects of trauma.

AIAN have profound knowledge to protect AIAN people, and AIAN know this wisdom is true. The principles of respect, reverence, responsibility, and harmony would be honored, and the sacred needs to align with various intersecting systems. AIAN have survived thousands of years because of this knowledge system. That is why AIAN are still here, why they persevere, and why they endure.*

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VIII. Violence Prevention and Public Health Law

To address and prevent violence in AIAN populations,[64] we turn to the tools of public health law and policy. *Public health law* is defined generally as the powers and duties of federal and state governments to advance public health aims across populations, including prevention as previously defined in this article, while protecting individual rights.[65] As written in the Tenth Amendment to the U.S. Constitution, states have "police powers" over health, safety, and welfare to effectuate public health laws on everything from infection control, motor vehicle safety, and prescription drug overdose to violence prevention.[66] States also have the authority to delegate these powers to localities.[67]

Together, these laws can prevent individuals and populations from experiencing violent outcomes, such as going missing or being murdered, but as noted in greater detail in this section, there are

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[64] As public health approaches to missing and murdered people address violence prevention generally, this article discusses the laws and legal approaches taken to preventing violence.

[65] LAWRENCE O. GOSTIN & LINDSAY F. WILEY, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 5 (3d ed. 2016). The tension between individual liberties and government action reflects the history behind the Tenth Amendment, which reserves powers not granted to the federal government to states. *Id.*

[66] Public health laws can be distinguished as*: interventional* laws that seek to change behaviors and environments through incentives and disincentives; *infrastructural* laws that establish agencies and authorize programs; and *incidental* laws that relate to housing, education, and other topics that have public health impact. Scott Burris et al., *Moving from Intersection to Integration: Public Health Law Research and Public Health Systems and Services Research,* 90 MILBANK Q. 375, 378 (2012).

[67] For example, the Supreme Court has upheld the use of police powers by localities to effectuate public health policy over vaccinations time and again, stating that there are "manifold restraints to which every person is necessarily subject for the common good." Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905). In a more contemporary example, in September 2019, Seattle adopted a resolution to confront the problem of missing and murdered AIAN women and girls with a focus on pursuing "Indigenous-led approaches to ending gender-based violence." City Res. 31900, at 5 (Seattle 2019) (enacted).

gaps.[68] These gaps are exacerbated in AIAN communities due to a lack of data that could help identify MMIP, clarify the public health dimension of MMIP, and tailor effective ways to prevent violence.[69] As discussed later in this section, our rapid assessment of current federal and state public health laws and policies identified few statutes and regulations that specifically address AIAN people or the specific needs of AIAN communities.

Some people may perceive tribal law as bearing primary responsibility for addressing the interests of AIAN people. Outside of Alaska, where many rural communities are majority AIAN, about three in four AIAN people live outside of reservations, where they are neither subject to tribal law nor likely perceived as key constituents of state and local policymakers who may operate on the presumption that AIAN interests and needs are addressed by tribal authorities.[70]

Public health law can be used to help prevent the disproportionate impact of violence on AIAN populations, particularly as policymakers consider a coordinated legal approach comprised of federal, tribal, state, and local measures and initiatives to prevent violence in AIAN populations.[71]

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[68] As discussed below, a small number of states have passed laws or regulations that seek to address the phenomenon of MMIP or that seek to mitigate violence against AIAN people. Additionally, some federal legislation such as the proposed Savanna's Act, which is currently pending in the U.S. House of Representatives, seeks to do some of that gap-filling by requiring increased training of law enforcement agencies, development and implementation of educational and other outreach to tribes and the public on MMIP, and development of guidelines for responding to cases involving MMIP. Savanna's Act S. 227, 116th Cong. (2019); Not Invisible Act of 2019, S. 982, 11th Cong. (2020).

[69] *See supra* discussion of these data challenges above, at pages 6–11 [of current draft].

[70] NORRIS ET AL., *supra* note 8.

[71] *See, e.g., Missing and Murdered: Confronting the Silent Crisis in Indian Country: Hearing Before the S. Comm. on Indian Affs.,* 115th Cong. (2018) [hereinafter *Hearing*] (statement of Hon. Amber Kanazbah Crotty, 23rd Navajo Nation Council Del.); Not Invisible Act of 2019, *supra* note 67 (as pending in Congress the Act seeks to advance coordination among tribal, federal, state, and local law enforcement officials to pursue prevention efforts).

A. Federal law and violence prevention

Federally recognized tribes in the United States, as sovereign nations, operate tribal governments that exercise jurisdiction over their lands and citizens and conduct formal nation-to-nation relationships with the U.S. government. The inherent power of tribes to self-govern is recognized in the U.S. Constitution, as well as in various treaties and case law.[72] These legal sources describe a "trust responsibility," or duty of protection, owed by the U.S. government to tribal nations and their members.[73] One critical manifestation of that trust relationship can be federal funding,[74] which may have a significant impact on violence prevention activities. Two of several laws allocating such funding are discussed below.

The Violence Against Women Act (VAWA) and the Family Violence Prevention and Services Act (FVPSA) create funding initiatives aimed at preventing violence against women, including "Native women," as defined in these laws. VAWA was passed by Congress in 1994 and requires the Attorney General to conduct annual consultations with tribal governments about administering its funding and programs.[75] VAWA also includes initiatives that strengthen law enforcement services for preventing violence against women, expand recognition of tribal jurisdiction over non-Native perpetrators, and allocate funds to expedite the processing of rape kits and other victim services.[76] Additionally, VAWA authorizes the Department of Justice's Office on Violence Against Women to administer grants through several programs designed to reduce domestic violence, dating violence,

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[72] U.S. CONST. art. I, § 8; *see* Williams v. Lee, 358 U.S. 217 (1959).
[73] Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, AM. BAR ASS'N (Oct. 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol--40--no--1--tribal-sovereignty/short_history_of_indian_law/; *Tribal Governance*, NAT'L CONG. OF AM. INDIANS, http://www.ncai.org/policy-issues/tribal-governance (last visited Aug. 11, 2020).
[74] *American Indians and Alaska Natives—The Trust Responsibility,* ADMIN. FOR NATIVE AMS. (Mar. 19, 2014), https://www.acf.hhs.gov/ana/resource/american-indians-and-alaska-natives-the-trust-responsibility#:~:text=The%20trust%20doctrine%20is%20a,tribes%20and%20respect%20their%20sovereignty.
[75] 34 U.S.C. § 20126.
[76] *Tribal Affairs*, U.S. DEP'T OF JUST. (updated Jan. 28, 2019), https://www.justice.gov/ovw/tribal-affairs.

sexual assault, and stalking.[77] Typically, programs funded under VAWA or other federal grants have a competitive application processes and stringent reporting requirements that can make them inaccessible to some tribes with few resources, limiting their reach and impact in AIAN communities.[78]

FVPSA is the primary source of federal funding for emergency support and services for victims of domestic violence and their dependents, with funds directed to states, territories, tribes, state domestic violence coalitions, and resource centers.[79] FVPSA also supports efforts to prevent repeated victimization through prevention and public awareness initiatives.[80] Much of the federal funds intended for tribal services have typically been directed through states first, only some of which ultimately reach tribal communities.[81] As of June 2018, however, approximately 10% of FVPSA funds were distributed through tribal formula grants that were earmarked specifically for tribal services.[82]

Federal grants like these and others to tribal organizations can be used to evaluate and analyze data related to the high prevalence of MMIP, including whether law and policy are effective in preventing violence. Tribal leaders, however, reported during the annual consultation with the Attorney General that current direct funding to tribes is insufficient to implement violence prevention initiatives, including legal and policy analysis activities, within federally

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[77] 34 U.S.C. § 20126.

[78] *See How to Apply for OVW Funding*, U.S. DEP'T OF JUST. (updated Jan. 28, 2019), https://www.justice.gov/ovw/how-apply; BROKEN PROMISES, *supra* note 31; NATIONAL CONGRESS OF AMERICAN INDIANS, RESPONSE TO DOJ QUESTIONS (2019) [hereinafter Response to DOJ]; *Hearing, supra* note 70 (statement of Hon. Amber Kanazbah Crotty).

[79] 42 U.S.C. §§ 10401–10414; *Family Violence Prevention and Services Program*, FAM. & YOUTH SERVS. BUREAU, https://www.acf.hhs.gov/fysb/programs/family-violence-prevention-services/about (last visited Aug. 27, 2020).

[80] FAM. & YOUTH SERVS. BUREAU, FAMILY VIOLENCE PREVENTION AND SERVICES PROGRAM OVERVIEW (June 2018).

[81] *Support for Tribal Governments*, NATIONAL CONGRESS OF AMERICAN INDIANS (2018), http://www.ncai.org/3FY2018-NCAI-Budget-Request2-Tribal_Gov.pdf.

[82] FAM. & YOUTH SERVS. BUREAU, *supra* note 79.

recognized tribes.[83] This perceived insufficiency is likely compounded when considering non-federally recognized tribes and AIAN women who live outside of tribal lands. Awarding grants to state governments for sub-allocation to tribes or to cover tribes within their boundaries, either due to congressional statute or directives or agency strategy, can make it difficult for tribes to administer service programs for their own citizens if states make funding and programmatic decisions without sufficient input from, and understanding of, needs within tribal communities.[84] Competitive grant funding processes may make it more difficult for some tribes to apply and ultimately be awarded funds, thereby potentially perpetuating inequitable access to resources that tribes, instead of states, are best equipped to deploy to address their communities' needs.[85] While this is a burgeoning area of focus, federal and state initiatives point to a recognition that laws and policies can be used to ensure tribes receive adequate funding for violence prevention programs that strengthen AIAN data collection efforts and create culturally relevant and sensitive programming to combat violence against AIAN people and protect AIAN communities.[86]

B. State violence prevention laws

Some states and localities have also sought to develop public health laws to prevent the downstream effects of violence. With few exceptions, however, these laws are limited in number and scope, do not expressly define primary or secondary prevention, and largely do not specifically address AIAN needs.

Results from a rapid legal assessment indicated that 12 states in the United States have statutes or regulations reflecting legislative or regulatory attention to primary or secondary violence prevention.[87]

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[83] OFF. ON VIOLENCE AGAINST WOMEN, U.S. DEP'T OF JUST., 2019 TRIBAL CONSULTATION REPORT (2019).

[84] BROKEN PROMISES, *supra* note 31, at 45–54, 205–06; RESPONSE TO DOJ, *supra* note 77; *Hearing*, *supra* note 70 (statement of Hon. Amber Kanazbah Crotty).

[85] BROKEN PROMISES, *supra* note 31, at 45–54, 205–06; RESPONSE TO DOJ, *supra* note 77; *Hearing*, *supra* note 70 (statement of Hon. Amber Kanazbah Crotty).

[86] *See supra* note 67 and *infra* note 88.

[87] *See infra* notes 88–95. These states are Arkansas, California, Colorado, Connecticut, Illinois, Minnesota, New Hampshire, New York, Ohio, Rhode

For example, Minnesota authorizes its commissioner of public safety to "award grants to programs that provide sexual assault primary prevention services to prevent initial perpetration or victimization of sexual assault."[88] New York also established a grant to support primary and secondary prevention programs aimed at domestic and family violence and child abuse; it requires annual reporting to the governor and legislature on the effectiveness of their prevention and treatment initiatives.[89]

None of these laws specifically identify AIAN women as key targets, but some laws have discrete implications for AIAN populations. For example, Washington addresses primary and secondary prevention of domestic violence by prioritizing the development of "culturally relevant and appropriate services" for victims and their children from unserved or underserved populations.[90] Because it also establishes a domestic violence prevention account in the state treasury to support such culturally appropriate, community-based services[91] and emphasizes secondary prevention of domestic violence in other parts of the public health code related to alcohol and drug treatment,[92] the

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Island, Texas, and Washington. This research was conducted by searching in the WestlawEdge™ database for state statutes and regulations with the keywords: primary prevention or secondary prevention within 50 words of violence or violent (using search string of "'primary prevention' 'secondary prevention' /50 viole!").

[88] MINN. STAT. ANN. §§ 611A.211, 611A.212.

[89] N.Y. SOC. SERV. LAW § 481-e (McKinney 2019). Some state laws support educational institutions with, and penalize those without, primary and secondary prevention initiatives. CAL. CODE REGS. tit. V, § 11987.1; CAL. EDUC. CODE § 67386; CONN. GEN. STAT. ANN. § 10a-55m; 110 ILL. COMP. STAT. 155/5; 19 TEX. ADMIN. CODE § 3.4. California, Illinois, and Texas require postsecondary education to have "comprehensive prevention and outreach programs" addressing sexual violence or assault, sexual harassment, domestic violence, dating violence, and stalking. CAL. EDUC. CODE § 67386 (making student financial assistance contingent on having such a program); 110 ILL. COMP. STAT. 155/5 (including same-sex violence); 19 TEX. ADMIN. CODE § 3.4 (extending these programs to benefit students and employees of these institutions).

[90] WASH. REV. CODE ANN. § 70.123.010.

[91] WASH. REV. CODE ANN. § 70.123.150.

[92] WASH. REV. CODE ANN. § 70.83C.020.

impact of these provisions could be far-reaching for AIAN individuals living in Washington.[93]

Apart from primary and secondary prevention, a second rapid assessment identified 10 laws in 7 states that address "missing and murdered" AIAN people, all of which focus on law enforcement responses.[94] Only one provision, from Utah, mentions prevention.[95] Some states, like Oklahoma, established a government entity, such as a task force or commission, to study and implement programmatic initiatives. Oklahoma is exceptional in its inclusion of AIAN women in its Domestic Violence Fatality Board, which draws upon the input of several institutions, including the health department, to examine domestic violence incidents and fatalities, as well as the views of at least one AIAN survivor of domestic violence.[96]

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[93] Other states that have created funding for primary prevention, albeit without specific reference to culturally appropriate services, including Ohio and Rhode Island. OHIO REV. CODE ANN. § 109.46; 12 R.I. GEN. LAWS § 12-29-12.

[94] These states are Arizona, Oregon, North Dakota, South Dakota, Utah, Washington, and Wyoming. ARIZ. REV. STAT. ANN. § 41-2051; Act of May 14, 2019, ch. 119, 2019 Or. Laws 1; N.D. CENT. CODE ANN. § 54-12-23 ; S.D. CODIFIED LAWS §§ 23-3-18.1, 23-3-18.2; UTAH CODE ANN. § 36-29-107; Wash. Rev. Code Ann. § 43.386.900; WASH. REV. CODE ANN. §§ 43.43.874, 43.43.876; WYO. STAT. ANN. § 9-1-638. As of this writing, some states like California, Minnesota, Montana, and Wisconsin are developing task forces to research the issue, but these are not yet reflected in state legislation or regulations. This research was conducted by searching in the WestlawEdge™ database for state statutes and regulations with the keywords: "(missing and murdered) and (Indigenous or Native or Indian)."

[95] UTAH CODE ANN. § 36-29-107. North Dakota establishes a human trafficking commission that focuses on investigation and prosecution relating to MMIP, N.D. CENT. CODE ANN. § 54-12-23(d) it also requires the commission to make presentations on awareness and prevention generally.

[96] OKLA. STAT. ANN. tit. 22, § 1602. Similarly, Colorado requires a domestic violence fatality review board to collect and analyze data and create recommendations for the state legislature, suggesting that its public report "may include . . . [r]ecommendations directed at primary prevention of domestic violence." COLO. REV. STAT. ANN. § 24-31-702. It does not, however, target, AIAN women. *See id*.

C. Opportunities for improvements in public health law and policy

As our rapid assessments indicate, the relatively small number of states with laws specifically addressing AIAN individuals suggests a silence in public health law about the phenomenon of missing or murdered AIAN women. Laws establish authorities and priorities for jurisdictions to create and implement policies and programs and are a critical foundation for improving our response to the MMIP crisis. Accordingly, lawyers, judges, advocates, and policymakers can form strategic alliances with public health practitioners at each level of government to address MMIP. Training and capacity building can help build the literacy of the public health workforce in public health law.[97] Also vitally important in these efforts is educating lawyers on how to promote primary and secondary violence prevention.

Laws can be valuable tools to fill critical gaps in data collection about missing or murdered people. Laws can, themselves, be a source of instructive data. Using legal epidemiology and policy evaluation, public health practitioners can assess legal strategies for preventing violence.[98] Subsequently, data from these studies can be used to develop and more equitably apply policies, such as investigations, to missing or murdered AIAN people. Public health law initiatives, such as medical–legal partnerships or alternative funding mechanisms, can also help support AIAN communities and expand research in violence prevention.[99]

Legal epidemiological research and policy surveillance can lead to sustained, evidence-informed activities and decision making for

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[97] Montrece McNeill Ransom et al., *Building the Legal Capacity of the Public Health Workforce: Introducing the Public Health Law Academy*, 47 J. LAW, MED. & ETHICS 80 (2019); *see also* Kristine Gebbie et al., *The Public Health Workforce,* 21 HEALTH AFFS. 57, 58 (2002).

[98] *See* Scott Burris et al., *A Transdisciplinary Approach to Public Health Law: The Emerging Practice of Legal Epidemiology*, 37 ANN. REV. PUB. HEALTH 135 (2016).

[99] *See generally Medical-Legal Partnerships*, NETWORK FOR PUB. HEALTH LAW, https://www.networkforphl.org/resources/topics/initiatives/medical-legal-partnerships/ (last visited Sept. 4, 2020); *Tribal Programs: Resource Constraints and Management Weaknesses Can Limit Federal Program Delivery to Tribes: Hearings Before the Subcomm. for Indigenous Peoples of the U.S., H.R.,* 116th Cong. (2019) (statement of Anna Maria Ortiz, Dir., Nat. Res.'s & Env't).

improving the difficult social and environmental conditions in which some AIAN people live. It can also inform an often overlooked but crucial area for growth in the legal realm, expanding the awareness of judges and lawmakers of critical gaps in the law and promoting trauma-informed approaches in addressing matters involving MMIP.

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Author Perspective

State of emergency declared—why we wear red

Indigenous women and children suffer a spectrum of violence, including rape, physical assaults, abductions, and murder. Violence began with first contact and continues to escalate with no accountability as reflected in the current MMIW crisis.

As of August 2020, the National Missing and Unidentified Persons System (NamUs) system listed 619 missing Alaska Native and American Indian people, 241 of those were from Alaska—the most of any state.[100] Many agree there are many more unreported or misclassified deaths that should be included in this number. Over half of Alaska Native women experience physical or sexual violence in their lifetime.[101] Alaska is reported to have the highest homicide of women by men,[102] and Alaska has the highest state violent crime rate (2018).[103]

Tracking MMIW is difficult because the deaths are often classified as accidents, suicides, or undetermined—even with signs of foul play—meaning investigations do not take place. Reports often go uninvestigated because there is no evidence of a crime or dismissed due to perceived or actual alcohol/drug use. This leaves families and friends to conduct the searches themselves.

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[100] *American Indian/Alaska Native Missing Persons Cases*, NAMUS (Aug. 1, 2020), https://static1.squarespace.com/static/5d0cfe3b240ddb00016f9215/t/5f2c09387396c2352a0ba67b/1596721468197/August_2020_AIAN.pdf.

[101] ANDRÉ B. ROSAY, VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN 11 (2016).

[102] NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE IN ALASKA (2015).

[103] *Crime in the United States by Region, Geographic Division, and State, 2017–2018*, FED. BUREAU OF INVESTIGATION, https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/tables/table-4 (last visited Nov. 24, 2020).

Tribal governments have the inherent right and ability to protect their citizens but for the federal and state barriers.

Our tribal governments likely would be in a better position to respond and provide public health prevention, public safety, social services for victims, and justice systems with fewer barriers. Increasing the collaboration and coordination of federal, state, and tribal investigations, prosecutions, and law enforcement would likely lead to improved protocols for intervention and the establishment of an alert system similar to the amber or silver alerts for children and elders.

Mothers, aunties, and grandmas have been put in the position to not prevent violence, but to prepare our daughters how best to survive when they inevitably experience physical or sexual violence.

We wear red for the missing women and for an end to the violence.*

Author Perspective

The role of prevention in healing intergenerational and historical trauma

Intergenerational and historical trauma represents an imbalance and disharmony that has been the result of years of trauma passed from generation to generation. The repetitive and cumulative effects of this trauma and unresolved grief originated from the loss of lives, land, spirituality, language, and other aspects of AIAN culture as a result of colonization.

Prevention is integral to healing from intergenerational and historical trauma, including understanding the risk and protective factors. The protective factors are key to prevention efforts. Restoring harmony and balance involves developing a sense of who we are in relation to our history, nature, land, time, and our physical and spiritual world. Elders are the carriers of culture and tradition. The wisdom and knowledge of our elders are essential parts of the healing process.

* Debra O'Gara (Djik Sook; Cedar Bark House of the Teeyhittaan Clan of Wrangell), Pro Tem Judge, Tlingit and Haida Tribal Court and Senior Policy Specialist, Alaska Native Women's Resource Center

Our history is woven into the very fabric of our daily lives. Our history is the premise of who we are and how we make decisions today. What our ancestors have gone through and what we have gone through is as real as yesterday. It is a history not of mere survival but of resiliency and strength. Our ancestors, elders, and activists before us left us a legacy, and we have the responsibility to pass this legacy on to future generations. Future generations listen and learn and take on this responsibility to restore the harmony and balance to tribal communities.

Tribal people have fought to maintain traditional ways, beliefs, and value systems. Native languages are spoken. Tribal sovereignty remains strong. The interconnected view of the world has survived. The sense of duty and responsibility to others continues, as well as an unwavering ability to not only survive but to succeed and thrive despite all obstacles, and an unwillingness to give up. Current and past activists led the efforts to address MMIP with dignity, strength, and hope that will benefit future generations.*

IX. Conclusion

AIAN people are at increased risk to be missing or murdered because they experience all of the same factors that put any individual at risk for violence, *compounded* by centuries of structural inequities rooted in systemic violence against AIAN people. AIAN communities survive and, through action, are moving toward collective healing, promotion of health and well-being, and ultimately, to the prevention of MMIP. Violence is preventable. We recommend deploying the public health model—collecting and using data to guide policy and program approaches grounded in traditional Native wisdom.

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* Rose Weahkee (Diné), Director, Indian Health Service, Office of Urban Indian Health Programs

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- The Sage (Indigenous Critical Thinking) Circle for Healing of Our Indigenous Communities;
- The Sovereign Bodies Institute; and
- The Urban Indian Health Institute.

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Federal Sexual Crimes

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I. Introduction to Chapter 109A

Federal sexual crimes against both adults and children are defined in chapter 109A of the federal criminal code, codified at 18 U.S.C. §§ 2241–48.

Chapter 109A consists of eight separate sections delineating the criminal offenses of aggravated sexual abuse, sexual abuse, sexual abuse of a minor or ward, and abusive sexual contact.[1] Chapter 109A is not a federal law of general jurisdiction; an act must occur within the special maritime or territorial jurisdiction of the United States and must otherwise comply with jurisdictional criteria to qualify for federal prosecution.[2] The status of a defendant or victim as Indian, together with the situs of the crime in Indian country, may confer federal jurisdiction concurrent with a tribe under the Major Crimes Act[3] or the General Crimes Act.[4]

Chapter 109A distinguishes sexual assaults by (1) the nature and type of assault; (2) the means used to commit the assault; and (3) the defendant's age or position in relation to the victim. Further, sexual assaults fall within two categories: abusive sexual acts[5] and abusive sexual contact.[6] Abusive sexual acts, the more serious category of offenses, include

> contact between the penis and the vulva or the penis and the anus . . . ; [] contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; [] the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass,

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[1] 18 U.S.C. §§ 2241–48.
[2] 18 U.S.C. §§ 2241–48.
[3] 18 U.S.C. § 1153.
[4] 18 U.S.C. § 1152.
[5] 18 U.S.C. §§ 2241–43.
[6] 18 U.S.C. § 2244.

> degrade, or arouse or gratify the sexual desire of any person;

and intentional direct touching on the skin of person under the age of 16, done "with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."[7]

By contrast, abusive sexual contact is the "intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."[8] A sexual assault is "aggravated" when actual or attempted force is used; when an individual threatens or places a victim "in fear that any person will be subjected to death, serious bodily injury, or kidnapping;" when the victim is rendered unconscious or there is an attempt to do so; when a drug, intoxicant, or similar substance is given by force, threat, or without the victim's knowledge or permission that substantially impairs the victim's ability to appreciate the situation or to control her conduct; or when committed against a victim under the age of 12.[9] Both completed and attempted sexual assaults are criminalized under federal law.[10] The statutes have uniformly withstood constitutional challenges.[11]

II. Aggravated sexual abuse: 18 U.S.C. § 2241

The most serious federal sexual crime is aggravated sexual abuse, which is committed when the sexual act is accomplished (A) by force

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[7] 18 U.S.C. § 2246(2).
[8] 18 U.S.C. § 2246(3).
[9] 18 U.S.C. § 2241.
[10] 18 U.S.C. §§ 2241–43.
[11] *See, e.g.,* United States v. Gavin, 959 F.2d 788, 791 (9th Cir. 1992) (holding that the term "fear" as used in section 2242 is not unconstitutionally vague because "[a] person of ordinary intelligence would understand the kind of fear the statute prohibits is fear of harm to self or others"); United States v. Ransom, 942 F.2d 775, 777–78 (10th Cir. 1991) (disallowing "mistake of age" defense; not a violation of equal protection or due process); United States v. Cherry, 938 F.2d 748, 755 (7th Cir. 1991) (stating "fear," as used in section 2242, not unconstitutionally vague).

or threat; (B) after rendering the victim unconscious or substantially impaired; or (C) with children under 12.[12]

A. By force or threat

To establish aggravated sexual abuse under section 2241(a), a prosecutor must prove that the defendant *knowingly* caused the victim to engage in a sexual act, either (1) by using force against that victim; or (2) "by threatening or placing that [victim] in fear that any person will be subjected to death, serious bodily injury, or kidnapping."[13]

While a showing of actual "force" is necessary under section 2241(a), the term is not defined in the statute.[14] A showing of actual force may be satisfied by physical force "sufficient to overcome, restrain, or injure a person," or by threats of harm "sufficient to coerce or compel submission by the victim."[15]

Force may be implied from a disparity in size or coercive power between the defendant and the victim.[16] The Third and Seventh

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[12] 18 U.S.C. § 2241.

[13] 18 U.S.C. § 2241(a).

[14] *See, e.g.,* United States v. Archdale, 229 F.3d 861, 868 (9th Cir. 2000) ("A showing of actual force is necessary to satisfy the force requirement of 18 U.S.C. § 2241(a)(1)."); United States v. Jones, 104 F.3d 193, 197 (8th Cir. 1997) ("'Force' is not specifically defined in the statute.").

[15] United States v. Johnson, 492 F.3d 254, 257 (4th Cir. 2007) (quoting United States v. Weekley, 130 F.3d 747, 754 (6th Cir. 1997) (describing victim held down by her arms while other perpetrator raped her)); *see also* United States v. Carey, 589 F.3d 187, 194–95 (5th Cir. 2009) (describing victim choked with own hair); United States v. Wayka, 21 F. App'x 489, 491 (7th Cir. 2001) (not precedential) (describing victim unable to escape when grabbed, hugged tightly, and lifted off ground); United States v. Buckley, 195 F.3d 1034 (8th Cir. 1999) (describing physical force sufficient to overcome, restrain, or injure the victim); United States v. Fulton, 987 F.2d 631, 633 (9th Cir. 1993) (describing 12-year-old victim pushed and held).

[16] United States v. Holly, 488 F.3d 1298, 1302 (10th Cir. 2007) (citing United States v. Reyes Pena, 216 F.3d 1204, 1211 (10th Cir. 2000)); *see also* United States v. Sharpfish, 408 F.3d 507, 510–11 (8th Cir. 2005) (describing three-year-old assaulted by 235-pound defendant); United States v. Demarrias, 876 F.2d 674, 678 (8th Cir. 1989) (describing victim felt pain inflicted by larger and stronger defendant).

Circuits, however, have held the opposite.[17] While force may be inferable depending on the circuit in which the case is brought, it is not conclusive.[18]

B. By other means

To establish aggravated sexual abuse under section 2241(b), a prosecutor must prove that the defendant *knowingly* engaged in a sexual act with the victim and either (1) rendered the victim unconscious; or (2) administered a drug or other intoxicant to the victim—by force, threat of force, or without the victim's knowledge or permission—that substantially impaired the victim's ability to appraise or control his conduct.[19]

C. With children

To establish aggravated sexual abuse under section 2241(c), a prosecutor must show that the defendant (1) knowingly engaged in a sexual act with a victim and (2) the victim was younger than 12.[20] For this offense, federal jurisdiction arises from either interstate travel to accomplish the act or the location of the offense; for example, the special maritime and territorial jurisdiction of the United States. If brought pursuant to 18 U.S.C. §§ 1152 or 1153, establishing federal jurisdiction also requires proof of the Indian or non-Indian status of the perpetrator and victim.[21] A prosecutor need not prove the defendant had actual knowledge that the victim was under 12 years old.[22] If a victim is at least 12 but under 16 years old, the prosecutor must establish that the defendant was at least four years older than the victim and committed the act by force, threat of force, or by rendering the victim incapable of consent for the sexual conduct to fall within the ambit of section 2241(c).[23] Mistake of a victim's age is not a

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[17] United States v. Shaw, 891 F.3d 441, 451 (3d Cir. 2018); Cates v. United States, 882 F.3d 731, 737 (7th Cir. 2018).
[18] United States v. Fire Thunder, 908 F.2d 272, 274 (8th Cir. 1990) (stating relationship alone of defendant, as an adult and the victim's stepfather, and victim, as a young child, is insufficient to prove actual force).
[19] 18 U.S.C. § 2241(b).
[20] 18 U.S.C. § 2241(c).
[21] *See* 18 U.S.C. §§ 1152–53.
[22] 18 U.S.C. § 2241(d).
[23] *See* 18 U.S.C. § 2241(c).

defense to 2241(c) when the victim is under 12.[24] Aggravated sexual assault is a specific intent crime.[25]

D. Heightened degree of fear

Aggravated sexual abuse requires a heightened degree of fear to distinguish the offense from the crime of sexual abuse.[26] Fear alone may be sufficient to support a conviction for aggravated sexual abuse without the use of actual force when the fear is specific and severe.[27] Fear may also arise from a threat of harm to people other than the victim.[28]

E. Penetration

Penetration is a question of fact that may be proven by circumstantial evidence.[29]

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[24] United States v. Juvenile Male, 211 F.3d 1169, 1171 (9th Cir. 2000); United States v. Ransom, 942 F.2d 775, 777 (10th Cir. 1991).

[25] *See* United States v. Kenyon, 481 F.3d 1054, 1071 (8th Cir. 2007) (holding that refusal to instruct jury that intoxication was a defense to specific intent required reversal); United States v. Sagg, 125 F.3d 1294, 1295 (9th Cir. 1997) (stating that defendant's intent was at issue, not victim's).

[26] United States v. Holly, 488 F.3d 1298, 1303 (10th Cir. 2007).

[27] *Id.*

[28] 18 U.S.C. § 2241(a)(2) ("by threatening or placing that other person in fear that *any* person will be subjected to death, serious bodily injury, or kidnapping") (emphasis added); *see also* United States v. Rojas, 520 F.3d 876, 882–83 (8th Cir. 2008) (describing defendant's threat to commit suicide); United States v. Fire Thunder, 908 F.2d 272, 275 (8th Cir. 1990) (describing threats to kill victim's father).

[29] *See* United States v. Espinosa, 585 F.3d 418, 424–25 (8th Cir. 2009) (stating victim's testimony that his "part" touched her, that he "stuck his in me[,]" her claim of pain, and notation on anatomical drawing sufficient to establish penetration); United States v. Wilcox, 487 F.3d 1163, 1169 (8th Cir. 2007) (stating defendant's admission coupled with the victim's testimony about her "bottom part" provided sufficient evidence of penetration); United States v. Seymour, 468 F.3d 378, 388 (6th Cir. 2006) (stating victim's testimony that touch occurred where she wiped after urinating, on her skin, and inside underclothes sufficient to permit reasonable juror to conclude penetration had occurred); United States v. Norman T., 129 F.3d 1099, 1103 (10th Cir. 1997) (concluding that the statutory definition of penetration includes penetration through clothing); United States v. Red Cloud, 791 F.2d 115, 117 (8th Cir. 1986) (stating officers' testimony describing the position in which they found the victim and

F. Attempts

Attempts to commit a federal sexual crime are criminalized by chapter 109A. To establish an attempt, the prosecutor must prove the defendant intended to commit a specific crime and took a substantial step towards its completion.[30] A substantial step is "more than mere preparation" but "may be less than the last act necessary" to complete the crime.[31] Attempts to commit federal sex crimes are specific intent crimes.[32] Sexual contact may be difficult to distinguish from attempted sexual abuse.[33]

G. Sufficiency of the evidence

Evidence is sufficient for a criminal conviction if, when examined in the light most favorable to the government, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt.[34] A

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defendant, and defendant's movements at the time was sufficient to support an inference of penetration). *But see* United States v. Reddest, 512 F.3d 1067, 1072 (8th Cir. 2008) (stating testimony that defendant touched "right in," "almost close to" genitalia was ambiguous and insufficient to prove penetration); United States v. Plenty Arrows, 946 F.2d 62, 65–66 (8th Cir. 1991) (stating victim's testimony that defendant placed his penis on victim's behind insufficient to establish penetration).

[30] United States v. Mandujano, 499 F.2d 370, 376 (5th Cir. 1974).

[31] United States v. Manley, 632 F.2d 978, 987 (2d Cir. 2000); *see* United States v. Crowley, 318 F.3d 401, 407–08 (2d Cir. 2003) (holding substantial step was taken when defendant pinned victim and pushed hand inside victim's clothes in "groping, gripping" manner); United States v. Hourihan, 66 F.3d 458, 461–62 (2d Cir. 1995) (holding substantial step was taken when defendant kissed victim, rubbed her breasts, tried to force her to kneel). *But see* United States v. Blue Bird, 372 F.3d 989, 993 (8th Cir. 2004) (stating insufficient evidence of attempt when defendant abandoned acts after victim expressed disinterest).

[32] United States v. Sneezer, 900 F.2d 177, 179 (9th Cir. 1990) ("[A]ttempt includes an element of specific intent even if the crime attempted does not").

[33] *Compare* United States v. Hayward, 359 F.3d 631, 641 (3d Cir. 2004) (pushing victim's head toward clothed penis was sexual contact, not sexual abuse), *with* United States v. Miranda, 348 F.3d 1322, 1331 (11th Cir. 2003) (arriving to meet 14 year old for sex as arranged was an attempted sexual act).

[34] Jackson v. Virginia, 443 U.S. 307, 319 (1979).

minor's testimony alone may be sufficient to prove aggravated sexual abuse.[35]

III. Sexual abuse by threat or fear: 18 U.S.C. § 2242(1)

To establish sexual abuse under section 2242(1), a prosecutor must show that a defendant *knowingly* (1) caused the victim "to engage in a sexual act (2) by threatening or placing that [victim] in fear (other than . . . fear that any person will be subjected to death, serious bodily injury, or kidnapping)."[36] Fear for others is not considered in this section.[37] Section 2242 is a general intent crime.[38]

A. Section 2242(1) requires a lesser degree of fear

"By expressly excluding fear of death, serious bodily injury, or kidnaping, . . . section 2242(1) [requires] a lesser degree of fear" than aggravated sexual abuse under section 2241.[39] The fear itself, however, is broadly defined.[40] As with force, fear may be inferred from

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[35] United States v. DeCoteau, 630 F.3d 1091, 1097 (8th Cir. 2011) (citing United States v. Kirkie, 261 F.3d 761, 768 (8th Cir. 2001); United States v. Wright, 119 F.3d 630, 634 (8th Cir. 1997)); *see also* United States v. St. John, 851 F.2d 1096, 1099 (8th Cir. 1988) (rejecting argument of insufficient evidence where child marked anatomically correct diagrams and testified bad touching happened and that he "humped" with the defendant). *But see* United States v. Plenty Arrows, 946 F.2d 62, 64–66 (8th Cir. 1991) (holding testimony that defendant placed penis against victim's nude behind insufficient to sustain convictions for either aggravated sexual abuse or attempted aggravated sexual abuse).

[36] 18 U.S.C. § 2242(1).

[37] *See id.*

[38] United States v. Sneezer, 900 F.2d 177, 179 (9th Cir. 1990) (stating sexual abuse is not specific intent crime and therefore voluntary intoxication is not a defense).

[39] United States v. Johns, 15 F.3d 740, 743 (8th Cir. 1994).

[40] *See* United States v. King, 215 F.3d 1338, at *3–*4 (10th Cir. 2000) (not precedential) (holding fear of physical and spiritual consequences sufficient); United States v. Lucas, 157 F.3d 998, 1002–03 (5th Cir. 1998) (holding fear arising from warden's power over inmate sufficient); United States v. Gavin, 959 F.2d 788, 791 (9th Cir. 1992) ("[T]he kind of fear the statute prohibits is fear of harm to self or others" and the possible range of harms encompassed is "very large"); United States v. Cherry, 938 F.2d 748, 755 (7th Cir. 1991) (holding defendant's "actions implicitly placed [the victim] in fear of at least

the circumstances, such as a disparity in power between a defendant and a victim and a defendant's control over a victim's everyday life.[41]

IV. Sexual abuse by incapacity: 18 U.S.C. § 2242(2)

To establish sexual abuse under section 2242(2), a prosecutor must show that a defendant *knowingly* (1) engaged in a sexual act with a victim who was either "(A) incapable of appraising the nature of the conduct; or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act."[42]

A. Incapacity to decline

A victim's testimony about her incapacity, by itself, may be sufficient to satisfy section 2242(2)'s incapacity element.[43] In *Bruguier*, however, the Eighth Circuit held that the perpetrator must have had knowledge of the victim's incapacity to be found guilty under section 2242(2).[44] The court held that the knowledge requirement of section 2242(2) applies to both elements of the statute: The

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some bodily harm" even where the court found that the amount of physical restraint exercised was insufficient to sustain charge of aggravated sexual abuse).

[41] *See* United States v. Castillo, 140 F.3d 874, 885 (10th Cir. 1998) ("A jury could infer, simply from the nature of the circumstances, that a male parent attempting to perform sexual acts with his children would place them in fear of bodily harm"); *Johns*, 15 F.3d at 742–43 (holding defendant "fail[ed] to acknowledge the fear generated by his dominance of every aspect of [the victim's] life").

[42] 18 U.S.C. § 2242(2).

[43] *See* United States v. Betone, 636 F.3d 384, 387 (8th Cir. 2011) (stating victim's testimony that defendant began fellating him while he was asleep sufficient to prove victim incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act); United States v. Benais, 460 F.3d 1059, 1064 (8th Cir. 2006) (stating victim's testimony that she consumed alcohol, passed out twice from alcohol consumption and twice awoke to find the defendant assaulting her was sufficient); United States v. Carter, 410 F.3d 1017, 1027 (8th Cir. 2005) (stating victim's testimony that she was intoxicated and drowsy when defendant performed oral sex sufficient).

[44] United States v. Bruguier, 735 F.3d 754 (8th Cir. 2013).

perpetrator must have known both that "he or she was 'engag[ing] in a sexual act with another person'" and that the victim "was 'incapable of appraising the nature of the conduct' or [was] 'physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act."[45]

V. Sexual abuse of a minor or ward: 18 U.S.C. § 2243

Section 2243 recognizes the danger of sexual assaults by those in a position of power or control over victims.[46]

A. Sexual abuse of a minor: 18 U.S.C. § 2243(a)

Section 2243(a) prohibits sexual abuse of a child between 12- and 16-years-old when the perpetrator is at least four years older than the child.[47] The four-year age difference requirement addresses the disparity in power between a minor and a sexual partner without criminalizing peer teenage sexual relationships.

To convict under section 2243(a), a prosecutor must prove that a defendant *knowingly* engaged in a sexual act with a victim who (1) was between 12 and 16 and (2) was at least four years younger than the defendant.[48]

A prosecutor need not prove that the defendant knew the victim's actual age or the age difference.[49] This section does, however, include an affirmative defense for defendants who "reasonably believed" the victim was 16.[50] There is also a statutory defense if the two were married.[51]

B. Sexual abuse of a ward: 18 U.S.C. § 2243(b)

Section 2243(b) criminalizes sexual abuse when anyone with "custodial, supervisory, or disciplinary authority" over a person "in official detention" knowingly engages in a sexual act over that

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[45] *Id.* at 763 (first alteration in original); *see also* United States v. Rouillard, 740 F.3d 1170 (8th Cir. 2014) (per curium).
[46] *See* 18 U.S.C. § 2243.
[47] 18 U.S.C. § 2243(a).
[48] *Id.*
[49] 18 U.S.C. § 2243(d).
[50] 18 U.S.C. § 2243(c)(1); *see infra* section (V)(A)(1) of this article.
[51] 18 U.S.C. § 2243(c)(2).

person.[52] For the purposes of this section, and chapter 109A as a whole, "official detention" is defined as:

> (A) detention by a Federal officer or employee, or under the direction of a Federal officer or employee, following arrest for an offense; following surrender in lieu of arrest for an offense; following a charge or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following civil commitment in lieu of criminal proceedings or pending resumption of criminal proceedings that are being held in abeyance, or pending extradition, deportation, or exclusion; or
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> (B) custody by a Federal officer or employee, or under the direction of a Federal officer or employee, for purposes incident to any detention described in subparagraph (A) of this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation . . . .[53]

This definition specifically excludes supervision after release on bail, probation, and parole.[54]

Conduct within federal prisons and jails and custodial institutions or facilities directed by, under contract to, or under agreement with, federal departments and agencies fall within the purview of this section.[55] To convict under section 2243(b), a prosecutor must prove that a defendant *knowingly* engaged in a sexual act with a victim who (1) was "in official detention; and (2) [was] under the custodial, supervisory, or disciplinary authority" of the defendant.[56]

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[52] 18 U.S.C. § 2243(b)(1)–(2).
[53] 18 U.S.C. § 2246(5).
[54] *Id.*
[55] 18 U.S.C. § 2246(5); United States v. Urrabazo, 234 F.3d 904, 907 (5th Cir. 2000) (stating cell block in federal courthouse was "federal prison" within meaning of statute).
[56] United States v. Solorzano, No. 06-922, 2008 WL 5451040, at *3 (D.N.J. 2008).

VI. Abusive sexual contact: 18 U.S.C. § 2244

Chapter 109A also criminalizes abusive sexual conduct that does not involve penetration.[57] Sexual contact is "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."[58]

Section 2244 references and incorporates the definitions and elements of proof set forth in sections 2241 through 2243 with the exception of the nature of the sexual acts.[59] Section 2244(a) refers back to sections 2241 through 2243, criminalizing sexual contact involving elements of force, fear, and power.[60] Section 2244(b) also contains a residual provision criminalizing non-consensual sexual contact that occurs without resort to force, fear, or power, as required in section 2244(a).[61] Finally, section 2244(c) enhances the maximum sentence for a case involving victims younger than 12.[62]

A. Sexual contact in circumstances that would punish sexual acts

To establish abusive sexual contact under section 2244(a), a prosecutor must prove that the defendant "knowingly engage[d] in or cause[d] sexual contact" with the victim and that the defendant would have violated either (1) section 2241(a) or (b) "had the sexual contact been a sexual act"; (2) section 2242 "had the sexual contact been a sexual act"; (3) section 2243(a) "had the sexual contact been a sexual act"; (4) section 2243(b) "had the sexual contact been a sexual act"; or (5) section 2241(c) "had the sexual contact been a sexual act."[63]

B. Sexual contact in other circumstances

To establish a crime under section 2244(b), a prosecutor must prove that the defendant (1) knowingly engaged in sexual contact

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[57] *See* 18 U.S.C. § 2244.
[58] 18 U.S.C. § 2246(3).
[59] *See* 18 U.S.C. § 2244.
[60] *See* 18 U.S.C. § 2244(a)(1)–(5).
[61] *See* 18 U.S.C. § 2244(b).
[62] *See* 18 U.S.C. § 2244(c).
[63] *See* 18 U.S.C. § 2244(a)(1)–(5).

(2) without the victim's permission.[64] Section 2244(c) provides that the maximum term of imprisonment for sexual contact violating section 2244, other than subsection (a)(5), "shall be twice that otherwise provided" in section 2244 if the victim was younger than 12.[65]

C. Age of victim

A violation of section 2244(a)(3) does not require proof that a defendant knew the victim's age.[66] Because a prosecutor does not need to prove a defendant's knowledge of a victim's age under section 2243(a), and section 2244(a)(3) explicitly criminalizes conduct that would violate section 2243(a) had the "sexual contact" been a "sexual act," a court may convict a defendant under section 2244(a)(3) without proof that the defendant knew the victim's age.[67]

VII. Recurring trial issues in sex crime prosecutions: evidence of other perpetrators

Whether excluding evidence of a victim's past sexual behavior is constitutional is a matter of discretion evaluated on a case-by-case basis.[68] Excluding a child victim's sexual assault history, however, may violate the Sixth Amendment.[69] Unlike evidence of a victim's past sexual behavior and its notice requirement pursuant to Rule 412 of the Federal Rules of Evidence, a defendant need not give notice of intent to offer evidence of another abuser.[70] Evidence of another perpetrator must be substantial to be admissible.[71]

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[64] *See* 18 U.S.C. § 2244(b).
[65] 18 U.S.C. § 2244(c).
[66] United States v. Jennings, 496 F.3d 344, 352 (4th Cir. 2007).
[67] *Id.*
[68] LaJoie v. Thompson, 217 F.3d 663, 669–71 (9th Cir. 2000).
[69] *See id.* at 671.
[70] *See* United States v. Yazzie, 59 F.3d 807, 814 (9th Cir. 1995).
[71] Guam v. Ignacia, 10 F.3d 608, 615 (9th Cir. 1993) (citing Perry v. Rushen, 713 F.2d 1447, 1449 (9th Cir. 1983)).

VIII. Limitations on cross-examination of victims and witnesses

The right to confront witnesses under the Confrontation Clause of the Sixth Amendment includes the right to cross-examine witnesses, to attack their general credibility, and to show their possible bias or self-interest in testifying.[72] The right is not unlimited, however, and a trial judge retains wide discretion in limiting the scope of cross-examination.[73] A trial court may, for example, exclude evidence or testimony if the probative value is substantially outweighed by the danger of unfair prejudice.[74] In determining whether the Confrontation Clause has been violated, a court examines whether the limitations placed by the trial court on the scope of the cross-examination constituted harmless error beyond a reasonable doubt.[75] The Confrontation Clause guarantees "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense might wish."[76]

As a result, limitations on cross-examinations of victims and witnesses in sex crime prosecutions vary with the facts and the vigor of the defense.[77]

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[72] *See* Davis v. Alaska, 415 U.S. 308, 316 (1974).
[73] Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986).
[74] FED. R. EVID. 403.
[75] *Van Arsdall*, 475 U.S. at 681.
[76] United States v. Owens, 484 U.S. 554, 559 (1988) (quoting Kentucky v. Stincer, 482 U.S. 730, 739 (1987)).
[77] *Compare* United States v. Bear Stops, 997 F.2d 451, 457 (8th Cir. 1993) (excluding evidence of other sexual assault as alternate explanation for the child victim's symptoms of sexual abuse was error), *and* United States v. Begay, 937 F.2d 515 (10th Cir. 1991) (holding the Confrontation Clause required cross-examination on prior sexual abuse and other abusers when child recanted, defense proffered medical explanation for injuries, and other adult admitted prior abuse of child), *with* United States v. Powers, 59 F.3d 1460, 1470 (4th Cir. 1995) (excluding cross-examination of consensual sex over a year after the charged incident with person other than defendant was not error), *and* United States v. NB, 59 F.3d 771, 778 (8th Cir. 1995) (stating no inquiry allowed into victims' medical records unrelated to sexual abuse).

A. Child witnesses

The Federal Rules of Evidence presume witness competency.[78] This presumption extends to children.[79] Courts have a long history of allowing young children to testify to the best of their ability.[80]

Federal courts have made clear that—although they "must be sensitive to the difficulties attendant upon the prosecution of alleged child abusers" and understand that in "almost all cases a youth is the prosecution's only eyewitness"—they "cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases."[81]

A court may be closed to the public during a child's testimony after a showing that failing to do so would either (1) result in substantial psychological harm to the child or (2) prevent the child from effectively communicating.[82]

B. Mode and order of examining witnesses

Courts have the authority to "exercise reasonable control over the mode and order" of interrogating witnesses to "protect witnesses from harassment or undue embarrassment."[83] A court may instruct counsel

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[78] FED. R. EVID. 601.

[79] 18 U.S.C. § 3509(c)(2).

[80] *See, e.g.,* Walters v. McCormick, 122 F.3d 1172, 1175 (9th Cir. 1997) (stating inconsistencies in child's testimony went to the weight, not admissibility); United States v. Spoonhunter, 476 F.2d 1050 (10th Cir. 1973) (holding seven-year-old competent); Pocatello v. United States, 394 F.2d 115, 116–17 (9th Cir. 1968) (holding five-year-old victim and seven-year-old sibling competent). *But see* Virgin Islands v. Riley, 750 F. Supp. 727, 729 (D.V.I. 1990) (holding four-year-old incompetent to testify when court was uncertain child would be able to communicate to the jury).

[81] Tome v. United States, 513 U.S. 150, 166 (1995) (quoting in part United States v. Salerno, 505 U.S. 317, 322 (1992)).

[82] 18 U.S.C. § 3509(e); *see also* United States v. Yazzie, 743 F.3d 1278 (9th Cir. 2014) (citing Waller v. Georgia, 467 U.S. 39 (1984)) (holding child's ability to communicate effectively was overriding interest, closure was narrowly tailored, court considered but rejected reasonable alternatives, and court made adequate findings to support the closure).

[83] FED. R. EVID. 611(a).

to refrain from asking confusing, misleading, ambiguous, or unintelligible questions.[84]

C. Leading questions

The Federal Rules of Evidence provide that "leading questions should not be used on direct examination except as necessary to develop the witness's testimony."[85] Many courts, however, allow leading questions with child witnesses.[86]

D. Inconsistencies and memory lapse

Inconsistencies in testimony or lack of complete memory will not automatically render a witness incompetent to testify.[87]

E. Competency hearings

A court conducts a competency hearing for a child witness "only upon written motion and offer of proof of incompetency."[88] Before a hearing can be conducted, the court must determine "on the record,

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[84] *See, e.g.,* Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) (stating the court may "impose reasonable limits on . . . cross-examination based on concerns about . . . harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant").

[85] FED. R. EVID. 611(c).

[86] *See* United States v. Rojas, 520 F.3d 876, 881–82 (8th Cir. 2008) (permitting leading questions when 10 year old witness became distraught while testifying); United States v. Boyles, 57 F.3d 535, 547 (7th Cir. 1995) (leading four year old in videotaped deposition assisted in eliciting difficult testimony); United States v. Butler, 56 F.3d 941, 943 (8th Cir. 1995) (permitting leading question within discretion of court); United States v. Tome, 3 F.3d 342, 353 (10th Cir. 1993), *rev'd on other grounds*, 513 U.S. 150 (1995) (stating district court did not abuse its discretion by allowing leading questions to reluctant child victim who halted questioning several times to regain composure); United States v. Castro-Romero, 964 F.2d 942, 943–44 (9th Cir. 1992) (citing FED. R. EVID. 611(c)) (approving leading questions due to "the age of the witness and the nature of the testimony"); United States v. Demarrias, 876 F.2d 674, 678 (8th Cir. 1989) (leading appropriate when 14- year-old exhibited reluctance to testify).

[87] Walters v. McCormick, 122 F.3d 1172, 1175 (9th Cir. 1997).

[88] 18 U.S.C. § 3509(c)(3).

that compelling reasons exist" to justify the hearing.[89] The age of the child alone does not qualify as a compelling reason.[90]

The hearing must "be conducted out of the sight and hearing of a jury," and attorneys from both sides may submit questions to the judge.[91] The judge, the government attorney, the defense attorney, and the court reporter may be present during the hearing.[92] In addition, a person who, "in the opinion of the court, is necessary to the welfare and well-being of the child, including" a guardian ad litem or an adult attendant, may attend.[93] Before the Supreme Court's decision in *Crawford v. Washington*,[94] a defendant's exclusion from a competency hearing did not violate the Confrontation Clause.[95]

F. Psychological and psychiatric examinations

Title 18 U.S.C. § 3509(c) prohibits courts from ordering psychological and psychiatric examinations to assess the competency of a child witness absent a showing of compelling need.[96] Even before the enactment of section 3509 in 1990, federal courts viewed psychiatric testing on the issue of witness competency as an extraordinary measure.[97]

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[89] 18 U.S.C. § 3509(c)(4).

[90] *Id.*; *see also* United States v. Allen, 127 F.3d 1292, 1295 (10th Cir. 1997) (holding child victim's developmental delays not compelling reason for a competency evaluation).

[91] 18 U.S.C. § 3509(c)(6)–(7).

[92] 18 U.S.C. § 3509(c)(5).

[93] *Id.*

[94] 541 U.S. 36 (2004).

[95] *See* Kentucky v. Stincer, 482 U.S. 730, 744 (1987); *see also* United States v. Spotted War Bonnet, 882 F.2d 1360, 1362–63 (8th Cir. 1989) (upholding denial of the defendant's motion for an in-camera determination of the victim's competency), *vacated on other grounds*, 497 U.S. 1021 (1990).

[96] 18 U.S.C. § 3509(c)(9).

[97] *See, e.g.,* Virgin Islands v. Leonard, 922 F.2d 1141, 1143 (3d Cir. 1991) (quoting State v. R.W., 514 A.2d 1287, 1291 (1986)) ("In order to satisfy the 'substantial need' criterion for a psychiatric examination, there must be a showing of some deviation from acceptable norms, such as an identifiable or clinical psychiatric or similar disorder, beyond the realm of those human conditions that ordinary experience would confirm as normal"); *see also* Keeney v. McDaniel, 67 F. App'x 424, 426 (9th Cir. 2003) (not precedential) (stating no basis shown for additional medical and psychological testing of child victims when the defendant requested examinations "nearly a year and

G. Videotaped and closed-circuit testimony

Title 18 U.S.C. § 3509 allows a child to testify via closed-circuit television[98] or by videotaped deposition[99] where

> [(1) t]he child is unable to testify because of fear[; (2) t]here is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying[; (3) t]he child suffers a mental or other infirmity[; or (4) c]onduct by defendant or defense counsel causes the child to be unable to continue testifying.

If testimony will be videotaped, a court may, after a preliminary finding that the child is unable to testify in the physical presence of the defendant, exclude the defendant, even a pro se defendant, during the taping.[100] The Supreme Court has cautioned that such findings are case specific and rely on three prerequisites: (1) A court must find that the use of one-way, closed-circuit television is "necessary to protect the welfare of the particular child witness who seeks to testify"; (2) a court must find that the child would be traumatized by the presence of the defendant himself, not solely by being in court; and (3) the emotional trauma caused by the defendant must be "more than 'mere nervousness or excitement or some reluctance to testify.'"[101]

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a half after the events occurred[,] [t]he children had been examined within two days of the alleged incident, and the medical examination corroborated their [assertions] of sexual abuse"); Markel v. Walter, 232 F.3d 895, at *1 (9th Cir. 2000) (not precedential) (stating district court's denial of request for pre-trial psychological test of child not in error where child's mental state never at issue); McCafferty v. Leapley, 944 F.2d 445, 454 (8th Cir. 1991) (stating defendant failed to make showing to justify examination of child by court-appointed psychologist when all materials relating to child's physical and mental evaluations were made available to defendant); Gilpin v. McCormick, 921 F.2d 928, 930–32 (9th Cir. 1990) (stating court's "refusal to compel child sexual assault victims to undergo psychiatric examination does not violate constitutional due process").

[98] 18 U.S.C. § 3509(b)(1)(B).

[99] 18 U.S.C. § 3509(b)(2).

[100] 18 U.S.C. § 3509(b)(2)(B)(iv).

[101] Maryland v. Craig, 497 U.S. 836, 855–56 (1990) (quoting in part Wildermuth v. State, 530 A.2d 275, 289 (1987)); *see also* United States v. Yates, 438 F.3d 1307, 1313 (11th Cir. 2006) (en banc); United States v.

H. Adult attendants

Title 18 U.S.C. § 3509(i) permits a child witness to have an adult attendant close by to provide emotional support while testifying. "The court, at its discretion, may allow the adult attendant to remain in close physical proximity" with the victim, including holding the child's hand or allowing the child to sit on the attendant's lap while testifying.[102] While the child testifies or is deposed, the statute requires the attendant to be videotaped and the tape be preserved.[103] Tension arises between section 3509(i) and Rule 615 of the Federal Rules of Evidence, which provides for sequestration of witnesses at the request of a party.[104]

IX. Recommendations of the National Coordination Committee on the AI/AN SANE-SART Initiative for improving the federal response to sexual violence in Indian country

In June 2016, Attorney General Lynch issued a memorandum to all United States Attorneys concerning recommendations of a national task force looking at the issue of sexual violence in Indian country. The Attorney General's memorandum required the following of all United States Attorneys with Indian country responsibility:

> Pursuant to Key Area One of the Committee recommendations, by August 12, 2016, all United States

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Bordeaux, 400 F.3d 548 (8th Cir. 2005) (stating, although child testified via two-way closed circuit television, *Craig* standard not satisfied and Confrontation Clause violated when child's fear of defendant was not dominant reason child unable to testify); United States v. Turning Bear, 357 F.3d 737 (8th Cir. 2004).

[102] 18 U.S.C. § 3509(i).

[103] *See id.*; *see also* United States v. Grooms, 978 F.2d 425, 429–30 (8th Cir. 1992) (holding adult attendant may be a witness; failure to videotape attendant did not constitute a reversible error).

[104] *See* 18 U.S.C. § 3509(i); FED. R. EVID. 615; *see also* Virgin Islands v. Edinborough, 625 F.2d 472, 474 (3d Cir. 1980) (stating, although a witness herself, victim's mother, was allowed in court during child's testimony, failure to sequester a witness is not a reversible error absent a showing of prejudice).

> Attorneys with jurisdiction to prosecute crimes in Indian Country based on Title 18, United States Code, Sections 1152 and 1153, shall meet with federal partners (FBI, BIA, and IHS) and tribal partners to develop written sexual violence guidelines that detail specific responsibilities of each federal partner. United States Attorneys shall implement those guidelines by September 9, 2016. United States Attorneys with Indian Country jurisdiction but without the authority to prosecute crimes based on Title 18, United States Code, Sections 1152 and 1153 shall discuss federal sexual violence response with their tribal partners and federal partners as appropriate during annual consultations.[105]

Consequently, all United States Attorney's Offices with federally recognized Indian tribes have written sexual violence guidelines in place.

About the Author

Leslie A. Hagen serves as the Department of Justice's (Department) first National Indian Country Training Coordinator. In this position, she is responsible for planning, developing, and coordinating training in a broad range of matters relating to the administration of justice in Indian country. Previously, Ms. Hagen served as the Native American Issues Coordinator for the Executive Office for United States Attorneys (EOUSA). In that capacity, she served as EOUSA's principal legal advisor on all matters pertaining to Native American issues, provided management support to the United States Attorneys' Offices, coordinated and resolved legal issues, and served as a liaison and technical assistance provider to Department of Justice components and the Attorney General's Advisory Committee on Native American Issues. Ms. Hagen started with the Department as an Assistant United States Attorney in the Western District of Michigan, where she was assigned to Violent Crime in Indian Country and handled federal prosecutions and training on issues of domestic violence, sexual assault, child abuse, and human trafficking affecting the 11 federally recognized tribes in the Western District of Michigan.

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[105] Memorandum from Att'y Gen. Loretta Lynch to all United States Att'ys (June 27, 2016).

Before joining the Department, Hagen was both an elected prosecuting attorney and assistant prosecuting attorney in Michigan.

Sex Offender Registration in Indian Country: SORNA Implementation and 18 U.S.C. § 2250

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I. Introduction[1]

Practitioners working in Indian country face a host of unique issues surrounding the registration of sex offenders and the prosecution of federal failure-to-register cases under 18 U.S.C. § 2250. In addition, the case law interpreting section 2250 is often confusing and complicated. This article breaks down the process of sex offender registration and notification into easily understandable terms and describes the case law interpreting 18 U.S.C. § 2250 in an approachable way. Let's begin by taking a look at how the sex offender registration process works in practice.

The registration process begins when a person is convicted of a sex offense. Federal law, as well as the laws of every jurisdiction, requires that a person convicted of a sex offense be subject to sex offender registration and notification.[2] As discussed below, the definition of

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[1] Special thanks go out to Alexandra Gelber and Nancy Healey of the Child Exploitation and Obscenity Section (CEOS); Marcia Good of the Office of Tribal Justice (OTJ); Sarah Blazucki, Stephanie Carrigg, and Dawn Doran of the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART Office); and Kevin Forder of the US Marshals Service for their helpful editorial and content review of this article. In addition, some of the information in this article previously appeared in the SMART Office Annual Overview of Current Sex Offender Registration Case Law and Issues: *Case Law*, OFF. OF SEX OFFENDER SENT'G, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, http://www.smart.gov/caselaw.htm.

[2] Defined for the purposes of this article as a state, principal U.S. territory, the District of Columbia, and over 150 federally recognized Indian tribes who

"sex offense" and the registration and notification provisions imposed on a sex offender vary by jurisdiction, as do the mechanisms for providing notice to a sex offender of their registration obligations.

Persons convicted of a sex offense are generally notified by the court of their requirement to register at the time they are convicted and sentenced.[3] This notification often happens through a plea agreement and colloquy, a sentencing order, or another court order or form advising offenders of their registration responsibilities.

If a convicted sex offender is incarcerated, he may receive additional notice of his registration responsibilities before his release. In addition, probation officers will most likely advise sex offenders placed on probation supervision of their responsibility to register.

Sex offenders' actual registration responsibilities generally begin upon their release, regardless of whether they serve a period of incarceration for the underlying sex offense. Within a few days of release, a sex offender is generally required to present themselves for registration at the offices of their local police, sheriff, state troopers, or other designated registration official. If offenders work or attend school in jurisdictions different from where they live, they are required to present themselves for registration in that other jurisdiction.

While at the local registration office, sex offenders provide information to registry officials about themselves and their underlying sex offense. Photographs, fingerprints, palm prints, and a DNA sample may also be collected by the registry official.

During or soon after this initial visit, information is entered into the jurisdiction's administrative sex offender registration database and submitted to various Federal Bureau of Investigation (FBI) databases as appropriate. If necessary, a sex offender's registration and conviction information might be sent to the registering agency's legal counsel to determine whether the offender is required to register in the jurisdiction and, if so, how frequently and for how long.

Depending on the crime of conviction (or in some jurisdictions a risk assessment), certain information about offenders and their convictions is made available to the public on the jurisdiction's public sex offender

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operate their own sex offender registration and notification systems. *See* 34 U.S.C. § 20911(10).

[3] The processes described in this introduction will, as a matter of course, vary by jurisdiction.

registry website. Every jurisdiction has a public sex offender registry website, but not every jurisdiction posts information about *all* of their offenders on it. By way of example, Oregon posts fewer than 4% of its registered offenders on its public registry website.[4]

At the initial registration (or if the jurisdiction requires a separate risk assessment and classification, after the completion of that process), sex offenders are formally advised of how often and how long they are required to register in the jurisdiction. They are also advised of how and when they are required to update any registration information if it changes. This notification is generally done by way of a form generated by the jurisdiction's sex offender registry that is signed by the sex offender.

When sex offenders fail to appear for an initial registration appearance or subsequent check-in, they might be subject to criminal prosecution for failing to register. In addition, a sex offender might face criminal liability for providing false or incomplete information in the sex offender registration process.

Compliance with sex offender registration requirements is monitored by various law enforcement agencies across the country. As discussed in section XIV below, the United States Marshals Service (USMS) is the primary federal law enforcement agency responsible for investigating failure-to-register cases with a federal nexus. In addition, every jurisdiction investigates and prosecutes failure-to-register cases under their own criminal laws.

Some jurisdictions allow sex offenders to be relieved of their registration responsibilities early. There is usually a court or administrative process for such relief, and it generally requires offenders comply with their registration responsibilities and demonstrate good behavior for a significant period.

Once sex offenders register for the period required by the law of their jurisdiction, they are released from any further registration obligations with that jurisdiction. If a sex offender is registered in multiple jurisdictions, *each* jurisdiction determines whether and when a sex offender's registration requirements should be discharged.

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[4] As of February 4, 2021, Oregon posts 1,007 registered sex offenders on its public registry website, while its remaining 30,437 registered sex offenders are not posted. *Oregon State Police, Sex Offender Registry Section*, OSP.OREGON.GOV, https://sexoffenders.oregon.gov/ (last visited Feb. 4, 2021) (3.2% of offenders posted).

With this summary in mind, we turn to the current federal standards for sex offender registration and notification as a starting point for discussing sex offender registration and notification systems across the country.

II. The Adam Walsh Child Protection and Safety Act

On July 27, 1981, Adam Walsh was abducted at a department store in Hollywood, Florida, where his mother was shopping.[5] On August 10th, two weeks after his abduction, a local fisherman discovered Adam's decapitated head in a drainage canal in Vero Beach, Florida, approximately 100 miles from Hollywood. Adam was asphyxiated, but because his body was never found, further investigation was stymied. After his son's tragic death, John Walsh became a national advocate for victims of violent crime and was the host of a television program geared to finding fugitives.[6]

Twenty-five years to the day after Adam's abduction, the Adam Walsh Child Protection and Safety Act was signed into law. Title I of the Act is the Sex Offender Registration and Notification Act (SORNA). The majority of SORNA's provisions are now codified at 34 U.S.C. §§ 20901–20945.

SORNA has been supplemented by certain administrative actions and amended in part by certain pieces of legislation as follows (listed by the language commonly used to reference them):

- The Interim Rule—governing SORNA's retroactive application;[7]

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[5] John Padgett, *The Adam Walsh Child Protection and Safety Act*, *in* THE SAGE ENCYCLOPEDIA OF CRIMINAL PSYCHOLOGY, at 12 (ed. Robert D. Morgan).

[6] Mary Helen Moore, *'America's Most Wanted' Host John Walsh Filming for New TV Show in Downtown Vero Beach*, TCPALM. (Nov. 13, 2018), https://www.tcpalm.com/story/news/local/indian-river-county/2018/11/13/john-walsh-filming-new-investigation-discovery-tv-show-vero-beach-pursuit-john-walsh-americas-mos/1986826002/.

[7] Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894 (Feb. 28, 2007) (codified at 28 C.F.R. pt. 72).

- The Final Guidelines—interpreting SORNA's provisions and providing detailed guidance to jurisdictions regarding implementation of its terms;[8]
- The KIDS Act—codifying the Final Guidelines' requirements governing the collection of internet identifiers;[9]
- The Final Rule—governing SORNA's retroactive application;[10]
- The Supplemental Guidelines—addressing additional issues in SORNA implementation;[11]
- The Military Sex Offender Reporting Act—requiring the Department of Defense to transmit information about convicted sex offenders to the FBI and the Dru Sjodin National Sex Offender Public Website (NSOPW);[12]
- International Megan's Law—requiring offenders to provide advance notice of any intended international travel;[13] and
- The Juvenile Supplemental Guidelines—addressing different ways jurisdictions can implement SORNA's juvenile registration requirements.[14]

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[8] The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030 (July 2, 2008) [hereinafter Final Guidelines].
[9] Keeping the Internet Devoid of Sexual Predators Act of 2008, Pub. L. No. 110-400, 122 Stat. 4224.
[10] Applicability of the Sex Offender Registration and Notification Act, 75 Fed. Reg. 81849 (Dec. 29, 2010) (codified at 28 C.F.R. pt. 72).
[11] Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1630 (Jan. 11, 2011) [hereinafter Supplemental Guidelines].
[12] Military Sex Offender Reporting Act of 2015, Pub. L. No. 114-22, § 502, 129 Stat. 227, 258 (codified at 34 U.S.C. § 20931).
[13] International Megan's Law to Prevent Child Sexual Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders, Pub. L. No. 114-119, 130 Stat. 15 (codified at 34 U.S.C. §§ 21501–21510).
[14] Supplemental Guidelines for Juvenile Registration Under the Sex Offender Registration and Notification Act, 81 Fed. Reg. 50552-01 (Aug. 1, 2016).

- The Proposed Rule Specifying SORNA's Registration Requirements[15]

SORNA has two broad areas of focus. First, it creates minimum standards for sex offender registration and notification systems across the country. Second, it directly imposes registration responsibilities on convicted sex offenders. While issues surrounding the implementation of SORNA's minimum standards are largely beyond the scope of this article, it is important to understand the offices and resources involved in that process when considering prosecuting a case under 18 U.S.C. § 2250.

III. The Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART Office)

SORNA created a new office within the Department of Justice (Department) to provide training, technical assistance, and funding for the efforts to substantially implement SORNA among the states, the District of Columbia, certain federally recognized tribes, and the five principal U.S. territories. The SMART Office is tasked with a number of statutory duties, including administering the jurisdictions' standards for sex offender registration and notification under SORNA as well as providing assistance to states, localities, and tribal governments in relation to sex offender registration and notification activities.

The SMART Office has developed numerous resources to assist the practitioner, including digests of social science research regarding sex offenders, case law summaries and other legal publications, and official reviews noting the SORNA implementation status of each jurisdiction.

Of particular note to practitioners in Indian country are the robust resources developed specific to federally recognized tribes, including a Model Tribal Sex Offender Registration Code, a guide on SORNA implementation in Indian country, and ongoing projects dedicated to sex offender management in Indian country. SMART also provides

[15] Registration Requirements Under the Sex Offender Registration and Notification Act, 85 Fed. Reg. 49332-55 (proposed Aug. 13, 2020) [hereinafter Registration Requirements].

subject-matter expertise for, and is a key funder of, the Tribal Access Program (TAP), which provides access through the Department to the FBI's Criminal Justice Information Services (CJIS) databases for both criminal and non-criminal justice purposes to participating tribes, including direct access to the National Sex Offender Registry (NSOR). Information about these resources can be found at the SMART Office's website.[16]

IV. The Dru Sjodin National Sex Offender Public Website

The National Sex Offender Public Website (NSOPW)[17] was created by the Department in 2005 and is administered by the SMART Office. NSOPW works much like a search engine: Jurisdictions' public sex offender registry websites connect to NSOPW by way of a web service or automated upload that enables NSOPW to conduct queries against the jurisdictions' websites. Only information that is publicly disclosed on a jurisdiction's own public sex offender registry website are displayed in NSOPW's search results, and only the jurisdiction's registry website page is displayed when a user clicks on a search result. NSOPW is not a database, and SMART only ensures that the information available on jurisdictional public sex offender registry websites can be queried through NSOPW.

V. The National Sex Offender Registry

SORNA requires registration agencies to submit detailed information about their registered sex offenders to NSOR. NSOR is a law enforcement-only database that is a subfolder of the National Crime Information Center (NCIC), managed by the FBI's CJIS division. NSOR was created in the late 1990s to store data on every registered sex offender in the United States and provides access to that data to law enforcement nationwide.

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[16] OFF. OF SEX OFFENDER SENT'G, MONITORING, APPREHENDING, REGISTERING, & TRACKING, www.smart.gov.

[17] NAT'L SEX OFFENDER PUB. WEBSITE, www.nsopw.gov.

VI. Biometric databases

SORNA also requires registration agencies to submit certain biometrics collected from registered sex offenders to the FBI. Fingerprints and palm prints are housed in the Next Generation Identification (NGI) system within CJIS. NGI fingerprint records are linked to the offender's corresponding NSOR record at CJIS. The National Palm Print System (NPPS) is the database for palm prints within NGI.

Jurisdictions must also ensure that any registered sex offender has a DNA sample in the Combined DNA Index System (CODIS), which is the national DNA database administered by the FBI.

VII. SORNA's requirements for jurisdictions

Each state has its own distinct sex offender registration and notification system. The District of Columbia and the five principal U.S. territories also have their own systems, as do over 150 federally recognized Indian tribes. Every jurisdiction makes its own determinations about who will be required to register, what information those offenders must provide, and which offenders will be posted on the jurisdiction's public registry website.

While every jurisdiction retains the ability to enact its own registration laws, over the last two decades, Congress has enacted various measures setting "minimum standards" for jurisdictions as they implement their sex offender registration and notification systems. The most recent set of standards can be found in SORNA, which currently governs the federal minimum standards for sex offender registration and notification systems.[18]

A. Substantial implementation

Title 34, section 20912(a) requires each SORNA jurisdiction to maintain a sex offender registration and notification system conforming to SORNA's standards.[19] Under SORNA, *jurisdiction* is defined as:

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[18] While this section describes SORNA's requirements, the actual implementation of these requirements varies across jurisdictions.

[19] 34 U.S.C. § 20912(a).

- the 50 States,
- the District of Columbia,
- the five principal United States territories—the Commonwealth of Puerto Rico, Guam, American Samoa, the Northern Mariana Islands, and the United States Virgin Islands, and
- Indian tribes to the extent provided in 34 U.S.C. § 20929. Generally speaking, federally recognized Indian tribes in non-PL 280 states were eligible to opt in as SORNA jurisdictions.[20]

Title 34, section 20926 required jurisdictions to substantially implement SORNA's terms by July 27, 2009.[21] The Attorney General granted two one-year extensions to this deadline, as the statute allowed, which resulted in a final implementation deadline of July 27, 2011. Non-tribal jurisdictions who did not substantially implement SORNA by this date had their Edward Byrne Memorial-Justice Assistance Grant (Byrne-JAG) funds reduced by 10%, as required by statute.[22] This reduction happens on an annual basis for every non-tribal jurisdiction that has not substantially implemented SORNA by July 27 of each year, as determined by the SMART Office. The penalty for tribal non-implementation of SORNA is discussed separately in Section IX below.

B. Required registration information

Generally speaking, SORNA requires jurisdictions to collect the following information about registered sex offenders:[23]

- Biographic Information: date of birth, name, photograph, physical description, and Social Security number
- Biometric Information: DNA sample, fingerprints, and palm prints
- Communications Information: internet identifiers and phone numbers
- Conviction Information: criminal history and the text of the registration offense

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[20] 34 U.S.C. § 20911(10).
[21] 34 U.S.C. § 20926(a).
[22] 34 U.S.C. § 20927(a).
[23] 34 U.S.C. § 20914.

- Identification Information and Documents: driver's license or identification card, passport and immigration documents, and professional licensing information
- Location Information: employer's address, resident address, and school address
- Travel Information: notice of international travel and temporary lodging information
- Vehicle Information: motor vehicle, boat, and aircraft information

C. Public notification

When a sex offender initially registers or updates a registration, SORNA requires that the registration jurisdiction provide that information about the offender to any interested person. The primary method of notification is the jurisdiction's public sex offender registry website.

To fulfill its standards for community notification of local organizations and individuals, SORNA recommends that each jurisdiction also establish an email notification system through the jurisdiction's public sex offender registry website, which will automatically email an individual (who registers for the notification system) when a sex offender relocates to, begins employment in, or starts attending school within a certain geographic area or zip code. Many jurisdictions have implemented such notification systems, and tribes using the Tribe and Territory Sex Offender Registry System (described in section XI(A), below) automatically have access to this technology.

D. Information sharing between jurisdictions

SORNA requires jurisdictions immediately notify one another when a sex offender indicates they are relocating and requires that the receiving jurisdiction notify the originating jurisdiction if the offender fails to appear for registration. Jurisdictions use multiple tools to facilitate such information sharing, including private software platforms and the SMART Office-created SORNA Exchange Portal, as well as phone, fax, and email.

E. Information sharing by corrections agencies

Excluding those held in military detention, there are three federal agencies that regularly house convicted sex offenders: the Bureau of

Prisons (BOP), the Bureau of Indian Affairs (BIA), and Immigration and Customs Enforcement's (ICE) Enforcement and Removal Operations (ERO).

1. Bureau of Prisons

BOP is housed within the Department and does not register sex offenders before their release. Instead, BOP or a federal probation officer is required to notify the chief law enforcement officer and registration officials of any state, tribe, or local jurisdiction when a federal prisoner required to register under SORNA is released from custody.[24]

2. Bureau of Indian Affairs

The Department of Interior's BIA operates a number of detention centers. There are no statutory or administrative requirements for these centers to provide notice to local or tribal law enforcement when a sex offender is released from custody. In practice, offenders in BIA facilities generally are not registered before their release from incarceration.

3. Immigration and Customs Enforcement

The Department of Homeland Security's (DHS) ICE ERO "is generally responsible for detaining and deporting undocumented individuals who are present within the United States."[25] In 2016, DHS issued a rule amending its Privacy Act provisions to permit the transfer of information from DHS to any sex offender registration agency about a sex offender who is released from DHS custody or removed from the United States.[26]

F. When a sex offender absconds

SORNA also requires certain actions when a jurisdiction receives information that a sex offender might be evading his registration responsibilities. The jurisdiction is required to notify the appropriate

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[24] 18 U.S.C. § 4042(c).

[25] *Sex Offender Registration and Notification in the United States: Current Case Law and Issues* 3 (March 2019), SMART.GOV, https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/case-law-update-2019-compiled.pdf.

[26] Notice of Privacy Act System of Records, 81 Fed. Reg. 72,080, 72,086 ¶(Z).

law enforcement agency and, if the offender cannot be located, the jurisdiction must:

- update its public registry website to reflect that the offender has absconded;
- update NSOR to reflect that the offender has absconded;
- seek a warrant for the offender's arrest and enter it into NCIC's Wanted Person file; and
- notify the USMS.[27]

VIII. Utilizing sex offender registration information to investigate missing person cases

The information contained in a jurisdiction's sex offender registry can be invaluable when investigating missing person cases. In situations where an abduction or coerced disappearance is suspected, the registry can provide information about known persons previously convicted of kidnapping or other sex offenses who live, work, or attend school in the area. While of course not every person on the registry will be a suspect, investigators can benefit greatly from the information.

For example, consider a case where an elementary school aged child goes missing and an abduction is suspected. There is a general description of the suspect and their vehicle: a blue station wagon. Investigators can quickly access their jurisdiction's sex offender registry to determine if there are any registered sex offenders in the area who own or operate a vehicle matching that description.

Consider also a situation where a teenager "runs away" and investigators suspect that he might be a victim of child sex trafficking or exploitation. Investigators would be able to compare the teenager's recent phone activity with known phone numbers of registered sex offenders in the jurisdiction and quickly develop a lead in the case.

While missing person investigations are necessarily complex and far beyond the scope of this article, it is important to remember the valuable information contained in sex offender registry databases as it might assist in those cases.

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[27] Final Guidelines, *supra* note 8, at 38,069.

IX. SORNA's requirements for sex offenders

In addition to the standards for jurisdictions described in the preceding section, SORNA also created direct registration requirements for persons convicted of a sex offense.[28] This direct registration requirement is enforceable by the federal failure-to-register statute[29] discussed below.

A. Who must register

Anyone convicted of a *sex offense*, as defined by SORNA, must register as a sex offender. An adult sex offender is *convicted* of a sex offense if they are subjected to penal consequences based on the conviction, however the conviction may be styled.[30] Juveniles are *convicted* under SORNA's definition if the juvenile was at least 14 years of age at the time of the offense and was adjudicated delinquent for committing (or attempting or conspiring to commit) an offense comparable to, or more severe than, aggravated sexual abuse as described in 18 U.S.C. § 2241.[31]

Title 34 of the United States Code, section 20911(5) delineates a multitude of offenses that are each classified as a *sex offense*. Generally, these include certain enumerated federal crimes and military offenses, as well as crimes in any jurisdiction involving a sexual act, some form of sexual contact, or those crimes included in SORNA's definition of a *specified offense against a minor*.[32] A *specified offense against a minor* generally includes all sexual offenses against minors, as well as non-parental kidnapping of a minor.[33]

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[28] *See* Registration Requirements, *supra* note 15.
[29] 18 U.S.C. § 2250.
[30] 34 U.S.C. § 20911(1).
[31] 34 U.S.C. § 20911(1), (8).
[32] SORNA specifically exempts from its definition of sex offense any case involving consensual sexual conduct: (1) between adults; or (2) involving any individual 13 years of age or older, so long as the other party is no more than four years older than the victim.
[33] 34 U.S.C. § 20911(7). A more extensive discussion of tiering under SORNA can be found in section XI(B)(1).

B. Tiering

Under SORNA, all sex offenders are classified in accordance with the crimes for which they are convicted. All sex offenses are classified as tier I, tier II, or tier III. Generally speaking, offenses are designated as follows:[34]

Tier I	All sex offenders that are not classified as a tier II or III sex offender are, by default, tier I sex offenders. In addition, any person convicted of an offense punishable by not more than one year of imprisonment is a tier I offender.
Tier II	Sex offenders whose registering offense involves a victim under the age of 18 and is punishable by more than one year of imprisonment, unless said offender is classified as a tier III offender.
Tier III	Sex offenders whose registering offense involves a victim under the age of 13 or whose offense is forcible in nature, and said offense is punishable by more than one year of imprisonment.

C. Initial registration

SORNA requires that all sex offenders register in any jurisdiction in which they reside, work, or go to school. SORNA also requires jurisdictions to register offenders before their release from incarceration if they are convicted in the jurisdiction. In practice, many jurisdictions do not actually register offenders before release and rely on the offender to report for registration within a certain number of days following their sentencing or release from incarceration, whichever comes later.

D. Keeping the registration current

SORNA requires sex offenders to immediately provide updates to registry officials if certain information they initially provided later changes. Offenders must immediately report, in person, any changes

[34] Interpretation of SORNA's specific statutory tiering language will vary in individual cases. The practitioner should use these broad tiering descriptions as a summary and not as applicable to any particular case standing alone.

in their name, residence address (including termination of residence), employment address, or school address. Offenders also must immediately report any changes to their vehicle information, temporary lodging information, internet identifiers, or phone numbers, although the report need not be made in person.

E. Duration of registration

Under SORNA's terms, tier I offenders are required to register for 15 years, tier II offenders for 25 years, and tier III sex offenders for life.[35] A jurisdiction may opt to allow for a reduction in a sex offender's registration period if certain conditions are met.[36]

F. Frequency of registration

SORNA requires tier I sex offenders to report in person once a year for verification of their information, tier II offenders every six months, and tier III offenders every three months.[37] During the in-person verification, the offender is to review and affirm or change any of the information previously gathered by the registration agency.

X. International Megan's Law

SORNA required the "Attorney General, in consultation with the Secretary of State and the Secretary of Homeland Security, [to] establish and maintain a system for informing the relevant jurisdictions about persons entering the United States who are required to register under [SORNA]."[38] In 2008, the *Final Guidelines* expanded this statutory authority to require the tracking of sex offenders who are departing the United States.[39] The *Supplemental Guidelines* amended SORNA's standards such that jurisdictions must require their registered sex offenders to provide 21 days' notice of any international travel.[40] Utilizing these notifications and other information about registered sex offenders, USMS and DHS each

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[35] 34 U.S.C. § 20915(a).
[36] 34 U.S.C. § 20915(b).
[37] 34 U.S.C. § 20918.
[38] 34 U.S.C. § 20930.
[39] Final Guidelines, *supra* note 5, at 38,066.
[40] Supplemental Guidelines, *supra* note 8, at 1637. It is important to note that this added a SORNA baseline requirement for registration jurisdictions and did *not* a place a reporting requirement directly on sex offenders.

created administrative processes for tracking registered sex offenders traveling internationally.

International Megan's Law (IML) was enacted in 2016 and supplemented these previous statutory, regulatory, and administrative efforts by requiring and establishing the following:

- Notice of International Travel: IML specifically requires sex offenders under SORNA to provide advance notice of their international travel to their jurisdiction of residence.[41] Unlike the *Supplemental Guidelines*' standards for jurisdictions, IML did *not* specify how many days in advance of international travel a registered sex offender must provide notice.
- National Sex Offender Targeting Center (NSOTC): Operated by USMS, NSOTC receives, vets, and processes such international travel notifications, and the information about intended travel is sent to any destination country via INTERPOL-Washington.[42]
- Angel Watch Center (AWC): As part of DHS, AWC evaluates sex offender registry and passenger manifest data to detect convicted child sex offenders traveling internationally and provides notice, as appropriate, to those destination countries.[43] Representatives from NSOTC are stationed at AWC and the agencies work together closely to ensure accurate and timely notifications.
- Passport Marking: The State Department is authorized to place a marker on the passport of any registered sex offender who was convicted of an offense against a child.[44]
- Amendment to 18 U.S.C. § 2250: The federal failure-to-register statute was amended to make it a violation when a sex offender attempts to travel internationally and has not provided the requisite advance notification.

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[41] 34 U.S.C. § 20914(a)(7).
[42] 34 U.S.C. § 21504.
[43] 34 U.S.C. § 21503.
[44] 22 U.S.C. § 212(b).

XI. Tribes and SORNA

Before the passage of SORNA, federally recognized tribes had largely been excluded from the nationwide network of sex offender registration and notification systems. Persons convicted of sex offenses in tribal courts were not always subject to state sex offender registration requirements, and reservation lands often became safe havens where other convicted sex offenders could evade registration requirements.

SORNA addressed these issues by including tribal convictions in its definition of *sex offense* and by allowing certain federally recognized tribes to become SORNA jurisdictions. Generally speaking, tribes not subject to PL-280[45] state criminal jurisdiction were eligible to opt-in. Initially, there were 212 tribes eligible to elect to become SORNA jurisdictions. Of those initially eligible tribes, 198 affirmatively elected to perform sex offender registry functions. That number has decreased over time as tribes affirmatively opted out of SORNA or delegated their registration and notification responsibilities to the state(s) within which they are located. There are currently over 150 tribes operating as SORNA jurisdictions.

As described in section VII(A) above, all SORNA jurisdictions are required to substantially implement the provisions of SORNA. Unlike other SORNA jurisdictions, if a tribe does not substantially implement SORNA, the responsibility for sex offender registration, notification, and enforcement on tribal lands is delegated to the state(s) within which the tribe is located.[46] The SMART Office is responsible for making all determinations regarding substantial implementation of SORNA.

The vast majority of tribes that have substantially implemented SORNA have used the Model Tribal Code, which was developed by Indian Law experts in conjunction with the SMART Office and fully covers *all* of SORNA's requirements. There are many tribes that have *more rigorous registration requirements* than the states within which they are located, particularly for those tribes located within states that have not substantially implemented SORNA. In addition, some tribes extend their criminal sanctions for failure to register beyond

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[45] *PL 280* refers to Act of Aug. 15, 1953, ch. 505, Pub. L. No. 83-280, 67 Stat. 588.

[46] 34 U.S.C. § 20929(a)(2)(C).

fines and incarceration to include penalties such as exclusion from their lands altogether.

Thus, there are issues particular to Indian country regarding both SORNA implementation and federal failure-to-register prosecutions.[47]

A. SORNA implementation in Indian country

A significant hurdle for SORNA implementation in Indian country was its lack of connectivity with federal criminal justice databases and communication systems. Before SORNA, federally recognized tribes generally did not have meaningful and full access to the federal systems described in sections IV, V, and VI. In order to substantially implement SORNA, tribes needed to develop the capacity to connect to NSOPW, as well as the relevant federal databases.

1. The National Sex Offender Public Website (NSOPW)

Most tribes did not have a public sex offender registry website before the passage of SORNA. Because many tribes that opted to become SORNA jurisdictions did not have the information technology infrastructure to develop such a website, the SMART Office created the Tribe and Territory Sex Offender Registry System (TTSORS), which is available free of charge and serves as both a jurisdiction's administrative database and public sex offender registry website. All of the tribes that have substantially implemented SORNA have their own public sex offender registry website that is linked to NSOPW.

2. The National Sex Offender Registry (NSOR)

Before SORNA, in order to submit information to NSOR, a tribe had to have a certain level of law enforcement infrastructure development (adequate to meet the audit standards of the FBI), and even then, it was required to submit information through a state conduit to NSOR. These bars were insurmountable for most SORNA tribes. To remedy this issue, the Department launched the TAP in 2015, which enables select tribes to submit NSOR data through the Department to the FBI. By the end of the current deployment cycle, TAP will have over 140 participating tribes.

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[47] 18 U.S.C. § 2250.

3. Fingerprints, palm prints, and DNA

At the time of SORNA's passage, there was no direct conduit for submitting tribal fingerprints, palm prints, or DNA to the FBI's databases and no way to require states and tribes to work together in order to facilitate such submissions. In response, the SMART Office and its federal partners developed a series of solutions for tribal jurisdictions:

- A workaround whereby tribal jurisdictions could take DNA samples and submit them directly to the FBI for analysis and entry into CODIS; and
- Allowing tribes to take hard copy fingerprints and palm prints (whether rolled manually or printed via livescan) and submit them directly to the FBI for entry into NGI.

B. Indian country and prosecutions under 18 U.S.C. § 2250

There are a handful of legal issues unique to Indian country that might impact a prosecution under 18 U.S.C. § 2250.[48]

1. Tiering of tribal court convictions

SORNA classifies all sex offenses that are punishable by a year or less of incarceration as tier I offenses. Tribal courts historically have not been permitted to sentence anyone convicted of a crime to more than one year of incarceration, which rendered all tribal convictions tier I offenses under SORNA—even very serious crimes such as rape and child sexual abuse. With the passage of the Tribal Law and Order Act (TLOA) in 2010, tribes are now eligible to impose sentences of more than one year, so long as certain conditions are met.[49] If a tribe implements the enhanced sentencing provisions of TLOA for its sex offenses, they might be classified as tier I, II, or III, depending on the circumstances. For the purposes of an 18 U.S.C. § 2250 prosecution involving an underlying tribal sex offense, a practitioner should review the punishment structure used by the tribe in order to determine whether the prior conviction might be eligible for classification as a tier II or tier III sex offense.

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[48] It is unclear what effect the recent decision in *McGirt v. Oklahoma*, 140 S. Ct. 2562 (2020) might have on future prosecutions under 18 U.S.C. § 2250.
[49] 25 U.S.C. § 1302.

2. Dual registration

Because SORNA's carve out of Indian country jurisdiction over sex offender registration in certain tribal lands is relatively recent, there are situations where sex offenders residing in Indian country might also be asked by state officials to register with the state. There have been a few cases addressing this situation, and practitioners should be sure to check that a person suspected of failing to register with a state was not, in fact, already registered with a SORNA-implementing tribe:

- Arizona: The Federal District Court held that persons living in Indian country are required to keep their registration current with both the state and the tribe.[50] In Arizona's state courts, however, a tribal member residing on tribal land cannot be prosecuted under state law for failing to register unless a tribe's registration responsibilities have been delegated to the state via SORNA's delegation procedure.[51]
- New Mexico: The state cannot impose a duty to register on enrolled tribal members living on tribal land who have been convicted of federal sex offenses.[52]
- Washington: In a state level prosecution for failing to register, it was error for the trial court to refuse to hear evidence that the sex offender was in fact properly registered with a tribe that substantially implemented SORNA.[53]

3. Validity of tribal court convictions

Because of the differing standards regarding the right to counsel in some tribal courts, it was sometimes argued that prosecuting a person based in part on an underlying tribal conviction violated the Sixth Amendment of the U.S. Constitution. This issue was largely resolved in *United States v. Bryant* when the Court held that prior tribal court convictions are valid for use in subsequent proceedings so long as the

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[50] United States v. Begay, 622 F.3d 1187, 1196 (9th Cir. 2010).
[51] State v. John, 308 P.3d 1208, 1212 (Ariz. Ct. App. 2013).
[52] State v. Atcitty, 215 P.3d 90, 98 (N.M. Ct. App. 2009).
[53] State v. Cayenne, No. 49696-8-II, 2018 WL 3154379, at *2 (Wash. Ct. App. June 26, 2018).

terms of the Indian Civil Rights Act were followed in the underlying proceedings.[54]

XII. 18 U.S.C. § 2250: failure to register

SORNA proactively requires a sex offender[55] to register as follows: "A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student."[56]

When such a sex offender fails to comply with this statutory requirement, the federal failure-to-register statute provides in part:

> (a) In general—Whoever—
>
> (1) is required to register under [SORNA];
>
> (2)(A) is a sex offender . . . by reason of a conviction under Federal law, . . . Indian tribal law, or the law of any territory or possession of the United States; or
>
> (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
>
> (3) knowingly fails to register or update a registration as required by [SORNA];
>
> shall be fined under this title or imprisoned not more than 10 years, or both.
>
> (b) International Travel Reporting Violations.—Whoever—
>
> (1) is required to register under [SORNA];
>
> (2) knowingly fails to provide information required by [SORNA] relating to intended travel in foreign commerce; and
>
> (3) engages or attempts to engage in the intended travel in foreign commerce;

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[54] United States v. Bryant, 136 S. Ct. 1954, 1959 (2016). Although *Bryant* involved a domestic violence conviction, its rationale is applicable to failure-to-register prosecutions.

[55] 34 U.S.C. § 20911(1) defines "sex offender" as "an individual who was convicted of a sex offense."

[56] 34 U.S.C. § 20913(a).

> shall be fined under this title, imprisoned not more than 10 years, or both.[57]

Prosecutions under 18 U.S.C. § 2250 have been vigorously pursued, and a body of case law interpreting the statute has developed as described below.

A. Is the offender required to register under SORNA?

Two threshold questions for any 18 U.S.C. § 2250 prosecution are (1) is the prior conviction that triggered a registration requirement a "sex offense" under SORNA; and (2) if it is a "sex offense," in what SORNA tier should it be placed? In some cases, the answer to either or both questions is clear because the underlying conviction is a federal offense specifically listed in SORNA's relevant definitions.[58] In other cases, courts compare an underlying conviction to SORNA's definitions using one of two primary approaches. Broadly speaking, those are the *categorical approach* and the *circumstance-specific approach*.

1. The categorical approach

When courts use this method, they only look at the elements of the offense involved when comparing it to a statutory definition. The underlying facts of the case are *not* considered when using the categorical approach.

The modified categorical approach

When it is unclear which specific elements were proven to sustain the underlying conviction,[59] the modified categorical approach is utilized as

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[57] 18 U.S.C. § 2250.

[58] Specifically, SORNA's tiering and "sex offense" definitions.

[59] Such an underlying conviction is generally referred to as a "divisible" offense. For example, the New Jersey crime of Endangering Welfare of Children was held to be divisible: "Any person having a legal duty for the care of a child or who has assumed responsibility for the care of a child *who engages in sexual conduct* which would impair or debauch the morals of the child is guilty of a crime of the second degree. Any other person who engages in conduct *or who causes harm* as described in this paragraph to a child is guilty of a crime of the third degree." N.J. STAT. ANN. § 2C:24-4(a)(1) (emphasis added); United States v. Berry, 814 F.3d 192, 195 (4th Cir. 2016).

> an off-shoot of the traditional categorical approach, . . . similarly focus[ing] on elements rather than facts. . . . [T]he court is entitled to refer to certain documents [(*Shepard* documents)[60]] from the underlying case to discern which alternative element formed the basis of conviction. . . . The focus of the modified categorical approach remains squarely on the elements of the prior conviction[,] . . . however, and the reviewing court is not entitled to assess whether the defendant's actual conduct matches the federal statute.[61]

In addition, the modified categorical approach might be used when the age of a victim is critical to determining which federal offense an underlying conviction is "comparable to" for tiering purposes under SORNA.[62]

2. Circumstance-specific approach

When courts use this method, they examine the facts of the underlying case in making a comparison to a statutory definition.[63]

B. Is the underlying offense a "sex offense" under SORNA?

The method for determining whether an underlying conviction is a *sex offense* under SORNA varies depending on the court where a person received that underlying conviction.[64]

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[60] Shepard v. United States, 544 U.S. 13 (2005) (holding that, when a statute contains alternative elements, courts are entitled to refer to documents from the underlying conviction to determine which element supported the prior conviction).

[61] United States v. Price, 777 F.3d 700, 705 (4th Cir. 2015) (citations omitted).

[62] United States v. White, 782 F.3d 1118, 1131 (10th Cir. 2015).

[63] For a detailed analysis of these issues, including litigating positions, please contact CEOS.

[64] Attempts and conspiracies to commit any included sex offense are also included in SORNA's definition of "sex offense." 34 U.S.C. § 20911(5)(A)(v). In addition, SORNA provides one broad exception to its definition of "sex offense": any offense involving consensual sexual conduct where the defendant is less than four years older than the victim, so long as the victim is 13 years of age or older, is specifically excluded from the definition of "sex offense." 34 U.S.C. § 20911(5)(C).

1. Federal convictions

A prior conviction is a sex offense under SORNA if it is "a Federal offense . . . under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of Title 18."[65] The definition of sex offense also includes these listed offenses when they occur in Indian country and are prosecuted under the Assimilative Crimes Act or Major Crimes Act.[66] Under the current iteration of the United States Code, this specifically includes convictions for the following federal crimes:

- Sex trafficking of children by force, fraud, or coercion;[67]
- Aggravated sexual abuse;[68]
- Sexual abuse;[69]
- Sexual abuse of a minor or ward;[70]
- Abusive sexual contact;[71]
- Offenses resulting in death;[72]
- Sexual exploitation of children;[73]
- Selling or buying of children;[74]
- Certain activities relating to material involving the sexual exploitation of minors;[75]
- Certain activities relating to material constituting or containing child pornography;[76]
- Misleading domain names on the internet;[77]

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[65] 34 U.S.C. § 20911(5)(A)(iii).
[66] *Id.*
[67] 18 U.S.C. § 1591.
[68] 18 U.S.C. § 2241.
[69] 18 U.S.C. § 2242.
[70] 18 U.S.C. § 2243.
[71] 18 U.S.C. § 2244.
[72] 18 U.S.C. § 2245.
[73] 18 U.S.C. § 2251.
[74] 18 U.S.C. § 2251A.
[75] 18 U.S.C. § 2252.
[76] 18 U.S.C. § 2252A.
[77] 18 U.S.C. § 2252B.

- Misleading words or digital images on the internet;[78]
- Production of sexually explicit depictions of a minor for importation into the United States;[79]
- Transportation generally;[80]
- Promotion or facilitation of prostitution and reckless disregard of sex trafficking;[81]
- Coercion and Enticement;[82]
- Transportation of minors;[83]
- Filing factual statement about alien individual;[84] and
- Use of interstate facilities to transmit information about a minor.[85]

Juvenile adjudications of delinquency

Practitioners are likely to encounter federal juvenile adjudications of delinquency for serious sex offenses committed in Indian country. So long as the underlying adjudication was for a violation of 18 U.S.C. § 2241, it will qualify as a sex offense under SORNA, and the juvenile will be subject to liability for a prosecution under 18 U.S.C. § 2250.[86]

Additional included federal offenses

Even if a prior federal conviction is not listed in the provisions above, it could still be a sex offense under SORNA if the underlying conviction either (1) has an element involving a sexual act or sexual contact with another or (2) is a specified offense against a minor.[87]

When a conviction involved an adult victim, section 20911(5)(A)(i) expands the definition of "sex offense" under SORNA to also include

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[78] 18 U.S.C. § 2252C.
[79] 18 U.S.C. § 2260.
[80] 18 U.S.C. § 2421.
[81] 18 U.S.C. § 2421A.
[82] 18 U.S.C. § 2422.
[83] 18 U.S.C. § 2423.
[84] 18 U.S.C. § 2424.
[85] 18 U.S.C. § 2425.
[86] *See* United States v. Under Seal, 709 F.3d 257, 266 (4th Cir. 2013).
[87] For example, kidnapping of a minor not committed by a parent or guardian.

any "criminal offense that has an element involving a sexual act or sexual contact with another."[88] Thus, an underlying conviction might not be listed in section 20911(5)(A)(iii) but could still be captured by this provision in section 20911(5)(A)(i). Courts considering these cases generally utilize the categorical approach in analyzing these offenses.[89] Where the underlying offense is divisible, courts employ the modified categorical approach as described above.

A different approach is generally used when a prior conviction involved a minor victim. In these cases, the prior conviction is analyzed utilizing the circumstance-specific approach,[90] also known in some circuits as the "non-categorical approach."

For example, utilizing the circumstance-specific approach, the following federal offenses have been deemed registerable under SORNA even though they are *not* specifically listed in SORNA:

- Importation of alien for immoral purpose;[91]
- Transfer of obscene materials to minors;[92] and
- Unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor.[93]

2. Military convictions

A prior Uniform Code of Military Justice (UCMJ) conviction is a sex offense under SORNA if it is listed in tables 4, 5, or 6 of Department of Defense Instruction 1325.07.[94] Table 6 applies to offenses

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[88] 34 U.S.C. § 20911(5)(A)(i).

[89] *See, e.g.,* United States v. Faulls, 821 F.3d 502, 512 (4th Cir. 2016); United States v. Rogers, 804 F.3d 1233, 1237 (7th Cir. 2015).

[90] *See, e.g.*, United States v. Hill, 820 F.3d 1003, 1005 (8th Cir. 2016); United States v. Price, 777 F.3d 700, 708 (4th Cir. 2015).

[91] 8 U.S.C. § 1328; United States v. Byun, 539 F.3d 982, 990–93 (9th Cir. 2008).

[92] 18 U.S.C. § 1470; United States v. Schofield, 802 F.3d 722, 728–32 (5th Cir. 2015); United States v. Dodge, 597 F.3d 1347, 1353–56 (11th Cir. 2010).

[93] 18 U.S.C. § 1592; United States v. Vanderhorst, 688 F. App'x 185, 187 (4th Cir. 2017) (not precedential).

[94] U.S. DEP'T OF DEF., INSTRUCTION NO. 1325.07 (2020), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/132507p.pdf?ver=2019-02-19-075650-100. The SORNA requirement for UCMJ convictions is found in 34 U.S.C. § 20911(5)(A)(iv).

committed on or after June 28, 2012; table 5 applies to offenses committed "on or after October 1, 2007 and before June 28, 2012"; and Table 4 applies to offenses committed before October 1, 2007. As with federal offenses generally, an unlisted UCMJ offense might qualify as a sex offense under SORNA if it meets the definitions described above in section XII(B)(3).

3. State, tribal, or territory convictions

A prior conviction from a state, tribe, or territory is registerable under SORNA when it is either (1) "a criminal offense that has an element involving a sexual act or sexual contact with another; [or (2)] a criminal offense that is a specified offense against a minor."[95]

> The term "specified offense against a minor" means an offense against a minor that involves any of the following:
>
> (A) An offense (unless committed by a parent or guardian) involving kidnapping.
>
> (B) An offense (unless committed by a parent or guardian) involving false imprisonment.
>
> (C) Solicitation to engage in sexual conduct.
>
> (D) Use in a sexual performance.
>
> (E) Solicitation to practice prostitution.
>
> (F) Video voyeurism as described in section 1801 of Title 18.
>
> (G) Possession, production, or distribution of child pornography.
>
> (H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.
>
> (I) Any conduct that by its nature is a sex offense against a minor.[96]

One of the most difficult issues in 18 U.S.C. § 2250 prosecutions is determining whether an underlying state sex conviction is a sex

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[95] 34 U.S.C. § 20911(5)(A)(i)–(ii) (emphasis added).
[96] 34 U.S.C. § 20911(7).

offense under SORNA. Underlying convictions from states, tribes, or territories are analyzed as described in the discussion of Additional Included Federal Offenses, Section (XII)(B) above, depending on the age of the victim involved.[97] Courts have made varying decisions, including:

- a conviction under Oklahoma's sexual battery statute was a sex offense under SORNA;[98]
- a conviction under South Carolina's indecent exposure statute was a sex offense under SORNA;[99] but
- a conviction under South Dakota's statutory rape statute was *not* a sex offense under SORNA.[100]

Practitioners investigating or prosecuting an 18 U.S.C. § 2250 case involving an underlying state, tribal, or territory sex offense should carefully analyze whether the prior conviction qualifies as a sex offense under SORNA.

C. Tiering

Once a determination is made that a prior conviction is a sex offense under SORNA, the practitioner must decide the SORNA tier in which the offense should be classified.[101] The tier of the offense will govern two important issues in a section 2250 prosecution: (1) the duration of time a sex offender is required to register; and (2) the base level for the sentencing guidelines.[102]

SORNA defines its three tiers as:

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[97] In addition, certain foreign country convictions are included in SORNA's definition of "sex offense." 34 U.S.C. § 20911(5)(B).

[98] United States v. Sumner, No. 15–CR–0037, 2015 WL 1410495, at *4 (N.D. Okla. Mar. 26, 2015).

[99] United States v. Hill, 820 F.3d 1003, 1005–06 (8th Cir. 2016).

[100] United States v. Sailors, No. CR 10–40003, 2010 WL 2574159, at *2 (D.S.D. June 23, 2010).

[101] Practitioners should note that a *jurisdiction's* tiering structure might vary from SORNA's tiering structure. For the purposes of prosecutions under 18 U.S.C. § 2250, it is the *SORNA* tier which governs.

[102] Although beyond the scope of this article, more information about how the SORNA tier of the underlying offense impacts sentencing guideline determinations in 18 U.S.C. § 2250 prosecutions can be found at § 2A3.5 of the United States Sentencing Commission Guidelines at U.S. SENTENCING GUIDELINES MANUAL § 2A3.5 (U.S. SENT'G COMM'N 2018).

(2) . . . The term "tier I sex offender" means a sex offender other than a tier II or tier III sex offender.

(3) . . . The term "tier II sex offender" means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is *comparable to or more severe than* the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

(i) sex trafficking (as described in section 1591 of Title 18);

(ii) coercion and enticement (as described in section 2422(b) of Title 18);

(iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a)) of Title 18;

(iv) abusive sexual contact (as described in section 2244 of Title 18);

(B) *involves*—

(i) use of a minor in a sexual performance;

(ii) solicitation of a minor to practice prostitution; or

(iii) production or distribution of child pornography; or

(C) occurs after the offender becomes a tier I sex offender. . . .

(4) . . . The term "tier III sex offender" means a sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is *comparable to or more severe than* the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or

(ii) abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years;

(B) *involves* kidnapping of a minor (unless committed by a parent or guardian); or

(C) occurs after the offender becomes a tier II sex offender.[103]

If an underlying federal conviction is specifically listed in one of the tier definitions above (for example, 18 U.S.C. § 2241), it is tiered as designated in the statute. If a prior conviction is not specifically listed (which is the case for *all* military, state, tribal, territory, and foreign offenses), it might be analyzed via the categorical or the circumstance-specific approach, depending on the tiering subsection being utilized.

The approach utilized might vary depending on whether an underlying conviction is analyzed as being "comparable or more severe than" a certain federal offense (suggesting a categorical or modified categorical approach), or "involving" certain conduct (suggesting a circumstance-specific approach). Practitioners should consult circuit precedent and the most recent guidance from CEOS in adopting their litigation strategy in such cases.

D. Duration of registration requirement

The tier of an offender's underlying sex offense determines the duration of their registration responsibilities under SORNA. As described in section (IX)(E), offenders are required to register for 15 years, 25 years, or life.[104] If a sex offender's SORNA registration requirement expires, that offender cannot be prosecuted under 18 U.S.C. § 2250.

Generally speaking, the duration of a sex offender's registration requirement is measured from the time of her sentencing or release from incarceration, whichever is later. Questions of whether a sex offender's registration duration is tolled during intervening periods of incarceration have not yet been widely addressed, although the cases

[103] 34 U.S.C. § 20911(2)–(4) (emphasis added).
[104] 34 U.S.C. § 20915(a).

addressing the issue thus far have declined to hold that an offender's registration duration under SORNA was tolled during those times.[105]

E. "Resides"

Most prosecutions under 18 U.S.C. § 2250 are based on the theory that a sex offender resided in a particular SORNA jurisdiction, thus triggering a registration responsibility under SORNA. In most cases, it is relatively easy to prove an offender resided in a particular jurisdiction for SORNA purposes; for example, she lived in a home in one jurisdiction, then moved to a permanent address in another jurisdiction.

In some instances, it is not so clear. What about cases where a sex offender is transient and moves from jurisdiction to jurisdiction in relatively short order? At what point does a sex offender's presence in a jurisdiction trigger a registration responsibility under SORNA and, thus, potential liability for failure to register under 18 U.S.C. § 2250?[106]

SORNA defines "resides" as "the location of the individual's home or other place where the individual habitually lives."[107] The term "habitually lives" is defined in the SORNA Final Guidelines as follows:[108]

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[105] *See* United States v. Walker, 931 F.3d 576, 578 (7th Cir. 2019) (state conviction in 1998 was a tier I SORNA offense, even though the state classified it as a tier III offense, and Walker's SORNA registration requirement ended after 15 years—before the offense date of the current failure-to-register charge); United States v. Red Tomahawk, No. 1:17–CR–106, 2018 WL 3077789, at *3–*5 (D.N.D. June 20, 2018) (an underlying 1998 conviction for 18 U.S.C. § 2244(a)(1) was a Tier I offense, even though the Standing Rock Sioux tribe classified it as a Tier II offense, and Red Tomahawk's SORNA registration requirement ended after 15 years).

[106] Every jurisdiction has its own rules for when a registration responsibility is triggered, and those definitions will often be different from the standard utilized for determining liability for an 18 U.S.C. § 2250 prosecution.

[107] 34 U.S.C. § 20911(13).

[108] There are two issues which often are conflated when discussing SORNA: (1) when does an offender 'reside' in a jurisdiction to trigger a SORNA registration requirement? 73 Fed. Reg. 38030, 38061–38062 (July 2, 2008); and (2) how does a registration jurisdiction properly record a residence address for an offender who is homeless or transient? *Id.* at 38055–38056. While these issues may overlap in a prosecution for 18 U.S.C. § 2250, it is important to distinguish between the two.

> "Habitually lives" accordingly should be understood to include places in which the sex offender lives with some regularity, and with reference to where the sex offender actually lives, not just in terms of what he would choose to characterize as his home address or place of residence for self-interested reasons. The specific interpretation of this element of "residence" . . . is that a sex offender habitually lives in the relevant sense in any place in which the sex offender lives for at least 30 days. Hence, a sex offender resides in a jurisdiction for purposes of SORNA if the sex offender has a home in the jurisdiction, or if the sex offender lives in the jurisdiction for at least 30 days.[109]

Cases discussing this issue are limited but include the following:

- *United States v. Alexander*;[110]
- *United States v. Wampler*;[111] and
- *United States v. Voice*.[112]

Practitioners should familiarize themselves with their relevant circuit standards for determining "residence" and when a sex offender "habitually lives" in a location so as to trigger liability under 18 U.S.C. § 2250.

F. Mens rea

By its terms, 18 U.S.C. § 2250(a) requires that an offender *knowingly* fail to register or update her registration as required. The United States is generally not required to prove that the offender had *specific knowledge* of SORNA's requirements when meeting the *knowing* element in a prosecution under 18 U.S.C. § 2250(a). In such a case, it is usually sufficient if a sex offender is *generally* aware of her obligation to register as a sex offender under state law.[113]

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[109] 73 Fed. Reg. 38030, 38062 (July 2, 2008).
[110] 817 F.3d 1205, 1215 (10th Cir. 2016) (establishing 'residence').
[111] 703 F.3d 815, 820 (5th Cir. 2013) (transient offender & "habitually lives").
[112] 622 F.3d 870, 874–75 (8th Cir. 2010) (transient offender & "habitually lives").
[113] United States v. Vasquez, 611 F.3d 325, 328–29 (7th Cir. 2010).

A prosecution under 18 U.S.C. § 2250(b) *also* requires proof that the offender knowingly failed to provide notice of intended international travel. More than half of the states now include information on their registration forms about the offender's obligation to provide advance notice of travel, and sometimes an offender is advised of this particular obligation by a court or probation officer. Before pursuing a case under 18 U.S.C. § 2250(b), a prosecutor should ensure that there is sufficient evidence that the offender had notice of the requirement to provide advance notice of international travel.

G. Basis for prosecution

There are three subsections under which a person might be prosecuted for a violation of 18 U.S.C. § 2250. Depending on the nature of the underlying conviction and the nature of the failure to register, one of the following theories of prosecution might apply.

1. 18 U.S.C. § 2250(a)(2)(A): underlying federal, military, tribal, or territory conviction

If a sex offender's underlying sex offense was from a federal, military, tribal, or territory court, he can be prosecuted under section 2250 without any travel element being met if he failed to register or update his registration as required by SORNA.

2. 18 U.S.C. § 2250(a)(2)(B): underlying conviction from a state or the District of Columbia

If a sex offender's underlying sex offense was from a state or the District of Columbia, there is an additional element that must be proven: The offender must either (1) travel in interstate or foreign commerce; or (2) enter, leave, or reside in Indian country.

Travel in interstate or foreign commerce

When sex offenders are prosecuted on the theory that they traveled in interstate or foreign commerce, the sequential and temporal timing of the travel is important to determine. Sequentially, the offender's travel must occur *after* his conviction and *after* his SORNA registration requirements attached. Depending on the circuit, an offender's travel must have occurred either after February 28, 2007,[114]

[114] United States v. Gould, 568 F.3d 459, 466 (4th Cir. 2009); United States v. Dixon, 551 F.3d 578, 585 (7th Cir. 2008), *rev'd on other grounds sub nom*;

March 30, 2007,[115] August 1, 2008,[116] or December 29, 2010.[117] The Third and Tenth Circuits have not established such a date.

Enter, leave, or reside in Indian country

Even if a sex offender was not convicted of an underlying tribal sex offense, they could be prosecuted under 18 U.S.C. § 2250(a) if they enter, leave, or reside in Indian country without any further proof of travel.

3. 18 U.S.C. §2250(b): international travel

Regardless of the jurisdiction of the court that issued the underlying conviction, a sex offender is required to engage in, or attempt to engage in, international travel in order to trigger liability under this subsection. As discussed above, these cases will require a more detailed proof of knowledge of the obligation to provide advance notice of international travel; it is unlikely that a court would hold a sex offender who is only generally aware of their sex offender registration responsibilities to be properly "on notice" for the purposes of satisfying the *knowingly* element in 18 U.S.C. § 2250(b).

H. Venue

When a failure-to-register case only involves one district, for example, when a federally convicted sex offender moves within a district and fails to update the information about where the offender resides, there are no venue issues. That said, a number of prosecutions under 18 U.S.C. § 2250(a) involve multiple districts, as offenders with underlying state convictions move across state lines

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Carr v. United States, 130 S. Ct. 2229, 2239 (2010); United States v. Dean, 604 F.3d 1275, 1277–80 (11th Cir. 2010).

[115] United States v. Johnson, 632 F.3d 912, 930 (5th Cir. 2011).

[116] United States v. Whitlow, 714 F.3d 41, 44–45 (1st Cir. 2013); United States v. Trent, 654 F.3d 574, 582–83 (6th Cir. 2011); United States v. Manning, 786 F.3d 684, 686–87 (8th Cir. 2015); United States v. Valverde, 628 F.3d 1159, 1167-69 (9th Cir. 2010). In *United States v. Lott*, 750 F.3d 214, 219–220 (2d Cir. 2014), the court used July 2, 2008 as the effective date (the date the SORNA Final Guidelines were published) but did not specifically address the issue of whether their *actual* effective date would be August 1, 2008, which is the thirty-day post-publication date utilized by other circuits.

[117] United States v. Ross, 848 F.3d 1129, 1133–34 (D.C. Cir. 2017).

and fail to register in their new jurisdiction. In those cases, which district is the appropriate venue for prosecution? Is the answer different when a person is being prosecuted for failure to provide notice of international travel under 18 U.S.C. § 2250(b)?

1. Cases involving domestic travel

For cases involving interstate travel, the best practice is to prosecute in the district of arrival rather than the district of departure. In *United States v. Haslage*, for example, a state-convicted offender travelled from Wisconsin to Minnesota and, thereafter, failed to register.[118] This offender was charged with a section 2250 violation in Wisconsin. The court of appeals dismissed the indictment, holding that the offender could not be prosecuted in Wisconsin. The opinion was based primarily on the reasoning in *Nichols v. United States*.[119] Although that case did not concern venue, but rather whether an offender had an obligation to notify the district of departure when moving abroad, some courts have found the case relevant when considering venue questions. Although other circuits considering the issue post-*Nichols* have upheld venue in either the originating or receiving jurisdiction, the general recommendation remains to prosecute in the district of arrival to minimize litigation risk.[120]

2. Cases involving international travel

The failure-to-register provision[121] in 18 U.S.C. § 2250(b) was enacted after the initiation of the *Nichols* case. By its terms, it applies when a sex offender fails to provide notice to her residence jurisdiction of any intended international travel. As such, venue is proper in the

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[118] 853 F.3d 331, 336 (11th Cir. 2017). A companion case involving an offender moving from Minnesota to Wisconsin also held that venue was only appropriate in the district of arrival. *See also* United States v. Toney, 853 F.3d 331, 336 (11th Cir. 2017).

[119] 136 S. Ct. 1113, 1118 (2016).

[120] United States v. Seward, 967 F.3d 57, 67–68 (1st Cir. 2020); United States v. Spivey, 956 F.3d 212, 216–217 (4th Cir. 2020); United States v. Holcombe, 883 F.3d 12, 16 (2d Cir. 2018); United States v. Llewallyn, 737 F. App'x 471, 474–75 (11th Cir. 2018) (not precedential).

[121] 18 U.S.C. § 2250(b).

offender's residence jurisdiction and, arguably, any other jurisdiction involved as the offender leaves or attempts to leave the country.[122]

I. Supreme Court cases

There have been six cases decided by the U.S. Supreme Court interpreting SORNA since its passage:

- *Carr v. United States*: This case involved a state-convicted offender who moved from Alabama to Indiana and then failed to register as required. The Court held that 18 U.S.C. § 2250 does not apply to sex offenders whose travel occurred before SORNA's enactment.[123]
- *United States v. Juvenile Male*: This case involved a juvenile adjudicated delinquent pursuant to the Federal Juvenile Delinquency Act who then failed to register as required. The defendant challenged on *Ex Post Facto* grounds. After remanding the case to Montana for certain state-law determinations, the Court decided that the challenge was moot.[124]
- *Reynolds v. United States*: This case involved a state-convicted sex offender who moved from Missouri to Pennsylvania and then failed to register as required. The Court held that SORNA's registration requirements do not apply to pre-SORNA offenders until a valid specification to that effect is made by the Attorney General, that is, no earlier than the issuance of the Interim Rule governing retroactivity.[125]
- *United States v. Kebodeaux*: This case involved a court-martialed offender who moved within Texas and failed to update his registration. The Court upheld the portion of the statute permitting the prosecution of

[122] For example, if a sex offender lives in New York and drives to Newark Airport (in New Jersey) to catch an international flight.
[123] 560 U.S. 438, 442 (2010).
[124] 564 U.S. 932, 938–39 (2011).
[125] 565 U.S. 432, 445 (2012).

offenders with federal predicate convictions without interstate travel.[126]

- *Nichols v. United States*: This case involved a federally convicted offender who moved out of the country without notifying his registering state. The Court held that he could not be prosecuted under 18 U.S.C. § 2250. Following this decision, Congress enacted legislation that requires offenders to provide advance notice of international travel and permits prosecution for failing to do so.[127]
- *Gundy v. United States*: This case involved an underlying state conviction that occurred before the passage of SORNA. The Court held that utilizing an Attorney General Rule to establish the timing for when SORNA's registration requirements applied to pre-Act offenders was constitutional.[128]

J. Additional charges for recidivists

Additional federal charges are available for crimes committed while an offender is required to register as a sex offender. Under 18 U.S.C. § 2260A, the commission of certain offenses against a minor while the defendant is required to register as a sex offender under *any law* will result in a 10-year mandatory minimum sentence that runs consecutively to any other sentences imposed. The application of this provision to offenders whose requirement to register began before the passage of SORNA does not violate the Ex Post Facto Clause.[129]

K. Prosecuting underlying sex offenses

When prosecuting offenders for conduct that may result in a sex offender registration requirement, prosecutors should take steps to lay the foundation for a possible future failure-to-register prosecution. To start, the prosecutor in such a case should be mindful of whether the offense of indictment or conviction will clearly require sex offender registration under state, tribal, territory, or federal law. If the offense

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[126] 570 U.S. 387, 396–399 (2013).
[127] 136 S. Ct. 1113, 1118–19 (2016).
[128] 139 S. Ct. 2116, 2129–30 (2019).
[129] United States v. Hardeman, 704 F.3d 1266, 1268–69 (9th Cir. 2013) (ex post facto challenge to the application of 18 U.S.C. § 2260A and California's sex offender registration laws).

is specifically listed or fits cleanly within the definitions in section (XI)(B) above, then a prosecutor can be relatively confident that the offender would be subject to 18 U.S.C. § 2250 liability should they ever fail to register in the future.

Conversely, if the offense is not specifically listed as a registrable offense, the offender may not have an obligation to register with any given jurisdiction or be liable for a prosecution for a failing to do so. *This result is so even if the defendant agrees in a plea agreement to register as a sex offender*. For example, consider a case where a defendant conspired to sex traffic minors and use the minors to distribute cocaine. If the defendant pleads to a 18 U.S.C. § 371 conspiracy or a drug offense, then she likely will not have to register in any jurisdiction where she resides, goes to school, or works because those offenses are not recognized under state law as registerable offenses despite the court order.

There are a number of points in the judicial process where an offender can, and ideally should, be provided with notice of her requirement to register as a sex offender. Although the omission of notice in plea agreements, colloquies, sentencing orders, or other process *does not relieve a sex offender of her requirement to register*, it, nonetheless, is best practice to provide such notice whenever possible.[130]

1. Plea agreements

In drafting plea agreements, prosecutors should specifically include language where offenders indicate that they understand they have registration responsibilities under federal law and that they can be prosecuted for failing to do so. Model language can be obtained from CEOS.

2. Plea colloquy

Whether or not a plea agreement is involved, prosecutors should ensure that an acknowledgement of the offender's sex offender registration responsibilities is specifically included in the plea colloquy with the judge.

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[130] Because sex offender registration is generally considered a collateral consequence of conviction—not a direct consequence—it applies administratively even in the absence of a court order.

3. Sentencing orders

Notice of a sex offender's registration responsibilities under SORNA should be included in the sentencing order for any sex offense conviction.

4. Bureau of Prisons

When a sex offender is sentenced to a period of federal incarceration, the BOP should provide a notice of registration responsibilities upon release.[131]

5. United States probation

Convicted sex offenders released to federal probation are required, as a condition of their probation, to register as sex offenders, and that registration requirement is generally monitored by their probation officers.

XIII. Case law

While the litigation surrounding sex offender registration and notification cases is voluminous and largely beyond the scope of this article, there are two constitutional issues about which practitioners should be particularly aware.

A. Ex post facto

Offenders may be prosecuted for a violation of 18 U.S.C. § 2250 if the conviction triggering their registration responsibilities occurred before the enactment of SORNA, so long as the elements of the offense are otherwise met. By its terms and via the administrative rule published in 2010, SORNA's registration responsibilities apply retroactively to all offenders. Because of the increasing success of ex post facto challenges at the state level, however, a general discussion of the issue is included here.

In 2003, the Supreme Court seemingly settled any ex post facto questions regarding sex offender registration in *Smith v. Doe*,[132] a challenge from a sex offender in Alaska who argued that the imposition of registration requirements violated the ex post facto

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[131] *See* BUREAU OF PRISONS, SEX OFFENDER REGISTRATION AND TREATMENT NOTIFICATION, BP-A0648 (2014), https://www.bop.gov/policy/forms/BP_A0648.pdf.

[132] 538 U.S. 84 (2003).

clause of the Constitution. The Court held that sex offender registration and notification—under the specific facts of that case—were not punitive, and could, therefore, be retroactively imposed as regulatory actions.[133]

Nevertheless, seven state supreme courts have held that the retroactive application of their sex offender registration and notification laws violate their respective state constitutions since the *Smith v. Doe* decision.[134]

At the federal level, there has been one notable successful ex post facto challenge to a state's sex offender registration laws. In *Doe v. Snyder*,[135] the court held that Michigan's sex offender registration and notification laws were punitive and, therefore, could not be applied retroactively to the plaintiffs in the case.[136]

For the purposes of 18 U.S.C. § 2250 cases, practitioners should be mindful of the applicable ex post facto case law in the circuit and state within which they practice. Depending on the governing state or federal precedent, a sex offender may not have the ability or requirement to register at the jurisdictional level, even if there clearly is a federal obligation to register under SORNA.

B. Eighth Amendment

Other challenges gaining some traction are those arguing that certain sex offender registration requirements violate the Eighth Amendment's protection against cruel and unusual punishment. Most

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[133] *Id.* at 105–06.

[134] Doe v. State, 189 P.3d 999 (Alaska 2008); Wallace v. State, 905 N.E.2d 371 (Ind. 2009); Maine v. Letalien, 985 A.2d 4 (Me. 2009); State v. Williams, 952 N.E.2d 1108 (Ohio 2011); Doe v. Dep't of Pub. Safety & Corr. Servs., 62 A.3d 123 (Md. 2013); Starkey v. Okla. Dep't of Corr., 305 P.3d 1004 (Okla. 2013); Commonwealth v. Muniz, 164 A.3d 1189 (Pa. 2017). One additional case, *Doe v. Phillips*, 194 S.W.3d 833 (Mo. 2006), was rendered moot by *Doe v. Keathley*, No. ED90404, 2009 Mo. App. LEXIS 4 (Mo. Ct. App. Jan. 6, 2009). In addition, the New Hampshire Supreme Court held that requiring lifetime registration without the opportunity for review violates the ex post facto provisions of the state's constitution. Doe v. State, 111 A.3d 1077, 1101 (N.H. 2015).

[135] 834 F.3d 696 (6th Cir. 2016).

[136] *Id.* at 705–06.

notably, the decision in *Millard v. Rankin*[137] held that Colorado's sex offender registration and notification requirements violated this provision of the Eighth Amendment. On appeal from the district court to the Tenth Circuit, however, that decision was overturned.[138]

XIV. United States Marshals Service

The United States Marshals Service (USMS) is the federal agency designated to enforce federal sex offender registration requirements and is available to provide assistance to state and local registration agencies in ensuring that their offenders are compliant with relevant registration requirements.

Following the enactment of the Adam Walsh Act, USMS established the Sex Offender Investigations Branch (SOIB) to direct and coordinate such enforcement and assistance efforts across the agency. As a component of SOIB, the National Sex Offender Targeting Center (NSOTC) was established in 2011 as an interagency intelligence and operations center supporting law enforcement in identifying, investigating, locating, apprehending, and prosecuting noncompliant sex offenders. Through the combined efforts of the SOIB and USMS District Offices to date, the USMS has closed, by arrest, over 62,000 warrants for non-compliant sex offenders; initiated over 34,000 federal failure-to-register investigations; and assisted with over 3,500 state, local, tribal, and territorial sex offender operations.

XV. Additional resources

There have been countless challenges to sex offender registration requirements and to prosecutions for failure to register that are beyond the scope of this article. For specific issues relevant to 18 U.S.C. § 2250 prosecutions and a more detailed overview of the entirety of the case law governing sex offender registration, please see the additional resources listed below.

- Bonnie Kane, *SORNA: A Primer*, 59 U.S. ATTY'S BULL., no. 5, 2011, 42.

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[137] 265 F. Supp. 3d 1211, 1231–32 (D. Colo. 2017). An Eighth Amendment argument was also successful in a case involving juvenile sex offender registration. *In re* C.P., 967 N.E. 2d 729, 750 (Ohio 2012).
[138] Millard v. Camper, 971 F.3d 1174, 1181–84 (10th Cir. 2020).

- Lori McPherson, *SORNA at 10 Years*, 64 DRAKE L. REV. 741 (2016).
- SMART Office Annual Overview of Current Sex Offender Registration Case Law and Issues: *Case Law*, OFF. OF SEX OFFENDER SENT'G, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, http://www.smart.gov/caselaw.htm.
- SMART Office Publications, available on https://www.smart.gov/indiancountry.htm and http://www.smart.gov/newsletters.htm:
  - *A Guide to SORNA Implementation in Indian country*
  - *Model Tribal Sex Offender Registration Code*
  - *SMART Summary: Prosecution, Transfer, and Registration of Serious Juvenile Sex Offenders*
  - *SMART Watch Dispatches*

About the Author

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Trauma-Informed, Culturally Relevant Psychological Responses in Cases of Missing or Murdered Indigenous Peoples

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"Linking back to the constant onslaught on Native land and therefore Native bodies, MMIWG2 (Missing and Murdered Indigenous Women and Girls and Two Spirit People) scholars underscore the connections between the violence experienced by Indigenous women to the continued subjugation of such bodies by the colonial state."[1]

I. Introduction

Missing or Murdered Indigenous People (MMIP) is a long-standing crisis that has only recently gained any attention due to efforts focusing on Missing and Murdered Indigenous Women (MMIW). Indigenous women are often the victims of violence at rates much higher than other groups[2] and often have a family legacy of this pain

[1] Abby Abinanti et al., *To'Kee Skuy'Soo Ney-Wo-Chek' I Will See You Again in a Good Way* (2020), https://www.niwrc.org/resources/report-kee-skuy-soo-ney-wo-chek-i-will-see-you-again-good-way-year-1-project-report.
[2] ANDRÉ B. ROSAY, *Violence Against American Indian and Alaska Native Women and Men: 2010 Findings from the National Intimate Partner and Sexual Violence Survey* (2016).

and suffering.[3] Indigenous People of North America have faced generations of violence and assimilation efforts, often resulting in intergenerational trauma.[4] The alarming rate at which Indigenous People are missing or murdered leaves families and communities with complex trauma and grief.[5] The impact on the individual, the family, and the community creates deep wounds that adversely affect mental health and community cohesion and support. The invisibility and lack of attention given to MMIP by anyone outside the local community further compounds the wounds.

Amidst the crisis of MMIP is the effect of being a MMIP survivor, which includes a surviving victim and the family and community of those harmed or killed by criminal actions. Cases of MMIP often go unsolved, and the lack of knowing further perpetuates the traumatic, emotional wounds for the community.[6] Individuals may experience significant challenges in their emotional well-being, with some developing post-traumatic stress disorder, anxiety and mood disorders, panic attacks, and major depressive disorder.[7] Due in part to repeated losses and unresolved grief, complex and historical trauma can lead to higher rates of mental health concerns, substance abuse, difficulties in interpersonal relationships, and problems with social and occupational functioning.[8] Oftentimes, the effects of complex

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[3] Hilary N. Weaver, *The Colonial Context of Violence: Reflections on Violence in the Lives of Native American Women*, 24 J. OF INTERPERSONAL VIOLENCE 1552–1563 (2009).

[4] Devon S. Isaacs et al., *When Psychologists Take a Stand: Barriers to Trauma Response Services and Advocacy for American Indian Communities*, 21 J. OF TRAUMA & DISSOCIATION 468–83 (2020).

[5] Melissa Tehee & Kee Straits, *Missing and Murdered: Act Now for Comprehensive Protection of Indigenous Women and Girls*, THE HILL (Feb. 22, 2020), https://thehill.com/blogs/congress-blog/politics/484201-missing-and-murdered-act-now-for-comprehensive-protection-of.

[6] Katherine T. Sullivan, *Strengthening the Response to Missing, Murdered Native Americans*, OFFICE OF JUSTICE PROGRAMS (May 6, 2020), https://www.ojp.gov/news/ojp-blogs/2020-ojp-blogs/strengthening-response-missing-murdered-native-americans.

[7] Cathy Zimmerman et al., *Human Trafficking and Health: A Conceptual Model to Inform Policy, Intervention and Research*, 73 SOCIAL SCIENCE & MEDICINE 327–35 (2011).

[8] Teresa Evans-Campbell, *Historical Trauma in American Indian/Native Alaska Communities: A Multilevel Framework for Exploring Impacts on Individuals, Families, and Communities*, 23 J. OF INTERPERSONAL VIOLENCE

trauma are interwoven with high rates of health disparities and inequities.[9] While, ultimately, the solution to this crisis is to eliminate the cause, until that occurs, we must identify those who could benefit from services, train responders and providers, and provide accessible Indigenous mental health survivor treatment.

II. Indigenous aware and informed care

A. Trauma-informed approach

As Native American/Indigenous psychologists who work with survivors of trauma within, peripherally, and outside of Native populations, we will suggest how to begin to identify pathways for training and overcoming barriers to effective, culturally appropriate, trauma-informed mental healthcare. Indigenous communities have much higher rates of trauma experiences and related mental health concerns than non-Native communities.[10] With trauma-informed care, the treatment provider(s) and person being served collaboratively develop a treatment plan. By understanding trauma-related issues that can manifest in survivors, providers ethically and holistically inform care. Also, a provider needs to consider culturally appropriate treatments, using patient-centered care, where the survivor leads and suggests meaningful and relevant elements of their recovery efforts. While these efforts require time and additional training for mental health providers in often understaffed and underfunded programs, retention in services and efficacious outcomes outweigh the costs needed to build this respectful therapeutic relationship.

316–338 (2008); Maria Yellow Horse Brave Heart et al., *Historical Trauma Among Indigenous Peoples of the Americas: Concepts, Research, and Clinical Considerations*, 43 J. OF PSYCHOACTIVE DRUGS 282–90 (2011).

[9] Royleen J. Ross et al., *American Indian and Alaska Native Health Equity*, *in* HEALTH EQUITY (K. Bryant Smalley, Jacob C. Warren, & M. Isabel Fernández eds., 1 ed. 2020); Donald Warne & Denise Lajimodiere, American Indian Health Disparities: Psychosocial Influences, 9 SOCIAL AND PERSONALITY PSYCHOLOGY COMPASS 567–79 (2015).

[10] Janette Beals et al., *Trauma and Conditional Risk of Posttraumatic Stress Disorder in Two American Indian Reservation Communities*, 48 SOCIAL PSYCHIATRY AND PSYCHIATRIC EPIDEMIOLOGY 895–905 (2013).

B. Cultural humility

Staff working with survivors of the MMIP crisis may believe they possess the skill set for service delivery that they considered sufficient in the past. We suggest, however, allowing the service recipients to evaluate the efficacy and quality of these services. If treatment retention is low, mental health symptoms are not improving, or there is a general dissatisfaction with services, we suggest looking to improve care through cultural humility and a trauma-informed approach. Cultural humility recognizes the historical realities of the legacy of violence and oppression against Indigenous populations. Providers must examine their historical knowledge, values, beliefs, power, and social position in relation to the populations they serve to provide more culturally relevant care. Cultural humility also denotes meeting a client where they are in terms of privilege, oppression, trust, experienced trauma, identity, orientation, and readiness for service engagement.[11] This effort will also lead to greater skills in trauma-informed care with Indigenous populations, including awareness of historical and intergenerational trauma due to racially based oppression and violence.

C. Cultural history and lifeways

One of the greatest strengths in Native communities is the aspect of communitarianism and an interdependent reliance on each other.[12] This construct is illustrated in the Lakota phrase, "Mitákuye Oyás'iŋ," loosely translated to, "We are all related," which extends beyond humans to all spiritual beings, including the earth. An essential foundation is that no person or being is more important or valuable than another; that everyone and everything has value and worth. In the sense of relatedness, the family structure extends beyond the nuclear family and transcends into extended family relations. Family relationships comprise not only degrees of consanguinity, but clan structures, moieties, spiritual relations, ceremony, and those close

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[11] Manivong J. Ratts et al., *Multicultural and Social Justice Counseling Competencies: Guidelines for the Counseling Profession*, 44 J. OF MULTICULTURAL COUNSELING AND DEVELOPMENT 28–48 (2016).
[12] MELINDA A. GARCÍA & MELISSA TEHEE, SOCIETY OF INDIAN PSYCHOLOGISTS COMMENTARY ON THE AMERICAN PSYCHOLOGICAL ASSOCIATION'S (APA) ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT (Society of Indian Psychologists 2014).

relationships adopted into the family. An example of the cultural norm of relatedness includes the family and household composition of multi-generations of "family" that reach beyond the legal definitions of family by blood. Within this family configuration concept, Native Peoples practice the values of generosity and reciprocity in every notion of family and community relations.

With respect to differences within various Indigenous communities and families, there are some similarities found in the concept of interconnectedness regarding relationships and community in a significant number of Native individuals. Hill describes this concept as a sense of belonging as connectedness.[13] Specifically, for Indigenous individuals that prescribe to this worldview, they may consider themselves an extension of the family, the community, and the physical environment in which they live.

Interconnectedness, tied to belongingness, must be considered in the development and delivery of treatment and professional interactions to fully understand the scope and depth of the experience of traumatic events. For example, there is relatively wide acceptance that the loss of a child to violence will adversely impact parents for their lifetime. In Native communities, the loss of a community member with distant or no legal familial ties may have the same effect. When there are multiple community traumas, it compounds the grief and shakes the foundation of interconnectedness.

The ideology of individualism, which most Western approaches to mental health recovery rely, may not resonate for Indigenous survivors of loss and violence. Approaches to healing may start with the individual, but the family, community, and environment should also be involved in long-term treatment, planning, and recovery. Additionally, community members beyond immediate family should be considered regarding treatment teams and for trauma treatment.

Many Native communities conceptualize wellness as a holistic balance in all aspects of life; balance with the body, spirit, and mind.[14]

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[13] Doris Leal Hill, *Sense of Belonging as Connectedness, American Indian Worldview, and Mental Health*, 20 ARCHIVES OF PSYCHIATRIC NURSING 210–16 (2006).

[14] J. Douglas McDonald et al., *Cognitive Behavioral Models, Measures, and Treatments for Depressive Disorders in American Indians*, *in* TREATING DEPRESSION, ANXIETY, AND STRESS IN ETHNIC AND RACIAL GROUPS: COGNITIVE BEHAVIORAL APPROACHES 99–121 (Edward C. Chang et al. eds., 2018); Dolores Subia BigFoot & Susan R. Schmidt, *Honoring Children, Mending the*

Thus, illness connotes an imbalance, and healing must address all components. The implementation of traditional knowledge informed interventions benefits prevention, intervention, and postvention for psychosocial and medical maladies.[15]

Time is another construct that is different for many Indigenous Peoples (circular/cycles) from western conceptualizations (linear). Time is part of the holistic framework and an element of "all my relations." Our perception of time is not limited to "now." We think of, value, and are connected to our ancestors and our relatives yet to be born. We inherit our ancestors' experiences, their trauma, and their resilience. Researchers have found evidence in our epigenetics.[16] We embody that history and carry it with us.

As previously stated, the invisibility of Indigenous People is not only detrimental to the needs of community members and the health and well-being of individuals who reside within those communities, but it also reflects non-Indigenous Peoples' lack of knowledge of Native American history. Responders to MMIP cases can inadvertently do harm by not being aware of the attempted genocide and culturicide that Native communities have faced and continue to face. From the use of the doctrine of discovery for colonization, treaties, and federal policies including Indian removal and relocation, allotments and assimilation, Indian reorganization, termination, and self-determination, much of the context for Native people in the United States has been forced upon them. The arduous issues of MMIP often elicits these historical traumas and compounds with the current trauma, grief, and lack of safety.

Circle: Cultural Adaptation of Trauma-focused Cognitive-behavioral Therapy for American Indian and Alaska Native Children, 66 J. OF CLINICAL PSYCHOLOGY 847–56 (2010).

[15] Heather Stringer, *The Healing Power of Heritage*, 49 MONITOR ON PSYCHOLOGY 44–51 (2018).

[16] MARY ANNETTE PEMBER, INTERGENERATIONAL TRAUMA: UNDERSTANDING NATIVES' INHERITED PAIN, INDIAN COUNTRY TODAY MEDIA NETWORK 1–15 (2016).

III. Culturally relevant approaches to addressing MMIP

A. Therapeutic approaches

One of the fundamental critical factors in working with Native populations is establishing relationships. The development of robust therapeutic rapport is a quintessential component of successful treatment. Many non-Indigenous approaches to care, interventions, and support demand evidence-based practices—that is, to rely solely on treatments, interventions, and other practices that have "evidence" based on rigorous technical research. These studies are usually culturally irrelevant and often conducted with dominant society populations with underlying cultural norms and values based on European epistemology.[17] Another illustration of the invisibility of Indigenous people is that we are rarely included in efficacy studies. These types of research approaches are typically not effective best practices when working with Native people due to a lack of efficacy evidence. We strongly advocate for the inclusion of practice-based evidence, a rigorous methodology, and procedure with community credibility. Native people have always engaged in healing praxis, and the legitimacy of these practices have been tried, tested, and refined for centuries.

Narrative therapy is one example of a culturally congruent method for grief and trauma work. The approach may be regarded as consistent with traditional healing practices wherein the "patient" utilizes tenets of an oral tradition to tell their story of trauma and grief from an epistemological perspective. This platform is reflective of traditional talking circles. From a historical perspective, the oral tradition was the mode of communication when passing knowledge from one generation to the next.[18] In many tribes, this continues to be a honored tradition and contributes to understanding the client's

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[17] Steven O. Roberts et al., *Racial Inequality in Psychological Research: Trends of the Past and Recommendations for the Future*, PERSPECTIVES ON PSYCHOLOGICAL SCIENCE 1–15 (2020).

[18] Joseph P. Gone & Laurence J. Kirmayer, *Advancing Indigenous Mental Health Research: Ethical, Conceptual and Methodological Challenges*, 57 TRANSCULTURAL PSYCHIATRY 235–49 (2020); EDUARDO DURAN, HEALING THE SOUL WOUND: COUNSELING WITH AMERICAN INDIANS AND OTHER NATIVE PEOPLES (Allen E. Ivey & Derald Wing Sue eds., 2006).

relational world, enhancing not only client–therapist relationships, but also likely relationships within individuals based in systemic and institutional arenas (for example, law enforcement, judicial, victim/witness advocates). In addition, narrative therapy also allows the individual to be heard, legitimized, and validated as it pertains to their traumatic experiences without having to frame their story within a western paradigm format.

Honoring Children, Mending the Circle (HC-MC) is a culturally adapted version of trauma-focused cognitive behavioral therapy for American Indian and Alaska Native children.[19] While HC-MC also uses a trauma narrative technique to aid in healing, the interdependent aspects of wellness and healing are woven throughout the therapy. Traumatic experiences can lead to imbalance, and HC-MC brings relational, mental, emotional, physical, and spiritual well-being into balance. While the overall therapy has been culturally adapted, the developers were aware of tribal differences and built in places that the therapy should be further adapted, such as imagery, songs, prayers, and healing ceremonies. Incorporating the family and caregivers as consultants for integrating cultural specifics is critical, which also considers the cultural identity of the child and their faith and belief system.

Another approach, Network therapy, may also be congruent with working with Indigenous families and understanding the family dynamics, which assists in understanding complex family relatedness.[20] The trauma survivors can process trauma within a collectivistic perspective and relational paradigm. Further, working with the family as a unit may be an effective approach to treatment, as the impact of the MMIP crisis has intergenerational implications.

B. Culture as medicine

Those who have experienced trauma and loss can benefit from engaging in traditional cultural activities while participating in western therapeutic services and navigating the judicial, law enforcement, medical, and mental healthcare systems. Although there is a dearth of research in Western academic literature on culture as a primary healing or stress reduction mechanism, the integration of

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[19] BigFoot & Schmidt, *supra* note 14.

[20] Carolyn Attneave, *Social Networks as the Unit of Intervention*, *in* FAMILY THERAPY: THEORY AND PRACTICE 220–32 (P. J. Guerrin ed., 1976).

cultural undertakings assists in the healing journey. "Healing requires traditional practices, spiritual values, indigenous knowledge, and culture and, importantly, depends on the idea that the health and well-being of individuals, families, communities, and nations require the restoration of balance."[21] While prayers, songs, and ceremonies differ by tribe, these cultural practices have been used in healing trauma and grief since time immemorial. In interdependent cultures, the effects of loss and grief extend from the individual to the extended family structure, the community, and society. Participation in cultural practices, including subsistence lifeways, traditional sewing, moccasin or pottery making, and any other type of cultural enrichment activity is rooted in balance, discipline, and is often done socially. Thus, they are a great place to start healing for communities.

C. Community approaches to MMIP

"We have value, and we have power, and we are a foundation, and should be recognized."[22]

As mentioned above in therapeutic approaches, storytelling can be healing. There are many new ways to engage in storytelling with technology, such as through video, social media, and podcasts that can reach many more people. One such example is the *Truth Sharing Podcast*, in which stories and grief of MMIP cases are shared to help process the trauma, bring awareness, and aid in understanding the pandemic of MMIP.[23] Social media is another tool to fight the silence around MMIP and share stories. There are many groups and pages to help form communities to begin to address the MMIP crisis together.

Recently, many hashtags have been created to bring awareness and change, mainly in relation to missing and murdered Indigenous women and girls, such as #MMIW, #MMIWG, #MMIWG2, #NoMoreStolenSisters, #NotInvisible, #WhyWeWearRed, and #NationalDayofAwareness. These hashtags have been introduced in tandem with social movements, such as MMIP marches, the United States' National Day of Remembrance for Missing and Murdered Indigenous Women and Girls (May 5th), and proposed state

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[21] LEVERAGING CULTURE TO ADDRESS HEALTH INEQUALITIES: EXAMPLES FROM NATIVE COMMUNITIES: WORKSHOP SUMMARY 10 (Karen Anderson, Steve Olson, & Institute of Medicine (U.S.) eds., 2013).

[22] *The Truth Sharing Podcasts*, http://www.sacredmmiwg.ca/.

[23] *Id.*

and federal policies to address MMIP. Many symbolic representations bring awareness, such as those wearing a red painted hand over their mouths, red dresses, ribbon skirts, beadwork, paintings, and music. Indigenous communities are resilient, and culture is woven into community advocacy.

IV. Strength in collaboration, training, and funding

A. General training recommendations for the MMIP response and prevention efforts

While MMIP is an ongoing national crisis, training culturally responsive professionals continues to be an ongoing issue that needs addressing. The dominant society's worldview very seldom matches the daily lives of Native people living on remote and rural tribal lands, urban enclaves, and in homeless camps and shelters. Many professions and tribes value cultural competence in their providers. "Helping professions," such as psychology, medicine, social work, and teachers, have accreditation standards related to their education programs.[24] Many tribes also provide cultural training for those working in their communities, such as members of the Pascua Yaqui Bar[25] providing legal services, those working in the Navajo Nation Peacemaking Program,[26] and those providing mental health services on or around tribal lands.[27]

Training sessions on various topics relevant to MMIP, delivered by Native American psychologists, can expand knowledge bases, transforming Western ideologies into traditional practices and vice versa, which benefits all parties involved in the MMIP crisis. The cultural identity of Native people exists on a continuum of varying

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[24] Melissa Tehee, Devon Isaacs & Melanie M. Domenech Rodríguez, *The Elusive Construct of Cultural Competence*, *in* HANDBOOK OF CULTURAL FACTORS IN BEHAVIORAL HEALTH 11–24 (Lorraine T. Benuto, Frances R. Gonzalez, & Jonathan Singer eds., 2020).

[25] PASCUA YAQUI BAR ASSOCIATION, https://pascuayaquibar.com/home/ (last visited Jan. 8, 2021).

[26] JUDICIAL BRANCH OF THE NAVAJO NATION, *Peacemaking Program* 1–69 (2013), http://www.navajocourts.org/Peacemaking/Plan/PPPO2013-2-25.pdf.

[27] PASCUA YAQUI TRIBE REGIONAL BEHAVIORAL HEALTH AUTHORITY, CULTURAL COMPETENCY PLAN: RAISING AWARENESS AND RESPECT FOR DIVERSITY 1–14 (2017).

levels of acculturation; thus, a one-size-fits-all model is seldom effective. For example, The Orthogonal Theory of Biculturalism posits that identifying with one culture does not detract from another culture, and both cultures exist in congruence.[28] Further, training on cultural identity would benefit all stakeholders involved in the MMIP response. Training on cultural identity instrumentation created by Native psychologists might be utilized to build trusting relationships with those affected by the coexisting issues of missing persons and murder victims so that an understanding of the person, family, and community might be better served.[29]

The acknowledgment of 574 Native tribes' heterogeneity should be included in training and treatment considerations as a prominent factor versus a generalized approach used in most federal or state government-sanctioned efforts. Thus, a training emphasis should be placed on specific tailoring to tribal nations using adaptational manuals such as the Positive Indian Parenting manual.[30] Additionally, utilizing literature written from culturally informed and culturally relevant approaches is imperative.[31] Awareness of the specific cultural and traditional orientation of the missing or murdered person and their family is vital. Training on trauma-informed response mechanisms across the map is sorely needed when working with victims, families, and communities affected by MMIP.

B. Funding

The gap in research and interventions provided by Native psychologists is evident in the MMIP epidemic. Nevertheless, we are on the front lines as mental health providers when an individual involved in some aspect of a MMIP case seeks services. Therapy may

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[28] E. R. Oetting & Fred Beauvais, *Orthogonal Cultural Identification Theory: The Cultural Identification of Minority Adolescents*, 25 INTERNATIONAL J. OF THE ADDICTIONS 655–85 (1991).

[29] John Gonzalez & Russell Bennett, *Conceptualizing Native Identity with a Multidimensional Model*, 17 AMERICAN INDIAN AND ALASKA NATIVE MENTAL HEALTH RESEARCH: THE JOURNAL OF THE NATIONAL CENTER 22–42 (2011).

[30] NATIONAL INDIAN CHILD WELFARE ASSOCIATION, *Positive Indian Parenting* (n.d.).

[31] RAY M. DROBY, WITH THE WIND AND THE WAVES (2000); RAY M. DROBY, WITH THE WIND AND THE WAVES: A GUIDE FOR MENTAL HEALTH PRACTICE IN ALASKA NATIVE COMMUNITIES (2020).

be the first time they divulge any information about their experience.[32] Often, mental health professionals are on the back end, helping victims and families "pick up the pieces" of their lives, families, and communities. There are many reasons for individuals electing not to report being a victim of crime, including not being believed, not seeing resolution in other cases, mistrust in law enforcement, the threat of harm by perpetrators, and a plethora of other reasons.[33] Ongoing funding for Indian Health Service mental health providers, tribal paraprofessionals, and tribal programs supporting survivors of the MMIP crisis is paramount.

In social spheres, we continuously advocate for policies such as the Violence Against Women Act, Savanna's Act, the Not Invisible Act, and other national policy initiatives that benefit the safety and welfare of Native people. Ongoing legislation and funding is an absolute necessity to confront and counter the MMIP crisis. In 2018, only 0.3% of psychologists identified as American Indian or Alaskan Native, far below the need.[34] In the pursuit of policy endeavors pertaining to MMIP, however, long-term funding is necessary for psychology programs supporting Native psychologists to benefit MMIP efforts fully.

C. Summary

MMIP is an epidemic plaguing tribal communities across the Americas. While the national media may not cover the majority of MMIP cases, Indigenous people have resorted to creating awareness and movements through social media and grassroots campaigns. Along with tribes, many states and the federal government are moving forward with forming task forces, legislation, and further recognizing the violence against Native people. Psychologists and mental health providers, however, are often omitted from these discussions. Culture is vital in prevention, intervention, postvention, and response efforts. Training about trauma-informed care, cultural

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[32] Royleen Ross et al., *Missing and Murdered Indigenous Women and Children*, SOCIETY OF INDIAN PSYCHOLOGISTS (2018), https://osf.io/4kmns/.
[33] LYNN LANGTON ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NATIONAL CRIME VICTIMIZATION SURVEY: VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006–2010 18 (2012).
[34] LUONA LIN ET AL., *Demographics of the U.S. Psychology Workforce: Findings from the 2007–16 American Community Survey* 1–24 (2018), http://doi.apa.org/get-pe-doi.cfm?doi=10.1037/e506742018-001.

awareness, and humility is essential for everyone involved in responding and preventing MMIP. We need to approach healing from the grief and trauma of MMIP by centering cultural lifeways and including families and communities to honor Indigenous Peoples' relational nature.

About the Authors

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Note from the Editor-in-Chief

This is the second of two issues devoted to the Department of Justice's initiative related to missing or murdered American Indians and Alaska Natives. While the last issue dealt with law enforcement and prevention, this one features legal, prosecution, advocacy, and healthcare topics. Together they comprise the most comprehensive treatment of these topics to date. We here at the DOJ Journal of Federal Law and Practice are honored to spotlight those seeking to end the violence within the communities of our country's indigenous people.

This issue's authors come from a wide variety of backgrounds, and their articles reflect the rich diversity of ideas on this subject. Their opinions, however, are their own and do not necessarily reflect the opinions of the Department of Justice. Once again, special thanks to the Office of Legal Education's Indian country expert, Leslie Hagen, for all her work in seeing this issue through to fruition. And, as always, thanks to the Office of Legal Education's Publications Team: Addison Gantt, Gurbani Saini, Phil Schneider, and our law clerks.

Chris Fisanick
Columbia, South Carolina
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