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## Two Countries in Crisis: Man Camps and the Nightmare of Non-Indigenous Criminal Jurisdiction in the United States and Canada

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## Notes:

# Two Countries in Crisis: Man Camps and the Nightmare of Non-Indigenous Criminal Jurisdiction in the United States and Canada

### ABSTRACT

*Thousands of Indigenous women and girls have gone missing or have been found murdered across the United States and Canada; these disappearances and killings are so frequent and widespread that they have become known as the Missing and Murdered Indigenous Women Crisis (MMIW Crisis). Indigenous communities in both countries often lack the jurisdiction to prosecute violent crimes committed by non-Indigenous offenders against Indigenous victims on Indigenous land. Extractive industries—businesses that establish natural resource extraction projects—aggravate the problem by establishing temporary housing for large numbers of non-Indigenous, primarily male workers on or around Indigenous land (“man camps”). Violent crimes against Indigenous communities around extractive industry projects have increased with the establishment of man camps while the current legal systems leave Indigenous communities vulnerable against this clear threat. Both the United States and Canada have endorsed international declarations of Indigenous rights, agreeing to protect Indigenous communities from violence, yet the MMIW Crisis in both countries continues. This Note first argues that both the United States and Canada can best further their commitments to international Indigenous rights while also combatting the MMIW Crisis by allowing Indigenous communities to exercise full criminal jurisdiction over non-Indigenous assailants of Indigenous victims on Indigenous lands. This Note then argues that, until full criminal jurisdiction over non-Indigenous offenders is realized, the United States and Canada can help further Indigenous international rights by providing extractive industries with financial incentives to address their role in enabling the MMIW Crisis.*

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## I. INTRODUCTION

*“No one should suffer the grief of having a sister, mother or daughter suddenly disappear never to be seen again. No one should have to live in fear that they will be the next woman or girl to go missing.”*<sup>1</sup>

Olivia Lone Bear, a citizen of the Fort Berthold Reservation in North Dakota, went missing in 2017.<sup>2</sup> Her family reported her disappearance to local law enforcement soon after she was last seen, but she was not found until nine months later.<sup>3</sup> At the search’s culmination, it was not law enforcement that found her, but rather a group of volunteers that discovered Olivia’s body in a truck at the bottom of a lake that authorities had already searched.<sup>4</sup> Olivia’s loved ones blamed the delay and necessary involvement of volunteers on the lackluster response of law enforcement.<sup>5</sup> Law enforcement agents, in turn, blamed the legal framework that constrained them.<sup>6</sup> While Olivia’s remains have been recovered, her case remains unsolved.<sup>7</sup>

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1. Amnesty Int’l, *Stolen Sisters: A Human Rights Response to Discrimination and Violence Against Indigenous Women in Canada*, at 35, AI Index AMR 20/003/2004 (Oct. 2004), <https://www.amnesty.org/en/documents/amr20/003/2004/en/> [<https://perma.cc/EB2U-KUB3>] (archived Sept. 23, 2022).

2. *Media Advisory – U.S. Attorney and FBI Leadership Brief Family of Olivia Lone Bear on Death Investigation*, DEP’T OF JUST. (Nov. 20, 2019), <https://www.justice.gov/usao-nd/pr/media-advisory-us-attorney-and-fbi-leadership-brief-family-olivia-lone-bear-death> [<https://perma.cc/B2NF-9GJP>] (archived Sept. 12, 2022).

3. See Jessica Lussenhop, *The Amateur Sleuth Who Searched for a Body – and Found One*, BBC NEWS (Mar. 25, 2019), <https://www.bbc.com/news/world-us-canada-47627701> [<https://perma.cc/2MF2-2Y5G>] (archived Sept. 12, 2022).

4. See *id.*

5. See *id.*

6. See *id.*

7. Joe Skurzewski, *Two Years Later, Feds Looking for Leads into Death, Disappearance of Olivia Lone Bear*, KYFR (July 31, 2020, 6:55 PM), <https://www.kfyrtv.com/2020/07/31/two-years-later-feds-looking-for-leads-into-death-disappearance-of-olivia-lone-bear/> [<https://perma.cc/VB3T-7AN3>] (archived Sept. 12, 2022).

In the United States, thousands of Indigenous Peoples<sup>8</sup> are missing or murdered.<sup>9</sup> A deficiency of data on the crisis makes completely accurate statistics impossible, but available reports reveal that

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8. Several terms are used to refer to Indigenous communities in a very general sense, with some of the most prevalent including “Indian,” “American,” “American Indian,” and “Indigenous Peoples”; none of these terms are universally accepted as a definitive title for Indigenous communities, nor are any of them without criticism. See Michael Yellow Bird, *What We Want to Be Called: Indigenous Peoples’ Perspectives on Racial and Ethnic Identity Labels*, 23 AM. INDIAN QUESTIONS 1, 1–3 (1999); WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR 14 (2014).

“Indian” is a term firmly established in United States and Canadian legal systems. The United States’ foundational legal document refers to Indigenous Peoples solely by the term. See U.S. CONST. art. I, §§ 2, 8; *id.* art. XIV, § 2. Canada’s Constitution also refers to Indigenous Peoples as “Indians,” and the statutes bestowing federal power over Indigenous Canadians are each titled “The Indian Act.” See Constitution Act, 1867, 30 & 31 Vict., c 3 (U.K.), reprinted in R.S.C. 1985, app II, no 5 (Can.); The Indian Act of 1876, S.C. 1876, c 18 (Can.); The Indian Act of 1889, S.C. 1880 c 28 (Can.). However, as a practical matter, the term “Indian” can cause confusion in that it does not always clearly distinguish between people indigenous to the Americas and people whose nationality aligns with the country of India. See Yellow Bird, *supra*, at 8–9. Further, the term carries the weight of centuries of stereotypes, racism, and colonial subjugation that can render even its benign use offensive. See *id.* at 4–6.

“Native American” is an alternative term that carries less controversy but remains open to criticism on the grounds that some US-born, non-Indigenous Americans have appropriated the term in support of nationalist agendas. See *id.* at 6 (referring to Charlton Heston, former president of the National Rifle Association, as a prominent example); see also Margot Hornblower, *Have Gun, Will Travel: But Can Heston’s Celebrity and Rhetoric Revive the N.R.A.?*, TIME (July 6, 1998), <http://content.time.com/time/subscriber/article/0,33009,988657,00.html> [<https://perma.cc/379E-TG8K>] (archived Sept. 12, 2022).

For the purposes of this Note, the term “Indigenous Peoples” will be used to refer generally to communities and peoples indigenous to both the United States and Canada. The term has garnered emerging acceptance as a general descriptor of a diverse community of people, especially in a transnational context. See Yellow Bird, *supra*, at 6, 16; UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES, WHO ARE INDIGENOUS PEOPLES?, [https://www.un.org/esa/socdev/unpfii/documents/5session\\_factsheet1.pdf](https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf) (last visited Mar. 7, 2022) [<https://perma.cc/HLK2-N4VD>] (archived Sept. 12, 2022); *Indigenous Peoples*, AMNESTY INT’L, <https://www.amnesty.org/en/what-we-do/indigenous-peoples/> (last visited Sept. 13, 2022) [<https://perma.cc/GVE5-Y3FU>] (archived Sept. 13, 2022); *Indigenous Peoples*, WORLD BANK (Mar. 19, 2021), <https://www.worldbank.org/en/topic/indigenouspeoples#1> [<https://perma.cc/3LTY-294X>] (archived Sept. 12, 2022); *Indigenous Peoples*, ORG. OF AM. STATES, [https://www.oas.org/en/topics/indigenous\\_peoples.asp](https://www.oas.org/en/topics/indigenous_peoples.asp) (last visited Mar. 7, 2022) [<https://perma.cc/F3E6-T4Z3>] (archived Sept. 12, 2022); G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Oct. 2, 2007) [hereinafter UNDRIP]; see also Amnesty Int’l, *supra* note 1, at 2 n.2 (using the term “Indigenous” because of its use in international human rights laws and standards). For clarity, Indigenous Peoples living within the boundaries of the United States will be referred to as “Indigenous Americans,” and Indigenous Peoples living with the borders of Canada will be referred to as “Indigenous Canadians.” The use of these general terms is in no way intended to diminish the uniqueness of individual Indigenous communities within and abroad.

9. *Unmasking the Hidden Crisis of Murdered and Missing Indigenous Women (MMIW): Oversight Hearing Before the Subcomm. On Indigenous Peoples of the United States of the H. Comm. On Nat. Res.*, 116th Cong. 3 (2019) [hereinafter *Unmasking the*

many of the perpetrators are non-Indigenous.<sup>10</sup> This problem is not unique to the United States, however, as Indigenous women and girls also disproportionately represent homicide and missing persons cases in Canada.<sup>11</sup> The growing number of missing and murdered Indigenous Peoples in both countries is known as the Missing and Murdered Indigenous Women Crisis (MMIW Crisis).<sup>12</sup>

With limited exceptions, enforcement of criminal law against non-Indigenous offenders who attack Indigenous victims in the United States and Canada is entrusted not to Indigenous communities, but to the non-Indigenous governments with jurisdiction over those communities.<sup>13</sup> Yet, these governments have failed to pursue non-Indigenous offenders to the satisfaction of the communities directly impacted by their inaction.<sup>14</sup> There is even evidence to suggest that non-Indigenous offenders target Indigenous Peoples specifically because of the lowered risk of law enforcement intervention.<sup>15</sup>

Exacerbating the crisis is the importation of non-Indigenous people onto Indigenous land by extractive industries.<sup>16</sup> With the objective of extracting natural resources on or around Indigenous lands, private companies have established temporary housing for transient workers to staff mining operations.<sup>17</sup> These “man camps” are typically comprised of non-Indigenous workers with only a transitory relationship to the Indigenous land they have come to live on.<sup>18</sup> Violent crimes against Indigenous Peoples—particularly sexual crimes—increase around these man camps.<sup>19</sup> For example, the man camps around the Bakken oil fields in North Dakota have fueled a wave of murders,

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*Hidden Crisis*] (statement of Rep. Ruben Gallego, Chairman of the Subcomm. On Indigenous Peoples of the United States) (“[A]n independent report found at least 5,712 cases of missing or murdered Indigenous women were reported in 2016.”).

10. See Kathleen Finn, Erica Gajda, Thomas Perin & Carla Fredericks, *Responsible Resource Development and Prevention of Sex Trafficking: Safeguarding Native Women and Children on the Fort Berthold Reservation*, 40 HARV. J.L. & GENDER 1, 6 (2017); Susan Filan, *Epidemic Hiding in Plain Sight*, ARIZ. ATT’Y, Jul.–Aug. 2021, at 44, 46.

11. See Robyn Bourgeois, *Colonial Exploitation: The Canadian State and the Trafficking of Indigenous Women and Girls in Canada*, 62 UCLA L. REV. 1426, 1429 (2015).

12. See, e.g., Sarah Deer & Elizabeth Ann Kronk Warner, *Raping Indian Country*, 38 COLUM. J. GENDER & L. 31, 78 (2020).

13. See *infra* Part II.A.

14. See *Unmasking the Hidden Crisis*, *supra* note 9.

15. See Filan, *supra* note 10.

16. See *id.* at 46–47 (“Men who live in ‘Man camps’ . . . commit crimes against Indians with impunity and prey upon local Indigenous communities.”).

17. See *id.*

18. See *id.*

19. See Deer & Kronk Warner, *supra* note 12, at 74–80.

rapes, and human trafficking.<sup>20</sup> In British Columbia, Canada, extractive industries have been linked to an increase in violence against women.<sup>21</sup>

In response to a lack of transnational literature on the MMIW Crisis, this Note analyzes the intersection of extractive industries, jurisdictional complexities, and violence against Indigenous Peoples in the United States and Canada. Part II provides a brief background on the laws governing Indigenous Peoples in the United States and Canada, the transnational agreements each country has endorsed in relation to Indigenous rights, and the emerging correlation between extractive industries on Indigenous land and violence in each country. Part III then analyzes proposed solutions to man camps' contributions to the MMIW Crisis. Finally, Part IV proposes that until Indigenous Peoples are empowered to exercise full criminal jurisdiction to effectively protect their communities from all non-Indigenous violence, financial incentives should be provided by the United States and Canadian governments to encourage extractive industries to address the MMIW Crisis.

## II. TWO COUNTRIES, ONE CRISIS

The MMIW Crisis persists across both the United States and Canada despite the boundaries separating the two countries. Because context is necessary to understand the crisis, subpart A will provide a brief examination of the foundational history of criminal jurisdiction over Indigenous Peoples in the United States and Canada. Subpart B will then examine the relevant framework of international law and organizations handling Indigenous rights. Lastly, subpart C will discuss man camps as a transnational problem for both countries.

### A. *The Rise of Non-Indigenous Criminal Jurisdiction over Indigenous Peoples in the United States and Canada*

The laws governing Indigenous Peoples in the United States have been described as “an indefensible morass of complex, conflicting, and illogical commands”<sup>22</sup> rooted in colonial principles of “civilized” settler

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20. See Penelope Simons, *Unsustainable International Law: Transnational Resource Extraction and Violence Against Women*, 26 *TRANSNAT'L. & CONTEMP. PROBS.* 415, 416 (2017) (quoting Sara Horwitz, *Dark Side of the Boom*, *WASH. POST* (Sept. 28, 2014), <https://www.washingtonpost.com/sf/national/2014/09/28/dark-side-of-the-boom/> [https://perma.cc/9UTL-A3LL] (archived Sept. 13, 2022)).

21. See *id.*

22. INDIAN L. & ORDER COMM'N, *A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES* ix (Nov. 2013), [https://www.aisc.ucla.edu/iloc/report/files/A\\_Roadmap\\_For\\_Making\\_Native\\_America\\_Safer-Full.pdf](https://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf) [https://perma.cc/5MXM-5RTD] (archived Sept. 13, 2022).

superiority over “uncivilized” Indigenous Peoples.<sup>23</sup> The laws governing Indigenous Canadians similarly grew from a colonial system driven by racist attitudes that encouraged the destruction and subjugation of Indigenous Peoples.<sup>24</sup> While school history textbooks may paint the European settlement of North America in a flattering light,<sup>25</sup> that settlement was fraught with deception and death.<sup>26</sup> Before European settlement, millions of Indigenous Peoples populated the lands now known as the United States and Canada.<sup>27</sup> These population levels declined dramatically after European settlement.<sup>28</sup>

European settlement of North America began in the late 1400s and early 1500s.<sup>29</sup> While European leaders had less than peaceful intentions for Indigenous Peoples,<sup>30</sup> the settlers were outnumbered and in unfamiliar lands.<sup>31</sup>

However, as more and more Europeans immigrated to North America, the population ratio shifted in the Europeans’ favor, and conflict over land, natural resources, and ideologies became the norm.<sup>32</sup> Spanish settlers cleared Indigenous land and imposed religious assimilation on Indigenous Peoples through brutal, murderous

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23. See ECHO-HAWK, *supra* note 8, at 15–22.

24. See NAT’L INQUIRY INTO MISSING & MURDERED INDIGENOUS WOMEN & GIRLS, RECLAIMING POWER AND PLACE: EXECUTIVE SUMMARY OF THE FINAL REPORT 4 (2019) [hereinafter NAT’L INQUIRY, EXECUTIVE SUMMARY].

25. See JAMES W. LOEWEN, LIES MY TEACHER TOLD ME: EVERYTHING YOUR AMERICAN HISTORY TEXTBOOK GOT WRONG 37–38 (2018 ed. 1995) (arguing that American history textbooks’ portrayals of Christopher Columbus “celebrate” European domination over Indigenous Peoples).

26. See ECHO-HAWK, *supra* note 8, at 15.

27. See *id.* at 16 (noting that in 1492, an estimated five million Indigenous Americans occupied the land that became the United States); 1 ROYAL COMM’N ON ABORIGINAL PEOPLES, REPORT OF THE COMMISSION ON ABORIGINAL PEOPLES 20–21 (1996) (scholarly estimates of pre-contract Indigenous Canadian populations ranged from 221,000 to two million).

28. See ECHO-HAWK, *supra* note 8, at 16 (noting that by 1900, the Indigenous population of the United States had declined to only 250,000); ROYAL COMM’N ON ABORIGINAL PEOPLES, *supra* note 27, at 21 (stating that the diseases Europeans brought to North America, in addition to hostilities and starvation, had an enormous impact on the Indigenous population).

29. See ROYAL COMM’N ON ABORIGINAL PEOPLES, *supra* note 27, at 95.

30. King Henry VII gave explorer John Cabot discretion to “conquer, occupy and possess” any population centers he discovered. See THE PRECURSORS OF JACQUES CARTIER 1497-1534: A COLLECTION OF DOCUMENTS RELATING TO THE EARLY HISTORY OF THE DOMINION OF CANADA 7–10 (Henry Percival Biggar ed., 1911).

31. See ROYAL COMM’N ON ABORIGINAL PEOPLES, *supra* note 27, at 95.

32. See *id.* at 97, 130–32.



methods.<sup>33</sup> Their English successors used similarly violent methods. Colonists “engaged in cruelty on a massive scale,” massacring entire settlements and marking the landscape with the mutilated, Indigenous bodies.<sup>34</sup> The US government sanctioned the murder of hundreds of Indigenous civilians, and the US Government’s forced removal of Indigenous Americans caused the deaths of thousands more.<sup>35</sup> Even when European settlers were not actively hostile toward Indigenous Peoples, the diseases that those settlers brought with them to North America ravaged Indigenous populations for over three centuries.<sup>36</sup> The decline of Indigenous populations in North America was accompanied by the rise of two non-Indigenous countries with developing legal systems that would later become the center of the MMIW Crisis.

### 1. The Development of Criminal Jurisdiction over Non-Indigenous Assailants of Indigenous Victims on Indigenous Land in the United States

In the early years of the United States, as the European settlers arrived, their purpose was not only to settle new land but also to eventually deprive Indigenous inhabitants of that which was rightfully theirs. After the Revolutionary War, George Washington, then-commander in chief of the Continental Army, outlined his vision of American Indian policy to politician James Duane. In delineating a

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33. See CONFLICT IN THE EARLY AMERICAS: AN ENCYCLOPEDIA OF THE SPANISH EMPIRE’S AZTEC, INCAN, AND MAYAN CONQUESTS 212–13 (Rebecca M. Seaman ed., 2013) (“After first contact, Spanish conquistadors had no qualms with torturing, killing, and raping natives in their quest for treasure. Spanish practices of brutality even extended to many missionaries sent to convert the native population to Catholicism.”); DEE BROWN, BURY MY HEART AT WOUNDED KNEE 2 (Picador 2007) (1971) (“The Spaniards looted and burned villages; they kidnapped hundreds of men, women, and children and shipped them to Europe to be sold as slaves.”).

34. See Daniel J. Sharfstein, *Atrocity, Entitlement, and Personhood in Property*, 98 VA. L. REV. 635, 661–63 (2012) (describing King Philip’s War in the 1670s: after the Wampanoag tribe launched attacks on English colonists, colonists retaliated by wiping out entire settlements and decorating the landscape with the mutilated bodies of their victims).

35. BROWN, *supra* note 33, at 444–45 (describing the Wounded Knee Massacre, where US soldiers killed hundreds of Indigenous men, women, and children); *History*, CHEROKEE NATION, <https://www.chokeee.org/about-the-nation/history/> (last visited Mar. 7, 2022) [<https://perma.cc/VZR2-8946>] (archived Sept. 13, 2022) (describing the forced removal of sixteen thousand Cherokees by the US government, leading to deaths of four thousand Cherokees); John Burnett, *The Navajo Nation’s Own ‘Trail of Tears’*, NPR (June 15, 2005, 12:00 AM), <https://www.npr.org/2005/06/15/4703136/the-navajonation-s-own-trail-of-tears> [<https://perma.cc/2GYA-EAZC>] (archived Sept. 13, 2022) (describing the Long Walk of the Navajo, where over ten thousand Navajos and Mescalero Apaches were forcibly moved to New Mexico, causing thousands of deaths).

36. See ROYAL COMM’N ON ABORIGINAL PEOPLES, *supra* note 27, at 97 (explaining that over the first three hundred years of sustained contact between Indigenous Peoples and settlers, diseases contributed to a 50 percent decline in Indigenous population).

boundary separating US land from Indigenous land, Washington emphasized accommodating Indigenous Americans just enough to avoid war with them, in the hope that “the gradual extension of” the United States would inevitably “cause the Savage as the Wolf to retire.”<sup>37</sup> The scheme for taking Indigenous land thus became one of patience and attrition, as the United States set boundary lines that it failed to enforce against settler encroachment.<sup>38</sup> This encroachment was encouraged by a booming speculative black market through which US citizens made claims to Indigenous lands they had no legal title to.<sup>39</sup>

A speculating settler’s lack of legal title to Indigenous land became of little consequence in 1823, however, when the US Supreme Court decided *Johnson v. M’Intosh*.<sup>40</sup> *Johnson* is a foundational case in American Indian Law that established the “doctrine of discovery” as the legal basis for legitimizing US citizens’ title to Indigenous land claims. The case arose after two US citizens came before the Court with competing claims to the same land, with one party claiming to have validly purchased the land directly from the Piankeshaw and Illinois Tribes.<sup>41</sup> The *Johnson* Court held that the United States inherited title to all Indigenous American land from Great Britain after the Revolutionary War, and that Indigenous Americans were incapable of freely alienating that land.<sup>42</sup> The tribes themselves were not party to the case and had no say in its disposition,<sup>43</sup> yet that disposition, riddled with racist language and reasoning, produced grave repercussions for Indigenous American rights in the United States.<sup>44</sup>

While *Johnson* primarily dealt with property rights, the case’s comprehension of Indigenous American sovereignty set a foundation

37. Letter from George Washington to James Duane (Sept. 7, 1783), in DOCUMENTS OF UNITED STATES INDIAN POLICY 1–2 (Francis Paul Prucha ed., 3d ed. 2000).

38. See ECHO-HAWK, *supra* note 8, at 59–62.

39. See *id.*

40. See generally 21 U.S. 543 (1823).

41. See *id.* at 571–72. But see ECHO-HAWK, *supra* note 8, at 56 (citing LINDSAY G. ROBERTSON, CONQUEST BY LAW (2005)) (noting that the complete corporate records of one of the parties “reveal a truly sordid tale of collusion” in which parties to the case and several other interested third parties brought “a friendly lawsuit about a feigned controversy” to be “decided by a chief justice of the Supreme Court who possessed an enormous stake in the outcome”).

42. See *Johnson*, 21 U.S. at 584 (“By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the propriety and territorial rights of the United States.”); CASES AND MATERIALS ON FEDERAL INDIAN LAW 80–81 (David H. Getches et al. eds., 7th ed. 2017).

43. See ECHO-HAWK, *supra* note 8, at 56.

44. See *Johnson*, 21 U.S. at 590 (reasoning that Indigenous Peoples “were fierce savages, whose occupation was war” and whose continued possession of the United States “was to leave the country a wilderness”).

upon which the Supreme Court would further define Indigenous American communities as dependent on the United States for protection. A later Supreme Court case, *Cherokee Nation v. Georgia*, gave a name to this dependent relationship when it labeled Indigenous American tribes as “domestic dependent nations” that, while possessing some sovereignty, were otherwise “so completely under the sovereignty and denomination of the United States” that their “relation to the United States resembles that of a ward to his guardian.”<sup>45</sup> Building upon this characterization of dependency, Supreme Court jurisprudence later entrusted the US Congress with plenary power over Indigenous American tribes, subjecting those tribes to the total, exclusive power of Congress.<sup>46</sup> The Court enabled Congress to exercise broad discretion in legislating with regards to Indigenous American affairs,<sup>47</sup> and this plenary power is expansive enough to even allow Congress to break its own treaties with Indigenous tribes.<sup>48</sup>

The dependence characterizing the relationship between the federal government and Indigenous Americans permeates law enforcement on Indigenous American land.<sup>49</sup> In *Oliphant v. Suquamish Indian Tribe*, the Supreme Court interpreted the federal government’s guardian-ward relationship with Indigenous tribes to exclude tribes from exercising criminal jurisdiction over non-Indigenous offenders for crimes committed on Indigenous land.<sup>50</sup> *Oliphant* came before the Court after two non-Indigenous residents of the Port Madison Reservation were prosecuted in tribal court under the Suquamish Tribe’s own criminal laws.<sup>51</sup> Repudiating the Tribe’s jurisdiction over the non-Indigenous defendants, the Court reasoned that Indigenous tribes

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45. 30 U.S. 1, 17 (1831) (establishing a presumption that Congress’s plenary power is exercised in good faith and that any legal injury resulting from the exercise of that power may only be resolved before Congress itself).

46. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903).

47. See COHEN’S HANDBOOK ON FEDERAL INDIAN LAW § 5.04(3)(a) [hereinafter COHEN’S HANDBOOK] (“The trust relationship thus formed the linchpin for the excesses of the late 19th and 20th century invocations of a nearly absolute and unreviewable congressional plenary power.”).

48. See *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020) (acknowledging that while Congress may “break the promise of a reservation, it must say so”); *United States v. Dion*, 476 U.S. 734, 738–40 (1986) (holding that Congress may abrogate a treaty with an Indigenous tribe through either a clear statement or a judicial inference of an intent to abrogate).

49. See *supra* Part II.A.

50. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 205–07 (1978) (discussing indigenous tribes’ dependence on the United States government for protection from non-indigenous intruders onto their land).

51. See *id.* at 193–94 (one defendant was charged with assaulting a tribal police officer and resisting arrest, while the other was charged with reckless endangerment and injuring tribal property after his street racing concluded with a collision with a tribal police vehicle).

could exercise criminal jurisdiction over non-Indigenous offenders only if Congress affirmatively granted tribes that power.<sup>52</sup>

While the *Oliphant* Court denied Indigenous American tribes criminal jurisdiction over non-Indigenous offenders, it did make clear that Congress possessed the authority to bestow such jurisdiction to tribes.<sup>53</sup> To this date, Congress has only taken the *Oliphant* Court up on this offer on two occasions: the 2013 Reauthorization of the Violence Against Women Act (2013 VAWA) and the 2022 Reauthorization of the Violence Against Women Act (2022 VAWA).<sup>54</sup> The 2013 VAWA permitted eligible Indigenous tribes to exercise “special domestic violence criminal jurisdiction” in domestic violence cases involving a non-Indigenous perpetrator and an Indigenous victim.<sup>55</sup> While some feared that Indigenous Peoples would wield criminal jurisdictional power as a weapon to unfairly prosecute non-Indigenous offenders, no prosecutions under this “partial *Oliphant* fix” were challenged by *habeas corpus* reviews.<sup>56</sup> However, as its nickname suggested, that special grant of criminal jurisdiction over non-Indigenous offenders was narrowly defined to apply exclusively to domestic violence cases.<sup>57</sup> Very recently, however, the 2022 VAWA broadened this “partial *Oliphant* fix” by expanding the range of covered crimes participating Indigenous tribes could exercise criminal jurisdiction over.<sup>58</sup> Effective October 2022, the 2022 VAWA enables participating tribes to exercise criminal jurisdiction over offenses involving assault of tribal justice personnel, child violence, dating violence, domestic violence, obstruction of justice, sexual violence, sex trafficking, stalking, and violations of protection orders.<sup>59</sup> But while the 2022 VAWA undoubtedly expanded the reach of tribal law enforcement, that reach may not extend beyond those enumerated offenses; numerous crimes, including murder, committed

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52. See *id.* at 208 (“Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress.”).

53. See *id.* at 212 (stating that “the prevalence of non-Indian crime” on reservations is a consideration “for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians”).

54. See generally 25 U.S.C. § 1304 (2013) (amended 2022) [hereinafter 2013 VAWA]; 25 U.S.C. § 1304.

55. See 2013 VAWA, *supra* note 54, § 1304(b)(1). But see *id.* § 1304(b)(4)(A) (stating as a general rule that tribes may not exercise this special jurisdiction over offenses involving both a non-Indigenous offender and a non-Indigenous victim).

56. Deer & Kronk Warner, *supra* note 12, at 55–57; see *Unmasking the Hidden Crisis*, *supra* note 9, at 32–33 (providing expert witness testimony that argued that six years after the VAWA’s 2013 reauthorization, no *habeas corpus* reviews were brought in federal court to contest such cases and “juries acquitted more often than they convicted non-Indian defendants”).

57. See 2013 VAWA, *supra* note 54, § 1304(a)(5), (c).

58. See Deer & Kronk Warner, *supra* note 12, at 56–57; 25 U.S.C. § 1304.

59. See 25 U.S.C. § 1304(a)(5), (c).

by non-Indigenous offenders remain exclusively under federal or state jurisdiction.<sup>60</sup>

Criminal jurisdiction over non-Indigenous offenders on Indigenous land against Indigenous victims is governed by the Indian Country Crimes Act.<sup>61</sup> The act extends the federal laws that govern federal enclaves within state land to Indigenous reservations, allowing the federal government to exercise jurisdiction.<sup>62</sup> While the Indian Country Crimes Act created federal criminal jurisdiction over offenders on reservations between non-Indigenous offenders and Indigenous victims on Indigenous land, a federal statute—Public Law 280—created a special grant of criminal jurisdiction to specific states.<sup>63</sup> Enacted in 1956, Public Law 280 transferred civil and criminal jurisdiction over Indigenous reservations to six states—Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin—and offered such jurisdiction to all other states.<sup>64</sup> Public Law 280 effectively withdrew federal jurisdiction over those reservations, with state governments taking over what were previously federal responsibilities over Indigenous land within those states.<sup>65</sup>

State and Indigenous governments were almost immediately dissatisfied with Public Law 280.<sup>66</sup> Indigenous Americans within Public Law 280 states did not want state jurisdiction imposed upon them without consent.<sup>67</sup> On the other hand, Public Law 280 states assumed law enforcement responsibilities over Indigenous reservations within their territorial boundaries without the power to generate revenue for

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60. See *id.* § 1304(c) (stating that participating tribes may only exercise special tribal criminal jurisdiction for covered crimes).

61. See 18 U.S.C. § 1152.

62. See *id.*; COHEN'S HANDBOOK, *supra* note 47, § 9.02(1)(c)(i).

63. See COHEN'S HANDBOOK, *supra* note 47, § 9.03(2).

64. See Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535, 537 n.11 (1975); *Tribal Crime and Justice: Public Law 280*, NAT'L INST. OF JUST. (Aug. 16, 2019), <https://nij.ojp.gov/topics/articles/tribal-crime-and-justice-public-law-280> [<https://perma.cc/N9LT-NK8G>] (archived Aug. 23, 2022). When first enacted, Public Law 280 originally transferred jurisdiction to only five states: California, Minnesota, Nebraska, Oregon, and Wisconsin. According to the Senate Committee on Interior and Insular Affairs, these states were chosen because their governments were agreeable to transfer, their Indigenous populations were not opposed “for the most part,” and their laws and constitutions did not expressly disclaim state jurisdiction over Indigenous land within their boundaries. S. REP. NO. 699, at 5–6 (1953). Alaska was later included when Public Law 280 was amended in 1958. See An Act to Amend the Law with Respect to Civil and Criminal Jurisdiction over Indian Country in Alaska, Pub. L. 85-615, 72 Stat. 545 (1958) (codified at 18 U.S.C. § 1162(a)).

65. See *Frequently Asked Questions About Public Law 83-280*, U.S. ATT'Y'S OFF., DIST. OF MINN. (May 1, 2015), <https://www.justice.gov/usao-mn/Public-Law%2083-280> [<https://perma.cc/74L4-5JK5>] (archived Aug. 23, 2022) (“[T]he main result of Public Law 280 is that for most reservations in the six named states, federal criminal jurisdiction became extremely limited while state jurisdiction was greatly expanded.”).

66. See Goldberg, *supra* note 64, at 538.

67. See *id.*

those services, and those states were not subsidized by federal funds.<sup>68</sup> This lack of funding for Public Law 280 states resulted in inadequate law enforcement on Indigenous reservations within those states.<sup>69</sup>

A 2007 report found that Indigenous People subject to Public Law 280 state jurisdiction rated state law enforcement as

less available, slower in response time, less prone to equally attend to minor or serious calls, provide less beneficial patrolling services, less willing to act without authority, more frequently decline services owing to remoteness, and are located farther away than federal-BIA [Bureau of Indian Affairs] and tribal police on non-Public Law 280 reservations.<sup>70</sup>

State law enforcement responses to murdered Indigenous Peoples has been criticized, with the leader of one tribal village in Alaska asserting that authorities are more likely to address the killing of a moose out of season than the killing of an Indigenous woman.<sup>71</sup> As incredulous as this statement may at first seem, its basis in reality becomes clearer when one considers the case of thirteen-year-old MacKenzie Howard, a villager from Kake, Alaska.<sup>72</sup> MacKenzie was found murdered behind a church in her village, and it took state troopers eleven hours to respond to the crime scene.<sup>73</sup> In the meantime, her fellow villagers guarded her body and secured the crime scene throughout the night.<sup>74</sup> This lapse in law enforcement response repeated itself five years later, after state troopers took around twelve hours to respond to the suspicious death of another Kake teenager.<sup>75</sup>

The power of state governments to prosecute non-Indigenous offenders on Indigenous land was recently expanded beyond the confines of Public Law 280. In *Oklahoma v. Castro-Huerta*, the US Supreme Court held 5–4 that, with certain exceptions, states and the federal government have concurrent jurisdiction to prosecute non-Indigenous

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68. See *id.* at 544–45.

69. See *id.* at 552.

70. CAROLE E. GOLDBERG & HEATHER VALDEZ SINGLETON, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280 viii–ix (Nov. 1, 2007), <https://www.ojp.gov/pdffiles1/nij/grants/222585.pdf> [<https://perma.cc/7JSA-GKLB>] (archived Aug. 23, 2022).

71. See *Unmasking the Hidden Crisis*, *supra* note 9, at 45.

72. See *id.* at 3 (statement of Rep. Ruben Gallego, Chairman of the Subcomm. on Indigenous Peoples of the United States).

73. See *id.*

74. See *id.*

75. See Alanna Elder, *One Year After Tragedy, Stakes are High for Kake VPSOs*, ALASKA PUB. MEDIA (Aug. 17, 2018), <https://www.alaskapublic.org/2018/08/17/ak-one-year-after-tragedy-stakes-are-high-for-kake-vpsos/> [<https://perma.cc/5CWZ-J84U>] (archived Aug. 24, 2022).

offenders on Indigenous land.<sup>76</sup> The Court, over a scathing dissent,<sup>77</sup> reasoned that Indigenous reservations are “part of the State, not separate from the State,” and that the General Crimes Act did not equate Indigenous reservations to federal enclaves for the purposes of criminal jurisdiction.<sup>78</sup> The dissent noted that Congress could correct *Castro-Huerta*’s “needless confusion” by simply amending Public Law 280 to preempt state authority, and such an outcome remains plausible given Congress’s recent attention toward jurisdictional issues on Indigenous land.<sup>79</sup> It remains to be seen whether *Castro-Huerta* will become a lasting fixture, or whether Congress will expressly favor federal jurisdiction.

Federal jurisdiction has not yielded better results than state jurisdiction, however. Federal prosecutors decline to prosecute a significant number of criminal cases arising from Indigenous land.<sup>80</sup> The Tribal Law and Order Act, enacted in 2010, requires the federal government to gather and disclose information about the declination of prosecutions, and reports have demonstrated a significant decrease in the declination rate since the act’s passage.<sup>81</sup> However, in recent years, federal prosecutors have still declined to prosecute well over a quarter

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76. See *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2494–95 (2022) (“[State jurisdiction] may be preempted (i) by federal law under ordinary principles of federal preemption, or (ii) when the exercise of state jurisdiction would unlawfully infringe on tribal self-government.”).

77. See *id.* at 2522 (Gorsuch, J., dissenting) (Justice Gorsuch surmising that “a more ahistorical and mistaken statement of Indian law would be hard to fathom” and noting that “throughout the Nation’s history, state governments have sometimes proven less than reliable sources of justice for Indian victims”).

78. See *id.* at 2493, 2495.

79. See *id.* at 2527; Matthew L.M. Fletcher, *In 5-4 Ruling, Court Dramatically Expands the Power of States to Prosecute Crimes on Reservations*, SCOTUSBLOG (June 29, 2022, 12:35 PM), <https://www.scotusblog.com/2022/06/in-5-4-ruling-court-dramatically-expands-the-power-of-states-to-prosecute-crimes-on-reservations/> [<https://perma.cc/AYQ7-GUSG>] (archived Aug. 24, 2022) (“Congressional lawmaking in the Indian country criminal jurisdiction space has been robust in recent decades . . . so the dissent’s entreaty for a congressional fix could be effective.”).

80. See Regina Branton, Kimi King & Justin Walsh, *Criminal Justice in Indian Country: Examining Declination Rates of Tribal Cases*, 103 SOC. SCI. Q. 69, 73 (2021) (“One finding has consistently emerged: Declination rates are higher for American Indians than for other racial groups.”); Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1584 (2016) (“Tribal members expressed deep frustration and a sense of hopelessness around federal prosecutors’ decisions to decline to prosecute the most serious crimes—even rape and murder—on the reservation.”).

81. See 25 U.S.C. § 2809(a)(4), (b) (requiring information to be compiled by federal judicial district regarding declinations to prosecute alleged federal crimes occurring in Indian country); Riley, *supra* note 80, at 1587–88 (stating that declination rates have improved since the passage of the Tribal Law and Order Act (TLOA) and that US attorneys have begun prosecuting a higher percentage of criminal cases in Indian country).

of cases referred to them each year.<sup>82</sup> Outside of prosecutorial decisions, the human cost of federal law enforcement's response has been painfully demonstrated in the cases of individual missing and murdered women. Ashley Loring HeavyRunner of the Blackfeet Tribe went missing in the summer of 2017, and the Federal Bureau of Investigation did not start searching for her until nine months afterwards.<sup>83</sup> In 2016, two Navajo children, Ian and Ashlynnne Mike, never made it home from school.<sup>84</sup> Ian was found wandering the desert several hours after being abducted by a stranger, but his sister was not found until the next day—sexually assaulted, strangled, and beaten to death with a tire iron.<sup>85</sup> Misunderstandings and jurisdictional issues prevented the issuance of an Amber Alert until twelve hours after her disappearance.<sup>86</sup> Mackenzie, Ashley, Ian, and Ashlynn represent only a few of the faces of a larger body of Indigenous victims in the United States. In 2020, the National Crime Information Center reported 9,571 cases of missing Indigenous Americans.<sup>87</sup> Unfortunately, the United States is not alone in this respect.

## 2. The Development of Criminal Jurisdiction over Non-Indigenous Assailants of Indigenous Victims on Indigenous Land in Canada

While the United States was still in its first century as a country, European settlement of the land now known as Canada expanded, displacing the Indigenous Peoples there physically, socially, culturally, and politically.<sup>88</sup> When Canada formally became a nation in 1867, its new government utilized legislation to aid in Indigenous Canadians' displacement. While Indigenous Canadians were not consulted in the formation of the new federal government, its founding document made

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82. U.S. DEP'T OF JUST., INDIAN COUNTRY INVESTIGATIONS AND PROSECUTIONS 3 (2019), <https://www.justice.gov/otj/page/file/1405001/download> (last visited Mar. 15, 2022) [<https://perma.cc/3GVG-EDLX>] (archived Aug. 24, 2022) (In 2019, the declination rate was 32 percent, compared to 39 percent in 2018, 37 percent in 2017, and 34 percent in 2016).

83. See *Unmasking the Hidden Crisis*, *supra* note 9, at 2.

84. See *The Legacy of Ashlynnne Mike*, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS (Sept. 9, 2019), <https://www.ojp.gov/files/archives/blogs/2019/legacy-ashlynnne-mike> [<https://perma.cc/NK2F-3GNJ>] (archived Aug. 24, 2022).

85. See *id.*

86. See *id.*; *Unmasking the Hidden Crisis*, *supra* note 9, at 2.

87. See *National Crime Information Center 2020 Missing Person and Unidentified Person Statistics*, FED. BUREAU OF INVESTIGATION (Feb. 4, 2021), <https://www.fbi.gov/file-repository/2020-ncic-missing-person-and-unidentified-person-statistics.pdf/view> [<https://perma.cc/F4JJ-SYHF>] (archived Aug. 25, 2022).

88. See ROYAL COMM'N OF ABORIGINAL PEOPLES, *supra* note 27, at 133 (discussing the Canadian government's attempts to dissolve and assimilate Indigenous societies and the displacement of Indigenous peoples from their lands).



clear that Indigenous Peoples and lands within Canada would be subject to the control of the Canadian federal government.<sup>89</sup> The Enfranchisement Act of 1869 was passed soon after Canada's independence, replacing traditional Indigenous governments with "municipal governments" that possessed limited powers, while extensive control of Indigenous "reserves" (the Canadian equivalent to US reservations) was granted to the federal government.<sup>90</sup> The Indian Acts of 1876 and 1880 and the Indian Advancement Act of 1884 further allowed the federal government "to mould, unilaterally, every aspect of life on reserves and to create whatever infrastructure it deemed necessary to achieve the desired end."<sup>91</sup> Indigenous cultural practices were outlawed and penalties were provided for nonconformity with Canadian ideas of marriage and parenting.<sup>92</sup>

Under the Indian Act, Indigenous Peoples in Canada are subject either to federal or provincial jurisdiction.<sup>93</sup> Indigenous Canadians living on reserve land within Canada are subject to federal jurisdiction, while Indigenous Canadians living off reserve land are under provincial and territorial jurisdiction.<sup>94</sup> As a result, Indigenous Peoples across Canada are subject to the jurisdiction of multiple non-

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89. See *id.*; British North America Act 1867, 30 Vict., c 3, § 91 (U.K.), <https://www.legislation.gov.uk/ukpga/Vict/30-31/3/section/91> [<https://perma.cc/QA8Q-6SL9>] (archived Aug. 24, 2022).

90. See ROYAL COMM'N OF ABORIGINAL PEOPLES, *supra* note 27, at 166. See generally Gradual Enfranchisement Act of 1869, 31 Vict. 42 (Can.) (outlining the vast control granted to the Canadian federal government over the daily lives and affairs of Indigenous peoples).

91. ROYAL COMM'N OF ABORIGINAL PEOPLES, *supra* note 27, at 166. See generally The Indian Act of 1876, S.C. 1876, ch. 18 (Can.); The Indian Act of 1889, S.C. 1889 ch.28 (Can.).

92. See ROYAL COMM'N OF ABORIGINAL PEOPLES, *supra* note 27, at 169–73. While outside the scope of this Note, one of the more tragic instruments of assimilation utilized by the Canadian government was the residential school program. Starting in the 1800s, Indigenous Canadian children were removed from their homes and forced to attend Canadian boarding schools. These facilities were plagued by poor management, unsanitary conditions, and rampant child abuse. Children were alienated from their home cultures, isolated from their families, and forced to adopt European ideals. See generally *Canada's Residential Schools: The Legacy*, NAT'L CTR. FOR TRUTH & RECONCILIATION, <https://nctr.ca/records/reports/#trc-reports> (last visited Mar. 18, 2022) [<https://perma.cc/WCL5-7W94>] (archived Aug. 24, 2022) (discussing that while the last residential school was closed in 1996, the schools' impact on Indigenous Canadians is still a very contemporary issue); Catherine Porter & Vjosa Isai, *Canada Pledges \$31.5 Billion to Settle Fight Over Indigenous Child Welfare System*, N.Y. TIMES (Jan. 4, 2022, 6:58 PM), <https://www.nytimes.com/2022/01/04/world/canada/canada-indigenous-children-settlement.html> [<https://perma.cc/VNN4-UW7H>] (archived Aug. 24, 2022) (reporting that the Canadian government agreed to a \$31 billion CAD settlement to reform the country's Indigenous child welfare system and to compensate victims of the residential school program).

93. See INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, MISSING AND MURDERED INDIGENOUS WOMEN IN BRITISH COLUMBIA, CANADA 24, OEA/Ser.L/V/II Doc.30/14 (Dec. 21, 2014) [hereinafter MISSING AND MURDERED INDIGENOUS WOMEN IN BRITISH COLUMBIA].

94. See *id.* at 24–25.

Indigenous police agencies, and these agencies have been criticized for not adequately addressing the disappearances and murders of Indigenous women and girls.<sup>95</sup> In British Columbia in particular, where the number of missing and murdered Indigenous women is the highest in Canada, jurisdictional confusion has resulted in uncertainty regarding which agency has responsibility for reported crimes.<sup>96</sup>

The human toll of these jurisdictional issues paints a disturbing parallel to that of the United States. A major highway in Canada has been labeled the “Highway of Tears” in reference to the number of Indigenous women and girls that have gone missing along it.<sup>97</sup> The Highway of Tears is merely the tip of a larger iceberg of missing Indigenous women and girls across Canada.<sup>98</sup> Fourteen-year-old Aielah Saric-Aurger went missing in 2006, until a motorist found her body lying at the base of an embankment of the Highway of Tears; her case remains an unsolved murder.<sup>99</sup> Fifteen-year-old Alisha Germaine was found murdered near an elementary school close to the Highway of Tears; her case remains unsolved.<sup>100</sup> Angela Williams, a mother of three, was reported missing in 2001 before her body—dumped in a ditch along a road—was identified; her case remains unsolved.<sup>101</sup> Fifteen-year-old Leah Kendra Anderson went missing after leaving her

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95. See *id.* at 12.

96. See *id.* at 11–12 (“[T]he existence of multiple policing jurisdictions in British Columbia resulted in confusion between the Royal Canadian Mounted Police and the Vancouver Police Department regarding responsibility for investigation.”).

97. See Dan Levin, *Dozens of Women Vanish on Canada’s Highway of Tears, and Most Cases Are Unsolved*, N.Y. TIMES (May 24, 2016), <https://www.nytimes.com/2016/05/25/world/americas/canada-indigenous-women-highway-16.html> [https://perma.cc/6H5E-G6B2] (archived Aug. 24, 2022); Katherine Morton, *Hitchhiking and Missing and Murdered Indigenous Women: A Critical Discourse Analysis of Billboards on the Highway of Tears*, 41 CAN. J. SOCIO. 299, 300 (2016) (“Highway 16 in Northwestern British Columbia is named The Highway of Tears for the substantial (although uncertain) number of Indigenous women who have disappeared.”).

98. See Levin, *supra* note 97 (explaining that the disappearances of Indigenous women along the Highway Tears “are just a small fraction of the number who have been murdered or disappeared nationwide”).

99. See *Missing and Murdered: The Unsolved Cases of Indigenous Women and Girls: Aielah Saric-Aurger*, CBC NEWS, <https://www.cbc.ca/missingandmurdered/mmiw/profiles/aielah-saric-auger> (last visited Mar. 18, 2022) [https://perma.cc/2F6M-6JPU] (archived Aug. 24, 2022).

100. See *Missing and Murdered: The Unsolved Cases of Indigenous Women and Girls: Alisha Germaine*, CBC NEWS, <https://www.cbc.ca/missingandmurdered/mmiw/profiles/alisha-germaine> (last visited Mar. 18, 2022) [https://perma.cc/PJ2G-HN9W] (archived Aug. 24, 2022).

101. See *Missing and Murdered: The Unsolved Cases of Indigenous Women and Girls: Angela Williams*, CBC NEWS, <https://www.cbc.ca/missingandmurdered/mmiw/profiles/angela-hazel-williams> (last visited Mar. 18, 2022) [https://perma.cc/E99S-RP7F] (archived Aug. 24, 2022).

house in 2013 to go ice skating.<sup>102</sup> Anderson's body was found two days later in a remote, rural area; her body was disfigured so severely that her death was at first attributed to a dog attack.<sup>103</sup> While a man was arrested in connection with her murder in 2017, the suspect was later released by police without explanation.<sup>104</sup> Anderson's case remains unsolved.<sup>105</sup> These are just a few of the 307 profiles of missing and murdered Indigenous Canadian women and girls compiled by the Canadian Broadcasting Corporation.<sup>106</sup> While the broadcasting company cataloged the cases of over three hundred victims, Canada's federal police force, the Royal Canadian Mounted Police (RCMP), have identified more than a thousand cases.<sup>107</sup> Research by the Native Women's Association of Canada suggests that this number is actually closer to four thousand.<sup>108</sup> And while Indigenous women and girls make up only about 4 percent of Canada's female population, they make up 16 percent of all female murder victims in the country.<sup>109</sup>

The Canadian government has primarily taken the blame for the missing and murdered victims. In 2008, Amnesty International released a report on the MMIW Crisis in Canada, concluding that the Canadian government's past practices and present inaction enabled the crisis to continue unabated.<sup>110</sup> One scholar has even argued that Canada's criminal justice system uniquely enables human traffickers to target Indigenous women and girls with a decreased risk of consequences.<sup>111</sup> Officers of the RCMP have been accused of attacking vulnerable Indigenous women and girls, driving them to secluded areas, and then assaulting them in police vehicles.<sup>112</sup> Criticism eventually

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102. See *Missing and Murdered: The Unsolved Cases of Indigenous Women and Girls: Leah Kendra Anderson*, CBC NEWS, <https://www.cbc.ca/missingandmurdered/mmiw/profiles/leah-kendra-anderson> (last visited Mar. 18, 2022) [<https://perma.cc/23RA-23Z8>] (archived Aug. 24, 2022) [hereinafter *Leah Kendra Anderson*].

103. See *Man Arrested in Connection with 2013 Killing of Leah Anderson Released*, CBC NEWS (July 27, 2017), <https://www.cbc.ca/news/canada/manitoba/manitoba-leah-anderson-killing-arrest-1.4225270> [<https://perma.cc/3FQT-TPYH>] (archived Aug. 24, 2022).

104. See *id.*

105. See *Leah Kendra Anderson*, *supra* note 102.

106. *Missing & Murdered: The Unsolved Cases of Indigenous Women and Girls*, CBC NEWS, <https://www.cbc.ca/missingandmurdered/> (last visited Mar. 18, 2022) [<https://perma.cc/6QSA-LVMD>] (archived Aug. 24, 2022).

107. See Levin, *supra* note 97.

108. See *id.*

109. See *id.*

110. See generally Amnesty Int'l, *supra* note 1.

111. See Bourgeois, *supra* note 11, at 1446–47 (arguing that the unique Canadian requirement that trafficking victims prove they feared for their safety decreases the likelihood of successful prosecution).

112. See *Those Who Take Us Away: Abusive Policing and Failures in Protection of Indigenous Women and Girls in Northern British Columbia, Canada*, HUM. RTS. WATCH (Feb. 13, 2013), <https://www.hrw.org/report/2013/02/13/those-who-take-us-away/abusive-policing-and-failures-protection-indigenous-women> [<https://perma.cc/2CN5-JW>]

prompted the Canadian government to start the National Inquiry into Missing and Murdered Indigenous Women and Girls in 2015.<sup>113</sup> The National Inquiry's investigation spanned four years and produced a two-volume Final Report that concluded that the failure of Canada's legal system and structures, rooted in colonial ideals, contributes to the violence that Indigenous women and girls experience.<sup>114</sup> Based on the evidence gathered, the National Inquiry issued 213 Calls for Justice: specific plans for honoring and protecting Indigenous Peoples.<sup>115</sup> In 2018, RCMP Commissioner Brenda Lucki issued a statement of apology to the families of missing and murdered Indigenous Canadians, acknowledging the agency's past failures and committing to future improvements.<sup>116</sup> While the National Inquiry and the RCMP's apology demonstrate Canada's awareness of the MMIW Crisis and its willingness to combat it, the crisis continues.<sup>117</sup>

3N] (archived Aug. 24, 2022) ("Human Rights Watch heard disturbing allegations of rape and assault by RCMP officers, including from a woman who described how in July 2012 police officers took her outside of town, raped her, and threatened to kill her if she told anyone."); Brandi Morin, *No One is Going to Believe You: When the RCMP Abuses Indigenous Women and Girls*, AL JAZEERA (Dec. 29, 2021), <https://www.aljazeera.com/features/longform/2021/12/29/no-one-will-believe-you-when-the-rcmp-abuses-indigenous-girls> [<https://perma.cc/G97R-NB4D>] (archived Aug. 24, 2022) (recounting the experiences of an Indigenous woman who was raped as a child by RCMP officers on two separate occasions).

113. See *Timeline of Key Milestones*, NAT'L INQUIRY INTO MISSING & MURDERED INDIGENOUS WOMEN & GIRLS, <https://www.mmiwg-ffada.ca/timeline/> (last visited Mar. 18, 2022) [<https://perma.cc/59S6-YK8D>] (archived Aug. 24, 2022).

114. See NAT'L INQUIRY, EXECUTIVE SUMMARY, *supra* note 24, at 33–34 ("The absence of basic economic, social, and political rights for this group contributes to the targeting of Indigenous women, girls, and 2SLGBTQQIA people."). To access both volumes of the final report, see *Reclaiming Power and Place*, NAT'L INQUIRY INTO MISSING & MURDERED WOMEN & GIRLS, <https://www.mmiwg-ffada.ca/final-report/> (last visited Mar. 18, 2022) [<https://perma.cc/UQ3U-PY5Q>] (archived Sept. 13, 2022).

115. See NAT'L INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS, RECLAIMING POWER AND PLACE, VOLUME 1B 176–218 [hereinafter NAT'L INQUIRY, VOLUME 1B].

116. *Statement of Apology to Families of Missing and Murdered Indigenous Women and Girls*, ROYAL CAN. MOUNTED POLICE (June 25, 2018), <https://www.rcmp-grc.gc.ca/en/news/2018/statement-apology-families-missing-and-murdered-indigenous-women-and-girls> ("I'm sorry that for too many of you, the RCMP was not the police service you needed it to be during this terrible time in your life. It's very clear to me that the RCMP could have done better. I promise to you, we *will* do better.") [<https://perma.cc/286G-79KG>] (archived Aug. 24, 2022).

117. See *Canada: Concrete Action to End Violence Against First Nations, Métis, and Intuit Women, Girls, and Two-Spirit Persons Needed Now*, AMNESTY INT'L (July 23, 2019), <https://www.amnesty.ca/ua-urgent-action/canada-concrete-action-end-violence-against-first-nations-metis-and/> [<https://perma.cc/DD56-5FKB>] (archived Aug. 24, 2022) (arguing that despite Canada's recent enactment of a national action plan against its MMIW crisis, the plan is incomplete and its implementation process unclear).

B. *The United States and Canada within the International Framework of Indigenous Rights*

The legal rights and issues of Indigenous Peoples have become an increasingly global issue, in no small part because of the tireless work of activists.<sup>118</sup> In recent decades, Indigenous rights have garnered transnational recognition.

In 2007, the United Nations adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>119</sup> The UNDRIP has been called “an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law.”<sup>120</sup> In addition to affirming the basic rights of Indigenous Peoples,<sup>121</sup> the UNDRIP creates obligations on the part of UN member states to protect those rights.<sup>122</sup> Article 22 specifically commands member countries “to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.”<sup>123</sup> Only four countries, including the United States and Canada, voted against the UNDRIP’s adoption, although both countries eventually reversed their objections years later.<sup>124</sup>

Canada recently implemented the UNDRIP into its domestic legal framework with the enactment of the United Nations Declaration on the Rights of Indigenous Peoples Act.<sup>125</sup> The act creates a roadmap for the implementation of the UNDRIP in Canada and requires the Canadian government to, “in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada

118. See ROYAL COMM’N OF ABORIGINAL PEOPLES, *supra* note 27, at 188–89 (describing the efforts of Indigenous Canadians in establishing an international network).

119. See UNDRIP, *supra* note 8.

120. S. James Anaya (Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 85, U.N. Doc., A/HRC/9/9/Add. 1 (Aug. 11, 2008).

121. For example, the Preamble declares that “indigenous peoples are equal to all other peoples.” UNDRIP, *supra* note 8, at 1.

122. See CASES AND MATERIALS ON FEDERAL INDIAN LAW, *supra* note 42, at 1101.

123. UNDRIP, *supra* note 8, art. 22.

124. *United Nations Declaration on the Rights of Indigenous Peoples*, UNITED NATIONS DEP’T OF ECON. & SOC. AFFS., <https://www.un.org/development/desa/indigenoupeoples/declaration-on-the-rights-of-indigenous-peoples.html> (last visited Jan. 11, 2022) [<https://perma.cc/4AJ9-ABXM>] (archived Aug. 24, 2022); see also CASES AND MATERIALS ON FEDERAL INDIAN LAW, *supra* note 42, at 1101 (noting that all of the countries that originally objected to the Declaration—the United States, Canada, Australia, and New Zealand—all built their Indigenous laws around the doctrine of discovery).

125. United Nations Declaration on the Rights of Indigenous Peoples Act, S.C. 2021, c 14 (Can.).

are consistent with the UNDRIP.”<sup>126</sup> The United States, however, has yet to similarly implement the declaration as part of its domestic law. While the United States supports the UNDRIP, the UNDRIP is currently not legally binding within the country and rather serves as a persuasive authority with moral and political force.<sup>127</sup>

Another transnational organization that has a bearing on North American Indigenous rights is the Organization of American States (OAS), which consists of all thirty-five countries across the Americas and “constitutes the main political, juridical, and social governmental forum” in the Americas;<sup>128</sup> both the United States and Canada are members.<sup>129</sup> The OAS Inter-American Commission on Human Rights (IACHR) investigates human rights complaints brought by Indigenous Peoples against its member states, and the OAS Inter-American Court of Human Rights has the authority to issue decisions that are binding on states as a matter of international law.<sup>130</sup>

The OAS also adopted its own American Declaration on the Rights of Indigenous Peoples in 2016.<sup>131</sup> Article VII states that member states “recognize that violence against indigenous peoples and individuals, particularly women, hinders or nullifies the enjoyment of all human rights and fundamental freedoms” and commands member states to “adopt, in conjunction with indigenous peoples, the necessary measures to prevent and eradicate all forms of violence and discrimination, particularly against indigenous women and children.”<sup>132</sup> Article XXX(4)(c) similarly commands member states to “take special and effective measures in collaboration with indigenous peoples to guarantee that indigenous women and children live free from all forms

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126. *Id.*; see also *Implementing the United Nations Declaration on the Rights of Indigenous Peoples Act*, GOV'T OF CAN. (Dec. 12, 2021), <https://www.justice.gc.ca/eng/declaration/index.html> [<https://perma.cc/52BK-3G6Q>] (archived Aug. 24, 2022) (providing an overview of the Act's impact).

127. *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, U.S. DEP'T OF STATE (Jan. 12, 2011), <https://2009-2017.state.gov/s/srgia/154553.htm> [<https://perma.cc/C4MT-JDY2>] (archived Aug. 24, 2022) [hereinafter *Announcement of U.S. Support for UNDRIP*].

128. *Who We Are*, ORG. OF AM. STATES, [https://www.oas.org/en/about/who\\_we\\_are.asp](https://www.oas.org/en/about/who_we_are.asp) (last visited Jan. 12, 2022) [<https://perma.cc/87XL-YTCL>] (archived Aug. 24, 2022).

129. *Member States*, ORG. OF AM. STATES, [https://www.oas.org/en/member\\_states/default.asp](https://www.oas.org/en/member_states/default.asp) (last visited Jan. 12, 2022) [<https://perma.cc/M9XR-K97E>] (archived Aug. 24, 2022).

130. See S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 35 (2001).

131. See American Declaration on the Rights of Indigenous Peoples, AG/RES.2888 (XLV-0/16) (June 15, 2016) [hereinafter *American Declaration*].

132. *Id.* art. VII.

of violence, especially sexual violence” and to “guarantee the right of access to justice, protection, and effective reparation for harm caused to the victims.”<sup>133</sup>

While the above declarations could be steps toward a safer life for Indigenous Peoples in North America, they remain hollow promises without proper enforcement.<sup>134</sup> Businesses that extract natural resources, and the man camps that develop around their extraction sites, represent a growing threat that transnational organizations seem unwilling or unable to handle.

### C. *Man Camps’ Transnational Contribution to the MMIW Crisis*

Extractive industries represent an unfortunate challenge to the jurisdictional systems of both the United States and Canada, revealing the inadequacy of those systems at the expense of Indigenous lives. Natural resource extraction companies interested in harvesting resources from Indigenous land typically employ a large, transient workforce.<sup>135</sup> This workforce, usually composed of non-Indigenous workers, is domiciled in temporary housing set up directly on Indigenous land.<sup>136</sup> By establishing these encampments, colloquially referred to as man camps,<sup>137</sup> extractive industries exacerbate criminal jurisdictional blind spots by encouraging non-Indigenous people to move onto Indigenous land for work. For the reasons discussed in preceding sections, these non-Indigenous workers are typically not subject to the criminal jurisdiction of Indigenous law enforcement.

The presence of man camps on Indigenous land has been anything but benign. The US Department of State’s Office to Monitor and Combat Trafficking in Persons noted that sex trafficking has increased near oil extraction camps.<sup>138</sup> A former Special Rapporteur on the Rights of Indigenous Peoples reported to the United Nations that an increase in violent crime related to extractive industries, and Indigenous Peoples’ inability to address these crimes themselves, has led to deep concerns

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133. *Id.* art. XXX(4)(c).

134. *See infra* Part III.B (discussing the failure of transnational organizations to address the MMIW Crisis).

135. *See* Deer & Kronk Warner, *supra* note 12, at 75.

136. *See id.*

137. This nickname is derived from the predominance of male workers living in these camps. *See id.*

138. *See* U.S. DEPT OF STATE, OFF. OF TRAFFICKING IN PERS., THE LINK BETWEEN EXTRACTIVE INDUSTRIES AND SEX TRAFFICKING 1 (June 2017), <https://www.state.gov/wp-content/uploads/2019/02/272964.pdf> [<https://perma.cc/TSL5-AKJD>] (Aug. 24, 2022) [hereinafter LINK BETWEEN EXTRACTIVE INDUSTRIES AND SEX TRAFFICKING] (“Service providers in areas near camps surrounding oil extraction facilities, such as the Bakken oil fields in North Dakota in the United States, have reported that sex traffickers have exploited women in the area, including Native American women.”).

about safety in Indigenous American communities.<sup>139</sup> The Canadian government's National Inquiry into Missing and Murdered Indigenous Women and Girls reported that extractive businesses utilizing a transient, largely male workforce contributed to human trafficking patterns in Canada.<sup>140</sup> Anecdotal reports by reservation residents and law enforcement officers of violence in and around man camps add harrowing details to these statistics.<sup>141</sup>

Despite acknowledgment of the connection between man camps and the MMIW Crisis, neither the United States nor Canada have taken measures to specifically address the risk that man camps pose. While identifying the connection between man camps and violence against Indigenous Peoples, the US Department of State identified no efforts to address the connection and made no recommendations for protecting Indigenous Peoples from the threat that man camps pose.<sup>142</sup> The US Department of Justice recently dedicated two issues of its *Journal of Federal Law and Practice* to the MMIW Crisis, but neither issue—over four hundred pages in total—discusses extractive industries or man camps.<sup>143</sup> While Canada's action plan for the MMIW Crisis identifies a need to address man camps, the paragraph of the plan focused on extractive industries provides only vague promises to gather data on the issue and help support community-led initiatives,

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139. See Victoria Tauli Corpuz (Special Rapporteur on the Rights of Indigenous Peoples), *Rep. of the Special Rapporteur on the Rights of Indigenous Peoples on Her Mission to the United States of America*, ¶¶ 56–60, U.N. Doc. A/HRC/36/46/Add. 1 (Aug. 9, 2017).

140. NAT'L INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS, RECLAIMING POWER AND PLACE, VOLUME 1A 565, 584–86, [https://www.mmiw-ffada.ca/wp-content/uploads/2019/06/Final\\_Report\\_Vol\\_1a-1.pdf](https://www.mmiw-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf) [<https://perma.cc/62PH-LQSD>] (archived Aug. 24, 2022) [hereinafter NAT'L INQUIRY, VOLUME 1A] (“Many factors contribute to the patterns in trafficking, including oil and gas development where a largely male, transient workforce travels for short periods for work.”).

141. See Deer & Kronk Warner, *supra* note 12, at 76 (“Advocates for Native women and children have reported a marked increase in the rates of sexual assault in their communities since the arrival of hundreds of non-Native men.”); Damon Buckley, *Firsthand Account of Man Camp in N.D. From Local Tribal Cop*, LAKOTA COUNTRY TIMES (May 22, 2014), <https://www.lakotatimes.com/articles/firsthand-account-of-man-camp-in-north-dakota-from-local-tribal-cop/> [<https://perma.cc/396A-XU9A>] (archived Aug. 24, 2022) (describing the account of a former Rosebud Tribe Police Chief, who reported finding a fifteen-year-old boy that was forced into sex slavery in a man camp and finding a four-year-old victim of sexual assault outside of a man camp); Morin, *supra* note 112 (describing sex trafficking and violence related to man camps on Alberta's oil sands).

142. See LINK BETWEEN EXTRACTIVE INDUSTRIES AND SEX TRAFFICKING, *supra* note 138.

143. See generally Good & Weyand, *Missing or Murdered Indigenous Persons: Law Enforcement & Prevention*, 69 DEP'T JUST. J. FED. L. & PRAC., no. 1, Jan. 2021; Good & Weyand, *Missing or Murdered Indigenous Persons: Legal, Prosecution, Advocacy, & Healthcare*, 69 DEP'T JUST. J. FED. L. & PRAC., no. 2, Mar. 2021.



appearing to put the burden of developing a solution on local communities.<sup>144</sup> Amnesty International criticized the Action Plan as “incomplete” and called upon Canada’s federal government to develop detailed plans for each of the 231 Calls for Justice issued by the National Inquiry into Missing and Murdered Indigenous Women and Girls;<sup>145</sup> five of those Calls for Justice focus on the contribution of extractive industries to the MMIW Crisis.<sup>146</sup>

### III. SEARCHING FOR A SOLUTION

While the United States and Canadian governments have not taken specific actions to address the threat that man camps pose to Indigenous Peoples in North America, solutions have been proposed. There has been widespread support for Indigenous communities’ ability to exercise criminal jurisdiction over non-Indigenous assailants of Indigenous Peoples on Indigenous lands in both the United States and Canada. Transnational organizations may appear to be a potential avenue for reform, but those organizations lack any of the enforcement power necessary to mandate action from the United States and Canada. Efforts at data gathering have garnered some success, though data on man camps specifically is limited and data alone cannot fully address the crisis. Some have also proposed holding extractive industries themselves accountable for man camps’ contributions to the MMIW Crisis, though these businesses have evaded responsibility so far.

#### A. *Full Indigenous Criminal Jurisdiction over Non-Indigenous Offenders*

Perhaps the most obvious and effective solution would be to enable Indigenous Peoples to exercise full criminal jurisdiction over non-Indigenous offenders who commit crimes on Indigenous land. Entrusting criminal jurisdiction over non-Indigenous offenders to Indigenous communities would thus enable those communities to

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144. GOV’T OF CAN., FEDERAL PATHWAY TO ADDRESS MISSING AND MURDERED INDIGENOUS WOMEN, GIRLS, AND 2SLGBTQIA+ PEOPLE 23 (2021), [https://www.rcaanc-cirnac.gc.ca/DAM/DAM-CIRNAC-RCAANC/DAM-RECN/STAGING/texte-text/fed\\_patway\\_mmiwg\\_2slgbtqia\\_1622728066545\\_eng.pdf](https://www.rcaanc-cirnac.gc.ca/DAM/DAM-CIRNAC-RCAANC/DAM-RECN/STAGING/texte-text/fed_patway_mmiwg_2slgbtqia_1622728066545_eng.pdf) (last visited Mar. 18, 2022) [<https://perma.cc/24N3-WRKE>] (archived August 23, 2022). The paragraph in the Action Plan also links to the webpage for the Aboriginal Community Safety Planning Initiative, but the initiative has released nothing to indicate they have worked or are currently working on ways to address man camps. *See id.*; *Aboriginal Community Safety Planning Initiative*, GOV’T OF CAN. (Feb. 8, 2022), <https://www.publicsafety.gc.ca/cnt/cntrng-crm/crctns/cmmnt-sft-entrbtn-prgrm-en.aspx> [<https://perma.cc/8GKD-329Z>] (archived August 23, 2022).

145. *See* AMNESTY INT’L, *supra* note 117.

146. *See* NAT’L INQUIRY, VOLUME 1B, *supra* note 115, at 196.

pursue those offenders without having to wait for non-Indigenous law enforcement.

In the United States, this solution would require Congress to fully accept the *Oliphant* Court's invitation to consider the prevalence of non-Indigenous crime on Indigenous reservation lands and authorize those Indigenous communities to prosecute non-Indigenous offenders.<sup>147</sup> Numerous scholars and students of Indigenous legal issues have recommended such a solution.<sup>148</sup> Even a US government commission recommended such a result; the Indian Law and Order Commission was an independent advisory group authorized by the Tribal Law and Order Act, and its final report strongly criticized the current jurisdictional system and recommended that federal law be modified to permit Indigenous tribes to opt out of federal or state jurisdiction.<sup>149</sup>

As desirable and effective as this solution would likely be, its likelihood of manifestation appears uncertain. Congress has had over forty years since the *Oliphant* decision to extend full criminal jurisdiction to tribes, and Congress has only extended that jurisdiction incrementally when it reauthorized the Violence Against Women Act in 2013 and 2022.<sup>150</sup> This 2013 VAWA extension carried with it several qualifications that limited its application to violence related to extractive industries. Specifically, Indigenous tribes were only able to exercise special domestic violence jurisdiction over non-Indigenous offenders if those offenders resided in the tribe's territory, were employed by the tribe,

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147. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

148. See, e.g., Deer & Kronk Warner, *supra* note 12, at 91–94 (arguing that a full congressional repudiation of *Oliphant* is necessary to protect Indigenous communities from violence associated with extractive industries); ECHO-HAWK, *supra* note 8, at 442 (“Given the long history of violence committed by non-Indians against Native Americans, reformers should seek to overturn the *Oliphant* line of cases in a more principled Supreme Court in the twenty-first century.”); Lily Grisafi, Note, *Living in the Blast Zone: Sexual Violence Piped onto Native Land by Extractive Industries*, 53 COLUM. J.L. & SOC. PROBS. 509, 530 (2020) (arguing that violence against Indigenous communities associated with extractive industries can be reduced if Congress expanded Indigenous criminal jurisdiction to encompass all crime on Indigenous land).

149. See INDIAN L. & ORDER COMM'N, *supra* note 22, at ix–xi. For more information about the Indian Law & Order Commission, see *Indian Law & Order Commission*, UCLA, <https://www.aisc.ucla.edu/iloc/> (last visited Jan. 13, 2022) [<https://perma.cc/G575-PLXB>] (archived Aug. 23, 2022); 25 U.S.C. § 2812 (statute creating the Indian Law and Order Commission).

150. See 2013 VAWA, *supra* note 54; 25 U.S.C. § 1304 (2022).

or were intimately related to a tribal member or Indigenous person living within the tribe's territory.<sup>151</sup> Consequently, sexual violence committed by strangers fell outside of VAWA 2013 jurisdiction.<sup>152</sup> Further, those offenders could only be prosecuted for two kinds of crimes: domestic violence and violations of protection orders.<sup>153</sup> As a result, many non-Indigenous offenders evaded Indigenous prosecution under the 2013 VAWA if they did not have the requisite ties to the Indigenous community or their conduct was simply beyond the 2013 VAWA's limited scope. These jurisdictional limitations were especially troublesome when applied to man camps, where the temporary, primarily non-Indigenous workers often have no connection to the surrounding Indigenous community.<sup>154</sup>

The more recent 2022 VAWA remedied many of these shortcomings, but still falls short of empowering tribal law enforcement with full criminal jurisdiction over all offenses committed by non-Indigenous offenders against Indigenous victims on Indigenous land.<sup>155</sup> The 2022 VAWA removed the requirement that a non-Indigenous perpetrator of domestic violence must reside in the tribal territory or be employed by the tribe, and also expanded the offenses that tribes may prosecute non-Indigenous offenders.<sup>156</sup> These newly enumerated offenses include sexual violence, child violence, stalking, and sex trafficking, which are defined broadly and without the specific limitations that qualified the 2013 VAWA jurisdiction.<sup>157</sup> However, despite these broad definitions, tribes' law enforcement powers over non-Indigenous offenders cannot extend beyond the nine offenses enumerated in the 2022 VAWA, leaving tribes powerless to prosecute offenses that fall beyond those categories.<sup>158</sup> Most notably absent from the list is murder. Accordingly, the 2022 VAWA has not brought the murders of those like Olivia Lone Bear, MacKenzie Howard, and Ashlyne Mike within the jurisdiction of Indigenous law enforcement.

Further, the 2022 VAWA provides that tribal law enforcement has concurrent jurisdiction with federal and state law enforcement over the

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151. See 2013 VAWA, *supra* note 54, § 1304(b)(4)(B).

152. See Grisafi, *supra* note 148, at 527–28 (noting that the VAWA extended jurisdiction “provides no protections against stranger rape, sexual assault that occurs during a casual sexual encounter, sex trafficking and sex slavery by strangers, or any other situation in which the defendant and victim have no prior relationship”).

153. See 2013 VAWA, *supra* note 54, § 1304(c).

154. See Grisafi, *supra* note 148, at 528 (“[T]he influx of transient workers means Native women are less likely to have a prior relationship with their attackers and their attackers are less likely to have sufficient ties with the tribe.”).

155. See 25 U.S.C. § 1304. While the 2022 VAWA was initially introduced into the Senate as a stand-alone bill, it was included within an appropriations act that became law in March 2022. See Violence Against Women Act Reauthorization Act of 2022, S. 3623, 117th Cong. (2022); Consolidated Appropriations Act, Pub. L. No. 117-103 (2022).

156. See 25 U.S.C. § 1304.

157. See *id.* § 1304(a)(3), (5), (7), (12), (13), (16).

158. See *id.* § 1304(c) (stating that participating tribes may exercise 2022 VAWA criminal jurisdiction over covered crimes that occur in that tribe's Indian country).

enumerated offenses, and that nothing in the statutory section “creates or eliminates any Federal or State criminal jurisdiction over Indian country.”<sup>159</sup> While tribes now have expanded jurisdiction, they must still share that jurisdiction with the federal and state authorities that previously had exclusive jurisdiction, and the 2022 VAWA does not specify whether Indigenous jurisdiction over these crimes is presumptive.<sup>160</sup> While it is too early to examine how this newly concurrent jurisdiction will affect tribal, state, and federal cooperation, the lack of presumptive tribal jurisdiction does create the opportunity for conflict among these sovereigns.<sup>161</sup> While the 2022 VAWA is a significant step toward empowering tribes with criminal jurisdiction over non-Indigenous offenders, it is still only incremental. The new provisions provide tribal authorities with a limited number of offenses to prosecute, and the provisions leave ambiguity as to how tribal, federal, and state authorities will prosecute those crimes under their newly concurrent jurisdiction.

In Canada, government inquiries have concluded that Indigenous Canadian communities should be empowered to build their own criminal justice systems. The Report of the Aboriginal Justice Inquiry of Manitoba recommended that Indigenous Canadians be enabled to create their own policing services and prosecution branches as a step towards a fully functioning, independent Indigenous justice system in Canada.<sup>162</sup> The report argued that Indigenous control of their own criminal justice system is essential to Indigenous self-government and poses no threat to non-Indigenous Canadians.<sup>163</sup> The Royal Commission on Aboriginal Peoples adopted the Aboriginal Justice Inquiry’s conclusion that Indigenous Canadian communities be allowed to

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159. *Id.* § 1304(b)(2)–(3)(A).

160. The only guidance provided regarding this concurrent jurisdiction is an exception that tribal authorities lack jurisdiction over crimes other than obstruction of justice or assault of tribal justice personnel when neither the defendant nor the victim are Indigenous. *See id.* § 1304(b)(4)(A).

161. The establishment of presumptive tribal jurisdiction is not new, as it already exists within the concurrent jurisdictional framework of the Indian Child Welfare Act (ICWA). *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989) (citing 25 U.S.C. § 1911(b)) (nothing that ICWA “creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation”).

162. *See* Aboriginal Justice Implementation Commission, *Aboriginal Justice Systems*, in 1 REPORT OF THE ABORIGINAL JUSTICE INQUIRY OF MANITOBA, <http://www.ajic.mb.ca/volumel/chapter7.html#3> (last visited Mar. 4, 2022) [<https://perma.cc/88YX-P7WC>] (archived Aug. 23, 2022).

163. *See id.*

develop their own justice systems.<sup>164</sup> Most recently, the final report of the National Inquiry into Missing and Murdered Indigenous Women called upon the federal, territorial, provincial, municipal, and Indigenous governments of Canada to “immediately implement” the recommendations of both the reports from the Aboriginal Justice Inquiry and the Royal Commission on Aboriginal Peoples.<sup>165</sup> Yet the Canadian government’s response to the National Inquiry’s final report made no specific commitment to implement those recommendations; aside from promising “to strengthen community-based justice systems” and “to provide alternatives to the mainstream justice system,” the Canadian government emphasized reforming the existing non-Indigenous response to crimes against Indigenous Canadians.<sup>166</sup>

Despite support for empowering Indigenous communities to exercise broader criminal jurisdiction over non-Indigenous offenders in both the United States and Canada, the realization of that empowerment remains uncertain in both countries. Other solutions must be explored until Indigenous criminal jurisdiction can be fully realized.

#### B. *Enforcement through Transnational Organizations*

While the UNDRIP provides international guidelines for preventing violence against Indigenous women and children, neither the United States nor Canada has taken effective steps to act on that guidance. The United States has yet to implement the UNDRIP as part of its legal framework, instead only supporting the UNDRIP as a persuasive authority with “moral and political force.”<sup>167</sup> Regardless of the strength of that persuasive force, the UNDRIP is not binding within the United States. Canada has made more progress on this front, formally implementing the UNDRIP as part of its legal framework and taking initial steps to fulfill its obligations.<sup>168</sup> However, Canada has been criticized both for not acting swiftly enough to implement the UNDRIP’s requirements and for its lack of transparency in its current efforts.<sup>169</sup>

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164. See ROYAL COMM’N ON ABORIGINAL PEOPLES, BRIDGING THE CULTURAL DIVIDE: A REPORT ON ABORIGINAL PEOPLE AND CRIMINAL JUSTICE IN CANADA 55–57 (1996) (quoting Aboriginal Justice Implementation Commission, *supra* note 162) [hereinafter ROYAL COMM’N ON ABORIGINAL PEOPLES, BRIDGING THE CULTURAL DIVIDE].

165. See NAT’L INQUIRY, EXECUTIVE SUMMARY, *supra* note 24, at 66, 69.

166. See GOV’T OF CAN., *supra* note 144, at 24–26.

167. *Announcement of U.S. Support for UNDRIP*, *supra* note 127, at 1; see also *Indigenous Peoples*, U.S. AGENCY FOR INT’L DEV. (Apr. 1, 2020), <https://www.usaid.gov/environmental-policy-roadmap/indigenous-peoples> [<https://perma.cc/4AWP-W46K>] (archived Aug. 24, 2022) (“The UNDRIP is not legally binding on States and does not impose legal obligations on governments, but like all human rights instruments, it carries moral force.”).

168. See United Nations Declaration on the Rights of Indigenous Peoples Act, S.C. 2021 c 15 (Can.); GOV’T OF CAN., *supra* note 144 (providing an overview of the act’s impact).

169. See AMNESTY INT’L, *supra* note 117.

The OAS Inter-American Commission on Human Rights also responded to the MMIW Crisis by gathering information and publishing its subsequent findings. In 2014, the IACHR published a report on its investigation of missing and murdered Indigenous women in British Columbia, Canada.<sup>170</sup> While the IACHR found several deficiencies in Canada's handling of the MMIW Crisis, the IACHR was limited to making recommendations and not binding orders.<sup>171</sup> While Canada did follow the IACHR's recommendation to conduct a national inquiry into the MMIW Crisis,<sup>172</sup> the Canadian government was not obliged to do so, and its post-inquiry actions have been criticized as insufficient to fully address the crisis.<sup>173</sup> Even after the National Inquiry was completed, the IACHR could only encourage Canada to implement the National Inquiry's recommendations, with no authority to mandate those reforms.<sup>174</sup> Canada alone is responsible for ensuring it fulfills the OAS's promise to "take special and effective measures in collaboration with indigenous peoples to guarantee that indigenous women and children live free from all forms of violence, especially sexual violence."<sup>175</sup> The IACHR has not made a similar investigation of the MMIW Crisis as it exists in the United States, with no report of recommendations for the United States to follow. Even if such a report were made, the United States, like Canada, would not be bound by any of the recommendations the IACHR could make.<sup>176</sup>

While the Inter-American Court of Human Rights may go a step further than the IACHR in its authority to issue judgments that are binding as a matter of international law,<sup>177</sup> that jurisdiction is limited only to OAS member states that have accepted that jurisdiction.

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170. See generally MISSING AND MURDERED INDIGENOUS WOMEN IN BRITISH COLUMBIA, *supra* note 93.

171. See *id.* at 21–22 (describing the IACHR's jurisdiction in investigating Canada).

172. See *id.* at 119.

173. See AMNESTY INT'L, *supra* note 117.

174. See IACHR Calls on the State of Canada to Address the Recommendations Issued by the National Inquiry into Missing and Murdered Indigenous Women and Girls in Order to Protect and Guarantee Their Human Rights, IACHR PRESS & COMM'N OFF. (June 25, 2019), [https://www.oas.org/en/iachr/media\\_center/PReleases/2019/159.asp](https://www.oas.org/en/iachr/media_center/PReleases/2019/159.asp) [<https://perma.cc/7RT5-5QK4>] (archived Aug. 24, 2022).

175. American Declaration, *supra* note 131, art. XXX(4)(c).

176. The commission has authority to investigate and make recommendations and requests, but nothing in the commission's governing statute allows it to enforce those recommendations and requests. Even in "serious and urgent cases," the commission may only request that a member state adopt precautionary measures. See *Mandate and Functions*, ORG. OF AM. STATES, <https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/functions.asp> (last visited Mar. 18, 2022) [<https://perma.cc/R4ZQ-QMDE>] (archived Aug. 24, 2022).

177. See Anaya & Williams, *supra* note 130.

Neither the United States nor Canada is among the twenty states that have consented to the Court's jurisdiction.<sup>178</sup>

While both the United Nations and OAS provide guidelines for the protection of Indigenous rights, these international organizations do not have the authority to impose remedies on the United States or Canada. Under the current international framework, the United States and Canada are left to hold themselves accountable for upholding international standards for Indigenous rights, and so a solution must come from within each country.

C. *Improvement of Data Gathering on the MMIW Crisis and Man Camps Specifically*

Another solution proposed to combat the MMIW Crisis in both the United States and Canada has been the effort to gather more data on the crisis. Accurate and consistent statistics related to the crisis are difficult to find.<sup>179</sup> When data are available, there are often noticeable disparities between data gathered within the same country by different organizations. For example, in the United States, the National Crime Information Center reported in 2016 that there were 5,712 reports of missing Indigenous women and girls, while the Department of Justice's missing persons database only listed 116 cases.<sup>180</sup> In Canada, the RCMP logged twelve hundred cases of missing and murdered Indigenous women, while the Native Women's Association of Canada suggests the number of cases could be closer to four thousand.<sup>181</sup>

In the United States, these data deficiencies have prompted new legislation aimed at providing more comprehensive statistics on the crisis. In 2018, Savanna's Act was passed with the purpose of increasing the collection of data on missing or murdered Indigenous Americans; effective October 10, 2020, the Act requires the US Attorney General to gather detailed statistics on missing Indigenous

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178. The twenty member states that have consented to the Court's jurisdiction are Argentina, Barbados, Bolivia, Brazil, Chile, Columbia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, and Uruguay. See *Inter-American Human Rights System*, INT'L JUST. RES. CTR., <https://ijrcenter.org/regional/inter-american-system> (last visited Mar. 18, 2022) [<https://perma.cc/FM6E-FW4G>] (archived Aug. 24, 2022).

179. See *Unmasking the Hidden Crisis*, *supra* note 9, at 1–2 (“A lack of comprehensive data to quantify the number of missing and murdered women in Indian Country is just one factor contributing to this crisis.”); AMNESTY INT'L, AI INDEX AMR 20/4872/2016, OUT OF SIGHT, OUT OF MIND 54 (2016) (describing how the first national police statistics for missing and murdered Indigenous women were only released in 2014).

180. See URB. INDIAN HEALTH INST., MISSING & MURDERED INDIGENOUS WOMEN & GIRLS 2 (Nov. 14, 2018), <https://www.uihi.org/wp-content/uploads/2018/11/Missing-and-Murdered-Indigenous-Women-and-Girls-Report.pdf> [<https://perma.cc/8W2C-MRDJ>] (archived Aug. 24, 2022).

181. See Levin, *supra* note 97.

Americans,<sup>182</sup> and the 2022 VAWA allows tribes' access to national criminal information databases.<sup>183</sup> In Canada, the National Inquiry on Missing and Murdered Indigenous Women and Girls made several recommendations to improve data gathering on the crisis,<sup>184</sup> but no legislation has been passed pursuant to these recommendations.

Direct evidence of man camps' contributions to the crisis in both the United States and Canada remains primarily anecdotal.<sup>185</sup> Information about man camps themselves is sparse, and they can even be unmapped, leading to difficulty in law enforcement and emergency service responses to calls for assistance in those camps.<sup>186</sup> It remains to be seen whether the legislation described above will help fill this void.

As important as data are to understanding the MMIW Crisis,<sup>187</sup> data are only part of the solution. Better data can help guide an effective solution to the crisis, but that data must be acted on for those solutions to materialize. So far, efforts in the United States and Canada have resulted in a greater push for data gathering on the crisis, but not as great an amount of action based on available data.

#### D. *Private Action by Extractive Businesses*

Up until this point, this Note has focused on the response of government actors to the MMIW Crisis and man camps rather than on the response of extractive industries. Frankly, there has been no response from the extractive resource companies setting up the man camps that are contributing to the crisis.<sup>188</sup>

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182. See 25 U.S.C. § 5701(4); 25 U.S.C. § 5705.

183. See 34 U.S.C. § 41107.

184. See NAT'L INQUIRY, EXECUTIVE SUMMARY, *supra* note 24, at 72, 78, 97, 100–01.

185. See Deer & Kronk Warner, *supra* note 12, at 75–76 (“While there is no comprehensive data collection system that allows us to quantify the increased rates of violence associated with man camps, there is ample anecdotal evidence to establish a significant problem.”).

186. U.S. DEPT OF JUST., OFF. ON VIOLENCE AGAINST WOMEN, 2013 TRIBAL CONSULTATION REPORT 3 n.2 (2013) [hereinafter 2013 TRIBAL CONSULTATION REPORT] (noting the difficulty of providing law enforcement and emergency services to remote and unmapped man camps).

187. See *Unmasking the Hidden Crisis*, *supra* note 9, at 14–15 (statement of Hon. Ruth Buffalo) (“Without data, there is no clear evidence that a problem exists.”).

188. See Corpuz, *supra* note 139, ¶ 60 (“While the trafficking of indigenous women and children is hardly a new phenomenon, there is little recognition by public and private stakeholders about affirmative actions that they can take to protect women in communities where energy development catalyzes an increase in sexual violence.”); Abaki Beck, *Why Aren't Fossil Fuel Companies Held Accountable for Missing and Murdered Indigenous Women?*, YES! (Oct. 5, 2019), <https://www.yesmagazine.org/>



For example, while the Bakken Formation was at the heart of the North Dakota oil boom, it was also at the center of horrific accounts of violence against Indigenous Americans living in the area.<sup>189</sup> Numerous articles have connected the man camps established around the Bakken Formation to a contemporaneous rise in violence against Indigenous Peoples.<sup>190</sup> The US State Department used the Bakken Formation as an example of the connection between man camps and increased violence against surrounding Indigenous communities.<sup>191</sup> The Department of Justice has recognized that the influx of transient workers to the Bakken Formation caused an increase in violence in the area.<sup>192</sup> Advocacy groups submitted a request for help in addressing the violence brought on by the Bakken man camps to the United Nations,<sup>193</sup> and the United Nations Special Rapporteur's subsequent report on her visit to the United States referenced the violence fueled by the Bakken man camps.<sup>194</sup> Yet none of the many companies responsible for the formation of those man camps have so much as acknowledged the suffering their workers have caused.<sup>195</sup>

And why should they? The current legal landscape does not obligate companies to take responsibility for the havoc their workforces wreak upon surrounding communities. Nor has much pressure been directed at extractive resource businesses to help address the MMIW Crisis; the vast majority of scholarship and proposed legislation places the burden of acting on the crisis on governments. In the absence of clear incentives or consequences, it is not difficult to see why extractive resource companies would ignore the crisis, allowing governments and the criminal justice system to take the brunt of the blame while their profits continue to soar. And considering the immense revenues US

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environment/2019/10/05/native-fossil-fuel-missing-murdered-indigenous-women-mmiw [https://perma.cc/VP3H-Y39X] (archived Aug. 24, 2022) (noting that extractive businesses have avoided accountability for violence against Indigenous Americans).

189. See LINK BETWEEN EXTRACTIVE INDUSTRIES AND SEX TRAFFICKING, *supra* note 138.

190. See, e.g., Deer & Kronk Warner, *supra* note 12, at 74–79; Simons, *supra* note 20, at 416–17; Finn, Gajda, Perin, & Fredericks, *supra* note 10, at 2–4, 7–8; Grisafi, *supra* note 148, at 512–13.

191. See LINK BETWEEN EXTRACTIVE INDUSTRIES AND SEX TRAFFICKING, *supra* note 138.

192. 2013 TRIBAL CONSULTATION REPORT, *supra* note 186.

193. See *Fossil Fuel Extraction Dangers: Native American and Women's Organizations Request UN Help on Sexual Violence*, INDIAN COUNTRY TODAY (Sept. 13, 2018), <https://indiancountrytoday.com/archive/fossil-fuel-extraction-dangers-native-american-and-womens-organizations-request-un-help-on-sexual-violence> [https://perma.cc/PKD5-G5KP] (archived Aug. 22, 2022).

194. See Corpuz, *supra* note 139, ¶¶ 57–60.

195. See *id.* ¶ 60. For a list of companies actively operating on the Bakken Formation, see *Bakken Shale Companies and Active Operators*, BAKKEN SHALE, <https://bakkenshale.com/companies> (last visited Mar. 17, 2022) [https://perma.cc/FG6L-BU7G] (archived Aug. 22, 2022).

and Canadian governments generate from these extractive industries,<sup>196</sup> it is not difficult to see why those governments might not be eager to place any responsibility on those industries.<sup>197</sup>

A few pieces of scholarship have proposed solutions that shift the focus away from the criminal justice system and onto extractive industries. An article by Kathleen Finn, Erica Gadjia, Thomas Perin, and Carla Fredericks of the University of Colorado Law School's American Indian Law Clinic argues that corporations have an obligation to their shareholders and to local communities to "invest and operate with fiscal responsibility and avoid undue risk," and that man camps pose a

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196. In 2021, extractive industries paid over \$9 billion USD to the United States federal government for the production of energy and minerals, including over \$1 billion USD for energy and minerals produced on Indigenous lands. See *Natural Resources Revenue Data*, U.S. DEP'T OF THE INTERIOR, <https://revenue.data.doi.gov/> (last visited Mar. 3, 2022) [<https://perma.cc/V738-YXKE>] (archived Aug. 23, 2022). From 2015 to 2019, extractive industries paid an average of over \$2 billion CAD each year to Canadian governments. See *Minerals and the Economy*, NAT. RES. CAN. (Feb. 3, 2022), <https://www.nrcan.gc.ca/our-natural-resources/minerals-mining/minerals-metals-facts/minerals-and-the-economy/20529#revenue> [<https://perma.cc/RH7Z-SZ4G>] (archived Aug. 22, 2022).

197. For several years now, Indigenous activists have repeatedly asked the US government to take measures to hold extractive industries accountable for their connection to the MMIW Crisis. See generally U.S. DEP'T OF JUST., OFF. OF VIOLENCE AGAINST WOMEN, 2021 GOVERNMENT-TO-GOVERNMENT VIOLENCE AGAINST WOMEN TRIBAL CONSULTATION ANNUAL REPORT 17 (2022), <https://www.justice.gov/ovw/page/file/1481661/download> (last visited Mar. 15, 2022) [<https://perma.cc/PP8J-QQEJ>] (archived Aug. 23, 2022) [hereinafter 2021 TRIBAL CONSULTATION REPORT]; U.S. DEP'T OF JUST., OFF. OF VIOLENCE AGAINST WOMEN, 2020 GOVERNMENT-TO-GOVERNMENT VIOLENCE AGAINST WOMEN TRIBAL CONSULTATION ANNUAL REPORT 15–16 (2021), <https://www.justice.gov/ovw/page/file/1380816/download> (last visited Mar. 15, 2022) [<https://perma.cc/V4U3-CGEH>] (archived Aug. 23, 2022); U.S. DEP'T OF JUST., OFF. OF VIOLENCE AGAINST WOMEN, 2019 TRIBAL CONSULTATION REPORT 74 (2020), <https://www.justice.gov/ovw/page/file/1271686/download> (last visited Mar. 15, 2022) [<https://perma.cc/C2JH-AVVK>] (archived Aug. 23, 2022); U.S. DEP'T OF JUST., OFF. OF VIOLENCE AGAINST WOMEN, 2018 TRIBAL CONSULTATION REPORT 70, 93 (2019), <https://www.justice.gov/tribal/page/file/1161726/download> (last visited Mar. 15, 2022) [<https://perma.cc/M9FU-RMVP>] (archived Aug. 23, 2022). Any response to recommendations regarding extractive industries was absent in each subsequent update issued by the government. See generally U.S. DEP'T OF JUST., OFF. ON VIOLENCE AGAINST WOMEN, 2021 UPDATE ON THE STATUS OF TRIBAL CONSULTATION RECOMMENDATIONS (2021), <https://www.justice.gov/ovw/page/file/1422721/download> (last visited Mar. 15, 2022) [<https://perma.cc/TZS2-GALD>] (archived Aug. 23, 2022); U.S. DEP'T OF JUST., OFF. ON VIOLENCE AGAINST WOMEN, 2020 UPDATE ON THE STATUS OF TRIBAL CONSULTATION RECOMMENDATIONS (2020), <https://www.justice.gov/ovw/page/file/1327351/download> (last visited Mar. 15, 2022) [<https://perma.cc/QP33-DTDK>] (archived Aug. 23, 2022); U.S. DEP'T OF JUST., OFF. ON VIOLENCE AGAINST WOMEN, 2019 UPDATE ON THE STATUS OF TRIBAL CONSULTATION RECOMMENDATIONS (2019), <https://www.justice.gov/ovw/page/file/1206996/download> (last visited Mar. 15, 2022) [<https://perma.cc/3KAX-WMXU>] (archived Aug. 23, 2022).

threat to extractive businesses by exposing them to such risks as damage to their public image and potential civil or criminal litigation.<sup>198</sup> However, as indicated previously, extractive companies have not suffered any documented consequences as a result of their workforces' connection to the MMIW Crisis. While many scholarly and governmental sources acknowledge the connection, no specific companies have been identified in connection to the MMIW Crisis.

A recent student note by Lily Grisafi proposes holding extractive industries accountable by suing them in state and tribal courts for negligent hiring practices that lead to harm in surrounding communities.<sup>199</sup> These claims would rely on the doctrine of negligent hiring, which allows an individual to hold an employer liable if the employer knew or should have known of an employee's risk to the surrounding community (i.e., if a background check would have revealed that the employee was a sexual predator).<sup>200</sup> While such actions would incentivize extractive businesses to take an interest in their connection to the MMIW Crisis by putting their profits on the line, there is currently no precedent for an extractive business being held liable for the actions of its temporary employees. The success of such litigation thus remains unclear, especially considering that the application of the doctrine varies across jurisdictions.<sup>201</sup> Another potential barrier to civil liability is that the victims bear the cost of bringing such actions against these businesses.<sup>202</sup>

Extractive businesses themselves could play a crucial role in addressing man camps' contributions to the MMIW Crisis, but so far these businesses have remained silent on the issue. While a strong argument can be made that addressing the crisis would be in these businesses' best interests,<sup>203</sup> these businesses have nonetheless continued to

198. See Finn, Gajda, Perin & Fredericks, *supra* note 10, at 40–41.

199. See Grisafi, *supra* note 148, at 536–38.

200. See *id.* at 536 n.144.

201. See *id.* (noting that while the doctrine of negligent hiring is recognized in nearly every US jurisdiction, liability and foreseeability standards vary across jurisdictions).

202. See Dominique Alan Fenton, *Poor on a Native American Reservation? Good Luck Getting a Lawyer.*, THE MARSHALL PROJECT (June 13, 2016, 10:00 PM), <https://www.themarshallproject.org/2016/06/13/poor-on-a-native-american-reservation-good-luck-getting-a-lawyer> (“In rural parts of this country, accessing legal services of any kind is increasingly difficult. If you are poor, it is nearly impossible. . . . [J]ustice in less populous spaces, and Indian Country in particular, often is treated as an afterthought.”) [<https://perma.cc/6QQW-4343>] (archived Aug. 23, 2022); *Demographics*, NAT'L CONG. OF AM. INDIANS, <https://www.ncai.org/about-tribes/demographics> (last visited July 29, 2022) [<https://perma.cc/5UFY-TM4G>] (archived Aug. 23, 2022) (stating that 26.8 percent of Indigenous Americans lived in poverty, compared to 14.6 percent of the total US population); *Low-income Statistics for the Population Living On Reserve and in the North Using the 2016 Census*, STAT. CAN. (Sept. 21, 2021), <https://www150.statcan.gc.ca/n1/daily-quotidien/210921/dq210921d-eng.htm> (stating that 44 percent of Canadians living on reserves lived in low-income households, compared to 14.4 percent of the total Canadian population) [<https://perma.cc/YU6Z-Y7S6>] (archived Aug. 23, 2022).

203. See Finn, Gajda, Perin & Fredericks, *supra* note 10, at 40–41.

operate without even acknowledging the effect their man camps are having in local communities.<sup>204</sup> And while forcing extractive businesses to acknowledge their connection to the crisis through civil litigation is possible, the absence of any existing precedent, combined with the financial strain such litigation could put on the plaintiffs prosecuting such actions, makes civil liability an uncertain avenue for accountability.

#### IV. INCENTIVIZING EXTRACTIVE INDUSTRY INVOLVEMENT AS AN INTERIM SOLUTION TO FULL INDIGENOUS CRIMINAL JURISDICTION OVER NON-INDIGENOUS OFFENDERS

In this Part, this Note will first join the calls for allowing Indigenous Peoples in both the United States and Canada to exert full criminal jurisdiction over non-Indigenous offenders, as consistent with international declarations both countries have endorsed. This Note will then propose that extractive industries themselves can best be encouraged to help address man camps' contributions to the MMIW Crisis through government incentives.

##### A. *Full Indigenous Criminal Jurisdiction over Non-Indigenous Offenders Is in Furtherance of the United States and Canada's Commitments to Internationally Recognized Indigenous Rights*

The current jurisdictional framework in both the United States and Canada enables non-Indigenous offenders to commit heinous crimes against Indigenous Peoples on Indigenous land with little or no consequences.<sup>205</sup> The man camps set up around extractive projects on or near Indigenous land and communities inflame this problem by encouraging large amounts of non-Indigenous workers to temporarily reside in these communities despite the high crime these workers bring with them and the lack of consequences those workers subsequently face.<sup>206</sup> This failure of each country's criminal justice system exists in the context of each country's endorsement of international declarations stating that countries should take special measures to protect Indigenous women and children from violence.<sup>207</sup> Allowing Indigenous American and Canadian governments to exercise criminal jurisdiction over

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204. A former sex worker that worked in Canadian man camps suggested that extractive businesses are aware of the violence in their camps and that they ignore it. See Morin, *supra* note 112.

205. See *supra* Part II.A.

206. See *supra* Part II.C.

207. See American Declaration, *supra* note 131, art. XXX(4)(c); UNDRIP, *supra* note 8, art. 22.

non-Indigenous offenders who commit violent offenses on Indigenous land will not only help alleviate the jurisdictional issues contributing to the MMIW Crisis but also lend credibility to each country's commitments to the international rights of Indigenous Peoples.

Articles 3 and 4 of the UNDRIP emphasize Indigenous Peoples' rights to self-determination and self-government, while Article 5 states that Indigenous Peoples have a right to maintain distinct legal institutions.<sup>208</sup> The OAS American Declaration on the Rights of Indigenous Peoples similarly states Indigenous Peoples' right to self-determination and also provides that member countries must recognize Indigenous juridical systems.<sup>209</sup> Canada's Royal Commission on Aboriginal Peoples endorsed the conclusion that an Indigenous right to self-determination cannot be served by a non-Indigenous justice system.<sup>210</sup> The criminal jurisdictional framework of both the United States and Canada impedes these rights by unilaterally removing Indigenous communities' abilities to prosecute those that would harm their people. After all, "a community that cannot create its own definition of right and wrong cannot be said in any meaningful sense to have achieved true self-determination."<sup>211</sup> Indigenous prosecution of crimes against their people can give Indigenous communities a sense of control over the MMIW Crisis that is currently lacking under non-Indigenous prosecution of those crimes.<sup>212</sup>

In addition to furthering each country's promises to support Indigenous self-determination and legal systems, allowing Indigenous communities to exercise full criminal jurisdiction over non-Indigenous offenders would bring the United States and Canada in compliance with their promises to protect Indigenous populations from violence. The UNDRIP requires member states "to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination,"<sup>213</sup> while the OAS American Declaration on the Rights of Indigenous Peoples requires member

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208. See UNDRIP, *supra* note 8, arts. 3–5.

209. See American Declaration, *supra* note 131, arts. III, IX, XXI, XXII(1)–(2).

210. See ROYAL COMM'N ON ABORIGINAL PEOPLES, BRIDGING THE CULTURAL DIVIDE, *supra* note 164 (quoting Aboriginal Justice Implementation Commission, *supra* note 162).

211. Kevin Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 779 (2006).

212. See Deer & Kronk Warner, *supra* note 12, at 89–90 (arguing that "[t]ribal prosecution and enforcement are key to true tribal self-determination" and that "tribal criminal prosecutions help to empower the tribal community"); Human Rights Council, *Efforts to Implement the United Nations Declaration on the Rights of Indigenous Peoples*, Rep. of the Expert Mechanism on the Rights of Indigenous Peoples, ¶ 65, U.N. Doc. A/HRC/48/75 (2021) ("States should recognize in legislation indigenous peoples' own legal systems and institutions, normative and legal practices (customs and traditions) and autonomous and governmental systems and provide adequate funding and resources to support indigenous peoples in their pursuit of self-determination.").

213. UNDRIP, *supra* note 8, art. 22(2).

states to “take special and effective measures in collaboration with indigenous peoples to guarantee that indigenous women and children live free from all forms of violence, especially sexual violence,” and to “guarantee the right of access to justice, protection, and effective reparation for harm caused to the victims.”<sup>214</sup> Man camps are a proven source of violence, especially sexual violence, to Indigenous women and children living near them.<sup>215</sup> Yet the current jurisdictional systems in the United States and Canada far from ensure or guarantee that Indigenous women and children are safe from non-Indigenous offenders;<sup>216</sup> on the contrary, the current systems likely encourage non-Indigenous offenders to specifically target Indigenous women and children.<sup>217</sup> While the 2022 VAWA has empowered Indigenous American communities to prosecute non-Indigenous offenders for a wider range of violent crimes, those communities still lack the jurisdiction to prosecute violent crimes, including murder, that are not enumerated in its “covered crimes” provisions.<sup>218</sup> While this extension of jurisdiction is a step in the right direction, it still falls short of ensuring “full protection and guarantees against *all* forms of violence and discrimination.”<sup>219</sup>

The United States should follow the recommendations of the Indian Law and Order Commission, which proposed that Indigenous communities be allowed to voluntarily “opt out immediately, fully or partially” of federal or state criminal jurisdiction, except for federal laws of general application.<sup>220</sup> Allowing Indigenous communities to opt out of the current systems at their own discretion, rather than unilaterally removing federal and state jurisdiction over all Indigenous communities, supports Indigenous self-determination by empowering

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214. American Declaration, *supra* note 131, art. XXX(4)(c).

215. See Deer & Kronk Warner, *supra* note 12, at 33 (describing how “the crime of sexual violence has exponentially increased in communities where extractive industries have been established”); Sarah Morales, *Digging for Rights: How Can International Human Rights Law Better Protect Indigenous Women from Extractive Industries*, 31 CAN. J. WOMEN & L. 58, 65 (2019) (“An influx of transient workers can often contribute to increasing rates of sex work, sexual exploitation, and human trafficking.”); Grisafi, *supra* note 148, at 512–13 (describing how sexual violence perpetrated against Indigenous women has increased near man camps in the United States); LINK BETWEEN EXTRACTIVE INDUSTRIES AND SEX TRAFFICKING, *supra* note 138 (describing reports of sex trafficking of Indigenous women near man camps surrounding oil extraction sites in the United States); NAT’L INQUIRY, VOLUME 1A, *supra* note 140, at 521 (describing how man camps have contributed to an increase in the sexual harassment and abuse of Intuit women).

216. See *supra* Part II.

217. See Filan, *supra* note 10.

218. See 25 U.S.C. § 1304(a)(5) (listing covered crimes as assault of tribal justice personnel, child violence, dating violence, domestic violence, obstruction of justice, sexual violence, sex trafficking, stalking, and a violation of a protection order).

219. UNDRIP, *supra* note 8, art. 22(2) (emphasis added).

220. See INDIAN L. & ORDER COMM’N, *supra* note 22.

Indigenous communities to decide which system will serve them best. This discretion may also address the potential financial and practical concerns of thrusting such responsibility upon unprepared Indigenous communities. Criminal justice systems are expensive to create and maintain, and some Indigenous communities may lack adequate financing to develop their own systems.<sup>221</sup> Allowing Indigenous communities to choose whether or not to give up current federal or state jurisdiction can empower those communities that feel ready to implement their own criminal justice systems, while still allowing communities that feel unprepared time to build up their systems.

Once Indigenous communities are granted full criminal jurisdiction in their territories, Canadian and US governments should provide those communities with the funding and resources they need to build and maintain their own justice systems. The United States and Canada both already have programs for providing funding to support Indigenous justice systems as they exist under each country's current jurisdictional frameworks, and US and Canadian governments should not only continue to offer such programs, but also expand them to help Indigenous communities take full advantage of their new, expansive powers.<sup>222</sup> In respect for Indigenous Peoples' right to self-determination, the conditions of such funding and support should allow Indigenous communities the freedom to deviate from the models adopted by the United States and Canada.<sup>223</sup>

Efforts toward broader Indigenous jurisdiction over non-Indigenous offenders have not been immune from criticism, however. Some fear that Indigenous courts and law enforcement will not fairly and objectively apply their authority to non-Indigenous offenders.<sup>224</sup> Such

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221. See Grisafi, *supra* note 148, at 523–24 (“Many tribes find it financially impracticable to meet the due process requirements necessary to enact special domestic violence jurisdiction under VAWA and enhanced sentencing under TLOA.”).

222. See *Tribal Community Policing Resources*, U.S. DEP'T OF JUST., <https://cops.usdoj.gov/tribalpolicing> (last visited Oct. 1, 2022) [<https://perma.cc/LD27-DFXW>] (archived Oct. 4, 2022); *Indigenous Policing*, GOV'T OF CAN. (Aug. 8, 2022), <https://www.publicsafety.gc.ca/cnt/cntrng-crm/pleng/brgnl-pleng/index-en.aspx> [<https://perma.cc/4WQH-FLLL>] (archived Oct. 4, 2022).

223. See UNDRIP, *supra* note 8, arts. 3–4. For a compilation of resources on various Indigenous systems of restorative justice, or “peacemaking,” see *Indigenous Native American Peacemaking*, NAT'L INDIAN L. LIBR., <https://narf.org/nill/resources/peacemaking.html> (last visited Oct. 1, 2022) [<https://perma.cc/F3UV-GH28>] (archived Oct. 4, 2022).

224. See Stacy L. Leeds, *[dis]Respecting the Role of Tribal Courts?*, 42 HUM. RTS., no. 4, 2017, at 20 (“The lack of faith in tribal courts is typically limited to situations involving non-Indian litigants. Tribal court jurisdiction is generally respected when the underlying controversies are considered wholly intra-tribal.”); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210–11 (1978) (quoting *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883)) (reasoning that fears that the United States would impose “an external and unknown code” on Indigenous offenders applied “equally strongly” to concerns that Indigenous Americans would exercise criminal jurisdiction over non-Indigenous offenders).

criticism is largely speculative, however, focusing on hypothetical, future violations litigants may face if Indigenous governments are granted broader jurisdiction over non-Indigenous peoples.<sup>225</sup> These fears have not come true in the case of Indigenous Americans' handling of non-Indigenous domestic violence offenders under 2013 VAWA special jurisdiction. Five years after the 2013 VAWA's enactment, a report by the National Congress of American Indians revealed that not a single conviction under tribes' exercise of special criminal jurisdiction resulted in a petition for federal *habeas corpus* review.<sup>226</sup> Despite encouragement, defendants have declined to appeal their convictions in federal court.<sup>227</sup> Several defendants even preferred tribal court over federal court, because it "was less formal, less intimidating, offered more focus on treatment and showed more respect to defendants."<sup>228</sup> Indeed, the legislative findings contained within the 2022 VAWA confirmed that a reason for extending tribal jurisdiction further was the success of tribal law enforcement under the 2013 VAWA.<sup>229</sup> While Canada lacks a statute analogous to either the 2013 VAWA or 2022 VAWA criminal jurisdiction provisions, the success of Indigenous systems in the United States lends credence to the Aboriginal Justice Inquiry of Manitoba's conclusion that an independent, Indigenous Canadian justice system could coexist with the non-Indigenous Canadian system.<sup>230</sup>

Advocates and lawmakers in both countries should continue to push for broader Indigenous criminal jurisdiction over non-Indigenous offenders as not only a strong solution to the MMIW Crisis but also as an effective means for the United States and Canada to protect Indigenous Peoples' international rights to self-determination and personal safety. While the recent enactment of the 2022 VAWA is evidence of momentum toward full tribal criminal jurisdiction over non-Indigenous offenders in the United States, that goal is unlikely to be realized in the near future. The 2022 VAWA jurisdictional extension was passed nearly a decade after the 2013 VAWA, with the success of tribal law enforcement under the 2013 VAWA used as evidence in support of

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225. See Leeds, *supra* note 224 ("These cautionary approaches to tribal court power are rarely based on allegations of due process violations in the cases at hand, but on speculation that future litigants might someday encounter civil liberty infringements, should judicial authority be fully embraced.")

226. NAT'L CONG. OF AM. INDIANS, VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 18–19 (2018), [https://www.ncai.org/resources/ncai-publications/SDVCJ\\_5\\_Year\\_Report.pdf](https://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf) (last visited Mar. 16, 2022) [<https://perma.cc/V4P8-2EG2>] (archived Sept. 13, 2022).

227. See Riley, *supra* note 80, at 1616–17.

228. *Id.* at 1617.

229. See H.R. 2471, 117th Cong., div. W § 801(a)(4) (2022) (enacted).

230. See Aboriginal Justice Implementation Commission, *supra* note 162.



the 2022 VAWA extension.<sup>231</sup> It would follow that another extension of tribal jurisdiction will not be enacted until at least several years later, when legislators can cite evidence of tribal law enforcement successes under these new provisions to justify further empowerment of tribal law enforcement. And in Canada, there appears to be no movement by the Canadian government towards full Indigenous criminal jurisdiction over non-Indigenous offenders. Quicker measures should be taken to address the crisis and to protect Indigenous international rights until full Indigenous criminal jurisdiction can be realized.

*B. To Support Internationally Recognized Indigenous Rights, the United States and Canada Should Provide Extractive Industries with Incentives to Address the Violent Impact of Man Camps*

While past scholarship proposed opening extractive businesses up to greater risk for their failure to address their contribution to the MMIW Crisis, this Note proposes providing companies with incentives for engaging in government efforts to address the MMIW Crisis in their local communities.

Both the United States and Canada already offer numerous incentives to businesses in furtherance of other public policy goals. In the United States, businesses may take advantage of numerous tax breaks for engaging in activities that align with the federal government's public policy goals.<sup>232</sup> A recent example is the Biden administration's announcement that the federal government will continue to encourage businesses to adopt clean energy technologies and practices through tax credits and other financial incentives.<sup>233</sup> The federal government has already made financial incentives available to businesses that sup-

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231. See H.R. 2471, 117th Cong., div. W § 801(a)(4) (2022) (enacted) ("Indian Tribes exercising special domestic violence criminal jurisdiction over non-Indians . . . have reported significant success holding violent offenders accountable for crimes of domestic violence, dating violence, and civil protection order violations.").

232. For a database of these programs, see *Federal Programs and Incentives*, SELECTUSA, [https://www.selectusa.gov/federal\\_incentives](https://www.selectusa.gov/federal_incentives) (last visited Mar. 2, 2022) [<https://perma.cc/K5C9-T6PQ>] (archived Aug. 24, 2022).

233. See Pippa Stevens, *Biden's New Spending Framework Has \$555 Billion for Clean Energy, Focused on Incentives, Not Punishments*, CNBC (Oct. 28, 2021, 9:19 AM), <https://www.cnbc.com/2021/10/28/biden-spending-framework-includes-555-billion-in-climate-incentives.html> [<https://perma.cc/3CWG-JXY9>] (archived Sept. 23, 2022); *President Biden Announces the Build Back Better Framework*, THE WHITE HOUSE (Oct. 28, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/28/president-biden-announces-the-build-back-better-framework/> [<https://perma.cc/MMR5-T9HQ>] (archived Aug. 24, 2022). The Obama administration also encouraged private businesses to adopt clean energy practices through financial incentives. See *Fact Sheet: The Recovery Act Made the Largest Single Investment in Clean Energy in History, Driving the Deployment of Clean Energy, Promoting Energy Efficiency, and Supporting Manufacturing*, THE WHITE HOUSE (Feb. 25, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/02/25/fact-sheet-recovery-act-made-largest-single-investment-clean-energy> [<https://perma.cc/3WD9-U4SR>] (archived Aug. 24, 2022).

port efforts concerning Indigenous Americans. The Indian Employment Credit incentivizes business to hire individuals who live on or near Indigenous land by entitling employers to a 20 percent tax credit on a portion of that individual's qualified wages and employee health insurance costs.<sup>234</sup> The Indian Incentive Program also provides federal contractors a 5 percent rebate on the total amount subcontracted to an Indigenous American owned enterprise or organization.<sup>235</sup> Canada similarly offers financial incentives to encourage private businesses to engage in activities that support its public policy goals.<sup>236</sup> Canada's response to climate change, like the response of the United States, includes offering private businesses tax benefits for investing in clean energy.<sup>237</sup>

Rather than punishing extractive businesses through exposure to civil liability, governments could instead encourage extractive businesses to address the MMIW Crisis through financial incentives. Like the Indian Employment Credit incentivizes businesses to hire Indigenous Peoples, a statute could be enacted that provides extractive businesses with tax credits for hiring a certain amount of their workforce from the Indigenous communities surrounding their extractive projects. Such an incentive would decrease the number of employees hired from outside communities while also economically supporting local communities.

Extractive businesses are also in a unique position to contribute to data-gathering efforts related to man camps and their contribution to the MMIW Crisis. The US Department of Justice stated that man camps can be unmapped, increasing the difficulty law enforcement and

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234. See 26 U.S.C. § 45A; *What is the Intent of the Indian Employment Credit (Section 45A)?*, INTERNAL REVENUE SERV. (Aug. 3, 2021), <https://www.irs.gov/government-entities/indian-tribal-governments/itg-faq-1-answer-what-is-the-intent-of-the-indian-employment-credit-section-45a> [<https://perma.cc/3XC7-C4MK>] (archived Aug. 24, 2022); *What Tax Credits are Available to Businesses that Employ Native Americans?*, INTERNAL REVENUE SERV. (Aug. 3, 2021), <https://www.irs.gov/government-entities/indian-tribal-governments/itg-faq-1-answer-what-tax-credits-are-available-to-businesses-that-employ-native-americans> [<https://perma.cc/XN5Q-4EU8>] (archived Aug. 24, 2022).

235. See 25 U.S.C. § 1544; *Indian Incentive Program (IIP)*, DEP'T OF DEF., OFF. OF SMALL BUS. PROGRAMS, <https://business.defense.gov/Programs/Indian-Incentive-Program/> (last visited Mar. 2, 2022) [<https://perma.cc/A2MW-8LAC>] (archived Aug. 24, 2022).

236. For a database of these programs, see *Business Grants and Financing*, GOV'T OF CAN. (Aug. 20, 2021), <https://www.canada.ca/en/services/business/grants.html> [<https://perma.cc/75PV-JQR3>] (archived Aug. 24, 2022).

237. See *Tax Incentives for Businesses*, NAT. RES. CAN., [https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/2019%20Tax-Incentives-Businesses\\_EN\\_v2.pdf](https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/2019%20Tax-Incentives-Businesses_EN_v2.pdf) (last visited Mar. 2, 2022) [<https://perma.cc/6B9M-LC38>] (archived Aug. 24, 2022).

emergency service providers experience in trying to locate them.<sup>238</sup> Governments could help alleviate this difficulty by providing extractive industries with financial incentives for working with local law enforcement agencies to map out the locations of these man camps. Incentives could also be used to encourage these businesses to provide data about man camps to law enforcement, local Indigenous communities, or the general public. In the United States specifically, these incentives could compliment tribes' new 2022 VAWA jurisdictional powers by encouraging extractive industries to cooperate with tribal law enforcement investigating sexual violence and sex trafficking suspected to be occurring on or within those businesses' man camps.

In response to the influx of sexual offenders that live around extractive projects and Indigenous advocates' calls for employee screening,<sup>239</sup> financial incentives can also be provided for extractive businesses that require their prospective employees to undergo criminal background checks. In the United States, federal law already requires background checks for individuals hired or contracted by the federal government to work with children under the age of eighteen; if that background check reveals that the prospective employee was convicted of a sex crime, that prior conviction may be grounds for denying employment.<sup>240</sup> Just as this law was proposed in response to an urgent need to address rising child abuse cases,<sup>241</sup> a new law could be implemented in response to the urgent need to address violence against Indigenous Peoples around extractive industry projects. Extractive businesses working on or near Indigenous land, for example, could be granted tax breaks for requiring their employees to undergo criminal background checks.

This proposal faces the same obstacle that Indigenous criminal jurisdiction has struggled against for decades: surviving the legislative process. However, this proposal is likely to be more palatable to opponents of expanding Indigenous criminal jurisdiction, as it completely avoids due process concerns by focusing on private action. Lobbyists for extractive industries may object to the reasoning supporting such legislation (i.e., that extractive industries need to be incentivized because they will not take action otherwise), but strategic writing on the

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238. See 2013 TRIBAL CONSULTATION REPORT, *supra* note 186.

239. See Deer & Kronk Warner, *supra* note 12, at 77 (“One of the more alarming trends correlated with energy development in rural areas is the large numbers of registered sex offenders who are attracted to work in oil fields.”). In the most recent tribal consultation report, the Sovereign Tribal Leaders of the National Congress of American Indians Task Force on Violence Against Women recommended that the federal government “should establish screening guidelines to prevent convicted rapists, domestic violence offenders, stalkers, child predators, sex traffickers, and murderers from assignments with extractive industries on tribal lands to prevent predators from accessing vulnerable and often unprotected populations.” 2021 TRIBAL CONSULTATION REPORT, *supra* note 197.

240. See 34 U.S.C. § 20351(a)(1), (c).

241. See H.R. REP. NO. 101-681, pt. 1, at 165 (1990).

part of lawmakers could avoid potential objections by framing the legislation as fostering a partnership between the federal government and extractive industries. For example, without explicitly blaming extractive industries for their lack of action, arguments in favor of the law could simply recognize that extractive industries are in a unique position to address the MMIW Crisis, and that the federal government intends to reward those businesses that help the government address the crisis.

On the other hand, there may be objections to rewarding extractive industries for finally helping with a crisis they are partly responsible for and should have addressed long ago. While these objections are understandable, proposed solutions that are tougher on extractive industries have not made much, if any, progress. Given the immense revenues that extractive industries generate for the United States and Canada, and the lack of action those governments have taken toward extractive industries despite evidence of their connection to the crisis,<sup>242</sup> those governments may be hesitant to impose tougher solutions on extractive industries. Incentivizing those industries to take measures to address their role in the crisis avoids these practical challenges while still seeking to achieve the same goal: giving extractive industries a stake in preventing more missing and murdered Indigenous people.

This is not to say that governments should stand idly by while waiting for extractive businesses to act, however. At the very least, US and Canadian governments should begin to subject these companies to greater scrutiny. While these governments have acknowledged that extractive industries are contributing to the MMIW Crisis, these governments have done little beyond acknowledging that connection.<sup>243</sup> These governments should target their data collection efforts specifically on extractive industries and man camps on or near Indigenous populations so that such data can finally move beyond an anecdotal nature. US and Canadian governments should also take proactive measures to map and track extractive businesses so that law enforcement is better able to respond to and investigate crimes against Indigenous victims around these businesses.

Further, to increase extractive businesses' willingness to embrace financial incentives, US and Canadian governments should consider imposing measures that increase these business' risk in not cooperating with efforts to address their role in the MMIW Crisis. The law enforcement agencies and prosecutors' offices with jurisdiction over the

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242. See *supra* Part III.D.

243. See *supra* Part II.C.

land these businesses operate on could adopt policies to encourage extractive business employees to come forward with information about crimes they have witnessed in man camps. Legislation could be drafted that protects individual employees from retaliation by their employers for reporting crime, similar to the whistleblower protections the federal government already provides for employees of federal contractors that report human trafficking.<sup>244</sup> The State of Texas recently enacted a statute protecting employees of lodging businesses from retaliation for reporting human trafficking that they witness, exemplifying the ability of state governments to provide special protections for employees in certain industries plagued by specific crimes.<sup>245</sup> Canada's Criminal Code already prohibits employers from taking adverse action against employees who provide "information to a person whose duties include the enforcement of federal or provincial law, respecting an offence the employee believes has been or is being committed . . . by the employer."<sup>246</sup> Federal and provincial law enforcement should take measures to enforce this statute against extractive businesses and publicize these efforts so that employees of extractive businesses are aware that they are protected from retaliation for cooperating with law enforcement.

The above measures are by no means a complete solution to the MMIW Crisis, but they acknowledge that private action, and not government action alone, is necessary to address the crisis and to prevent further harm by extractive industry employees. While allowing Indigenous communities to exercise criminal jurisdiction over non-Indigenous offenders is the best means for the United States and Canada to protect the international rights of Indigenous Peoples in relation to the crisis, incentivizing private businesses to address the crisis can move both countries toward better fulfillment of those rights until Indigenous criminal jurisdiction can be fully realized. And even after full Indigenous criminal jurisdiction is realized, these measures can be modified to encourage extractive industries to cooperate with tribal law enforcement.

## V. CONCLUSION

Indigenous blood and bodies supported the United States and Canada's rise to power in North America, and both countries have promised to prevent further harm to Indigenous communities by endorsing international declarations of Indigenous rights. Yet thousands

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244. Federal contractors and subcontractors are required to maintain a compliance plan that, at a minimum, provides "[a] process for employees to report, without fear of retaliation, activity inconsistent with the policy prohibiting trafficking in persons, including a means to make available to all employees the hotline phone number of the Global Human Trafficking Hotline." 48 C.F.R. § 52.222-50(h)(3)(ii).

245. See TEX. BUS. & COM. ANN. § 114.0054 (West 2022).

246. Criminal Code, R.S.C., 1985, c C-46, § 425.1(1) (Can.).

of Indigenous People have gone missing or have been found murdered. While both countries' criminal justice systems are primarily charged with prosecuting the non-Indigenous offenders of these crimes, their systems struggle to hold non-Indigenous offenders accountable. At the same time, they prevent Indigenous communities from prosecuting these offenders themselves. Aggravating this crisis is the presence of extractive industries on Indigenous land and the temporary, largely non-Indigenous workforces that set up man camps around extractive projects.

Various solutions have been proposed to address extractive industries and their man camps' connection to the MMIW Crisis, but thus far none have been successful. Efforts to expand Indigenous criminal jurisdiction over non-Indigenous offenders have been stalled in the lawmaking progress or ignored altogether. Both the United States and Canada have endorsed documents establishing the international rights of Indigenous Peoples, but international organizations lack any authority to mandate that the United States or Canada take action to protect those rights. Efforts toward better data gathering have made some progress, but they are at best a partial solution to the problem. And under the current legal landscape in both countries, extractive industries themselves have been content to ignore the crisis altogether.

Expanding Indigenous criminal jurisdiction is the best way for both the United States and Canada to address the MMIW Crisis while also furthering Indigenous Peoples' international rights. Such jurisdiction puts control over the protection of Indigenous communities back into the hands of Indigenous Peoples, furthering their right to self-determination. In the rare cases where Indigenous governments have been granted criminal jurisdiction over non-Indigenous offenders, they have proven that they can hold non-Indigenous offenders accountable while still ensuring fairness towards those offenders. While support for expanding Indigenous criminal jurisdiction is growing, the realization of that jurisdiction remains uncertain. Other measures must be taken to address the crisis until Indigenous criminal jurisdiction over non-Indigenous offenders can be fully realized.

Extractive industries themselves are in a unique position to help address the crisis, as they are responsible for the creation of man camps and the hiring of those camps' residents. Where the threat of loss of reputation and civil liability will not move extractive industries to action, the promise of financial incentives very well could. Extractive industries currently have no stake in acknowledging the MMIW Crisis, but financial incentives offered by the United States or Canadian governments would make it financially viable for extractive industries to finally take an interest in protecting the Indigenous Peoples that their man camps put at risk. While it is unfortunate that these

businesses must be incentivized to take action on such a crucial problem, especially because it is a problem they play a substantial role in producing, more punitive proposals have failed to hold these businesses accountable. And if nothing continues to be done, the number of missing and murdered Indigenous women will only continue to rise.

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\* J.D. candidate, 2023, Vanderbilt University Law School; B.A., 2018, California State University, Northridge. I will forever be grateful for the unending support of my parents and my brother. Thank you to Dr. Leigh Bradberry, for encouraging me to pursue a legal education, and to Professor Daniel J. Sharfstein, whose course in Federal Indian Law helped me make sense of the “morass of complex, conflicting, and illogical commands” characterizing that body of jurisprudence. *See* INDIAN L. & ORDER COMM’N, *supra* note 22, at ix. And, of course, special thanks to the hard work and dedication of the incredible staff of the Vanderbilt Journal of Transnational Law.