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Luhui Whitebear

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# VAWA Reauthorization of 2013 and the Continued Legacy of Violence Against Indigenous Women: A Critical Outsider Jurisprudence Perspective

Luhui Whitebear

*“A nation is not conquered until the hearts of its women are on the ground.”*

– *Cheyenne Proverb*

*“They trespass her body like they trespass this land . . .”*

– *Thomas Ryan Red Corn*  
*(“To the Ingenious Woman” by the 1491s)*

I. INTRODUCTION .....	76
II. CONNECTION OF VIOLENCE TO INDIGENOUS LANDS AND BODY ....	77
III. BACKGROUND STATISTICS .....	81
IV. VAWA REAUTHORIZATION OF 2013.....	83
V. CLOSING THE LOOPHOLES .....	86
VI. CONCLUSION.....	88

## I. INTRODUCTION

Indigenous<sup>1</sup> women. Often termed as the backbone of our nations, that solid foundation that keeps our people moving forward through the multiple waves of colonization. Indigenous women. Often labeled as the sustainers of life, birthing new generations. Indigenous women. They will help sing the songs of remembering, dry the tears, heal the wounds, and forgive without second thought. Indigenous women. Enduring vicious forms of violence to both body and spirit. Indigenous women. Expected to withstand this settler colonial violence as our lands are continued to be subjected to the same forms of violence. Indigenous women. Expected to do so even beyond the grave as they become yet another statistic in the long list of missing and murdered Indigenous women. Indigenous women. Can the laws protect us? Indigenous women. What will it take for them to hear our cries?

I begin this article situated in story as a form of survivance. Malea Powell describes the concept of survivance as the ways in which our own stories help carry us through the generations.<sup>2</sup> This is done in resistance to the dominant narratives of who we are. In this context, it is a way to survive the retelling of law and policy while resisting a dominant system that tells us we are protected by these same laws and policies. Keeping in mind that the legal system does not typically incorporate the power of story into the conversation, it is important to find ways for us to keep our voices heard in ways that not only help describe the impacts of law and policy, but also to recognize the ways in which these stories can help us reimagine further reforms. Richard Delgado describes legal stories as ways to give voice to and perspective of oppressed groups.<sup>3</sup> Their experiences are brought into the reality of the dominant groups as, “Stories, parables, chronicles, and narratives are powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place.”<sup>4</sup> This article is part of a larger story about

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<sup>1</sup> I use the words “Indigenous, Native, American Indian, Native American, and Indian” interchangeably throughout this article in reference to the Indigenous people of North America.

<sup>2</sup> Malea Powell, *Rhetorics of Survivance: How American Indians Use Writing*, 53 C. COMPOSITION & COMM. 396, 399 (2002). The concept of survivance was coined by Gerald Vizenor and has been used across disciplines by Indigenous scholars.

<sup>3</sup> Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 (1989). Delgado also tells us that stories are what shaped our society and the laws that exist within it. By only using a single story of truth in the construction of law and legal recourse, we do not acknowledge the ways in which systematic structures are upheld that oppress those outside this master story. Bringing in stories of the oppressed, or counter stories, is a way to disrupt this cycle of oppression.

<sup>4</sup> *Id.* at 2413.

legal loopholes related to the legacy of murdered and missing Indigenous women, situated primarily in the context of the United States. It is my hope that by being in community through this story we can envision ways in which we create healing that may be missed by the current legal system.

Understanding the complexity of Indian Law in this country and the ensuing effects on Indigenous women, particularly in regard to missing and murdered Indigenous women, must always begin with a conversation about land. Our lands and bodies have been exploited, commodified, and violated in very connected and systematic ways. Federal law and policy build a foundation that not only normalize this violence, they validate it. The laws create structural issues that are based on race, gender, and social locations. This article will discuss loopholes that exist within the current legal system with emphasis on the Violence Against Women Act Reauthorization of 2013. It is those outside of Indigenous communities that create and regulate the laws that make this violence as prevalent as it is, which will also be discussed. This is important to note as, “. . . how race is used is always a question of power. The techniques for wielding that power may be more or less sophisticated. Power involves not just power over the objects of regulation, but those objects become instruments for apportioning power among the powerful.”<sup>5</sup> Additionally, using a critical outsider jurisprudence lens to approach violence against Indigenous women is a necessary piece in using our own voices to address the systemic flaws in existing laws that fail us as Indigenous women.

## II. CONNECTION OF VIOLENCE TO INDIGENOUS LANDS AND BODY

To understand how to address violence against Indigenous women, a firm understanding of the history behind this violence is necessary. The common story is, North America was ‘discovered’ by European explorers, or more accurately, invaded.<sup>6</sup> With them came the swift decision that our Indigenous souls needed saving and Indigenous lands needed to be put to use. The common story continues to say it was their ‘manifest destiny’ to rule from sea to sea.<sup>7</sup> Like a violent storm the wave of destruction of Indigenous lives, lands, and cultures swept across the continent. Unlike storms in nature, nothing was cleansed. Rather, the lands were seeped

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<sup>5</sup> Gerald Torres, *American Blood: Who is Counting and for What?*, 58 ST. LOUIS U. L.J. 1017, 1036 (2014).

<sup>6</sup> ROXANNE DUNBAR-ORTIZ, *AN INDIGENOUS PEOPLES’ HISTORY OF THE UNITED STATES* 15 (Beacon Press, 2014).

<sup>7</sup> Michael T. Lubragge, *Manifest Destiny: The Components of Manifest Destiny*, University of Groningen, <http://www.let.rug.nl/usa/essays/1801-1900/manifest-destiny/the-components-of-manifest-destiny.php> (last visited October 11, 2018).

with the blood of our ancestors. When they could not kill our bodies completely, they tried to kill our spirits, our cultural identity. This process began with the introduction of the boarding school system by Captain Richard H. Pratt, whose motto was to “Kill the Indian and save the man.”<sup>8</sup> Wars were fought, and borders were imposed. It was always outside forces that defined these borders, and with them, our identities. Landscapes were destroyed and with them, the stories they told. Place names were replaced by the names deemed suitable by the colonizers. Natchee Barnd describes this process as a way to transform space in the process of colonization.<sup>9</sup> This is a strategic process in which, “Settlers initiate a fundamental transformation in the demographics, cultures, and physical landscape of colonized lands. Settler presence is the core feature of this mode of domination, with the goal of establishing a new home to solidify territorial claims.”<sup>10</sup> Through this process, tribal names became American Indian, Alaskan Native, First Nations, and Mexican in the eyes of the law. These laws were shaped very much by the dismantling of our nations. A series of wars (both on and off the battlefield) were crucial instruments of this process.

The whole premise behind warfare is often linked to who controls the land. Not only was the land impacted by settlers developing it into what they thought it should be used for, it was ravaged with and alongside war. The land is then disrupted in violent ways. In the context of the United States, governmental policies enacted genocide as documented in both federal and tribal records as a way to obtain authority over land.<sup>11</sup> Warfare then became a tool to exert these policies as a form of settler state-sanctioned actions. An extension of this tool is the use of rape as a weapon of war. The violence towards land and body cannot be separated. It is about who controls both. Because laws and policies sanction these actions, or lack thereof, to punish people from acting this violence out, not only is dominance asserted, behavior is normalized. In North America, Indigenous women (and others) were subjected tremendously to this violence. Our bodies became objects to conquer and control.<sup>12</sup> This disrupted the ways in which Indigenous communities were viewed by others as well as how they viewed themselves. This is not to say that the

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<sup>8</sup> *Id.*

<sup>9</sup> *See generally* NATCHEE B. BARND, *NATIVE SPACE: GEOGRAPHIC STRATEGIES TO UNSETTLE SETTLER COLONIALISM* (Oregon State University Press, 2017). Brand further discusses the ways in which physical landscapes and traditional connections/names can be used to help tell a counter story of colonization as well as cultural survival.

<sup>10</sup> *Id.* at 9.

<sup>11</sup> DUNBAR-ORTIZ, *supra* note 6.

<sup>12</sup> *See generally* ANDREA SMITH, *CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE* (South End Press, 2005).

victim narrative was something that was adopted as part of Indigenous identity, but rather that the behavior was normalized.<sup>13</sup> Alongside the normalization of violence against Indigenous women was the violence against the lands. Both behaviors became part of the dominant narrative that shaped this country in particular, which will be discussed more in depth later in this article.

In her article “Gender, Violence, and Subjectivity,” Veena Das explains the ways in which the normalization of gendered violence affects the realities of people who live them.<sup>14</sup> It is through the ways in which the state and nation work together that creates and supports a system in which men express their masculinity through warfare.<sup>15</sup> The system created, further places men in a dominant role over the subjects in which they are conquering. War has been a tool to normalize rape and other forms of violence against women as the “stitching together of the state with the nation makes demands on men to exercise heroic virtues in war to protect the nation.”<sup>16</sup> While rape and torture may have generally been condemned in a society, these actions would be viewed as acceptable through the progression of land acquisition of the Americas. For Indigenous women, this meant that their bodies became part of the conquest, and that rape was part of this process. As Huanani Kay Trask describes, “Violence is thus, normal, and race prejudice, like race violence, is as American as apple pie.”<sup>17</sup> Our bodies have become an object of desire in a very systematic way.

It is clear that violence against Indigenous women of this continent became prominent after contact with European colonialists. Reyna Ramirez describes this mindset and process well. As she explains, “[w]hites thought Indian peoples’ extinction would purify and cleanse California of a group of very repulsive creatures. They felt they must rid themselves of Indian people, an abominable contamination. Genocidal

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<sup>13</sup> SARAH DEER, *THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA* (Univ. of Minn. Pres 2015). Deer’s book is helpful in further understanding the complexity of Indian Law and how laws changed in ways that shaped/reshaped Native communities drastically.

<sup>14</sup> See generally Veena Das, *Violence, Gender, and Subjectivity*, 37 ANN. REV. OF ANTHROPOLOGY 283 (2008).

<sup>15</sup> *Id.* at 295.

<sup>16</sup> *Id.* at 286.

<sup>17</sup> Huanani Kay Trask, *The Color of Violence*, 31 SOC. JUST. 8, 10 (2004). Trask’s article also digs deeper into the complexity of Native Hawaiian nationhood, which is largely left out of the provisions of American Indian laws and policies. The ways in which this further sanctions violence against Indigenous people in Hawaii for asserting sovereignty (both of land and body) is not the focus of this article, but it is deeply related.

violence, therefore, became justified.”<sup>18</sup> By reducing Indigenous women in this way, they became objects that must be destroyed. The destruction of mind, body, and spirit manifested into sex slavery, murder, dismemberment, torture, abduction, and other forms of violence at the hands of the colonizers.

This behavior is still prominent in today’s society. Because these behaviors are normalized, they are manifested in more violent ways. Not only have Indigenous women’s bodies and Indigenous lands become objects to conquer, they have become disposable as well. Andrea Smith describes this desire to control land and body in *Conquest*.<sup>19</sup> Smith asserts:

The connection between the colonization of Native people’s bodies—particularly Native women’s bodies—and Native lands is not simply metaphorical. Many feminist theorists have argued that there is a connection between patriarchy’s disregard for nature, women, and indigenous peoples. The colonial/patriarchal mind that seeks to control the sexuality of women and indigenous peoples also seeks to control nature.<sup>20</sup>

The significant rise in sexual violence and sex trafficking in the areas in which natural resource extraction is occurring exemplifies Smith’s argument. In North Dakota in particular, the Bakken oil boom is attributed to being the direct cause of the “increased rates of rape, murder, and sex trafficking to a population that already suffers from the highest rates of violence in the United States.”<sup>21</sup> Indigenous lands and bodies are interrelated and viewed as something to control, use, and disregard. Natural resources are extracted in violent ways out of the earth. The landscape is then destroyed, water is contaminated, and more waste is produced through pollution. It takes generations to heal. Indigenous women are disappeared, raped, left for dead, and killed alongside the violence to the lands. As with the lands, it will take generations to heal from this violence. The ways in which this violence translates in

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<sup>18</sup> Raina Ramirez, *Healing, Violence, and Native American Women*, 31.4 SOC. JUST. 103, 104 (2004) (citations omitted).

<sup>19</sup> See generally Smith, *supra* note 11.

<sup>20</sup> *Id.* at 55.

<sup>21</sup> Mary Katherine Nagle & Gloria Steinem, *Sexual Assault on the Pipeline*. September 29, 2016. BOSTON GLOBE, (Sept. 29, 2016), <https://www.bostonglobe.com/opinion/2016/09/29/sexual-assaultpipeline/3jQscLWRcmD12cfefQTNsL/story.html>. The significant increase in sex trafficking (and subsequent related violence) around oil extraction sites has left impacted Indigenous communities facing trauma with little resources to address the issues and provide adequate recovery for survivors of violence.

Indigenous communities is devastating. To understand this better, we can look at the current statistics.

### III. BACKGROUND STATISTICS

Gendered violence has been experienced in Indigenous communities for centuries, as discussed previously. The impact of colonization and the ensuing settler colonial views on Indigenous women as disposable objects of desire are reflected in the alarming statistics of violence against Indigenous women in this country. This violence is not only more prevalent than with any other racial group in North America, it is more severe.<sup>22</sup> For how small of a fraction of the population Indigenous women represent, our statistics around violence are disturbing to say the least. To illustrate the segment of the population Indigenous people embody, of the 308.7 million people listed on the 2010 U.S. Census report, only 1.7% (or 5.2 million people) self-reported as Native American/Alaskan Native.<sup>23</sup> This statistic alone shows the result of the waves of genocide Indigenous people have endured over the past 525+ years since contact with Europeans. Much of the population loss in what is now considered the United States happened in even less time.

Despite being a fraction of the total U.S. population, Indigenous women statistically face the highest rates of violence per capita of any other demographic.<sup>24</sup> Specifically, “Indian women are 2 ½ times more likely to be assaulted and more than twice as likely to be stalked than other women in this country. Today, one in three Native women will be raped in her lifetime, and six in ten will be physically assaulted.”<sup>25</sup> The one in three number is a more commonly known statistic among those who follow sexual violence rates. However, these numbers only reflect those who report. Sarah Deer asserts that data actually shows “. . . that 34.1 percent of Native American women will be raped during their lifetime (meaning that the more accurate statement is *more* than one in three Native women).”<sup>26</sup> The sexual violence rates are so high they reflect a continued normalization of rape that was discussed in the previous section. The

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<sup>22</sup> Christine Crossland, et al., *NIJ's Program of Research on Violence Against American Indian and Alaskan Native Women*, 19 *VIOLENCE AGAINST WOMEN* 771, 772 (2013).

<sup>23</sup> *Profile of General Population and Housing Characteristics: 2010*, UNITED STATES CENSUS BUREAU, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited Dec. 27, 2018).

<sup>24</sup> Deer, *supra* note 12, at 4.

<sup>25</sup> *Violence Against Native Women Gaining Global Attention*, INDIAN LAW RESOURCE CENTER, [www.indianlaw.org/safewomen/violence-against-native-women-gaining-global-attention](http://www.indianlaw.org/safewomen/violence-against-native-women-gaining-global-attention) (last visited Dec. 27, 2018).

<sup>26</sup> Deer, *supra* note 12, at 4.

Indian Law Resource Center also reports that the murder rate of Native American women is as high as ten times the national average on some reservations.<sup>27</sup>

While the numbers above show violence against Native women is extremely overrepresented, it is important to note that Futures Without Violence state that interracial violence against Indigenous people is five times that of other groups,<sup>28</sup> or in other words, the majority of violence against Indigenous women is at the hands of another race. Many times a narrative is created that depicts violence against Indigenous women as something that needs to be addressed solely within tribal communities. If this is the route used, the normalization of this violence will not be addressed, “[p]redators may target Native women and girls precisely because they are perceived as marginalized and outside the protection of the American legal system.”<sup>29</sup> That high statistic of interracial violence will not be addressed without disrupting the normalization of violence against Indigenous women. The statistics and data show a clear indication that we need to reexamine current laws and policies that are aimed at addressing this prevalence.

The practices commonly used have not proven effective to lower these statistics. The lack of prosecution for these crimes supports the continuation of this type of behavior as well. This is a further reflection of the normalization of violence against Indigenous women. Lee Maracle retells stories that reflect this violence in *I Am Woman*.<sup>30</sup> Her recollection of rape, abuse, drug and alcohol use, murder, and suicide in her community all tell a similar story.<sup>31</sup> Violence has saturated Native communities in a very systematic way, and Native women have suffered tremendously as a result. In 2013, the Violence Against Women Act (VAWA) Reauthorization was applauded for its inclusion of Indigenous women in the scope of federal law and policies.<sup>32</sup> However, the extent of how much protection is offered through this change is something that must be looked at more closely.

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<sup>27</sup> Violence Against Native Women Gaining Global Attention, *supra* note 24.

<sup>28</sup> *Violence Against Native American/American Indian Women Fact Sheet*, FUTURES WITHOUT VIOLENCE, <https://www.futureswithoutviolence.org/the-facts-on-violence-against-native-americanalaska-native-women/> (last visited Dec. 27, 2018).

<sup>29</sup> Deer, *supra* note 12, at 9.

<sup>30</sup> LEE MARACLE, *I AM WOMAN: A NATIVE PERSPECTIVE ON SOCIOLOGY AND FEMINISM* (Press Gang Publishers, 1996).

<sup>31</sup> *Id.*

<sup>32</sup> *Restoration of Native Sovereignty and Safety for Native Women*, NATIONAL INDIGENOUS WOMEN’S RESOURCE CENTER 4 (March 2014), <http://www.niwrc.org/files/Restoration-V11.1.1.pdf>.

#### IV. VAWA REAUTHORIZATION OF 2013

Since 1978, federally recognized tribes have not been able to prosecute non-Native offenders that committed a crime on their reservation.<sup>33</sup> The *Oliphant v. Suquamish* case of 1978 resulted in a Supreme Court decision ruling that tribes have no criminal jurisdiction over non-Indians.<sup>34</sup> What does this then mean for tribes? In short, it opens tribal lands as a prime area for violence and predatory behavior of non-Native offenders. For example, “If a non-Indian rapes a Native woman, the tribe has absolutely no criminal jurisdiction to punish the offender. Tribal police may be able to arrest a suspect if they are cross-deputized with a local or state government, but the tribal government cannot criminally prosecute that offender.”<sup>35</sup> As a result, tribal lands become a sort of hunting ground where the reservation boundaries encourage and continue to normalize violence against Indigenous bodies as the prey.

This legal loophole is not only a restriction of tribal sovereignty, but it also influences the rate of reporting acts of violence towards Indigenous women that live on reservations. Given that about half of Native women are married to non-Native men,<sup>36</sup> having inadequate consequences for acts of violence is another hurdle that victims face. This is not to say that crimes committed by non-Natives on reservations can be committed without threat of punishment. Rather, it is the fact that these crimes must be tried through the federal judicial system that makes the likelihood of prosecution low. The 2010 U.S. Accountability Report states that, of crimes committed on reservation lands, “U.S. attorneys declined 67 percent of sexual abuse and related cases.”<sup>37</sup> Sadly, the reporting of these acts of violence is less likely when the consequences may outweigh the benefit of reporting.

The 2013 reauthorization of the Violence Against Women Act allowed tribes to begin to prosecute non-Native people who commit crimes on reservation lands.<sup>38</sup> Tribal jurisdiction on reservation lands was intended to empower tribes in taking more direct action on violent crimes

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<sup>33</sup> Felicia Fonseca, *Violence Against Women Act: Tribes Have New Authority Over Non-Natives*, CHRISTIAN SCIENCE MONITOR (Feb. 7, 2014), <http://www.csmonitor.com/USA/Latest-News-Wires/2014/0207/Violence-Against-Women-Act-Tribes-have-new-authority-over-non-natives>.

<sup>34</sup> Deer, *supra* note 12, at 41; *see also Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194 (1978).

<sup>35</sup> Deer, *supra* note 12, at 41.

<sup>36</sup> Sarah Childress, *Will the Violence Against Women Act Close a Tribal Justice “Loophole”?*, PUBLIC BROADCASTING SYSTEM (Feb. 4, 2013), <http://www.pbs.org/wgbh/pages/frontline/biographies/kind-hearted-woman/will-the-violence-against-women-act-close-a-tribal-justice-loophole/>.

<sup>37</sup> *Id.*

<sup>38</sup> Fonseca, *supra* note 31.

against women living in their communities. Specifically, “[t]he changes to tribal jurisdiction resulted from the high rate of domestic violence on reservations, and from an effort to give tribes more authority over crime, according to the Justice Department.”<sup>39</sup> Given the statistics discussed above, this change was clearly needed. But VAWA is not the end of the story. While at first celebrated, advocates for Indigenous rights quickly noticed that VAWA Reauthorization was not all that it appeared to be. Many loopholes emerged, and with these loopholes came severe consequences which I will highlight.

The first loophole that stood out to me as I learned more about the VAWA Reauthorization, was who, specifically, is covered. Under VAWA, only women who live on a reservation are covered, with the exception of Alaska.<sup>40</sup> Additionally, the term woman only covers cisgender, adult, women<sup>41</sup> meaning transwomen are not covered, nor are minors. Upon first realizing this, my heart sank and I felt sick to my stomach. The shift of violence was being redirected rather than being addressed. The new targets are among some of the most vulnerable people in our communities. Did people really get what this meant? I did not think this was possible. I then remembered that something or someone is always left out of any law or policy, sometimes by mistake, and sometimes on purpose. Indigenous women living off the reservation also received no further protection under VAWA.<sup>42</sup> In their report on reproductive health risks and sexual violence, the Urban Indian Health Institute (UIHI) states that about half of the Native American/Alaskan Native population now live off reservations.<sup>43</sup> They are referred to as the “invisible Tribe”<sup>44</sup> and are not likely to be able to access the same resources as those who live on the reservations.

Another major loophole that emerged was that in order to prosecute non-Native offenders under VAWA, tribes were subject to much

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<sup>39</sup> *Id.*

<sup>40</sup> Mary Hudetz, *We’re Not Done’: MacArthur Fellow Sarah Deer Finds Justice for Native American Victims of Violence*, THE WASHINGTON POST (Sept. 22, 2014), [https://www.washingtonpost.com/blogs/she-the-people/wp/2014/09/22/were-not-done-macarthur-fellow-sarah-deer-finds-justice-for-native-american-victims-of-violence/?utm\\_term=.fb16897eb749](https://www.washingtonpost.com/blogs/she-the-people/wp/2014/09/22/were-not-done-macarthur-fellow-sarah-deer-finds-justice-for-native-american-victims-of-violence/?utm_term=.fb16897eb749).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Urban Indian Health Institute, *Reproductive Health of Urban American Indian and Alaska Native Women: Examining Unintended Pregnancy, Contraception, Sexual History and Behavior, and Non-Voluntary Sexual Intercourse*, 2010. Seattle Indian Health Board. <http://www.uihi.org/download/reproductive-health-urban-american-indian-alaska-native-women-examining-unintended-pregnancy-contraception-sexual-history-behavior-non-voluntary-sexual-intercourse-executive-summa/> (last visited Dec. 15, 2017).

<sup>44</sup> *Id.*

restriction. Specifically, they would need to provide a public defender, provide a jury of the offender's peers, and have adequate housing for the offenders.<sup>45</sup> For many tribes that face economic challenges, this is not a possibility. Limited resources offered by the U.S. government under treaty payments are already making it hard for many tribes to offer service to their members, let alone invest in new legal infrastructure. While federal grants were enacted, they have yet to be funded.<sup>46</sup> This leaves crimes reported at the hands of federal law enforcement to decide whether or not Native Americans would be picked up, statistically a low likelihood. As a result, not much has changed for many tribes under the most recent VAWA Reauthorization.

Lastly, VAWA only covers intimate partner violence involving people who live together.<sup>47</sup> This means people dating that do not live together are not covered, nor are instances of strangers inflicting violence. Additionally, violence is limited solely to domestic violence. In other words, rape, abduction, and murder are not covered under VAWA. One area in particular where this proves especially problematic is in regard to sex trafficking. As mentioned previously, natural resource extraction and the abduction of Indigenous women and children is interconnected. However, this is not a new story but rather the continuation of longer legacy of these abductions through colonization. Sarah Deer reminds us:

The tactics of contemporary traffickers are consistent with many of the tactics used by colonial and American governments to subjugate Native women and girls. The commoditization and exploitation of the bodies of Native women and girls, although theoretically criminalized through contemporary prostitution laws, have not been the subject of rigorous investigation and intervention. In fact, this ubiquitous form of predation was not only legal throughout most of our history, it was encouraged by dominant culture.<sup>48</sup>

The VAWA Reauthorization does not offer tribes any jurisdictional authority to help address abduction and sex trafficking. Tribes are still required to allow the federal government to determine if they will take the case, which as previously discussed, is less likely to happen. This does

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<sup>45</sup> *Violence Against Women Act (VAWA) Reauthorization 2013*, THE U.S. DEP'T OF JUSTICE (Mar. 26, 2015), <https://www.justice.gov/tribal/violence-against-women-act-va-wa-reauthorization-2013-0>.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Deer, *supra* note 12, at 61-62.

very little to address the prevalence of violence against Indigenous women. Rather, it continues to support and normalize this violence through law and policy. With all of the loopholes described, it is safe to say, the hunting ground is still open. Indigenous women are still prey and still considered disposable objects of desire. VAWA was the answer to decades of pleading for help and protection under federal law. In turn, the reality of that answer is that, even in current times, laws are still being written that encourage our erasure.

## V. CLOSING THE LOOPHOLES

Given the current state of VAWA, little has changed that shifts the dominant discourse about Indigenous women. Women are still viewed as something to dominate, as disposable and consumable. When looking at the Canadian national database of Missing and Murdered Indigenous Women (since the U.S. does not have such a database), it is clear that the prevalence has not gone down.<sup>49</sup> Rather, the number has increased significantly over the years—the graphical data shows a steady increase.<sup>50</sup> Although this is Canadian data that would not be impacted by VAWA, it is safe to draw a conclusion that the data would be similar in the U.S. due to the similar view and treatment of Indigenous women in both countries. Knowing this, we can look towards policy reforms, such as the VAWA Reauthorization of 2013, as the key to address the significant rates of missing and murdered Indigenous women. Dean Spade offers a view on law reform as a tool that further perpetuates the oppression we seek to disrupt. Spade asserts:

We must stop believing that what the law says about itself is true and that what the law says about us is what matters. Our goal cannot be to get the law to say “good” instead of “bad” things about people who are marginalized, criminalized, impoverished, exploited, and exiled. Law reform and an investment in winning “rights” has proven to legitimize and shore up the very arrangements that produce the harm we seek to eradicate. If we curtail and narrow our vision in ways that make it impossible to imagine a more just world, that limit our imaginations to what a US legal system, created to establish and maintain slavery and colonialism can provide, we will perpetuate rather than deeply transform the arrangements that concern us. Thinking about population-management power opens up a space for us to reconsider how we think about those harmful

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<sup>49</sup> Kristy Hoffman et al., *Missing & Murdered: The Unsolved Cases of Indigenous Women and Girls*, CBC NEWS, <http://www.cbc.ca/missingandmurdered/> (last visited Dec. 15, 2017).

<sup>50</sup> *Id.*

arrangements, what targets and methods we take for our interventions, and how to strategize the change we need.<sup>51</sup>

Taking into consideration this information, what can be done to create shifts in law and policy? In order to look at how to strategize for this much needed change, we must learn how to see things in balance. When anything is out of balance, there is a threat that it will fall down. The same theory applies to society. If balance is the main objective, we have to look for places to intervene. Donella Meadows describes these interventions as using leverage points, which she describes as “. . . places within a complex system (a corporation, an economy, a living body, a city, an ecosystem) where a small shift in one thing can produce big changes in everything.”<sup>52</sup> Finding these points requires looking for the place on the input and output system flow that can disrupt the system and change the course.<sup>53</sup> The goal is to create a discrepancy. Creating social change helps redirect the course of society.

For Indigenous people, law and policy have been used to shape our realities by those who maintain dominance and control of a system that has benefited from the continued erasure of indigenous people. To obtain the goal Meadow seeks to achieve, we must understand how Indigenous experiences with law and policy are unique to our communities. Torres explains to us:

Unlike Latin America, we do not have a detailed philosophical tradition exploring the question of whether Indians “count” as people with souls worth saving. Instead, we supplied a political answer that was premised on exclusion, but which was also informed by pre-existing ideas of racial hierarchy that used to justify treating Indians like political communities suitable of recognition framed by the law of nations. It would also be used, however, to strip these tribes of autonomy, resources, and humanity. Indians, whether in tribes or individual, would count in different ways but always for the purposes of the one doing the counting.<sup>54</sup>

The question of who counts as an Indigenous person impacts the statistical data. It also impacts the ways in which laws and policies are written. As I have described, many people are left out from the protections of VAWA. Indigenous people have political identities, rights, and protections which are all encompassed and defined through series of

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<sup>51</sup> DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF THE LAW*, 128 (Duke University Press, 2011).

<sup>52</sup> Donella Meadows, *Leverage Points: Places to Intervene in a System*, *WHOLE EARTH* 78-84, 78 (Winter 1997).

<sup>53</sup> *Id.*

<sup>54</sup> Torres, *supra* note 5, at 1045.

laws; we must take a nuanced approach in order to address the prevalence of violence against Indigenous women.

How then can we shift the conversation about violence against Indigenous women in ways that create lasting change? Rather than completely rely on governmental law and policy, we must look towards our own knowledge systems that can help fill the gaps where we are failed by these systems. Ramirez offers specific steps to take in order to address violence against Indigenous women that can be applied in this context.<sup>55</sup> She states:

The first is to acknowledge that violence against Indian women exists. The second is to open up these emotional wounds and grieve. The third is to understand how colonialism has traumatized Indian women (see Smith, 1999). The fourth is to guide our thinking with Native philosophies of respect rather than Eurocentric distortions that condone violence against Indian women. In these ways, these activists' approach to healing can help Indian women move forward from the damaging effects of colonialism.<sup>56</sup>

These effects are much more than recent statistics offered in this article. They are the results of centuries of settler colonial genocide that exist up to present day. We feel these pains deeply as Indigenous communities and must find ways to heal while coexisting with this system that has evolved into what it is today. For these reasons,

. . . Native and non-Native communities must meet the challenge to develop programs which address sexual violence from an anticolonial, antiracist framework, so we don't attempt to eradicate acts of personal violence while strengthening the apparatus of state violence. Nothing less than a holistic approach toward eradicating sexual violence can be successful.<sup>57</sup>

By bringing tribal knowledge systems, such as restorative justice practices, into the conversation as a central piece, we can strategize in ways that make sense to us as Indigenous people. While discussing these tribal knowledge systems is outside the purview of this article, it is important to keep them in mind as laws and legal policies are revised and created.

## VI. CONCLUSION

Indigenous women. Sacred, worthy of life, resilient. Indigenous women. Who will hear our cries carried by the wind, down the courtroom halls, silenced by the gavel of the law? Indigenous women. Can the laws

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<sup>55</sup> Ramirez, *supra* note 17.

<sup>56</sup> Ramirez, *supra* note 17, at 111-12.

<sup>57</sup> Smith, *supra* note 11, at 169.

ever really protect us? This is not a question that has an easy answer. Thus far, the legal recourse to prosecute non-Indians under VAWA has been minimal, despite being reauthorized nearly five years ago. Clearly the violence has continued. What about those women who are not covered under the act? Who will speak for them? How can we prevent reservations from being considered hunting grounds by those who continue to inflict this generational violence? What will it take to stop them? So many unanswered questions and so much work to do. One thing that is evident is that we must continue to use a critical outsider jurisprudence view when it comes to the laws that are enacted to protect us. Otherwise, our voices will not be heard, and we will continue to suffer as a result. Our stories can counter the dominant narrative and, “. . . open new windows into reality . . .”<sup>58</sup> for others to see. For, if we do not look out for each other, who will? Without the voices of Indigenous women, and our stories, laws like VAWA will continue to fail us. It is crucial that we are part of the conversations. Our lives depend on it.

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<sup>58</sup> Delgado, *supra* note 2, at 2414. Delgado’s introduction of critical storytelling to law and policy discussions is as important now as it was when he introduced it. As outlined in this article, Indigenous women’s voices need to be heard to challenge the systematic violence we face. The complex web of law, policy, conquest, and violence will take multiple approaches to address. If we are not part of the conversation in an authentic way, we will continue to suffer the consequence.

