

# (En)Gendering Indian Law: Indigenous Feminist Legal Theory in the United States

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**ABSTRACT:** American Federal Indian law is often mistakenly assumed to be a gender-neutral discipline. Although Native women suffer disproportionately from numerous maladies, Indian law practitioners rarely engage with questions of gender discrimination or intersectional oppression. Several Canadian scholars have begun to explicate “indigenous feminist legal theory.” This is the first Article in the United States to consider how such a theory might inform the practice of Federal Indian law and tribal law.

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## INTRODUCTION

I began writing this Article just six weeks after the historic November 2018 midterm elections. On the evening of November 6, the world of American politics saw the election of the first-ever Native<sup>1</sup> women to Congress—Deb Haaland (Laguna Pueblo) of New Mexico and Sharice Davids (Ho-Chunk) of Kansas.<sup>2</sup> Native women have been subject to the laws of the United States for hundreds of years with absolutely no voice—indeed, no *presence*—in the halls of Congress. That same evening, Peggy Flanagan (White Earth Ojibwe) of Minnesota became the first Native woman to be elected to serve as lieutenant governor of a state. Many other Native women won seats in state legislatures across the country. Native women are also emerging in other types of high visibility political and legal positions. For example, Tobi Young (Chickasaw) became the first Native person to clerk for the United States Supreme Court when Justice Neil Gorsuch appointed her in 2018.<sup>3</sup> We are entering a new era of political visibility of contemporary Native women.

It is within the context of this moment that I assess the field of Indian law and tribal law. This Article considers whether the discipline is keeping up with the times with regard to gender consciousness and lasting equity for Native women and Native Two-Spirit (LGBTQ+) people.<sup>4</sup> I also situate this Article in the context of the #MeToo movement, as several Native women have come forward with their own experiences of sexual abuse and harassment in the Indian law workplace.

This inquiry is also prompted by the numerous issues of inequity that Native women continue to experience in 2019. It is becoming common knowledge that Native women experience extremely high rates of violent crime, including

1. In this Article, I choose to use the word “Native” to mean American Indian and Alaska Native people in the United States. I use “indigenous” to speak more generally about Native people in other countries (including Canada).

2. Julian Brave NoiseCat, “*They’re Gonna Rock It*”: *The First Day Native Women Served on Capitol Hill*, THE NATION (Jan. 7, 2019), <https://www.thenation.com/article/haaland-davids-congress-joy-native-representation/> [https://perma.cc/2XWV-6UFR].

3. Tony Mauro, *Gorsuch Hires Native American Law Clerk, Likely First in SCOTUS History*, NAT’L L.J. (Apr. 14 2018), <https://www.law.com/nationallawjournal/2018/04/14/gorsuch-hires-native-american-law-clerk-likely-first-in-scotus-history/?slreturn=20190117173747> [https://perma.cc/VL5T-PHXJ].

4. Cherokee scholar Qwo-Li Driskill explains, “The term Two-Spirit was chosen as an intertribal term to be used in English as a way to communicate numerous tribal traditions and social categories of gender outside dominant European binaries.” Qwo-Li Driskill, *Doubleweaving Two-Spirit Critiques: Building Alliances between Native and Queer Studies*, 16 GLQ: A J. LESBIAN GAY STUD. 69, 72 (2010).

domestic violence, sexual assault, stalking, and murder.<sup>5</sup> The federal government's own statistics reveal that the vast majority—over 80 percent—of Native people in the United States have experienced violent victimization.<sup>6</sup> In fact, where there has been progress in Federal Indian law, it has largely turned on the issue of high rates of domestic violence and sexual assault.<sup>7</sup> The rates of violence are an extension of the historical mistreatment and dehumanization of Native women. These practices have continued well into the twenty-first century in the form of hypersexualized images of Native women, often associated with “sexy” Indian Halloween costumes and movies like Disney's *Pocahontas*.<sup>8</sup>

But there are other areas of gender inequity that deserve attention.<sup>9</sup> For example, Native women experience the highest poverty rate in the United States.<sup>10</sup> While Native people in general experience high poverty rates in the United States, Native men are less likely to experience poverty than Native women.<sup>11</sup> Further, in 2018, the American Association of University Women released a report concluding that Native women overall only make fifty-eight percent of a white man's earnings.<sup>12</sup>

Many Native women are unable to access comprehensive reproductive healthcare, including adequate prenatal care.<sup>13</sup> Other reproductive disparities experienced by Native women include higher rates of unintended pregnancies<sup>14</sup>

5. ANDRE B. ROSAY, VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN: 2010 FINDINGS FROM THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (2016), <https://www.ncjrs.gov/pdffiles1/nij/249736.pdf> [<https://perma.cc/VL5T-PHXJ>].

6. *Id.* at 2 (concluding that 84.3 percent of American Indian and Alaska Native women and 81.6 percent of American Indian and Alaska Native men have experienced violence).

7. See discussion *infra* Part I.

8. See, e.g., CUTCHA RISLING BALDY, WE ARE DANCING FOR YOU: NATIVE FEMINISMS & THE REVITALIZATION OF WOMEN'S COMING-OF-AGE CEREMONIES 32 (2018) (“Throughout history, Native women have been portrayed as either Pocahontas or the squaw. Either Native women are assisting in the colonization of their people, or they are dirty and disregarded as overtly sexual, stupid, and lazy. Native women have also been left out of historical scholarship and treated as peripheral to their nations, cultures, and societies rather than shown as integral or as serving in leadership positions.”).

9. JENNIE R. JOE & FRANCINE C. GACHUPIN, HEALTH AND SOCIAL ISSUES OF NATIVE AMERICAN WOMEN viii (2012) (noting that “[American Indian and Alaska Native] women face extraordinary challenges in all spheres of life: economic, health, social, and education.”).

10. INST. FOR WOMEN'S POL'Y RES., *Status of Women in the States*, at fig. 4.4 (2015), <http://statusofwomensdata.org/explore-the-data/poverty-opportunity/poverty-and-opportunity-full-section/#pofig4.4> [<https://perma.cc/DES4-4TKY>].

11. *Id.*

12. AM. ASS'N OF U. WOMEN, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP (2018), <https://www.aauw.org/resource/the-simple-truth-about-the-gender-pay-gap/> [<https://perma.cc/GTP6-YUZH>].

13. Greta B. Raglan et al., *Racial and Ethnic Disparities in Preterm Birth Among American Indian and Alaska Native Women*, 20 *MATERNAL & CHILD HEALTH J.* 16, 19 (2016).

14. 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 7 (2010), [https://mchb.hrsa.gov/research/documents/finalreports/forquera\\_r40\\_mc\\_08954\\_final\\_report.pdf](https://mchb.hrsa.gov/research/documents/finalreports/forquera_r40_mc_08954_final_report.pdf) [<https://perma.cc/Q4ZE-M5YZ>] (concluding that, “Urban AI/AN had higher rates of unintended pregnancies and higher rates of mistimed pregnancies than NH-whites”).

and higher rates of pre-term births.<sup>15</sup> As a result, in some states, the Native infant mortality rates are up to three times greater than that of whites.<sup>16</sup> Native women also lack adequate access to abortion services, in large part due to the Hyde Amendment, which prohibits the use of federal funding for abortions except in the narrow circumstances.<sup>17</sup>

Health disparities persist beyond reproductive care. According to the federal government's own statistics, Native women are more likely than white women to suffer from obesity, diabetes, hypertension, liver disease, kidney disease, HIV and hepatitis.<sup>18</sup> Native women are also far more likely than white women to suffer from mental health problems, including substance abuse disorders, post-traumatic stress disorder, and suicidal ideation.<sup>19</sup> The suicide rate for Native women and girls between 15 and 24 is six times that of all races combined.<sup>20</sup>

In this Article, I argue that attorneys and legal scholars should intentionally think about gender in the context of Federal Indian law and tribal law to assess whether there are areas for closer consideration and attention. I am primarily interested in whether we can better address gender inequities in the lives of Native women, including gendered violence. As part of this analysis, I explore how attorneys and legal scholars can—and do—support the interests of Native women in their work.<sup>21</sup> As a self-identified Native feminist who is also an attorney, I am interested in asking hard questions about the shortcoming of the Indian Bar to adequately address the needs of Native women and Two-Spirit people.

How do feminism and Indian law “meet”? What are the cross-sections of efforts to promote gender equity and the continued resilient existence of tribal nations? In order to answer these questions, I begin by defining the word “feminism” itself. There are multiple strands of schools of feminist thought—some entirely inconsistent with one another. Therefore, more scholars are now

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15. See, e.g., Raglan, *supra* note 13, at 16.

16. See, e.g., Ramona A. Danielson et al., *Disparities in Risk Factors and Birth Outcomes Among American Indians in North Dakota*, 22 *MATERNAL & CHILD HEALTH J.* 1519 (2018).

17. Dep't of Labor, Health and Hum. Servs., and Educ. and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-78, §§ 509-510, 111 Stat. 1467 (1997) [hereinafter Hyde Amendment].

18. U.S. DEP'T OF HEALTH & HUMAN SERVS., *WOMEN'S HEALTH USA 2011* (2011), <https://mchb.hrsa.gov/whusa11/hstat/hssp/pages/235aianw.html> [<https://perma.cc/8M7S-P5VH>].

19. AMERICAN PSYCHIATRIC ASSOCIATION, *MENTAL HEALTH DISPARITIES: AMERICAN INDIANS AND ALASKA 2* (2017).

20. Sally C. Curtin & Holly Hedegaard, *Suicide Rates for Females and Males by Race and Ethnicity: United States, 1999 and 2017*, at 2 (2019), [https://www.cdc.gov/nchs/data/hestat/suicide/rates\\_1999\\_2017.pdf](https://www.cdc.gov/nchs/data/hestat/suicide/rates_1999_2017.pdf) [<https://perma.cc/VM4A-T9HR>].

21. I mean to cast a wide net in terms of the audience for this Article. The practice of Indian law takes many forms, including working for non-profit organizations, government organizations (federal, state, or tribal), or private practice, for-profit lobbying arms and trade organizations. I mean for this Article to be inclusive of all attorneys who practice Indian law—including non-Native practitioners. I believe as a collective, we have a responsibility to our profession to be mindful of the ways that gender and sexuality intersect with our work.

speaking of plural feminisms rather than a monolithic feminism.<sup>22</sup> For the purposes of this Article, I consider feminisms to be legal and social responses to entrenched patriarchy. This simplified definition is, on the one hand, reductive, but on the other, a useful framework because it is broad enough to encompass different types and styles of patriarchy, along with different types and styles of responses. Patriarchy comes in different forms and can be modified to include terms like “hetero-patriarchy” and “settler colonial patriarchy,” which are both relevant for Native women.<sup>23</sup> The thrust of most feminist movements is to overturn sexist and misogynist laws and practices through legal and social action, which, again, can take many forms.

More specifically, in this Article, I approach Indian law using the lens of *indigenous* feminisms. I intentionally choose to use the fraught “f” word in this analysis, even though mainstream feminist movements and Native women have not always had an easy relationship. Indeed, mainstream feminism has historically failed Native women by ignoring or marginalizing issues like sovereignty and self-determination. Moreover, despite the fact that many early white American feminists were influenced by Native women,<sup>24</sup> early American feminists were sometimes the instigators and supporters of horrific Federal Indian law policies, including the boarding school era and child removal.<sup>25</sup> Thus, it makes sense that many indigenous women categorically reject the label of “feminist” because of its Western, colonial connotations, even while supporting Native women’s rights.<sup>26</sup> Some Native women who reject the term “feminism” point out that patriarchy is a foreign concept to traditional tribal cultures.<sup>27</sup> If feminism is a response to patriarchy, Native women have perhaps not needed it.

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22. See, e.g., Gina Miranda Samuels & Fariyal Ross-Sheriff, *Identity, Oppression, and Power: Feminisms and Intersectionality Theory*, 23 AFFIL. J. WOMEN SOC. WORK 5, 6 (2008) (noting that “[u]se of the term feminisms in the plural to represent this diversity is an acknowledgment of these [scholarly] efforts.”).

23. Settler colonialism is “a unique brand of colonialism in which colonizers took up permanent and intimate residence among the Native people they exploited and resources they extracted rather than occupying temporary posts.” KATRINA JAGODINSKY, *LEGAL CODES AND TALKING TREES: INDIGENOUS WOMEN’S SOVEREIGNTY IN THE SONORAN AND PUGET SOUND BORDERLANDS, 1854-1946*, at 4 (2016).

24. See Sally Roesch Wagner, *The Indigenous Roots of United States Feminism*, in FEMINIST POLITICS, ACTIVISM AND VISION: LOCAL AND GLOBAL CHALLENGES 267–284 (Luciana Ricciutelli, Angela Miles, & Margaret H. McFadden eds., 2004) (describing how early suffrage activists like Matilda Jocelyn Gage were influenced by observations of women of the Iroquois (Haudenosaunee) confederacy).

25. See generally MARGARET D. JACOBS, *WHITE MOTHER TO A DARK RACE: SETTLER COLONIALISM, MATERNALISM, AND THE REMOVAL OF INDIGENOUS CHILDREN IN THE AMERICAN WEST AND AUSTRALIA, 1880-1940* (2009); MARGARET D. JACOBS, *ENGENDERED ENCOUNTERS: FEMINISM AND PUEBLO CULTURES, 1879-1934* (1999).

26. See, e.g., Haunani-Kay Trask, *Feminism and Indigenous Hawaiian Nationalism*, 21 SIGNS 906, 909 (1996) (“I recognized that a practicing feminism hampered organizing among my people in rural communities. Given our nationalist context, feminism appeared as just another haole intrusion into a besieged Hawaiian world. Any exclusive focus on women neglected the historical oppression of all Hawaiians and the large force field of imperialism.”).

27. See, e.g., Laura Tohe, *There Is No Word for Feminism in My Language*, 15 WICAZO SA REV. 103, 104 (2000) (exploring the power of female lineage in Diné culture and noting the fact that the Diné language does not have a word for “feminism”).

Still, I am intentionally choosing to use the term “feminisms” because it carries profound implications for structural change that I see as a critical intervention in the lives of twenty-first century Native women. Though patriarchy may have been a European import, it now exists in the lives of Native people through forced assimilation and cultural hegemony.

But it wasn’t until the late twentieth century that Native women started writing about contemporary feminism in any sustained fashion. Paula Gunn Allen’s 1982 book *The Sacred Hoop* opened up multiple conversations among academic and activist circles about whether certain feminist principles are inherent within tribal cultures.<sup>28</sup> More self-identified indigenous feminists have joined the academy in the past two decades, developing a corpus of writings, including multiple anthologies focused on the way that indigenous feminists analyze political, legal, and social problems.<sup>29</sup>

Native feminists often deploy and explore the concept of “intersectionality,” a term coined by Black legal scholar Kimberlé Crenshaw in 1989.<sup>30</sup> Intersectional feminist theory understands that gender oppression is inextricably linked to other forms of oppression, such as race and class. In other words, experiences of gendered oppression may be substantively different depending on one’s position in society. By conceptualizing Native gender oppression as inextricably linked to settler colonialism and Western imperialism, Native feminists have begun to explicate the unique ways in which Native women experience patriarchy, including the problem of sexism perpetrated by Native men.

However, as Emily Snyder notes, there has been little, if any, sustained focus on how indigenous feminism can inform *legal* theory and practice.<sup>31</sup> As a result of this gap, in 2014 Snyder published what may be the first North American law journal article to begin articulating contemporary indigenous feminist legal theory. In “Indigenous Feminist Legal Theory,” published in the *Canadian Journal of Women and the Law*, Snyder identifies an underdeveloped intersection of three theoretical fields: feminist legal theory, Indigenous feminist theory, and Indigenous legal theory.<sup>32</sup> By exploring this intersection, she ultimately concludes that Indigenous feminist legal theory (IFLT) is “an

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28. PAULA GUNN ALLEN, *THE SACRED HOOP: RECOVERING THE FEMININE IN AMERICAN INDIAN TRADITIONS* (1982).

29. See, e.g., *CRITICALLY SOVEREIGN: INDIGENOUS GENDER, SEXUALITY, AND FEMINIST STUDIES* (Joanne Barker ed., 2017); *INDIGENOUS WOMEN AND FEMINISM: POLITICS, ACTIVISM, CULTURE* (Cheryl Suzack et al. eds., 2010); *MAKING SPACE FOR INDIGENOUS FEMINISM* (Joyce Green ed., 2007).

30. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989).

31. Emily Snyder, *Indigenous Feminist Legal Theory*, 26 CAN. J. WOMEN & L. 365, 366 (2014) (“[T]here are few scholars accounting for . . . gendered realities in relation to Indigenous laws, and . . . the insights and contributions from their research have yet to be widely embraced.”).

32. *Id.* at 367.

important analytic tool that is intersectional, attentive to power, anti-colonial, anti-essentialist, multi-juridical, and embraces a spirit of critique that challenges static notions of tradition, identity, gender, sex and sexuality.”<sup>33</sup> Whereas mainstream American feminist legal theory has existed for decades,<sup>34</sup> IFLT is a relatively new theory, largely explicated by Canadian scholars of indigenous law, including Snyder, Val Napoleon, and John Borrows.<sup>35</sup> In this Article, I apply IFLT to American Federal Indian law and tribal law as a way to explore how and why Native women experience law and oppression in the United States.

To do so, I explore the substance and practice of Indian law through an IFLT lens. Because IFLT uses an intersectional framework, it offers a way to synthesize how and why Native women suffer multiple different kinds of oppression simultaneously. Native women in the United States experience structural discrimination in the forms of at least four ideologies: sexism, settler colonialism, classism, and racism. Two-Spirit Native people also suffer from insidious forms of homophobia and transphobia. IFLT allows us to see these intersections and begin to think of practical, creative solutions to intersecting oppressions. IFLT also allows us to view tribal sovereignty and gender equity as closely linked. Native women’s liberation is a key component of lasting change in Indian country.<sup>36</sup> I take to heart Snyder’s explication of IFLT as “a spirit of critique that challenges static notions of tradition, identity, gender, sex and sexuality” and offer these critiques in the spirit of improving the lives of Native women and Two-Spirit people. Because IFLT is in its nascent stages of development, I hope that this Article will continue a necessary conversation about the efficacy of feminism in the context of Indian law.

The Article proceeds in three parts. In Part I, I explore how gender oppression is expressed in the context of Federal Indian law, often assumed to be a gender-neutral legal discipline. The only significant “gender” case in Federal Indian law is *Santa Clara Pueblo v. Martinez*.<sup>37</sup> In fact, the very few articles written by feminists about Indian law are almost invariably written about the famous 1978 patrilineal descent case.<sup>38</sup> However, there are gendered

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33. Snyder, *supra* note 31, at 401.

34. See, e.g., MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 17 (3d ed. 2013) (discussing the emergence of feminist legal theory in the United States during the 1970s).

35. See, e.g., Emily Snyder, et. al., *Gender and Violence: Drawing on Indigenous Legal Resources*, 48 U.B.C. L. REV. 593 (2015).

36. Indian country is defined at 18 U.S.C. § 1151 as “(a) all 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, (b) all 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 (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.”

37. 436 U.S. 49 (1978).

38. See, e.g., CATHARINE A. MACKINNON, *Whose Culture? A Case Note on Martinez v. Santa Clara Pueblo*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 63 (1987); Francine R. Skenandore, *Revisiting Santa Clara Pueblo v. Martinez: Feminist Perspectives on Tribal Sovereignty*, 17 WIS. WOMEN’S L.J. 347 (2002).

implications in a variety of other contexts in Federal Indian law and policy. I will explore some of those implications and proffer possibilities for sustaining a gender-conscious response. I also consider ways to increase the visibility and profile of Native women in the federal courts by crafting gender-conscious arguments.

In Part II, I consider how gender intersects with tribal legal systems. I am interested in ensuring that Native women are visible within tribal court systems, with the understanding that each tribal nation must approach gendered problems within the context of its own culture and history. In this Part, I also explore the possible remedies that can emerge from the development and reform of tribal statutes and policies. As I often say to my students, there is no reason that tribal codes in the United States cannot have the strongest protections for women, far exceeding those found in state and federal laws. Unfortunately, due to centuries of assimilation, many tribal justice systems adopted American legal “norms,” such as sexism. Some tribal legal systems, though, have managed to maintain some connection to pre-colonial gender equity principles. For this Part, I gathered several published tribal appellate court opinions that consider a question about tribal law and gender. I use these as examples for how tribal attorneys and judges have recognized gendered claims that are grounded in traditional tenets or principles. I also offer some examples of ways in which tribal courts have reinforced patriarchy.

My Article closes with Part III, which is a reflection on the experiences of Native women law students, professors, attorneys and legal scholars. This Part contributes to an ongoing dialogue about sexism faced by Native women attorneys and scholars. I believe the Indian Bar can do a great deal to ensure that Native women and Two-Spirit (LGBTQ+) attorneys in the workplace receive pay equity and respect from co-workers. I ultimately conclude that a gender-conscious Indian law paradigm serves common goals of tribal sovereignty and self-determination.

## I. FEDERAL INDIAN LAW

In this Part, I offer some thoughts on how IFLT can inform the thinking and practice of Federal Indian law.<sup>39</sup> Although issues of gender and sexuality arise every day in the lives of tribal people, much of Federal Indian law, both historical and contemporary, has usually proceeded as if it were gender-neutral, even though problematic results were often heavily gendered. Early Federal Indian law was established and cultivated by a patriarchal government that was

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39. By Federal Indian law, I mean to include both federal case law as well as statutory and regulatory codes.

preceded by colonial systems that emanated from patriarchal countries.<sup>40</sup> American law was based on the common law tradition of England, which largely treated women as property or chattel of their husbands.<sup>41</sup> Thus, at the founding of the United States, American women had little, if any, legal or political power.<sup>42</sup> And it was within this historic patriarchal paradigm that Federal Indian law was developed and fostered. In fact, it was not until the twentieth century that any real progress was made toward government and cultural reform for *any* women in the United States.

Patriarchy influenced the development of Federal Indian law in a variety of ways beyond the scope of this Article.<sup>43</sup> For example, some of the earliest formal legal relations between tribal nations and the federal government were marked with a significant absence and erasure of Native women's political power. One of the challenges faced by early Indian leaders was that European governments almost invariably declined to treat or even negotiate with Native women.<sup>44</sup> Thus, Native women's perspectives rarely found their way into treaty language.<sup>45</sup> Moreover, this tendency to treat only with Native men became part of the hegemonic introduction of patriarchy. As Native men were treated as more powerful in the eyes of Europeans, some internalized the Western concept of natural superiority of men and began to deny Native women their rightful role as equal participants in social and political spheres.<sup>46</sup> To the extent that federal officials encouraged or mandated that tribal nations adopt Christianity, this also introduced patriarchal logics that conceptualize men as heads of the household and women as subservient to men.

Formal government assimilation and forced "civilization" policies, which reached their height in the late nineteenth to mid-twentieth centuries, were also grounded in patriarchal logics.<sup>47</sup> For almost a century, the government forced

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40. See generally OLWEN HUFTON, *THE PROSPECT BEFORE HER: A HISTORY OF WOMEN IN WESTERN EUROPE, 1500-1800* (1995) (exploring how few legal rights European women had).

41. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* CH. 15 (Of Husband and Wife).

42. JOAN HOFF, *LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN* 4 (1991) ("[T]he Founding Fathers believed in the necessity of limiting legal equality primarily to white, male property owners.").

43. I highly recommend the work of Bethany Berger who has painstakingly chronicled the variety of different gendered issues that were embedded in historic Indian law. See Bethany R. Berger, *After Pocahontas: Indian Women and the Law, 1830 to 1934*, 21 *AM. INDIAN L. REV.* 1 (1997); Bethany R. Berger, *Indian Policy and the Imagined Indian Woman*, 14 *KANSAS J. L. PUB. POL'Y* 103 (2004).

44. Bethany R. Berger, *Indian Policy and the Imagined Indian Woman*, 14 *KANSAS J. L. PUB. POL'Y* 103, 105-106 (2004); see also BALDY, *supra* note 8, at 33 (noting that "When Westerners came to negotiate, however, they did not invite or involve women . . .").

45. See, e.g., Shirley R Bysiewicz & Ruth E. Van de Mark, *The Legal Status of the Dakota Indian Woman*, 3 *AM. INDIAN L. REV.* 255, 266 (1975) ("The truly democratic nature of Dakota society was never comprehended, and the role of Dakota women in that process was completely ignored.").

46. See Joyce Green, *Taking Account of Aboriginal Feminism, in MAKING SPACE FOR INDIGENOUS FEMINISM* 20-32, 22-23 (Joyce Green ed., 2007).

47. See, e.g., Andrea A. Curcio, *Civil Claims for Uncivilized Acts: Filing Suit Against the Government for American Indian Boarding School Abuses*, 4 *HASTINGS RACE & POVERTY L.J.* 45, 49

thousands of Native children to attend government or church-run boarding schools to formally indoctrinate them into “white” Christian culture.<sup>48</sup> Patriarchal control and gender hierarchy were institutionalized in these schools.<sup>49</sup> Native boys were taught to farm and weld, whereas Native girls were trained as domestic servants, developing skills in sewing and baking.<sup>50</sup> Native anthropologist K. Tsianina Lomawaima explains, “the underlying federal agenda . . . was to train Indian girls in subservience and submission to authority.”<sup>51</sup> In addition to enforcing Western gender roles, these boarding schools almost universally utilized corporal punishment as the primary means of discipline, and school officials inflicted horrific abuse upon many Native children.<sup>52</sup> Given the high rates of physical and sexual abuse that occurred during the boarding school era, we might even consider that Western gender hierarchies were literally beaten into the children.<sup>53</sup>

Even though gendered hegemony has been central to the colonial project, gendered consciousness is largely absent from Federal Indian law today. Berger notes that the words “women,” “wives,” and “mothers” were not even indexed in Felix Cohen’s famous treatise on Federal Indian Law.<sup>54</sup> In fact, one of the only clear connections between Native women and Federal Indian law comes from

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(2006) (“To Europeans, ownership of land and other property, Christianity, a nuclear family in which the man made all the decisions and children were strictly and harshly disciplined and were taught the value of hard work so that they could acquire more land and material goods, were life’s guiding principles. These principles shaped the devastation wrought by European settlers on America’s indigenous people.”).

48. See, e.g., *id.* at 46; Ann Murray Haag, *The Indian Boarding School Era and Its Continuing Impact on Tribal Families and the Provision of Government Services*, 43 TULSA L. REV. 149, 153 (2007); Linda J Lacey, *The White Man’s Law and the American Indian Family in the Assimilation Era*, 40 ARK. L. REV. 327, 357-359 (1986); 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, 422 (2012).

49. See Eric Margolis, *Looking at Discipline, Looking at Labor: Photographic Representations of Indian Boarding Schools*, 19 VIS. STUD. 54, 55 (2004) (explaining that the long-term goal of boarding schools was “to exterminate the indigenous culture and replace it with the disciplines, habits, language, religion and practices of the dominant one.”).

50. *Id.* at 65 (“[J]ob training was heavily gendered. Boys were trained for farming or industrial occupations . . . girls for domestic service.”).

51. K. Tsianina Lomawaima, *Domesticity in the Federal Indian Schools: The Power of Authority Over Mind and Body*, 20 AM. ETHNOLOGIST 227, 229 (1993).

52. See Robert A. Trennert, *Corporal Punishment and the Politics of Indian Reform*, 29 HIST. EDUC. Q. 595, 595 (1989) (explaining that “corporal punishment was seen as a useful tool in promoting the discipline necessary for assimilation . . . the infliction of pain by means of spanking, whipping, and even beating was justified.”).

53. At a Phoenix boarding school, for example, “matrons regularly used male employees to whip unruly Indian girls.” *Id.* at 600.

54. Berger, *After Pocahontas*, *supra* note 43, at 2-3. Even today, the only references to gender in the current iteration of Cohen’s handbook come from twenty-first century efforts to draw attention to the high rate of victimization experienced by Native women, such as the Violence Against Women Act (VAWA). A word search for “women” in the current 2017 version of the Handbook yields several results, almost all connected to VAWA. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW (Nell Jessup Newton ed., 2017).

the seminal 1978 case *Santa Clara Pueblo v. Martinez*.<sup>55</sup> Many consider this case to be one of the most significant Indian law cases of the last century.<sup>56</sup>

In *Santa Clara*, Julia Martinez brought a federal lawsuit alleging gender discrimination by her tribe, the Santa Clara Pueblo.<sup>57</sup> At that time, the Pueblo had a strict patrilineal citizenship law. Because Ms. Martinez married a Navajo man, her children were not eligible for enrollment in the Pueblo, leading to numerous hardships for her family.<sup>58</sup> The case was appealed to the Supreme Court, and the Court was able to sidestep the question of gender discrimination by holding that the Pueblo (like all tribal governments) was immune from such suits.<sup>59</sup> Therefore, the substantive question of gender discrimination is left to the tribal nations. As Tweedy argues, the 1978 decision “led to a widespread, monolithic impression that tribes were not protective of the rights of women.”<sup>60</sup> While the case is largely lauded a “victory” for tribal nations,<sup>61</sup> some observers have raised concern that the decision is now being used by tribal nations to shield discriminatory laws from oversight.<sup>62</sup> Odawa legal scholar Wenona T. Singel writes, “Many have criticized the harm inflicted on individuals by tribes and have questioned whether tribal sovereignty’s legal affirmation was achieved on the backs of women and other oppressed individuals within tribal communities.”<sup>63</sup> This framework requires a feminist analysis—indeed, a *Native* feminist analysis to unpack.

Indigenous feminist legal theory, though, takes us far beyond the contours of *Santa Clara* and patrilineal descent laws, and illuminates the discovery of other gendered issues facing our communities that often are eclipsed in gender-neutral conversations about tribal resiliency and tribal sovereignty. IFLT encourages us to think critically about how Federal Indian law has developed with regard to gender, something that has not been done in mainstream feminist legal theory. Bringing an indigenous lens to mainstream feminist jurisprudence is necessary; merely being feminist in and of itself does not necessarily mean that one understands the historical legacy and nuances of colonization and contemporary Indian law. Many of my feminist friends, for example, are

55. 436 U.S. 49 (1978).

56. JOANNE BARKER, *NATIVE ACTS: LAW, RECOGNITION, AND CULTURAL AUTHENTICITY* 100 (2011) (“The literature that has addressed the importance of the Martinez decision is exhaustive.”).

57. *Santa Clara*, 436 U.S. at 51.

58. *Id.* at 52.

59. *Id.* at 59 (“[W]e conclude that suits against the tribe under ICRA are barred by its sovereign immunity from suit.”).

60. Ann E. Tweedy, *Sex Discrimination Under Tribal Law*, 36 WM. MITCHELL L. REV. 392, 394 (2010).

61. Matthew L.M. Fletcher, *The Supreme Court’s Indian Problem*, 59 HASTINGS L.J. 579, 614 (2008) (the case is one of the “major wins for tribal interests.”).

62. Wenona T. Singel, *Indian Tribes and Human Rights Accountability*, 49 SAN DIEGO L. REV. 567, 585 (2012) (“[F]ederal judges have openly expressed concern that tribal immunity from federal court review leaves tribes free to engage in acts that are deeply troubling on the level of fundamental substantive justice.”).

63. *Id.* at 586.

surprised to hear that Ruth Bader Ginsburg has ruled against tribal interests in several monumental cases.<sup>64</sup> While mainstream feminist theories center a universal “woman” in legal analysis, indigenous feminist theories center a “Native” woman as the focal point for analysis. In the following section, I explain how centering Native women leads to different types of practice strategies and interventions.

#### A. *Feminist Interventions in Federal Indian Law*

Because Federal Indian law on its surface often appears to be gender-neutral, we must be creative in thinking about how to bring gender back into Federal Indian law conversations. Here, I consider how IFLT can inform the praxis and practice of Indian law. For the past five years, I have worked with Cherokee attorney and playwright Mary Kathryn Nagle<sup>65</sup> to file gender-conscious amicus briefs in major Supreme Court Indian law cases. We initially conceived of this project as an intervention for the 2016 case *Dollar General v. Mississippi Choctaw*<sup>66</sup> (described *infra* at Section I.A.1) but have filed similar briefs in three other cases. This is a concerted effort to re-introduce gender as a necessary element of consideration in Indian law cases.<sup>67</sup> We saw the need to consider the impact of Federal Indian law on the lives of Native women and their children in ways that conventional jurisprudence could miss. By providing a gendered intervention, we believe that federal courts can grasp a larger picture of what is at stake than is otherwise possible with a gender-neutral approach. In other words, by arguing on behalf of women we enlarge the lens through which judges can view the case.<sup>68</sup> We are hopeful that these gender-conscious briefs are of interest to at least some of the Justices and may be able to influence votes on key questions of sovereignty and self-determination.

The primary client for these amicus briefs has been the National Indigenous Women’s Resource Center (NIWRC), a national non-profit organization dedicated to addressing domestic violence and sexual assault in tribal communities.<sup>69</sup> Over 100 local and regional anti-violence coalitions (including

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64. See Carole Goldberg, *Finding the Way to Indian Country: Justice Ruth Bader Ginsburg’s Decisions in Indian Law Cases*, 70 OHIO ST. L.J. 1003,1004 (2009) (noting that “several of her opinions have garnered considerable (and justified) criticism from Indian law scholars and tribal leaders . . .”).

65. Ms. Nagle serves as counsel of record in these briefs.

66. 136 S. Ct. 2159 (2016).

67. A similar brief had been filed by other attorneys in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2007).

68. FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT 5 (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016) (“Feminist consciousness broadens and widens the lens through which we view law and helps the decision maker overcome the natural tendency to see things the same way or do things ‘the way they’ve always been done.’”).

69. *Organizational History*, NAT’L INDIGENOUS WOMEN’S RESOURCE CTR., <http://www.niwrc.org/content/organizational-history> [<http://perma.cc/Z5NM-YMMG>] (“[NIWRC is] dedicated to reclaiming the sovereignty of Native nations and safeguarding Native women and their children.”).

non-Native organizations) have also signed on to these briefs.<sup>70</sup> The following Section summarizes the three briefs we have filed, along with an assessment of their efficacy.

### I. Dollar General v. Mississippi Choctaw

In *Dollar General v. Mississippi Choctaw*,<sup>71</sup> the Court considered whether non-Indian businesses could be subject to tribal civil jurisdiction. At its core, however, the case was about a young child who had been sexually victimized by a non-Indian,<sup>72</sup> a story that ultimately was eclipsed by the dry, mechanical question of civil adjudicatory authority.

Many Native women's organizations were quite concerned about the stakes in *Dollar General* because the case concerned sexual abuse.<sup>73</sup> The facts reveal an all-too-common theme in Indian country: a non-Indian commits acts of sexual violence and escapes tribal criminal jurisdiction. Since the 1978 Supreme Court decision in *Oliphant v. Suquamish*,<sup>74</sup> tribal justice systems had been prohibited from prosecuting non-Indians—for any crime, no matter how heinous or insidious. According to the National Institute of Justice, most Native victims report that they have had a least one perpetrator who is non-Native.<sup>75</sup> The facts in *Dollar General* date back to 2003, when the white manager of a reservation-based Dollar General retail establishment molested a 13-year-old Choctaw boy who had been temporarily placed with the store through a Youth Opportunity Program.<sup>76</sup> Even though the victim reported the abuse—a rarity in itself—the tribal government had no power to prosecute the perpetrator since he was non-Indian. The question of whether the company could be vicariously liable for the harm, though, raised different legal questions, since *Oliphant* did not directly address civil jurisdiction.

Seeking justice, the child's parents filed a civil lawsuit in Mississippi Choctaw tribal court against the perpetrator's employer, the Dollar General Corporation, which immediately objected to tribal court jurisdiction based on the same principles elucidated in *Oliphant*.<sup>77</sup> Even though Dollar General had a

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70. The *Dollar General* amicus brief included 104 additional organizations beyond NIWRC. Brief of Amici Curiae National Indigenous Women's Resource Center and Additional Advocacy Organizations for Survivors of Domestic Violence and Assault in Support of Respondents at 1, *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496) [hereinafter NIWRC Brief, *Dollar General v. Mississippi Choctaw*].

71. 136 S. Ct. 2159 (2016).

72. *Doglencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 169 (5th Cir. 2014).

73. Andrew Bard Epstein, *Dollar General Takes Its Case Against Indigenous Sovereignty to the Supreme Court*, THE NATION, (Dec. 7, 2015) <https://www.thenation.com/article/dollar-general-takes-its-case-against-indigenous-sovereignty-to-the-supreme-court/> [<https://perma.cc/8Q3B-NPXQ>].

74. 435 U.S. 191 (1978).

75. ROSAY, *supra* note 5, at 18-19.

76. *Doglencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 169 (5th Cir. 2014).

77. *Id.* at 169-70.

contractual relationship with the Choctaw tribe and even though they operated a retail store on the reservation, they argued that the tribal court had no jurisdiction over them in this kind of civil tort case.<sup>78</sup> Dollar General appealed the case to the tribal supreme court, then into federal district court and the Fifth Circuit, and lost their argument at every juncture (although the case against the manager himself was dismissed). When the case was granted certiorari by the Supreme Court, NIWRC expressed interest in filing a brief on behalf of Indian country victims.

As we began strategizing about the purpose of the amicus brief, it became clear that our primary goal was to encourage the Justices to consider the long-term ramifications of their decision on victims of abuse. We decided to focus on gender-conscious public policy arguments since the merits briefs were, necessarily, heavily focused on Supreme Court precedents and canons of Indian law. There simply wouldn't be enough space in the merits briefs to include the policy arguments we wanted the Court to consider.

Thus, we took the opportunity to argue that a finding against the tribe would lead to the re-victimization of victims of violent crimes on Indian land, since they would not be able to seek justice in tribal court for the violent and abusive actions of non-Indians.<sup>79</sup> Using statistical data and congressional findings, the brief established that Native women and children are at extremely high risk for violence. This in turn led us to argue that there are limited remedies for this violence, and that the ability to sue a non-Native for violence was crucial to the well-being of Native people.<sup>80</sup>

We also raised what we believed was a novel argument about the "consensual relations" test established in *Montana v. United States* (1981).<sup>81</sup> Under this *Montana* test, "a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."<sup>82</sup> Dollar General argued that this test should not allow suits against nonmembers for common law tort actions, because it does not fit under the categories of taxation or licensing and that nonmembers must offer "clear and unequivocal consent" to adjudicatory jurisdiction.<sup>83</sup> The Choctaw tribe countered that the test includes the phrase "or other means" which should be read to include adjudicative authority over matters that arise as part of the consensual relationship.<sup>84</sup> In the NIWRC brief, we considered Dollar General's arguments in light of sexual abuse, arguing that Dollar General's position

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78. *Id.*

79. NIWRC Brief, *Dollar General v. Mississippi Choctaw*, *supra* note 70.

80. *Id.* at 4.

81. *Id.* at 5-7.

82. *Montana v. United States*, 450 U.S. 544, 565 (1981).

83. Brief for the Petitioners at 18, *Dollar General v. Mississippi Choctaw*, 136 S. Ct. 2159 (2016) (No. 13-1496).

84. Brief for Respondents at 16, *Dollar General v. Mississippi Choctaw*, 136 S. Ct. 2159 (2016) (No. 13-1496).

would create an untenable situation where tribal courts would have to inquire as to whether a non-Indian perpetrator clearly and unequivocally expressed his consent to tribal jurisdiction before he sexually assaulted or abused a Native woman or child. Not only is the scenario implausible, it is unconscionable. Native women and children do not consent to being assaulted on tribal lands, yet this proffered revision of *Montana's* consensual relationships would render their profound lack of consent a legal nullity.<sup>85</sup>

We urged the Court to find in favor of the Mississippi Choctaw Nation so that other victims would be able to hold offenders accountable in tribal civil courts. While the brief itself did not use the term “feminist,” the brief was informed by IFLT, since it considered the twin oppressions of sexism and settler colonialism in its reasoning. Many Native women from around the country came to the Supreme Court the day of the oral argument and staged a prayerful demonstration to further amplify the importance of the case, which significantly raised the profile of the case for tribal leaders.<sup>86</sup> The oral argument itself focused largely on Federal Indian law precedent, but there were two references to concerns about victims. After Dollar General admitted that they would have to acquiesce to tribal civil jurisdiction regarding business or commercial matters, Justice Kagan asked, “[i]t’s a bit of an odd argument, isn’t it, Mr. Goldstein, that there’s less of a sovereign interest in protecting your own citizens than in enforcing your licensing laws?”<sup>87</sup> Later, during the Choctaw arguments, counsel Neal Katyal referenced the NIWRC brief, stating, “[t]he Domestic Violence brief gives other reasons why in general people want to bring suits in tribal courts because it’s a more familiar process and one closer, geographically, to them.”<sup>88</sup>

Six months later, we learned that the Court had deadlocked at a vote of 4-4 and no opinion was rendered, essentially upholding the Fifth Circuit’s favorable decision for the tribal government but establishing no nationwide precedent.<sup>89</sup> It was the longest pending case of the 2015 term. The tie-vote can be fairly characterized as “victory” or, perhaps more accurately, a “close call,” since it was clear that four justices were willing to strip tribal nations of civil jurisdiction

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85. NIWRC Brief, *Dollar General v. Mississippi Choctaw*, *supra* note 70, at 6.

86. Rebecca Nagle, *Native Women Protest Sexual Violence Case at the Supreme Court*, BITCH MEDIA (Dec. 4, 2015), <https://www.bitchmedia.org/article/native-women-take-fight-against-sexual-violence-supreme-court> [<https://perma.cc/73PB-R2GB>].

87. Transcript of Oral Argument at 23, *Dollar General v. Mississippi Choctaw*, 136 S. Ct. 2159 (2016) (No. 13-1496).

88. *Id.*

89. Justice Scalia had passed away during the Court’s term, on February 13, 2016, and left the Court with eight justices for a period of time.

over non-Indians.<sup>90</sup> Unfortunately, the absence of a written opinion in this case means that we do not know if the NIWRC brief held any weight or importance for the Court. The next case, however, offered reasons to be more optimistic.

## 2. United States v. Bryant

In the same term as *Dollar General*, we also filed a brief in *United States v. Bryant*.<sup>91</sup> This case tested the constitutionality of the federal habitual offender statute, which allows for federal criminal justice authority over people who have two or more convictions in tribal court.<sup>92</sup> Bryant, the Native defendant, was a serial domestic violence offender with multiple tribal court convictions for increasingly disturbing violent behavior against women. Importantly, the maximum imprisonment sentence that tribal nations were able to impose at that time was one year, pursuant to the Indian Civil Rights Act of 1968 (ICRA).<sup>93</sup> The habitual offender statute was passed as part of the Violence Against Women Act (VAWA)<sup>94</sup> in 2005, and was intended to address the problem of short tribal jail sentences for abusers by providing for federal criminal jurisdiction after two predicate cases.<sup>95</sup> Once charged in federal court under the habitual offender statute, Bryant argued that his tribal court convictions were uncounseled and thus should not have been considered as a trigger for federal prosecution.<sup>96</sup> Even though he had court-appointed counsel in federal court, he argued that the habitual offender statute itself was unconstitutional because it relied on uncounseled tribal court convictions.

Given that the case turned on a fact pattern involving a dangerous serial abuser, NIWRC again filed a brief on behalf of Native victims.<sup>97</sup> Since the merits briefs needed to focus squarely on Sixth Amendment arguments, the NIWRC brief could enlarge the scope of consideration to include victims of crime.<sup>98</sup> Nagle and I crafted the brief using some of the same statistics we had cited in the *Dollar General* brief, again proffering that Native women were at heightened risk for abuse and were in need of special consideration.<sup>99</sup> We argued that the federal habitual offender statute was one of the only ways that serial abusers on

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90. Sarah Deer & Mary Kathryn Nagle, *Return to Worcester: Dollar General and the Restoration of Tribal Jurisdiction to Protect Women and Children*, 41 HARV. J.L. & GENDER 179 (2018) (offering an optimistic assessment of the tie vote).

91. 136 S. Ct. 1954 (2016).

92. 18 U.S.C. § 117(a).

93. Indian Civil Rights Act, 25 U.S.C. § 1302.

94. Pub. L. 109-162, tit. IX, § 909 (2006).

95. 18 U.S.C. § 117(a).

96. 136 S. Ct. at 1952.

97. Brief of Amici Curiae National Indigenous Women's Resource Center and Additional Advocacy Organizations for Survivors of Domestic Violence and Assault in Support of Petitioner, *United States v. Bryant*, 136 S. Ct. 1954 (2016) (No. 15-420).

98. *Id.* The entire brief was framed around the central theme of victim safety.

99. *Id.* at 13-14.

reservations could be held accountable. Since tribal courts are limited to a maximum penalty of three years per offense (only one year at the time of Bryant's offenses), abusers such as Bryant were in and out of tribal jail on a regular basis. Thus, the only way to remove him from the community for the long term would be for the federal government to prosecute him pursuant to the habitual offender statute. Ideally, of course, tribal nations would not be limited in their ability to impose an appropriate carceral sentence on a violent offender, but until that limitation is eliminated, this kind of federal prosecution may mean the difference between life and death of Native women on tribal lands. We also advanced tribal sovereignty arguments by linking the safety and well-being of Native women to the strength and prosperity of tribal nations.<sup>100</sup>

Because *Bryant* concerned a law that was passed as part of the Violence Against Women Act, it is somewhat surprising that violence against Native women was only mentioned near the end of the oral arguments, when counsel for the United States remarked that Bryant “kept battering women in Indian country and contributed to that epidemic of domestic violence.”<sup>101</sup> The bulk of the oral arguments focused on the Sixth Amendment right to counsel, the Indian Civil Rights Act, and the relevant Supreme Court precedent on those questions.<sup>102</sup>

However, unlike *Dollar General*, which lingered in the Court for over six months, the Court issued its opinion in *Bryant* in less than two months. *Bryant* was a unanimous decision (8-0) in favor of upholding the federal statute, with Justice Ruth Bader Ginsburg authoring the majority opinion.<sup>103</sup> In this case, it is clear that the NIWRC brief was, at the very least, consulted in the construction of the decision.<sup>104</sup> Not only did Ginsburg mention some of the statistics included in the NIWRC brief, but there are also several parallels between the structure of the NIWRC brief and the Ginsburg opinion.<sup>105</sup> This opinion suggested to us that Justice Ginsburg had found the brief informative and relevant.<sup>106</sup>

100. *Id.* at 24.

101. Transcript of Oral Argument at 42, *United States v. Bryant*, 136 S. Ct. 1954 (2016) (No. 15-420).

102. *Id.*

103. *United States v. Bryant*, 136 S. Ct. 1954 (2016). Justice Thomas authored a concurring opinion. 136 S. Ct. at 1967.

104. Bethany R. Berger, *Hope for Indian Tribes in the U.S. Supreme Court?: Menominee, Nebraska v. Parker, Bryant, Dollar General...And Beyond*, 2017 ILL. L. REV. 1901, 1930 (2017).

105. Ginsburg quoted two statements of Senator John McCain that we had also used in the brief. *Bryant*, 136 S. Ct. at 1959, 1961. Moreover, she referenced some of the same precedent we cited, including *Crow Dog* and the Indian Civil Rights Act as well as statistical data we used in the brief. *Id.* at 1961. She also cited to work published by Sarah Deer. *Id.* at 1960.

106. Not all Native feminists or tribal sovereignty advocates are in favor of the outcome in *Bryant*. The over-incarceration of Native people is a serious problem, and to the extent that *Bryant* is about increased federal punitive control over Native people, there is not consensus on the question of the habitual offender statute. Tribal and federal public defenders have raised concerns about the ramifications of the *Bryant* decision for the right to counsel in tribal court. *See, e.g.*, Barbara L. Creel & John P. LaVelle, *High Court Denies Rights of Natives*, ALBUQUERQUE J. (June 26, 2016), <https://www.abqjournal.com/798285/high-court-denies-rights-of-natives.html> [<https://perma.cc/6S2W-LZYM>].

### 3. Carpenter v. Murphy

Hopeful that the Court was receptive to gender-conscious arguments, NIWRC filed a third amicus brief in late 2018 in *Carpenter v. Murphy*,<sup>107</sup> a case argued in November 2018 but not decided in the 2018-2019 term. The Court has ordered that re-arguments take place in the next term, and the case remains undecided as of the publication of this Article. Because the case centers on the jurisdiction over a grisly homicide, it may seem curious that we filed a brief siding with the arguments of the defendant. From the outside, *Murphy* asks a seemingly gender-neutral question of whether or not there is still a Creek reservation in Oklahoma. But because of the implications for the safety of Native women, NIWRC again participated as an amicus.<sup>108</sup>

The case began in 1999, when Patrick Dwayne Murphy, a citizen of the Muscogee (Creek) Nation (MCN), murdered George Jacobs, another citizen of the MCN on a tract of land that was originally within the exterior borders of the reservation described in the 1866 treaty between the MCN and the United States government.<sup>109</sup> The state of Oklahoma prosecuted the case, and Murphy was convicted and sentenced to death.<sup>110</sup> Several years later, Murphy filed a habeas petition in federal court, arguing, among other things, that since his crime occurred on an Indian reservation—a quintessential type of “Indian country”—the state’s prosecution was unlawful.

It’s important to understand that, with some significant exceptions, the federal government and tribal government, and not the state government, share concurrent jurisdiction over a murder committed by an Indian on an Indian reservation.<sup>111</sup> Murphy argued that he had been tried and convicted in the wrong court—that since his crime occurred on an Indian reservation, the *federal* government should have prosecuted him. The state’s main response was that the reservation no longer existed, and thus state jurisdiction was lawful. Not surprisingly, the merits briefs (and most of the amicus briefs) focused on the federal precedent, the long, sordid history of Oklahoma statehood, and the callous but failed efforts to extinguish the MCN altogether. Although the legal question before the court is relatively simple (“Does the reservation still exist?”), the legal arguments required extensive historical research to uncover Congress’s intended boundaries of the reservation. Although it is not a party to the case, the decision will obviously have great ramifications for the MCN. Once the case

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107. *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *cert. granted*, 138 S. Ct. 2026 (2018).

108. Brief of Amici Curiae National Indigenous Women’s Resource Center and Additional Advocacy Organizations for Survivors of Domestic Violence and Assault in Support of Respondent, *Carpenter v. Murphy* (2018) (No. 17-1107) [hereinafter NIWRC Brief, *Carpenter v. Murphy*].

109. *Murphy v. Royal*, 875 F.3d 896, 904-905 (10th Cir. 2017) (“Mr. Murphy and the State agree that the offense in this case occurred within the Creek Reservation if Congress has not disestablished it.”).

110. *Id.*

111. Major Crimes Act, 18 U.S.C. § 1153.

reached the circuit level, the MCN was granted leave to participate in oral argument as *amicus curiae*.

The NIWRC brief, unlike the others, brought the interests of Native women to the discussion.<sup>112</sup> We argued that the existing definition of “Indian Country” should not be changed, because it is important that tribal governments exercise expansive territorial jurisdiction to protect women and children from violence. As part of this argument, we noted that in passing VAWA 2013 (explained *infra* at Section I.B), Congress had recently restored tribal criminal jurisdiction over non-Indians who are charged with certain domestic violence crimes. We argued that when Congress passed that law, it clearly demarcated that this jurisdiction would apply to “Indian country” and that Congress could not have anticipated that the Supreme Court would suddenly change the rules for what constituted “Indian country.”<sup>113</sup> We supported the arguments raised by Murphy and other amici that reservation disestablishment could only be achieved through clear congressional intent, which had not happened in this case.

The outcome in the *Murphy* case matters to Native women. If the Court rules that the MCN reservation is still recognized by the United States, it will reaffirm that MCN has the power to police and prosecute crimes committed anywhere within the reservation, providing more safety and security to Native women who rely on their tribal government to respond to domestic violence and sexual assault. By bringing these concerns to the discussion, we hope that the Justices will be sympathetic to arguments from tribal nations that can maximize their potential to protect tribal citizens from harm. Unlike *Dollar General* and *Bryant*, however, the initial oral arguments did not reveal any particular interest in how victims might experience the ramifications of the decision. There is also the possibility of another tie, as Justice Gorsuch has recused himself from the consideration of the case.<sup>114</sup>

It is premature to claim that briefs informed by IFLT will have a significant impact on the Court, but this certainly is not a reason to abandon the efforts. Professor Matthew L.M. Fletcher analyzed the efficacy of amicus briefs in Indian law cases in a 2012 article, concluding that “the best amicus briefs in Indian law cases offer some specialized and useful bits of information to the Supreme Court, information not otherwise available.”<sup>115</sup> The key is finding the synergy between the interests of Native women and the interests of tribal governments. The NIWRC briefs also achieve some of the goals of IFLT by linking the rights of tribal nations to the empowerment of Native women. As similar arguments are offered in future cases (both in the Courts of Appeal and the Supreme Court), we

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112. NIWRC Brief, *Carpenter v. Murphy*, *supra* note 108.

113. *Id.* at 23.

114. Justice Gorsuch was serving as a judge on the 10th Circuit Court of Appeals and took part in the en banc consideration for a re-hearing in the case.

115. Matthew L.M. Fletcher, *The Utility of Amicus Briefs in the Supreme Court's Indian Cases*, 2 AM. INDIAN L.J. 38, 51 (2013).

may begin to develop future strategies about how to convey support for tribal sovereignty through a gendered lens.

### *B. Federal Statutory Reform*

Besides litigation in federal courts, many attorneys work on federal law reform on behalf of tribal nations or tribal interests, and arguments informed by IFLT can be informative here as well. From 1900 to 2015, tribal interests lost 76.5 percent of the time at the Supreme Court.<sup>116</sup> Some argue that efforts to protect tribal interests might be better served by focusing on Congress as opposed to the courts.<sup>117</sup>

Certainly since Native women began working on the Violence Against Women Act, originally passed in 1994, there has been an infusion of Native women's voices into Federal Indian legislation, culminating with the passage of the Tribal Law and Order Act of 2010 (TLOA)<sup>118</sup> and the 2013 reauthorization of the Violence Against Women Act (VAWA 2013),<sup>119</sup> both of which restored crucial aspects of tribal sovereignty.

TLOA and VAWA 2013 were omnibus bills containing a wealth of directives and funding sources to deal with crime in Indian country. They made two significant changes to tribal criminal jurisdiction. In TLOA, the ICRA was revised to allow tribal nations that meet certain benchmarks to sentence offenders to up to three years per offense rather than the previous one-year maximum. In VAWA 2013, Congress restored tribal criminal jurisdiction over non-Indians, but only for the crimes of domestic violence, dating violence, or criminal violation of a protection order, and only if the tribal nation has complied with various federal requirements.<sup>120</sup> While the achievements may seem modest, neither federal law would exist without the activism of Native women, including attorneys, who articulated the need for these restorations of tribal authority.

We can expect to see continued momentum on Congressional actions to address violence against Native women, particularly because of heightened visibility of the "Missing and Murdered Indigenous Women" movements that are emerging across the United States. The first two Native women in Congress are also speaking out and sponsoring legislation intended to address the crisis of

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116. Berger, *supra* note 104, at 1907.

117. Kirsten Matoy Carlson, *Congress and Indians*, 86 COLO. L. REV. 77, 81 (2015) ("[M]any scholars, tribal leaders, and advocates have recently suggested that Congress may be more responsive than the courts to Indian interests and have turned to legislative strategies for pursuing and protecting tribal interests, especially tribal self-determination and jurisdiction.").

118. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 (2010).

119. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013).

120. 25 U.S.C. § 1304.

violence against Native women.<sup>121</sup> I am cautiously optimistic that continued engagement with law reform, informed by IFLT, will continue to yield positive results.<sup>122</sup>

In addition to pursuing new legislation like TLOA and VAWA, advocates should also work toward the enforcement of existing Federal Indian law. In truth, much of the substance of TLOA and VAWA are directives to federal agencies to improve the way they implement existing laws and develop policy. For example, TLOA requires the Department of Justice to release a yearly report that summarizes federal prosecution activities in Indian country.<sup>123</sup> Indian law practitioners, along with tribal leaders, must be vigilant to ensure that the provisions are being implemented in ways that improve Native lives. Federal legal reform in Congress is not guaranteed to achieve change on the ground without sustained oversight. For example, a 2017 Office of the Inspector General report concluded that significant goals of TLOA had not been achieved even though the Obama administration had claimed that the law was a success.<sup>124</sup> It is not enough to pass a law—we must ensure its enforcement.

### C. Future Areas for Reform

Thus far, the efforts to bring gender-consciousness to Federal Indian law have focused on criminal justice reform. But there are other gendered issues that deserve renewed attention, including reproductive justice and environmental law. I offer a few thoughts on how IFLT might inform efforts in these arenas. Here, I focus on reproductive justice and environmental justice, though these are only two examples of areas where IFLT could be informative.

Native women have struggled mightily for reproductive justice over the course of the twentieth century. Allegations that the federal government, via the Indian Health Service (IHS), forcibly sterilized Native women or sterilized them without informed consent have been widely documented, with a focus on mid-

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121. See, e.g., The Not Invisible Act of 2019, H.R. 2438; Violence Against Women Reauthorization Act (VAWA) of 2019, H.R. 1585; SURVIVE Act of 2019, H.R. 1351; Studying the Missing and Murdered Indian Crisis Act of 2019, H.R. 2029; The Native Youth and Tribal Officer Protection Act of 2019, H.R. 958.

122. Again, it is important to acknowledge that there is not clear consensus even among Native feminists as to the best way to resolve gender-based violence committed against Native women. Some have raised valid concerns that laws like VAWA and TLOA promote the further assimilation of tribal courts by requiring them to comply with new federal standards, and that the “law and order” model may not be the best way to achieve justice for Native victims of gender-based violence. See, e.g., Kimberly Robertson, *The “Law and Order” of Violence Against Native Women: A Native Feminist Analysis of the Tribal Law and Order Act*, 5 DECOLONIZATION: INDIGENEITY, EDUC. & SOC’Y 1 (2016).

123. Section 211, Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 (2010).

124. OFF. OF THE INSPECTOR GEN., REVIEW OF THE DEPARTMENT’S TRIBAL LAW ENFORCEMENT EFFORTS PURSUANT TO THE TRIBAL LAW AND ORDER ACT OF 2010, at i (2017), <https://oig.justice.gov/reports/2017/e1801.pdf> [<https://perma.cc/2VH5-WSC3>].

to-late twentieth century practices.<sup>125</sup> There has been no true reckoning or accountability for this history. Native women have also been targets of aggressive birth control policies, including the use of Depo-Provera and Norplant, long-acting contraceptives that can pose dangers to many women.<sup>126</sup> Indeed, it seems that the unofficial policy of the federal government has been to *stop* Native women from reproducing. As noted in the early passages of this Article, Native women today experience significantly higher rates of pre-term births and infant mortality, and are less likely to access pre-natal care during pregnancy.<sup>127</sup> Changes to federal laws and policies could be informed by IFLT, and perhaps there will be a need for litigation at some point to ensure that Native women have access to the resources necessary to bring healthy lives into the world.

The inverse of this battle is more controversial—namely, that Native women lack access to abortion services when they need to terminate pregnancies, due to the prohibition on using federal dollars to fund abortion services.<sup>128</sup> To be sure, abortion is as contentious within Native communities as it is within the rest of the United States, particularly given the fraught history of sterilization abuse and widespread child removal that has taken place in our communities.<sup>129</sup> Nonetheless, as a Native feminist who supports the right to abortion, I believe we must do more to support the full range of reproductive choices and options to Native women. IHS, as a federally funded agency, cannot provide abortion services for Native women (with limited exceptions for life of the woman, rape, and incest) because the so-called “Hyde Amendment” prohibits the use of federal funding for abortion services. The Hyde Amendment was first passed in 1976, and was upheld in *Harris v. McRae* in 1980.<sup>130</sup> However, no arguments were proffered in *McRae* for Native women.<sup>131</sup> Moreover, there is no comprehensive contemporary movement to repeal the Hyde Amendment in the Native legal community, despite evidence that Hyde Amendment, by prohibiting abortion, puts Native women’s lives and bodies at risk. The Native American Women’s Health Education and Resource Center (NAWHERC), a Native owned-and-

125. See, e.g., Brint Dillingham, *Indian Women and IHS Sterilization Practices*, 3 AM. INDIAN J. 27 (1977); Jane Lawrence, *The Indian Health Service and the Sterilization of Native American Women*, 24 AM. INDIAN Q. 400 (2000); Linda Robyn, *Sterilization of American Indian Women Revisited: Another Attempt to Solve the “Indian Problem,”* in CRIME AND SOCIAL JUSTICE IN INDIAN COUNTRY 39-53 (Marianne O. Nielsen & Karen Jarratt-Snyder eds., 2018).

126. Jael Silliman et al., *UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE* 119 (2004).

127. See *supra* notes 13-18 and accompanying text.

128. This law is known as the “Hyde Amendment.” Pub. L. 96-123, § 109, 93 Stat. 926.

129. See, e.g., Carly Thomsen, *From Refusing Stigmatization toward Celebration: New Directions for Reproductive Justice Activism*, 39 FEM. STUD. 149, 151-53 (2013) (chronicling the story of Cecilia Fire Thunder, the first contemporary female president of the Oglala Lakota Nation, who was impeached because of her support for abortion rights).

130. 448 U.S. 297 (1980).

131. A word search of the amicus briefs and the transcript of oral arguments yielded no mention of Native women, tribal governments, or Indian Health Service.

operated non-profit organization near the Yankton Sioux Indian Reservation in South Dakota has been one of the only Native women's entities to address reproductive justice in a sustained fashion.<sup>132</sup> They have raised national concerns about the lack of access to sexual assault forensic exams and Plan B within the Indian Health Service systems. They remain one of the only Native organizations that regularly call for a repeal of the Hyde Amendment. The mainstream efforts to repeal the Hyde Amendment are spearheaded by a nonprofit organization called All Above All, and there are several mentions of Native women in the materials on their webpage.<sup>133</sup>

IFLT is also a useful framework for thinking about environmental law. Gender intersects with issues of environmental protection in several ways. Native women have unique vested interests in tribal environmental law and have been at the forefront of major activism efforts such as the Idle No More movement in Canada and the NoDAPL efforts at Standing Rock.<sup>134</sup> There is a gendered nature to environmental degradation for many tribal cultures, which perceive the earth as feminine.<sup>135</sup> In a practical sense, the oil extraction projects of major corporations have wrought unique health issues for Native women who have discovered, for example, toxins in their breast milk.<sup>136</sup> In addition, extractive projects such as fracking have wreaked havoc on the safety of Native women and children through the creation of “man camps”—temporary housing encampments for non-Native pipeline workers that are set up in or adjacent to tribal lands.<sup>137</sup> These “man camps” have resulted in untold tragedy in many tribal

132. *Reproductive Justice Program*, NATIVE AM. WOMEN'S HEALTH EDUC. RESOURCE CTR., <http://www.nativeshop.org/programs/reproductive-justice.html> [<https://perma.cc/P9AF-SPJM>].

133. *Search Results for “Native”*, ALL ABOVE ALL, <https://allaboveall.org/?s=Native> [<https://perma.cc/NLD9-FH4T>] (showing that a search for “Native” on the website yielded over a dozen hits).

134. See, e.g., Kim TallBear, *Badass (Indigenous) Women Caretake Relations: #NoDAPL, #IdleNoMore, #BlackLivesMatter, Cultural Anthropology*, SOC'Y FOR CULTURAL ANTHROPOLOGY (2016), <https://culanth.org/fieldsights/badass-indigenous-women-caretake-relations-no-dapl-idle-no-more-black-lives-matter> [<https://perma.cc/7KWW-LDY4>] (“Women of the Oceti Sakowin, or the Seven Council Fires, are at the center of the movement at Standing Rock, widely dubbed #NoDAPL.”); Meredith Privott, *An Ethos of Responsibility and Indigenous Women Water Protectors in the #NoDAPL Movement*, 43 AM. INDIAN Q. 74, 76 (2019) (“[T]he voices of Indigenous women water protectors (of Standing Rock and beyond) figure prominently, as women water protectors undeniably played a central role in shaping and forwarding this movement.”).

135. Sarah Deer & Elizabeth Ann Kronk Warner, *Raping Indian Country*, 38 COLUM. J. GEND. & L. (forthcoming 2019) (“Because many tribal cultures ascribe important feminine qualities to the land, the mistreatment of “mother earth” carries important gendered consequences.”).

136. See, e.g., Bruce E. Johansen, *The Inuit's Struggle with Dioxins and Other Organic Pollutants*, 26 AM. INDIAN Q. 479, 479 (2002) (“Thus the Arctic, which seems so clean on the surface, has become one of the most contaminated places on Earth—a place where Inuit mothers think twice before breast-feeding their babies because high levels of dioxins and other industrial chemicals are being detected in their breast milk”); Janice Wormworth, *Toxins and Tradition: The Impact of Food-Chain Contamination on the Inuit of Northern Quebec*, 152 CAN. MED. ASSOC. J. 1237, 1237 (1995) (“The levels of polychlorinated biphenyls (PCBs) he found [in Indigenous mothers' breast milk] were five times greater than those among Caucasian women living in southern Quebec.”).

137. See, e.g., Kathleen Finn et al., *Responsible Resource Development and Prevention of Sex Trafficking: Safeguarding Native Women and Children on the Fort Berthold Reservation*, 40 HARV. J.L.

communities because of the high rates of sexual violence and sex trafficking that accompany them.<sup>138</sup>

Thus far, an opportunity has not presented itself for bringing a gender-conscious argument to bear in the environmental context, but that most certainly will change in the coming years as more becomes known as to how environment degradation has unique gendered outcomes.

## II. TRIBAL LAW

In this section, I analyze an IFLT approach to tribal law (as opposed to Federal Indian law). To determine how to bring feminism into conversation with tribal-centric law, we must consider how contemporary Native nations are situated with regard to gender and sexuality, a nearly impossible task when considering the diversity of tribal cultures. While many tribal nations emanate from cultures that are matrilineal and matrilineal, it is clear that some tribal nations operate with patriarchal principles that are products of long-term assimilation with American systems, as discussed earlier in this Article. We cannot assume that tribal justice systems have adequately addressed colonial patriarchy.

Historically, tribal nations that wished to operate legal systems that would be recognized by the federal government were nearly always encouraged to build a tribal court based on Western legal principles, to the detriment of traditional tribal dispute processes.<sup>139</sup> As some tribal legal systems became assimilated, they adopted the trappings of Western law and order, a system that is grounded in gender hierarchy.<sup>140</sup> Thus, attorneys who practice within the confines of tribal law also must be thoughtful about the extent to which assimilated court systems have ignored gender as a central component of analysis. Because most tribal legal systems have been heavily influenced by American culture, we see the same challenges with assumptions about gender-neutral laws. Assimilated legal systems adopted much of the framework and philosophy of the American systems of governance, including exact language in many cases.<sup>141</sup> And, of

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& GENDER 1, 2 (2017) (“[T]he influx of well-paid male oil and gas workers, living in temporary housing often referred to as “man camps,” has coincided with a disturbing increase in sex trafficking of Native women.”).

138. *Id.* at 2-3.

139. Kiowa legal scholar Kirke Kickingbird remarks that “European colonists . . . were unwilling or unable to leave the Indian systems of justice intact. The result was a continuing erosion of Indian control over their own institutions.” Kirke Kickingbird, *In Our Image...After Our Likeness: The Drive for Assimilation of Indian Court Systems*, 13 AM. CRIM. LAW REV. 675, 680 (1976).

140. FEMINIST JUDGMENTS, *supra* note 68, at 4 (“[W]hat passes for neutral law making and objective legal reasoning is often bound up in traditional assumptions and power hierarchies.”).

141. Many contemporary tribal courts are outgrowths of the first courts established on reservations by the Bureau of Indian Affairs during the late nineteenth century—courts that were designed to assimilate Native people into a western, Anglo-American legal system. See Julia M Bedell, *The Fairness of Tribal Court Juries and Non-Indian Defendants*, 41 AM. INDIAN LAW REV. 253, 257-258 (2017).

course, the early American legal system is hardly the starting point for a government interested in gender equity in society. In that sense, re-infusing gender and sexuality into our tribal legal systems moves us closer to a decolonizing approach to tribal legal matters.

In this Part, I argue that issues of gender and sexuality can and should be considered in the context of tribal court litigation and tribal statutory development. Ann Tweedy's excellent 2010 article, *Sex Discrimination Under Tribal Law*, takes a comprehensive look at sex discrimination prohibitions in tribal constitutions, statutes, cases, and policies.<sup>142</sup> It is important to note that the Indian Civil Rights Act (ICRA) currently allows tribal governments and courts to make gender differentiations under certain circumstances. ICRA imposes certain language from the federal constitution onto tribal governments, including the following passage, which mirrors language from the Fourteenth Amendment: “[No Indian tribe shall] deny to any person within its jurisdiction the *equal protection* of its laws or deprive any person of liberty or property without *due process* of law.”<sup>143</sup> Under most readings of Federal Indian law, tribal courts are free to interpret that equal protection and due process language in ways that may differ from the interpretation of the federal Constitution by the federal judiciary. Still, many tribal courts do not deviate significantly from federal constitutional law in interpreting ICRA language.

In federal courts, of course, the equal protection provision of the Fourteenth Amendment was not applied to gender discrimination until the late twentieth century, and gender discrimination has never seen more than “intermediate scrutiny”—a concept that is not altogether clear given the few gender discrimination cases that reach the highest Court. In *United States v. Virginia*, perhaps the most “feminist” decision ever issued by the Supreme Court, Justice Ginsburg stopped short of requiring “strict scrutiny” in gender distinction cases, writing that gender classifications must be given “heightened scrutiny.”<sup>144</sup>

Many tribal codes indicate that custom and tradition are viable laws,<sup>145</sup> yet we do not often see much engagement with culture and tradition, at least in the appellate courts of tribes that publish their opinions. There are vital lessons embedded within many tribal legal concepts, and gender can play a role in many different types of cases.

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142. Tweedy, *Sex Discrimination Under Tribal Law*, *supra* note 60.

143. 25 U.S.C. § 1302(a)(8) (emphasis added).

144. *United States v. Virginia*, 518 U.S. 515, 555 (1996).

145. Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 248 (1994).

### A. *Gender in Tribal Court Litigation*

For the past several years, I have collected an assortment of tribal court opinions that engage with gender as a legal category. Because most tribal appellate cases are not readily accessible,<sup>146</sup> these cases are not necessarily representative of how all tribal courts consider gender. I am currently working with an inventory of approximately twenty tribal court cases that engage with gender in a meaningful way, including in dicta, in an effort to widen the scope. I gathered this corpus of decisions by performing keyword searches in various tribal court databases, including gendered words such as “woman” and “matrilineal” and selecting cases where tribal judges and justices had to consider the role of gender in their analyses.

This collection includes both district level opinions as well as appellate level opinions. Almost all of the decisions are cases of first impression, meaning that there is not a corpus of cases where the tribal court had already considered gendered issues in this context. I describe some of these decisions below, not to explicate any particular patterns but rather as a sample of different ways in which tribal law and gender intersect. It should also be noted that these cases are not binding authority on the development of laws for other tribal nations (although they could be cited to as persuasive authority for other tribal courts, if relevant).

#### 1. *Hepler v. Perkins*

*Hepler v. Perkins*<sup>147</sup> is a relatively early case that arose out of southeastern Alaska. In resolving a custody dispute between a non-Indian father and a Tlingit mother, the tribal court referred a question of customary law to a Court of Elders, who returned this statement on matrilineal clan membership. “Children of female members of a clan are children of the clan regardless of where or under what circumstances they may be found. Clan membership does not wash off, nor can such membership be removed by any force, or any distance, or over time. Clan membership continues even in death, and in re-birth it is renewed.”<sup>148</sup>

By codifying this statement into case law, matrilineal clanship is seen as the traditional principle that informed the tribal court’s decision that the Sitka Tribe has jurisdiction over the children of female family members regardless of where they reside.

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146. See Bonnie Shucha, *Whatever Tribal Precedent There May Be: The (Un)Availability of Tribal Law*, 106 LAW. LIBR. J. 199, 199 (2014) (“For a majority of the 566 federally recognized tribes in the United States today, no law has been published.”).

147. 13 Indian L. Rep. 6011 (Sitka Cmty. Ass’n Tr. Ct., Apr. 7, 1986).

148. *Id.* at 6016.

## 2. Naize v. Naize

The Navajo Nation Supreme Court is perhaps the most well-known tribal court for drawing upon customary principles in deciding contemporary legal cases.<sup>149</sup> Here, I explore two cases that concern gender roles. The first, *Naize v. Naize*,<sup>150</sup> is a 1997 divorce case. The appeal considered spousal maintenance ordered by the trial court. The former husband had been ordered to pay his very ill former spouse \$200 per month for three years.<sup>151</sup> The tribal court had also ordered him to provide a truckload of wood and coal during the winter months for an indefinite period.<sup>152</sup>

While there was no spousal maintenance explicitly called for in the Navajo statutory code, the Court determined that Navajo courts can look to “traditional Navajo teachings” that one should not “throw their family away” to justify the order of spousal maintenance. The Court reasoned that

traditional Navajo society is matrilineal and matrilocal, which obligates a man upon marriage to move to his wife’s residence. The property the couple bring to the marriage mingle and through their joint labors create a stable and permanent home for themselves and their children. The wife’s immediate and extended family benefit directly and indirectly, in numerous ways, from the marriage. If the marriage does not survive, customary law directs the man to leave with his personal possessions (including his horse and riding gear, clothes, and religious items) and the rest of the marital property stays with the wife and children at their residence for their support and maintenance.<sup>153</sup>

With this understanding, the Court upheld the award of monetary payments after analyzing the significant hardships faced by the wife.<sup>154</sup> Interestingly, the Court went on to strike down the order of indefinite supply of winter wood and coal, stating that another tradition of Navajo people is that there must be finality in divorce cases so that harmony can be restored.<sup>155</sup>

## 3. Riggs v. Attakai

In *Riggs v. Estate of Attakai*,<sup>156</sup> the Navajo Court was called upon to determine the appropriate party to hold a leasing permit for sheep grazing, and it

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149. See generally RAYMOND D. AUSTIN, *NAVAJO COURTS AND NAVAJO COMMON LAW* (2009).

150. 1 Am. Tribal Law 445 (1997).

151. *Id.* at 447.

152. *Id.* at 447.

153. *Id.* at 449.

154. *Id.* at 449-50.

155. *Id.* at 450.

156. 7 Am. Tribal Law 534, No. SC-CV-39-04, 2007 WL 5886339 (Navajo June 13, 2007).

ultimately codified matrilineal land tenure in its decision.<sup>157</sup> After exploring a gender-neutral five-factor test for awarding grazing permits that was established by a 1991 Navajo case, the *Riggs* Court held that the five-factor test should be applied

consistent with the Navajo Fundamental Law which defines the role and authority of Diné women in our society. Traditionally, women are central to the home and land base. They are the vein of the clan line. The clan line typically maintains a land base upon which the clan lives, uses the land for grazing and agricultural purposes and maintains the land for medicinal and ceremonial purposes.<sup>158</sup>

Again, it should be noted that this a case of a Navajo court interpreting Navajo law, and perhaps another tribal court would analyze the question differently in light of different tribal traditional practice. But we should also notice what the Court is doing here—it is pushing back against the patriarchal history of westernized jurisprudence by clearly laying out the importance of Navajo women to tribal culture. This doctrine may become relevant in a future case that considers protections for Native women and girls.

#### 4. *The Bigfire Cases*

The Supreme Court of the Winnebago Tribe of Nebraska consolidated a series of criminal cases implicating gender and equal protection in 1998.<sup>159</sup> The Winnebago Tribe prosecuted three male teenagers under a gender-neutral statutory rape tribal statute provision that stated that “any person who subjects an unemancipated minor to sexual penetration is guilty of sexual assault in the second degree.” Two of the males were 17 and their female victims were 12. In the third case, the male was 15 and the female victim was 13. The defendants alleged that the victims consented to the sexual penetration and raised equal protection arguments because the underage females were not prosecuted.<sup>160</sup> The defendants relied on federal case law to support their position.

The legal question presented by these cases was whether it is impermissible to prosecute only boys and not girls under the sexual assault statute. The Winnebago court engaged with custom and tradition to side with the prosecution. The Court begins by referencing the work of an ethnologist who published the following tribal teaching in 1923, which says:

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157. *Id.* at 536. (“Navajos maintain and carry on the custom that the maternal clan maintains traditional grazing and farming areas.”).

158. *Id.* at 536.

159. *Winnebago Tribe of Neb. v. Hugh Bigfire*, 25 Indian L. Rep. 6229, 6229 (Winn. Sup. Ct. 1998).

160. *Id.* at 6230.

My son, never abuse your wife. The women are sacred. If you abuse your wife and make her life miserable, you will die early. Our grandmother, the earth, is a woman, and in mistreating your wife you will be mistreating her. Most assuredly will you be abusing our grandmother if you act thus. And as it is she that is taking care of us you will really be killing yourself by such behavior.<sup>161</sup>

The Court then explains how this traditional teaching can inform the legal analysis, noting that:

This quotation nicely summarizes Ho-Chunk thinking on gender relationships. Gender differences constitute a natural part of life. Indeed, the Earth, the Grandmother who gives life, is female. Thus, gender role differentiation and gender differences in legal or customary treatment related to those roles are natural and expected. In Ho-Chunk culture, therefore, gender differences or disparities in treatment do not signal hierarchy, lack of respect or invidious discrimination, but, rather, are a respected and natural part of life. They are, indeed, part of the way that the Winnebago world view brings meaning to life.<sup>162</sup>

In considering these traditional tenets about gender in the Ho-Chunk culture, the Court applies strict scrutiny to gender discrimination and ultimately concludes that the Tribe had a compelling interest for gender discrimination in this case.

##### 5. *Casteel v. Cherokee Nation*

Not all tribal court engagement with gendered questions is necessarily positive. *Casteel v. Cherokee Nation*<sup>163</sup> is the only tribal appellate case I have discovered where there is clear indication that a litigant made an intentional and direct feminist argument to a tribal judiciary. It was rejected soundly. The case itself involved the termination of an employee for sexual harassment. The Cherokee Judicial Appeals Tribunal<sup>164</sup> determined that the Tribe failed to meet its burden of proof—that is, they did not establish a pattern of behavior necessary to terminate the employment.

However, it is apparent that the attorney for the Cherokee Nation (a woman) objected to the fact that the judicial panel was comprised of three men, a notion that was soundly rejected by the Tribunal, which stated:

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161. *Id.* at 6232 (citing PAUL RADIN, *THE WINNEBAGO TRIBE* 122 (1923)).

162. *Bigfire*, 25 Indian L. Rep. at 6232.

163. *Casteel v. Cherokee Nation*, 5 Okla. Trib. 147 (1996).

164. Today, this is known as the Cherokee Supreme Court.

We further reject the statement made by . . . counsel for the Cherokee Nation . . . that this Court, being composed of three male judges, is incapable of applying the reasonable person standard in this case. Bias, no matter how well meaning, has no place in the courtroom. [The attorney] is hereby admonished to be more respectful when addressing this Court in the future.<sup>165</sup>

Although I do not have access to the transcript of the oral arguments and thus cannot assess exactly what the attorney argued, it is clear that this particular tribal court was opposed to considering how the gender makeup of the court might influence its decision. This case serves as a reminder that arguments informed by IFLT may not be successful in tribal court, and as a reminder that we must not romanticize the idea of bringing gendered issues to tribal court.

### *B. Tribal Statutory Development*

In this Section, I consider several ways that IFLT can inform the development of contemporary gender-conscious tribal statutory law. This Section of the Article is perhaps the most daunting, because as an advocate for tribal political and legal independence, I do not seek to tell tribal nations how to govern themselves. Instead, I am interested in encouraging tribal leaders to consult with the women and Two-Spirit people of their nations before passing laws that may affect or endanger them.

I encourage tribal attorneys and legislators to consult with local women before passing laws that criminalize their behavior. For example, some tribal nations have passed laws which allow tribal prosecutors to file criminal child abuse or neglect charges against pregnant women who use drugs or alcohol during pregnancy.<sup>166</sup> There is ample room for debate on the efficacy of this policy, and certainly sound minds can disagree, but my concern is whether the women of those particular communities have had a chance to weigh in on something as significant as criminalizing behavior during pregnancy. If possible, tribal legislatures and tribal litigants should consult female elders and leaders in the community about the best way to respond to the crisis of infants born with drugs in their system or other related concerns. Ideally, these female elders would be able to offer insight as to how traditional principles and tenets inform contemporary practices. Perhaps tribal nations could consider developing local

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165. 5 Okla. Trib. at 3.

166. See, e.g., Standing Rock Sioux Tribal Code of Justice Sec. 4-1204 (Child Neglect); White Mountain Apache Criminal Code, Sec. 2.82 (Endangering an Unborn Child); Reno-Sparks Indian Community Law and Order Code, Sec. 4-5-310 (Fetal Endangerment); Shoalwater Bay Tribe Code of Laws, Sec. 2.02.09 (Endangering a Fetus).

women's task forces, which would be able to assess the needs of women in the community so that the tribal nation's legislature can be better informed.

Gendered issues arise in a variety of different ways in tribal codes. Tribal nations could have the best laws in the world when it comes to addressing sexism. Tribal governments may wish to revisit their laws on divorce, custody, extended family, sexual violence, juvenile justice—all places where Native conceptions of gender might be relevant. Tribal nations can ensure, through statutory reform, that women and LGBTQ+ employees have expansive remedies for discriminatory treatment. Tribal governments might consider developing stricter laws and policies on sex trafficking, the establishment of “man camps,” and other efforts to enhance the safety of the communities. Even in those cases where the tribal nation is not allowed to prosecute non-Indians, tribal governments could amplify civil remedies for victims, including expansive protection orders and civil tort remedies. Tribal governments could set training requirements for first responders and other tribal officials that may come into contact with victims of gender-based violence. They may also strengthen employment protections for victims of violence who might miss work due to the physical, psychological, and legal barriers. There is no limit to the way that sovereign nations can imagine and explicate a system that seeks to end gendered oppression.

### III. GENDER EQUITY IN LEGAL EDUCATION & PRACTICE

If IFLT is to have “legs” and begin to be used as a tool in both Federal Indian law and tribal law, we need to cultivate a new generation of attorneys, scholars, and activists who can begin the development of a unique approach to jurisprudence when it comes to tribal governments. Unfortunately, Native women have been absent from the legal academy and nearly absent from legal scholarship in the United States. The earliest law review article about Native women I have found in my research was published in the *American Indian Law Review* in 1975.<sup>167</sup> The first law review article about violence against Native women was not published until 1993.<sup>168</sup> Even in 2019, there are still only a handful of law review articles that focus on Native women. Whereas there has been an explosion of Native feminist interventions in other scholarly disciplines such as history, sociology and indigenous studies,<sup>169</sup> there is very little Native feminist intervention in the law.

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167. Bysiewicz & Van De Mark, *The Legal Status of the Dakota Indian Woman*, *supra* note 45.

168. James W. Zion & Elsie B. Zion, *Hozho' Sokee' – Stay Together Nicely: Domestic Violence Under Navajo Common Law*, 25 ARIZ. ST. L.J. 407 (1993).

169. Several interdisciplinary anthologies about Native feminisms have been published in the last 10 years. *See, e.g.*, INDIGENOUS WOMEN AND FEMINISM, *supra* note 29; CRITICALLY SOVEREIGN, *supra* note 29.

To cultivate future feminist interventions in Indian law, I contend that we must do more to recruit and support Native women law students, and, ultimately, more Native women law professors. While Native men can certainly advance the cause of Native women, it is important that feminist interventions are backed by Native women attorneys who feel confident about advancing legal arguments on behalf of other Native women. There are very few Native women lawyers in the United States, and only a handful of Native women teaching in law schools.<sup>170</sup> This must change if we are to see significant shifts in the way that Native women can inform and influence the practice of Indian law in the United States. I believe that IFLT should begin to be taught in the law school curriculum, including in Indian law, feminist jurisprudence, and critical legal studies.

Unfortunately, Native women attorneys also experience racism and sexism in the legal workplace—both in the private and public sectors. For the past 20 years, I have heard anecdotal stories from other Native women attorneys about discrimination and abuse in the workplace. But there was no way of estimating the prevalence of discrimination because, until 2015, there was no comprehensive study of Native attorneys in the United States that asked such questions. The National Native American Bar Association (NNABA) commissioned such a study and published the results in 2015.<sup>171</sup> Over 500 attorneys responded to the study, and the results were illuminating. The study reveals that Native women attorneys suffer an unacceptable rate of gender-related discrimination in the profession. For example, nearly 38 percent of Native women respondents said they have experienced demeaning comments or harassment based on gender in the workplace.<sup>172</sup> Thirty-five percent reported that they had been discriminated based on gender<sup>173</sup> and nearly thirty percent reported that they had been denied appropriate compensation due to gender.<sup>174</sup> Of those Native women who had left the legal profession, 33 percent did so in part because of gender bias.<sup>175</sup> The study also revealed that Native women were mistreated by Native men in the legal workplace, revealing that the problem goes beyond non-Indian discrimination.<sup>176</sup>

Native women working for the federal government have also suffered from discrimination. A 2017 survey of Bureau of Indian Affairs (BIA) employees

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170. According to one article, as of 2008 there were only 21 Native American women in legal academia in the United States. Meera E Deo, *Looking Forward to Diversity in Legal Academia*, 29 BERKELEY J. GENDER L. & JUST. 352, 357 (2014).

171. NATIONAL NATIVE AMERICAN BAR ASSOCIATION, *THE PURSUIT OF INCLUSION: AN IN-DEPTH EXPLORATION OF THE EXPERIENCES AND PERSPECTIVES OF NATIVE AMERICAN ATTORNEYS IN THE LEGAL PROFESSION* (2015), [http://www.nativeamericanbar.org/wp-content/uploads/2014/01/2015-02-11-final-NNABA\\_report\\_pp6.pdf](http://www.nativeamericanbar.org/wp-content/uploads/2014/01/2015-02-11-final-NNABA_report_pp6.pdf) [https://perma.cc/8HZ6-EZBP].

172. *Id.* at 36.

173. *Id.* at 36.

174. *Id.* at 37.

175. *Id.* at 39.

176. *Id.* at 32.

showed 40 percent had experienced some form of harassment—primarily racial and sexual—in their workplaces in the past 12 months.<sup>177</sup> In fact, BIA suffers from the highest rate of harassment within the Department of Interior.<sup>178</sup> The perpetrators were typically older males.<sup>179</sup>

In the past two years, several prominent officials within the BIA have been investigated for sexual harassment. One BIA supervisor in the Southwest regional office repeatedly sexually harassed women—one subordinate said that he “pulled down the front of her shirt to ask if she was wearing a bra” and another subordinate reported that he “put his hand up her skirt.”<sup>180</sup> Managers were informed about his behavior but did not act immediately.<sup>181</sup> In April 2018, BIA Director Bryan Rice resigned abruptly after reports surfaced that he had harassed and bullied women subordinates.<sup>182</sup> The problems with sexist culture in the federal government are not limited to the BIA. During the Obama administration, William Mendoza, who was the director of the White House Initiative on American Indian and Alaska Native Education, resigned after pleading guilty to attempted voyeurism after video footage showed him taking “up skirt” photos on the Washington, D.C. Metro.<sup>183</sup>

A series of recent investigative reports on sexual harassment in the lives of Native women uncovered a plethora of stories about the behavior of Native men in high profile positions.<sup>184</sup> While not specific to the attorney experience, these

177. CFI GROUP, SUPPLEMENTAL STATISTICAL REPORT: BUREAU OF INDIAN AFFAIRS (BIA) WORK ENVIRONMENT SURVEY 2 (2017), [https://www.doi.gov/sites/doi.gov/files/uploads/bia\\_wes\\_supplemental\\_statistical\\_report.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/bia_wes_supplemental_statistical_report.pdf) [<https://perma.cc/LE9J-72B5>].

178. *Landmark Study Finds High Rate of Workplace Harassment at Bureau of Indian Affairs*, INDIANZ.COM (Dec. 14, 2017), <https://www.indianz.com/News/2017/12/14/landmark-study-finds-high-rate-of-workpl.asp> [<https://perma.cc/YD8A-S94E>].

179. Anna V. Smith, *Harassment pervades the Bureau of Indian Affairs*, HIGH COUNTRY NEWS (Mar. 13, 2018), <https://www.hcn.org/issues/50.6/tribal-affairs-harassment-pervades-interiors-bureau-of-indian-affairs> [<https://perma.cc/9RPH-3MH8>].

180. Wills Robinson, “*Predator*” Interior Department Official Told a Subordinate He “Wanted to Get Naked and Show Her What It’s Like to be with a “Real Man” and Told Another She Wasn’t Too Old to be “Spanked Over His Knee,” DAILY MAIL (Dec. 13, 2018), <https://www.dailymail.co.uk/news/article-6484087/Interior-Department-official-accused-predator-harassed-subordinates.html> [<https://perma.cc/8F38-RC7B>].

181. *Id.* See also *Insufficient Actions by BIA Management and Human Resource Officials in Response to Sexual Harassment Reports*, OFF. OF INSPECTOR GEN. (Sept. 18, 2017), <https://www.doi.gov/reports/insufficient-actions-bia-management-and-human-resource-officials-response-sexual-harassment> [<https://perma.cc/V46N-V9FE>].

182. *Bureau of Indian Affairs Director Resigned After Harassment Claim: Report*, DAILY BEAST (May 2, 2018), <https://www.thedailybeast.com/bureau-of-indian-affairs-director-resigned-after-harassment-claim-report> [<https://perma.cc/MPE7-WBHU?type=image>]. See also Anna V. Smith, *Bureau of Indian Affairs Director Resigned*, HIGH COUNTRY NEWS (Apr. 26, 2018), <https://www.hcn.org/articles/tribal-affairs-bureau-of-indian-affairs-director-resigns> [<https://perma.cc/R9Z-CMV6>].

183. Wills Robinson, *Surveillance Footage Shows One of President Obama’s Senior Officials Following a Woman around DC Metro Station and Taking a Picture Up her Skirt with His Cell Phone*, DAILY MAIL (July 27, 2018), <https://www.dailymail.co.uk/news/article-5997025/Obama-advisor-William-Mendoza-seen-taking-picture-womans-skirt-DC-Metro.html> [<https://perma.cc/C4RX-F7VN>].

184. Mary Annette Pember, *#MeToo in Indian Country; ‘We Don’t Talk About this Enough,’* INDIAN COUNTRY TODAY (May 28, 2019), <https://newsmaven.io/indiancountrytoday/news/metoo-in-indian-country-we-don-t-talk-about-this-enough-oXkstdPmDk2-zSXoDXZSZQ/> [<https://perma.cc/XX>].

stories indicate that many Native women experience unacceptable rates of harassment in the workplace, often perpetrated by powerful and respected men in their communities. These survivors of harassment interviewed for the series of articles “shared an overwhelming fear about losing their jobs, the chances for future employment, housing, social services for themselves and their families as well as the love, respect and support from close knit Native communities.”<sup>185</sup>

These levels of sexism, harassment, and assault cannot continue to be part of the lives of Native women attorneys and government workers. In the era of the #MeToo movement, the Indian Bar must do better to address a culture of toxic masculinity that seems to have permeated some of the most important workplaces in Indian law today.

### CONCLUSION

This Article has focused primarily on sex and sexism as a key intervention in IFLT, but we also must remember that issues of sexuality and gender identity are also impacted by legal hegemony and settler colonialism. Because these issues deserve full attention, in future pieces, I will strive to consider how homophobia and other forms of discrimination against Two-Spirit people can be addressed through IFLT.

The safety and well-being of tribal nations depends on the safety and well-being of Native women. Patriarchy and settler colonialism have taken their toll on the lives of Native people and IFLT can offer new, innovative ways of thinking about gender liberation in the context of tribal sovereignty. In the *Dollar General* brief, Mary Kathryn Nagle and I used the following traditional quotation from the Cheyenne to open our argument. I use it now in closing.

“The Nation shall be strong so long as the hearts of the women are not on the ground.”

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V5-R4N6]; Mary Annette Pember, *#MeToo What Happens When Native Women Come Forward with Harassment Complaints*, INDIAN COUNTRY TODAY (May 29, 2019), <https://newsmaven.io/indiancountrytoday/news/metoo-what-happens-when-native-women-come-forward-with-harassment-complaints-6W2mE2aNgE6bJw4m84nHTg/> [https://perma.cc/8GYK-7YYPG]; Mary Annette Pember, *#MeToo. Toxic Masculinity; Addressing a Terrible Truth*, INDIAN COUNTRY TODAY (May 30, 2019), <https://newsmaven.io/indiancountrytoday/news/metoo-toxic-masculinity-addressing-a-terrible-truth-RuptdDeOa0atVczu7G-WCA/> [https://perma.cc/C9LH-LWZ9].

185. Pember, *#MeToo in Indian Country*, *supra* note 184.