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## The Importance of Abolition of the Carceral State for Native Survivors

Christina M. Schnalzer

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# THE IMPORTANCE OF ABOLITION OF THE CARCERAL STATE FOR NATIVE SURVIVORS

*By Christina M. Schnalzer<sup>1</sup>*

## HOW MADWOMEN SURVIVE

I COME FROM A LONG LINE OF MADWOMEN AND OF THIS, I AM PROUD.

STRONG WOMEN  
WITH DETERMINED RESILIENCY, OPEN MINDS, AND HANDS THAT KNEW NO IDLENESS.

A GREAT GRANDMOTHER WHO BECAME ACCUSTOMED TO THE WHISKEY-COLORED BREATH OF STRANGERS IN  
ORDER THAT HER CHILDREN BE FED.

A GRANDMOTHER WHO CAPTURED AND KILLED THE WHITE CHICKENS OF NEIGHBORS FOR THE SAME REASON.

AND A MOTHER WHO TRIED AND FAILED  
AND TRIED AND FAILED  
AND TRIED AND FAILED

AND TRIED AND FAILED TO UNDERSTAND THE REASONING BEHIND THE LIES OF MEN  
WHO SAID THEY WERE HER LOVERS.

I COME FROM A LONG LINE OF MADWOMEN AND OF THIS, I AM PROUD.

THERE IS A DIFFERENCE IN MADNESS AND CRAZINESS:  
CRAZINESS CAUSES ONE TO TWIRL AND TWIRL UNTIL A GREAT BREATH SUCKS  
HER SPIRIT HOME LEAVING HER MIND AND BODY TO LAUGH ON THEIR OWN.

MADNESS ALLOWS THE MIND AND BODY TO FUNCTION  
WHILE THE SPIRIT DANCES  
TO THE HEARTBEAT OF THE STARS.

I COME FROM A LONG LINE OF MADWOMEN AND OF THIS, I AM PROUD.

WOMEN WHO FOLDED THEIR SHAME  
INTO THE GATHERS OF THEIR PRIDE  
WRAPPED THEM BOTH AROUND THEIR ANKLES  
AND CONTINUED TO DANCE, LETTING EVERYONE KNOW  
THEY WERE NOT AFRAID TO DANCE BACKWARD  
IF IT MEANT SURVIVAL.

I COME FROM A LONG LINE OF MADWOMEN AND OF THIS, I AM PROUD.

MARIJO MOORE (CHEROKEE)<sup>2</sup>

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<sup>1</sup> Christina M. Schnalzer is a 3L at Seattle University School of Law

<sup>2</sup> MariJo Moore, *How Madwomen Survive*, MARIJO MOORE & RENEGADE PLANETS PUBLISHING, <https://www.marijomoore.com/poetry.html> (last visited Oct 12, 2021).

# THE IMPORTANCE OF ABOLITION OF THE CARCERAL STATE FOR NATIVE SURVIVORS

*By Christina M. Schnalzer*

I.	INTRODUCTION .....	4
II.	BACKGROUND.....	5
	A. <i>Native Survivors at Disproportionate Levels</i> .....	5
	B. <i>Cultural and Historical Trauma</i> .....	6
	1. How Cultural and Historical Trauma Affects Native Survivors .....	7
III.	JURISDICTIONAL COMPLICATIONS .....	9
	A. <i>Legislative History</i> .....	9
	1. The Major Crimes Act .....	9
	2. Public Law 83-280.....	10
	3. The Indian Civil Rights Act.....	10
	4. <i>Oliphant v. Suquamish</i> .....	11
	5. The Tribal Law and Order Act .....	12
	6. The Violence Against Women Reauthorization Act .....	12
	B. <i>What Tribal Jurisdiction Means for Native Survivors</i> .....	13
IV.	THE NEUROBIOLOGICAL IMPACT OF TRAUMA ON THE BRAIN .....	15
	A. <i>The Brains Defense Circuitry</i> .....	15
	1. Hormones and the APA Axis.....	16
	2. Impairment of Function and the Prefrontal Cortex.....	17
	B. <i>Survival Reflexes</i> .....	17
	1. Dissociation .....	17
	2. Tonic Immobility .....	18
	3. Collapsed Immobility .....	18
	C. <i>Trauma and Memory Recall</i> .....	19
	1. How Stress Hormones Affect Memories .....	19
	D. <i>The Carceral State's Failure to Acknowledge that Trauma Affects Survivor         Testament</i> .....	20
	1. Poor Police Training .....	20
	2. Interview Techniques Used by Police .....	20
V.	TRIBAL SOVEREIGNTY AND ABOLITION OF THE CARCERAL STATE AS THE ROAD TO JUSTICE FOR NATIVE SURVIVORS.....	22
	A. <i>Restoring Tribal Jurisdiction and Sovereignty</i> .....	22
	B. <i>Abolishing the United States' Carceral State</i> .....	23
	1. Gender-Based Violence and the Abolition of the Carceral State .....	24
	a. <u>Police as Sexual Offenders</u> .....	25
	2. Reconceptualizing Prevention and Harm-Reduction.....	25
VI.	CONCLUSION.....	26

Throughout this article, I will use the heteronormative gender binary of men and women for clarity and concision. Please note that it is not my intention to exclude the reality of Native Two-Spirit<sup>3</sup> and gender non-conforming Native individuals, who experience sexual assault at similar rates to Native women.

Although I am advocating for the abolition of the carceral state, my advocacy does not extend to how tribal governments handle crime. Should tribal governments wish to prosecute and incarcerate offenders, they should do so. That is to say, this is a problem that we, as people benefiting from settler colonialism, need to fix, while understating that tribal governments may take a different approach. Our failed (in)justice system is the direct cause of tremendous harm – and something must be done to *attempt to correct* those harms.

I would like to acknowledge that I currently reside on the traditional land of the first people of Seattle, the Duwamish People past and present, and honor with gratitude the land itself and the Duwamish Tribe.<sup>4</sup>

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<sup>3</sup> *Two-Spirit*, INDIAN HEALTH SERVS. (last visited Apr. 17, 2021), <https://perma.cc/G4K8-Z82H>. “Traditionally, Native American two-spirit people were male, female, and sometimes intersexed individuals who combined activities of both men and women with traits unique to their status as two-spirit people. In most tribes, they were considered neither men nor women; they occupied a distinct, alternative gender status. In tribes where two-spirit males and females were referred to with the same term, this status amounted to a third gender. In other cases, two-spirit females were referred to with a distinct term and, therefore, constituted a fourth gender.” Zachary Pullin, *Two Spirit: The Story of a Movement Unfolds*, KOSMOS (last visited April 13, 2021), <https://perma.cc/DK3R-BXE3>, “The two-spirit tradition centers primarily on gender, not sexual orientation, and the distinction is important. While sexual orientation describes the sexual relationship that a person of one gender has with another person, gender describes an individual’s expected role within a community.”

<sup>4</sup> *Real Rent Duwamish*, REAL RENT DUWAMISH (last visited Apr. 17, 2021), <https://perma.cc/99DE-UG34> “The Duwamish do not have just access to the resources of their homelands. After decades of resistance to erasure, the Duwamish remain unacknowledged by the federal, state, and local governments...[o]ur government hasn't honored the treaty, but WE can. In 1971, 1,000 Duwamish members were paid \$64 each for their land. That is \$64,000 for 54,000 acres of land. \$64,000 adjusted for inflation today would maybe buy a single 1,000 square foot tiny home. In 2017, the median household income for Seattleites was \$82,133. We need to work together to begin to account for this and countless other inequities...100% of Real Rent goes to the non-profit, Duwamish Tribal Services, run by the Duwamish Tribe. With limited resources, DTS provides social, educational, health, and cultural services. They operate the Duwamish Longhouse and Cultural Center, which is a free museum, event space and community center.”

## I. INTRODUCTION

Since the arrival of colonists, Native women have experienced an excess of indescribable violence. In fact, “56.1% of Native American women have experienced sexual violence in their lifetimes, and Native Americans are twice as likely to experience sexual assault compared to other races.”<sup>5</sup> Many legal scholars have addressed the jurisdictional issues that Native women face in the wake of a sexual assault, and though important – I will later provide an overview of legislation impeding tribal sovereignty in sexual assault cases – there remains a deeper issue, the carceral state.<sup>6</sup>

The carceral state either neglects or actively harms victims and survivors. Over the years, there have been numerous calls for reform, yet “incarceration and policing have only grown more racist, more repressive, [and] more violent.”<sup>7</sup> In fact, many Native women are assaulted “at the hands of U.S. military forces, as well as local, state and federal law enforcement.”<sup>8</sup> Still, many remain convinced that abolition of the carceral state is unnecessary – that reform can be enough, that reform is not necessary, or even that more conservative reform<sup>9</sup> is essential.<sup>10</sup>

This article takes two approaches to illustrate how abolition of the carceral state would benefit Native women. First, for those who might need more convincing, I will examine how the current criminal justice system often fails to utilize hard science in its treatment of sexual assault victims and survivors. Here, I will provide a synopsis of what happens to the brain when experiencing trauma – and how victims and survivors are often unable to recall information as the criminal justice system requires, frequently leaving them without discourse. Second, I will address how the abolition of the carceral state would protect Native victims and survivors. Here, I will examine the harm that the carceral state inflicts on survivors and consider viable alternatives.

Before we address these two important topics, I will review (1) the disproportionate rate at which Native women are sexually assaulted, (2) how cultural and historical trauma affects Native survivors, and (3) the jurisdictional complications that exist for Native survivors.

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<sup>5</sup> The Sexual Assault Statistics of Native American Women, RIDESHARE SEXUAL ASSAULT LAWS. (Jun. 25, 2020), <https://perma.cc/WRQ2-5S2T> (citing <https://perma.cc/2CHZ-LZNC>).

<sup>6</sup> *What is the Carceral State? Documenting Criminalization and Confinement* (May 2020), <https://perma.cc/T532-X8XV>. When using the term ‘carceral state’ I am using a broad lens – encompassing all practices and structures that are punitive in nature. However, nearly everything in American society is carceral. *The Size and Scope of the Carceral State*, OAH BLOG (June 26, 2015), <https://perma.cc/45CC-DCW2> “The carceral state includes not only law enforcement, courts, and prisons but also private security, the Department of Homeland Security, especially U.S. immigration control efforts, the U.S. Armed Services, including the National Guard, and the contractors and subcontractors providing prison, police, border, and surveillance technologies, infrastructure, and services.”

<sup>7</sup> Harron Walker, *Angela Davis Calls for ‘Abolition Feminism Now’* (Jun. 14, 2020), <https://perma.cc/E6UA-4AXL>.

<sup>8</sup> *Native Women, Native Trans People, & Two Spirit People*, COLOR OF VIOLENCE: THE INCITE ANTHOLOGY 33, 33 (2006). “Additionally, Native women and Native Two Spirit, transgender, and gender nonconforming people are subjected to gender-specific forms of law enforcement violence, such as racial profiling, physical abuse, sexual harassment and abuse, and failure to respond or abusive responses to reports of violence.”

<sup>9</sup> By conservative reform, I mean increasing policing and the carceral state.

<sup>10</sup> Andrew Cohen, *Yes, you can be Pro-Cop and Pro-Police Reform*, BRENNAN CTR. FOR JUST. (July 18, 2016) <https://perma.cc/B7VL-B4XY>; Sheriff David Clarke, Ret. *How About Crime Victim Justice Reform?* TOWNHALL (August 29, 2018), <https://perma.cc/M6Q9-UTY7>.

## II. BACKGROUND

### A. Native Survivors at Disproportionate Levels

Sexual abuse is so prevalent among Native women that “on some reservations, it has been estimated that every single [Native] woman has experienced sexual violence,”<sup>11</sup> and mothers are forced to ask, “what do I tell my daughter *when* she is raped?”<sup>12</sup> Not only are Native women 2.5 times more likely to be raped than white women,<sup>13</sup> but they are also the only racial group that is more likely to be sexually assaulted by people who are not of their own race.<sup>14</sup> The already sky-high rates of sexual assault against Native women have reached new heights with the increase of extractive industries.<sup>15</sup> For example, in North Dakota, “violent crime rose by 121% and rates of violence and rape against Native women tripled with the influx of non-native workers.”<sup>16</sup> In the Yukon, waves of exploration, mining, and highway development led to such persistent abuse of Native women that Elders would advise women not to go out alone, or else they *would* be raped.<sup>17</sup>

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<sup>11</sup> Adam Crepelle, *Article: Tribal Courts, The Violence Against Women Act, and Supplemental Jurisdiction: Expanding Tribal Court to Improve Public Safety in Indian Country*, 81 MONT. L. REV. 59, 61 (2020).

<sup>12</sup> *Sexual Assault: A Horrifying Reality for Native American Girls*, NATIVE HOPE (last visited April 17, 2021), <https://perma.cc/8MNA-FVKC> (emphasis added). In an article published by The Guardian, Charon Asetoyer, CEO of the Native American Women’s Health Education Resource Center, was confronted with an inconceivable question by a young mother on the Yankton Sioux Reservation in Lake Andes, South Dakota. The question was: “What do I tell my daughter when she is raped?” Recalling the incident, Asetoyer, a member of the Comanche tribe, said, “Not if she’s raped, but when she’s raped. We’re aware of how bad the problem is in our reservation community, but when somebody puts it to you that way, you realize it’s even worse than you thought it was.”

<sup>13</sup> Gareth Bleir et al., *Murdered and Missing Native Women Challenge Police and Courts*, CTR. FOR PUB. INTEGRITY (Oct. 29, 2018 at 12:43 PM), <https://perma.cc/2PQR-9HV4> “More than half of Native American women have been sexually assaulted, including over a third who have been raped during their lifetime — a rate of rape nearly 2.5 times higher than for white women, according to a 2016 National Institute of Justice study.”

<sup>14</sup> *Id.* “A study by the University of Delaware and the University of North Carolina found that more than two-thirds of sexual assaults against indigenous women are committed by white and other non-Native American people.”; Heather Sauyaq Jean Gordon & Travis W. M. Roberts, *Missing or Murdered Indigenous People: Culturally Based Prevention Strategies*, 69 U.S. ATT’YS BULL. 47, 48 (2021) “A report analyzing the findings from the National Intimate Partner and Sexual Violence Survey found that, when looking at specific types of violence, such as intimate partner psychological aggression and physical violence, sexual violence, and stalking, American Indian/Alaska Native (AI/AN) women experienced interracial violence 2.8 times as much as intraracial violence (97% vs. 35%), and AI/AN men experience interracial violence 2.7 times as much as intraracial violence (90% vs. 33%).”

<sup>15</sup> Lily Grisafi, *Living in the Blast Zone: Sexual Violence Piped onto Native Land by Extractive Industries*, 53 COLUM. J.L. & SOC. PROBS. 509, 512-13 (2020).

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

<sup>17</sup> Lori Fox, *‘Man Camps’ May be a Threat to Yukon Indigenous Women and Girls, Say Advocates*, YUKON NEWS (Jul. 4, 2019 at 10:30 AM), <https://perma.cc/RJN3-HCHN> “In the development of the Yukon, we have had a wave of exploration, a wave of mining, a wave of highway builders. Throughout those waves, Indigenous women were abused,’ says Marilyn Jensen, member of Carcross/Tagish First Nation, and founder and leader of the Dakhká Khwáan Dancers. ‘We were not safe when that highway was built,’ she says. ‘Elders have told me, if you went out by yourself (as a woman) you were going to get raped. It was as straightforward as that.’”

## B. Cultural<sup>18</sup> and Historical Traumas

Native Americans have experienced individual and cultural traumas that have had an overwhelming effect on both their individual and communal lives.<sup>19</sup> “Historical trauma is understood as the collective trauma exposure within and across generations, including interpersonal losses and unresolved grief.”<sup>20</sup> Some traumas occurred in the remote past, in the lives of prior generations, the effect rippling across subsequent generations and marking people even to this day.<sup>21</sup> Other traumas continually occur in the present – the effect impacting the lives of individuals, families, and communities.<sup>22</sup> “The effects of cultural traumas from the remote past intermingle with effects of recent traumas, resulting in a cumulative and compounding spiral of traumatic effects.”<sup>23</sup>

One cause of historical trauma amongst Native women can be traced to the limitation of their authority by the federal government.<sup>24</sup> In many Native communities, women have been the culture carriers and political advisors, advising in both informal and formal capacities.<sup>25</sup> Such leadership was weakened when the federal government began negotiating treaties with Native men.<sup>26</sup> By removing Native women from the negotiation process, imposing the use of a family surname, and implying implicit male ownership of women and children, the European ideologies ingrained in the American government began to affect Native women.<sup>27</sup> When the federal government started confiscating land and reservations emerged, the emphasis on collective land caretaking began to switch to individual land ownership, further pushing Native women away from their once highly respected roles.<sup>28</sup>

Not only were Native women stripped of their rightful roles, but “[w]ith the inception of boarding schools, the European American culture prevailed” and further oppressed Native women and children.<sup>29</sup> Beginning in 1879, the Carlisle Indian School became the standard for enacting the

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<sup>18</sup> Gordon & Roberts, *supra* note 14, at 56. “Indigenous persons have lived in the United States and its territories for thousands of years with thriving societies and diverse cultures. In the United States, there are 574 federally recognized tribes, additional state recognized tribes, and other Indigenous organizations and entities. Over 5.2 million people identify as AI/AN and are living throughout the United States and its territories. Culture, unique to each Indigenous tribe, includes the customary beliefs, social forms, and material traits, such as values, languages, spirituality and ceremony, and traditions that are transmitted between generations. Before European contact, Indigenous communities widely practiced their cultures and spoke their Native languages. The United States enacted policies that disrupted culture and policies that made practicing Indigenous culture in the United States illegal.”

<sup>19</sup> Shelly A. Wiechelt & Jan Gryczynski, *Cultural and Historical Trauma Among Native Americans*, in TRAUMA; CONTEMPORARY DIRECTIONS IN THEORY, PRACTICE, AND RESEARCH 191, 192 (2011).

<sup>20</sup> Maria Yellow Horse Brave Heart, PhD et. al., *Women Finding the Way: American Women Leading Intervention Research in Native Communities*, 23 AM. INDIAN & ALASKA NATIVE MENTAL HEALTH RSCH. J., 24, 25 (2016).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 26.

<sup>25</sup> *Id.* at 27. Native women would often consult with male relatives on a more informal level; however, they also consulted with leaders, or were leaders themselves.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 27-28.

<sup>29</sup> *Id.* at 28.

policy of “the removal of children from all tribal influence . . . and the employment of officers of the army as teachers,” which moved children far away from their traditional homelands.<sup>30</sup> The trauma that these children endured at the boarding schools ranged from physical and sexual to cultural and spiritual.<sup>31</sup> Such experiences undermined the traditional roles and power of Native women “and contributed to the learned behavior of physical and sexual abuse” that many Native women and children face.<sup>32</sup>

## 1. How Historical Trauma Affects Native Survivors of Sexual Assault

“Native Americans contend with present-day events that have the potential to be traumatic at the individual and cultural level at much higher rates than other racial groups.”<sup>33</sup> The longstanding distrust of law enforcement within the Native community is rooted in the unfair treatment that has been endured for generations.<sup>34</sup> Such distrust has led Native women to be less likely to report crimes.<sup>35</sup> Brunner’s tale illustrated below exemplifies such distrust:

Brunner, who is also an Anishinaabe member of White Earth Nation in Minnesota, told News21 that she has survived numerous sexual assaults by non-Native and Native American men alike, which drove her to advocate for the past 20 years on behalf of other victimized Native American women.

“When a non-native rapes an indigenous woman, that to me is a hate crime,” Brunner said. “When we are facing a level of victimization where 67 percent of our perpetrators are non-native, that is race-based hate. That is a hate crime. We are being targeted for who we are as [N]ative women.”

Brunner wanted to be sure that her daughters understand the dangers associated with being Native American and female.

“My daughters know the fact that we’re not safe,” she said. “It’s not that I teach my daughters to live in fear, but to keep them safe, they need to know the threat levels that are present.”

One night in 2011, Brunner’s niece left the family home late at night to attend a party in the community without letting her family know. Brunner’s daughter, who was 17 at the time, woke up and noticed her cousin had left, and went to search for her alone.

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<sup>30</sup> *Id.*

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

<sup>32</sup> *Id.*

<sup>33</sup> Wiechelt & Gryczynski, *supra* note 19, at 199.

<sup>34</sup> See Jenna Kunze, *Without Justice in Nome, Women Wrestle With Trauma and Healing After Sexual Assault*, ALASKA PUB. MEDIA (Feb. 1, 2021), <https://perma.cc/E547-YP46>.

<sup>35</sup> *Id.*

As Brunner's daughter walked through the community in search of her cousin, a black SUV rolled up beside her with four men inside. They told her to jump in the car and they'd all "go party" and "have fun," Brunner said. Her daughter shook her head and told them "No," but the men chased her down and dragged her into the vehicle.

The four non-Native American men "wore bandanas over their faces like cowboys. One was driving, two of them held her down, and one of them raped her," Brunner said.

"When they were done with her, they threw her out by a bridge on the outskirts of town."

"They threatened to kill her and come and kill her family if she told anyone."

It took Brunner's daughter a month to tell her mother. When Brunner called tribal law enforcement, an officer took the statement over the phone and told Brunner they could do a forensic interview in Fargo, North Dakota, weeks later. Uncomfortable with the long wait time, Brunner called her uncle, who at the time was the police chief, and got a forensic interview the next day.

After that, Brunner said that there was little followup [sic] about her daughter's rape — a response *she said she expected*.

"I told them, 'The system is useless, you're going to prove to me today how useless you are,'" she recalled.

Many non-native people coming onto the reservation know that law enforcement can't touch them, she said.

"We as native women are hunted, we are deliberately sought after by sexual predators," Brunner said.<sup>36</sup>

Native women also commonly distrust law enforcement is because they are often prosecuted for crime while their assailants escape prosecution.<sup>37</sup> The lack of resolution in their sexual assault cases deepens the sense in the Native community that law enforcement is untrustworthy and leads survivors to grapple with their trauma for years.<sup>38</sup>

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<sup>36</sup> Bleir et al., *supra* note 13.

<sup>37</sup> Part 2 – Seeking Protection, Wanting Justice: Disparities in Sexual Assault Crimes in Nome, KNOM RADIO (Jan. 30, 2021), <https://perma.cc/D3BE-TWMS> (emphasis added).

<sup>38</sup> *Id.*

### III. JURISDICTIONAL COMPLICATIONS

Native Americans have long governed themselves in ways not respected by Europeans.<sup>39</sup> With settler colonization and the American imperialism that ensued, Native culture, policy, and law were driven “into the underground.”<sup>40</sup> Alongside the forced changes to Native society, a series of federal laws were passed that stripped tribal governments of nearly all jurisdiction that would allow them to handle rape cases within their respective communities.<sup>41</sup> Although recent legislation has allowed some progress in the reinstatement of tribal sovereignty, it can hardly be said that the Legislature has done enough in the way of protecting Native women and children.<sup>42</sup>

#### A. Legislative History

To better understand how the revocation of tribal sovereignty creates a barrier for Native women seeking justice, we will briefly examine the following: the Major Crimes Act (MCA); Public Law 83-280 (P.L. 280); the Indian Civil Rights Act (ICRA); the case of *Oliphant v. Suquamish (Oliphant)*; the Tribal Law and Order Act (TLOA); and the Violence Against Women Reauthorization Act (VAWA).

##### 1. The Major Crimes Act<sup>43</sup>

The MCA was enacted in 1885 and was one of the first Act’s to expand the federal government’s control over Native land.<sup>44</sup> Specifically, the MCA “grant[ed] the federal government *concurrent jurisdiction* over seven enumerated crimes if they were committed by a Native person on Native land and the crime was against a person or the property of a person.”<sup>45</sup> Notably, Congress listed rape as one of the crimes that fell under federal jurisdiction.<sup>46</sup> By granting the federal government concurrent jurisdiction, the MCA instilled a sense of ambiguity that effectively

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<sup>39</sup> Matthew L.M. Fletcher, *The Supreme Court’s Legal Culture War Against Tribal Law*, 2 INTERCULTURAL HUM. RTS. L. REV. 93, 93 (2007); Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 SUFFOLK U. L. REV. 455, 459-60 (2005).

<sup>40</sup> Fletcher, *supra* note 39, at 98.

<sup>41</sup> Deer, *supra* note 39, at 460.

<sup>42</sup> Reforming Federal Law to Restore Safety to Native Women, INDIAN L. RES. CTR. (last visited Apr. 17, 2021), <https://perma.cc/YDS4-KW74>. In order to prosecute an individual for a crime that occurred in Indian country, one must first determine: 1) whether the perpetrator is Indigenous and 2) whether the crime occurred on Indian Country.

<sup>43</sup> Major Crimes Act, 18 U.S.C. §1153 (2012).

<sup>44</sup> Emily Mendoza, *Jurisdictional Transparency and Native American Women*, 11 CALIF. L. REV. ONLINE 141, 150-51 (2020).

<sup>45</sup> *Id.* (emphasis added).

<sup>46</sup> Deer, *supra* note 39, at 460.

prevented tribes from prosecuting sexual offenders—even if both victim and perpetrator were Native.<sup>47</sup> Due to the uncertainty surrounding jurisdiction, fewer tribes pursued prosecution.<sup>48</sup>

## 2. Public Law 83-280<sup>49</sup>

Nearly seventy years later – in 1953 – the federal government transferred its criminal jurisdiction granted by the MCA to some states, without tribal consent, and without allocated resources.<sup>50</sup> In addition to the lack of allocated resources, the Bureau of Indian Affairs cut funding for tribal authorities without allowing the impacted states the needed time to arrange for increased jurisdictions.<sup>51</sup> Like the MCA, Pub Law 280 did not explicitly define concurrent jurisdiction.<sup>52</sup> This ambiguity resulted in tension and hostility between tribal governments and state officials and led to “jurisdictional vacuums” that allow violent crime, such as sexual assault and rape, to persist.<sup>53</sup> Thirty years after the law took effect, courts finally concluded that under Pub Law 280, tribes do retain their concurrent criminal jurisdiction; however, the ambiguity of the law still leaves Native women without recourse.<sup>54</sup>

## 3. Indian Civil Rights Act<sup>55</sup>

Enacted in 1968, the ICRA implemented procedural safeguards in tribal courts to reflect those enumerated in the Bill of Rights.<sup>56</sup> Although tribal governments did not oppose civil rights,<sup>57</sup> the “imposition and lack of choice” further stripped tribal governments of their sovereignty and further limited tribal sentencing authority.<sup>58</sup> The limitations were so intense when first initiated

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<sup>47</sup> *Id.*; 18 U.S.C. §1153(a).

<sup>48</sup> Deer, *supra* note 39, at 460; Mendoza, *supra* note 44, at 152 (stating that tribes either did not believe that they had the authority to prosecute or that the federal government would handle rape cases).

<sup>49</sup> Pub. L. No. 83-280 (1953) (codified as amended at 18 U.S.C. §1162 (2018)).

<sup>50</sup> Deer, *supra* note 39, at 460; Mendoza, *supra* note 44, at 152; 18 U.S.C. § 1162 (2004); 25 U.S.C. § 1301 (identifying California, Wisconsin, Minnesota, Nebraska, Oregon, and Alaska as states affected by P.L. 280).

<sup>51</sup> Mendoza, *supra* note 44, at 152.

<sup>52</sup> Deer, *supra* note 39, at 461; Mendoza, *supra* note 43, at 152.

<sup>53</sup> Mendoza, *supra* note 44, at 152.

<sup>54</sup> *Id.* at 152-53; for decisions establishing that tribes retain their concurrent criminal jurisdiction please visit <https://perma.cc/P7KY-P4PT>.

<sup>55</sup> 25 U.S.C. §§1301-1304 (2018).

<sup>56</sup> Mendoza, *supra* note 44, at 153.

<sup>57</sup> Deer, *supra* note 39, at 461 (stating “[t]ribal governments understood and honored individual autonomy in very sophisticated ways”).

<sup>58</sup> *Id.*; Mendoza, *supra* note 44, at 153; Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL'Y 121, 127-28 (2004) (stating “The Indian Civil Rights Act (ICRA) of 1968 has imposed additional limits on tribal governments, and is often cited as another reason why tribal governments cannot prosecute crimes classified as felonies by the Anglo-American system. ICRA prohibits tribal courts from imposing a sentence of more than one-year imprisonment and/or a \$ 5,000 fine for any one offense. This law is often interpreted to mean that tribal courts only have ‘misdemeanor’ jurisdiction, and therefore cannot prosecute felony-level crimes such as murder and rape. However, the ICRA sentencing limitation does not actually prohibit tribal nations from prosecuting any particular type of crime; it only controls the sanctions that can be imposed. It is true that tribal nations cannot

that they limited tribal sentencing authority to a “\$500 fine and up to six months incarceration regardless of the crime.”<sup>59</sup> Not much improvement has been made in way of the limitations set forth by the ICRA. The ICRA was amended in 1986<sup>60</sup> to allow for a maximum sentence of “one year of incarceration, a \$5,000 fine, or both.”<sup>61</sup> IRCA expanded the limitations once more, as will be discussed below; however, the expansion was not adequate, and many Native women still chose to handle their cases off-reservation so that they *might* find the justice that they deserve.<sup>62</sup>

#### 4. *Oliphant v. Squamish*<sup>63</sup>

In *Oliphant*, the Supreme Court catastrophically eliminated tribal jurisdiction over anyone who is not a member of a federally recognized tribe.<sup>64</sup> The *Oliphant* case occurred as a result of two separate arrests of non-Indian men on the Port Madison Reservation.<sup>65</sup> The Suquamish Tribe had posted blatant notices at entrances to the reservation to warn visitors that their entrance “indicated consent to the criminal jurisdiction of the tribal court.”<sup>66</sup> Tribal police officers arrested Mark Oliphant and charged him with assaulting a tribal police officer and resisting arrest.<sup>67</sup> The second defendant, Daniel Belgarde, was arrested and charged with recklessly endangering another person and injuring tribal property.<sup>68</sup> “After conviction in the tribal court, the two defendants sought a writ of habeas corpus in federal district court, and ultimately the Supreme Court, to determine whether the tribe appropriately exercised criminal jurisdiction over the non-Indian defendants.”<sup>69</sup> The Supreme Court held that tribes do not have intrinsic jurisdiction to punish non-Natives, reasoning that: 1) “tribal courts lack criminal jurisdiction unless ‘explicitly provided by treaty or statute’”; and 2) “because criminal justice implicates the deprivation of life and liberty, ‘citizens [should] be protected by the United States from unwarranted intrusions on their personal liberty.’”<sup>70</sup>

The jurisdictional scheme in *Oliphant* “sets up a system in which non-Natives who commit crimes against Natives can go unpunished.”<sup>71</sup> In other words, tribal governments lost all

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respond to sex offenses in the same way as the state and federal systems. But while a one-year imprisonment and/or a \$ 5000 fine may not be sufficient for the crime of rape, the limitations in and of themselves do not actually eliminate a tribe's ability to prosecute. Moreover, ICRA does not limit other forms of criminal sanctions, such as restitution, probation, and banishment.”).

<sup>59</sup> Mendoza, *supra* note 44, at 153.

<sup>60</sup> Pub. L. No. 99-570, tit. IV, § 4217, 100 Stat. 3207-146 (1986).

<sup>61</sup> Deer, *supra* note 39, at 462.

<sup>62</sup> See Mendoza, *supra* note 44, at 153.

<sup>63</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011, 55 L.Ed.2d 209 (1978).

<sup>64</sup> Mendoza, *supra* note 44, at 153.

<sup>65</sup> Marie Quasius, *Native American Rape Victims: Desperately Seeking an Oliphant-Fix*, 93 MINN L. REV. 1902, 1910 (2009).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 1910-11.

<sup>71</sup> Deer, *supra* note 58, at 128.

authority to penalize the primary perpetrators of violence against Native women.<sup>72</sup> Such a system is detrimental to Native women: “[a]mong Native women victims of rape or sexual assault, an average of 67 percent describe the offender as non-Native.”<sup>73</sup>

#### 5. Tribal Law and Order Act<sup>74</sup>

The TLOA was signed into law by President Obama in 2010 as an “attempt to return some authority to the tribes while simultaneously increasing cooperation between federal and tribal governments.”<sup>75</sup> One way of increasing cooperation was through the creation of the Office of Justice Services (OJS).<sup>76</sup> The OJS is responsible for coordinating federal and tribal law enforcement efforts by fostering dialogue between tribal leaders, training tribal law enforcement, and collecting information on crime in tribal communities.<sup>77</sup> In addition to increasing cooperation, the TLOA expanded the tribal sentencing authority that had been enacted under the ICRA.<sup>78</sup> As a result, tribal governments have the authority to impose fines of up to \$15,000, and incarceration terms of up to three years against offenders.<sup>79</sup> While the TLOA addressed sentencing limitations established in ICRA, it did nothing to address the jurisdictional restraint established in *Oliphant*.<sup>80</sup>

#### 6. Violence Against Women Reauthorization Act<sup>81</sup>

Although not fully enacted until 2015, President Obama signed VAWA into law as a direct response to *Oliphant*,<sup>82</sup> and this law returned some of the jurisdiction over non-Natives to the tribal governments.<sup>83</sup> One noted improvement that VAWA made was the creation of the Special Domestic Violence Criminal Jurisdiction (SDVCJ) “which allows tribes to prosecute non-

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<sup>72</sup> Mendoza, *supra* note 44, at 153; Deer, *supra* note 39, at 462.

<sup>73</sup> NCAI POL’Y RSCH. CTR., POLICY INSIGHTS BRIEF STATISTICS ON VIOLENCE AGAINST NATIVE WOMEN 5 (2013), <https://perma.cc/4V5B-Z8XT>.

<sup>74</sup> Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 (2010).

<sup>75</sup> Mendoza, *supra* note 44, at 155.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* “Additionally, the TLOA mandates that federal prosecutors communicate with tribal authorities regarding the status of cases and evidence, explain reasons for declination of prosecutions, and report data on crimes committed in Indian country. Further, the TLOA encourages the appointment of Special Assistant United States Attorneys to liaison and assist in prosecutions. The TLOA has been widely viewed as a step in the right direction for protecting the rights of Native American women; however, advocates recognize that significant changes are still necessary. Jurisdiction remains unclear, resources are scant, and the promising terms of the TLOA have been difficult to implement effectively.”

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013).

<sup>82</sup> Mendoza, *supra* note 44, at 155.

<sup>83</sup> *Id.*

[Natives] for specific domestic violence crimes under specific conditions.”<sup>84</sup> Although VAWA has made strides for Native jurisdiction, there are still a number of gaps in the legislation that harm Native women. For example, in order to prosecute someone under VAWA, the victim must be Native, the crime must have occurred “in the Indian country of the participating tribe,” and the non-Native defendant must have “sufficient ties to the Indian tribe.”<sup>85</sup> Another gap in the legislation is a direct result of verbiage and how tribal land is classified.<sup>86</sup> Only one of the 229 Alaskan tribes is able to benefit from VAWA “due to the way federal law classifies the lands of Alaska Native villages.”<sup>87</sup> The lack of careful inclusion is extremely detrimental to the population of Native women impacted by sexual assault the most.<sup>88</sup>

## B. What Tribal Jurisdiction Means for Native Survivors

The failure of the United States to protect Native women from systemic violence is nothing new; sexual violence against Native women began as soon as colonizers reached American soil and continues to the present day.<sup>89</sup> Native women have not only been preyed upon by military forces who “often demanded sexual favors for food, clothing, and shelter,” but also have been subjected to forced sterilization and child removal policies.<sup>90</sup> The horror of these truths are compounded by the fact that since the 1980s, Congress has been aware that the increased federalization of tribal law enforcement has “failed in every instance, and ha[s] no reason to believe that it would work to prevent the disturbingly high rates of domestic violence and sex crimes . . .”<sup>91</sup> Although the United States’ government has been making slow progress in way of policy changes, maintaining *any* jurisdiction over Indian Country is dangerous to Native women.

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<sup>84</sup> *Id.* at 155-56. “Those conditions limit the exercise of tribal jurisdiction to instances where the perpetrator is decidedly non-Indian, the perpetrator has sufficient ties to the reservation via employment or relationship, the crime occurred on reservation land, and the crime constitutes domestic violence, dating violence, or a protection order violation.”; *see also Reforming Federal Law to Restore Safety to Native Women*, INDIAN LAW RES. CTR. (last visited Apr. 17, 2021), <https://perma.cc/CRM7-SYP9>.

<sup>85</sup> Mendoza, *supra* note 44, at 156.

<sup>86</sup> *See Id.*

<sup>87</sup> *Reforming Federal Law to Restore Safety to Native Women*, *supra* note 84.

<sup>88</sup> *Id.* 40% of all federally recognized tribes were excluded from key reforms. This was devastating for Alaska Native women, who suffer rates of physical assault 12 times higher and domestic violence up to 10 times higher than the rest of the country. In at least 75 Native villages, there is no law enforcement presence whatsoever. Despite these historic improvements in the law, much work remains to restore full criminal authority to ALL Indian nations, a step needed to prevent and eliminate violence against Native women and children, and special attention is still needed to address the state of emergency facing Alaska tribes, Alaska Native women, and their communities.

<sup>89</sup> Ryan D. Dreveskracht, *House Republicans Add Insult to Native Women's Injury*, 3 U. MIA. RACE & SOC. JUST. L. REV. 1, 7-8 (2013); Deer, *supra* note 39, at 458.

<sup>90</sup> Dreveskracht, *supra* note 89, at 7-8.

<sup>91</sup> *Id.* at 8-9. “That we have known for some time how to put an end to this epidemic makes it that much worse. For instance, a 2001 U.S. Department of Justice study on reservation policing found the following: beginning in the 1970s, a handful of Indian nations embarked on 30 successful paths of social and economic development. Research by the Harvard Project on American Indian Economic Development indicates that the common denominator among these successful tribes was an effective government - one that was capable of both determining and implementing the policy priorities of the community. One indicator of a tribal government's ability to make and implement

The federal insistence on maintaining jurisdiction over non-Natives committing crimes in Indian Country results in an extreme lack of prosecution.<sup>92</sup> Because non-Natives carry out the majority of sexual assaults on tribal lands, almost all sexual assault cases land in federal courts.<sup>93</sup> However, federal courts often refuse to prosecute sexual violence cases that occur on tribal lands, resulting in a severe lack of justice for Native survivors.<sup>94</sup> A 2016 report confirmed that United States attorneys refused to prosecute forty-six percent of crimes that occurred in Indian Country, which equated to more than 550 assault and sexual assault cases.<sup>95</sup> The inaction by United States' attorneys has led to justice not being served for sexual assault survivors. Andrea Ciuniq Irrigoo's story illustrates the blatant lack of prosecution:

Another Nome woman, 25-year-old [sic] Andrea Ciuniq Irrigoo, said she also saw the justice system work against her. In April 2019, the days were getting long again and Irrigoo had a new job and a new studio apartment downtown. Irrigoo decided she would head down to Front Street and poke her head into the bars to find friends or even family who might be in town. At one bar, she was approached by a man she recognized as an acquaintance from around town. He offered to buy her drinks and she said she accepted. That was the last thing she remembers. When she came to in what she recognized as her apartment, she was naked and the man from earlier was naked on top of her. Irrigoo asked him to leave, but he refused. "I was trying to hand him his clothes, and then he started to get rough. I was trying to push him away, then he punched me." Irrigoo fought back, but he got on top of her and strangled her until she lost consciousness. "Then it goes black," she said. Irrigoo remembers screaming out for her neighbor, who heard her pleas and called police. "Then, the officer broke down the door."

EMTs took Irrigoo to the hospital for a forensic exam and rape kit swab. The police report from that night includes notes about a golf-ball [sic] sized bruise on Irrigoo's cheekbone as well as red and raw patchy skin on her neck. The man was charged with domestic violence — to which he pleaded not guilty — but the charges were

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effective decisions is whether or not it has increased control over its own institutions...[a]n important lesson from this research is the effect of increased tribal control over tribal institutions. Only those tribes that have acquired meaningful control over their governing institutions have experienced improvements in local economic and social conditions. The research has not found a single case of sustained economic development where the tribe is not in the driver's seat...[t]he general point is that self-determined institutions, ones that reflect American Indian nations' sovereignty, are more effective." (quoting STEWART WAKELING ET AL., *POLICING ON AMERICAN INDIAN RESERVATIONS: A REPORT TO THE NATIONAL INSTITUTE OF JUSTICE* viii (2001)).

<sup>92</sup> See generally *Olyphant v. Suquamish Indian Tribe*, 435 U.S. 191, 193 (1978) (Lack of prosecution includes serious crimes such as rape committed by a non-Indian who is not in a relationship with the victim or does not work on the reservation).

<sup>93</sup> Bleir et al., *supra* note 13.

<sup>94</sup> Mary Hudetz, *Despite Past Reforms, Native Women Face High Rates of Crime*, AP NEWS (Dec. 5, 2018), <https://perma.cc/G8Z8-Z7WH>.

<sup>95</sup> *Id.* (Prosecutors blamed the vast majority of rejections on insufficient evidence); U.S. DEP'T OF JUST., *INDIAN COUNTRY INVESTIGATIONS AND PROSECUTIONS* (2016), <https://perma.cc/T63Q-LLUW>.

dropped a year later by the Nome district attorney John Earthman. Earthman declined to speak with media about the specifics of why he chose to dismiss the case, but said that ultimately the available evidence would not have led to a conviction.<sup>96</sup>

The blatant violence depicted in Irrigoo’s experience makes it that much harder to understand why attorneys refuse to prosecute such cases. Irrigoo was found at the preparators apartment, and was physically injured – how is this not enough evidence to lead to a conviction?

#### IV. THE NEUROBIOLOGICAL IMPACT OF TRAUMA ON THE BRAIN

The next portion of this article examines the effect that trauma has on the brain. To better aid victims of sexual assault, there must be an understanding on how trauma physically affects a survivor’s ability to recall information. First, we will explore survival reflexes, specifically, we will explore how survival reflexes affect memory due to the neurobiological responses that occur during a traumatic event. Next, we will look at the foundational harms that are engrained in the carceral state when a person is unable to recall information in a specific manner.

Trauma can be defined as “an event that combines fear, horror, or terror with actual or perceived lack of control.”<sup>97</sup> Although trauma remains entirely subjective, the brain’s reaction to trauma remains objective, meaning that *most* brains have the same response to trauma.<sup>98</sup> To better understand how trauma affects the brain, it is important to have a basic understanding of the brain’s defense circuitry and how the defense circuitry shapes the way that a victim responds to, and copes with traumatic events.<sup>99</sup>

##### A. *The Brain’s Defense Circuitry*

When an individual detects a serious threat, the brain activates its defense circuitry.<sup>100</sup> When triggered, the defense circuitry tells the brain to switch to subcortical dominance which activates the fight, flight, or freeze responses.<sup>101</sup> Once the brain has activated a defense response, the defense circuitry will dominate brain functioning.<sup>102</sup>

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<sup>96</sup> KNOM RADIO, *supra* note 37.

<sup>97</sup> CHRISTOPHER WILSON ET AL., *Understanding the Neurobiology of Trauma and Implications for Interviewing Victims*, END VIOLENCE AGAINST WOMEN INT’L 1, 6 (2020), <https://perma.cc/2PT8-P2AQ>.

<sup>98</sup> *Id.*

<sup>99</sup> LORI HASKELL & MELANIE RANDALL, *THE IMPACT OF TRAUMA ON ADULT SEXUAL ASSAULT VICTIMS* 5, 6 (2019).

<sup>100</sup> Dean Mobbs et al., *From Threat to Fear: The Neural Organization of Defensive Fear Systems in Humans*, 29 J. NEUROSCIENCE 12236, 12236 (2009).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

## 1. Hormones and the APA axis

When the brain is under the dominance of the defense circuitry, it will automatically and unconsciously allow certain sensory information to bypass the cortex, directing the information to the amygdala.<sup>103</sup> The amygdala, part of brain's limbic system,<sup>104</sup> "predicts dangerous stimuli and triggers the appropriate psychological responses to danger and threat."<sup>105</sup> The message of danger is first sent from amygdala to the hypothalamus,<sup>106</sup> then to the pituitary gland from the hypothalamus, and lastly to the adrenal glands<sup>107</sup> – this is called the Hypothalamic Pituitary Adrenal Axis.<sup>108</sup> The adrenal glands release two types of hormones once the message is received: (1) adrenaline, which "bolsters the 'flight or fight' response by constricting blood vessels and making the heart pump faster to rush blood to the body and brain;" and (2) cortisol, which "suppresses the body from doing anything which isn't necessary [for survival]."<sup>109</sup> Once the defense circuitry has been fully activated, the "brain, body, attention, thinking, *behavior*, and *memory processes*" are significantly altered.<sup>110</sup>

The first defense response that occurs is to freeze.<sup>111</sup> When the amygdala detects a threat, it will automatically signal the brainstem to inhibit movement and will shift the person into a "state of vigilance" as the brain assesses the environment for danger and possible means of escape.<sup>112</sup> The freeze response can be illustrated as follows:

...[T]hink of the proverbial deer in the headlights. The reason the deer freezes is because the car is identified as a threat, and the deer's response was developed to respond to their primary threat, which is a predator. If that deer was in the forest, and a mountain lion entered the vicinity, the frozen deer may not be seen by the mountain lion. The mountain lion's attention might even be drawn to a deer that has not yet frozen, because predatory instincts evolved to detect movement. Unfortunately, this "freeze" response that evolved to protect the deer from the mountain lion leaves it completely unprotected against the threat of a car approaching at 60 mph.<sup>113</sup>

It is important to remember that the stigma that surrounds the 'lack of ability' to fight back during a sexual assault is asinine because these responses are automatic and unconscious.<sup>114</sup>

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<sup>103</sup> HASKELL & RANDALL, *supra* note 99, at 13.

<sup>104</sup> The limbic system is a set of structures in the brain that aids in the assistance of emotion and memory.

<sup>105</sup> HASKELL & RANDALL, *supra* note 99, at 13.

<sup>106</sup> One of the main functions of the hypothalamus is to secrete hormones and regulate the body.

<sup>107</sup> The pituitary gland sends signals to different organs and glands through the secretion of hormones.

<sup>108</sup> HASKELL & RANDALL, *supra* note 99, at 13.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* (emphasis added).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> WILSON ET AL., *supra* note 97, at 16.

<sup>114</sup> HASKELL & RANDALL, *supra* note 99, at 13.

## 2. Impairment of Function and the Prefrontal Cortex

During a traumatic event, the brain will release large amounts of stress hormones that greatly affect the prefrontal cortex, limiting the ability to think, plan, and reason.<sup>115</sup> Because the prefrontal cortex is the center of executive function and manages complex processes, an individual experiencing a traumatic event will likely be unable to organize experiences into logical sequences.<sup>116</sup> Furthermore, the impairment of the prefrontal cortex during a traumatic event will result in an individual losing the ability to consciously focus on anything other than: (1) things that will allow them to survive the threat; or (2) things that will help them cope with or withstand the threat.<sup>117</sup> When an individual experiencing a traumatic event loses the ability to consciously focus, the details that they are able to focus on are called *central details*, while all other details are called *peripheral details*.<sup>118</sup> For example, a survivor may be able to describe a painting that was on the wall where they were assaulted with great detail, but not the color of the offender's hair. When the survivor utilized the painting as a coping mechanism, it became a central detail, while the offender's hair color became a peripheral detail.

### B. *Survival Reflexes*

Following the initial freeze response detailed above, the brain will quickly assess different ways to respond to the threat based on other typical, habit-based responses to extreme circumstances, such as fight or flight.<sup>119</sup> However, sexual assault victims rarely respond with fight or flight.<sup>120</sup> Because women are, in some cases, “not trained to effectively fight” and often know their offenders which causes confusion and destabilization, they will often turn to other survival reflexes.<sup>121</sup> When a victim is sexually assaulted and believes that escape is impossible and “resistance futile” they may respond with one of the following three survival reflexes: (1) dissociation; (2) tonic mobility; or (3) collapsed immobility.<sup>122</sup>

#### 1. Dissociation

Dissociation occurs when the brain “disconnect[s] from the circuitry that keeps us aware of what's [sic] happening inside our bodies.”<sup>123</sup> For victims of sexual assault, dissociation allows

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<sup>115</sup> Amy F. T. Arnsten., *Stress Signaling Pathways That Impair Prefrontal Cortex Structure and Function*, in 10 NATION'L REV. OF NEUROSCIENCE 410, 412 (2009).

<sup>116</sup> HASKELL & RANDALL, *supra* note 99, at 14.

<sup>117</sup> WILSON ET AL., *supra* note 97, at 25.

<sup>118</sup> *Id.*

<sup>119</sup> HASKELL & RANDALL, *supra* note 99, at 15.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* Many women are effectively trained to fight, but it should not be ignored that this ‘old world’ way of thinking has permeated the minds of many, making them believe that they are not able to defend themselves.

<sup>122</sup> WILSON ET AL., *supra* note 97, at 21.

<sup>123</sup> *Id.* at 19.

the survivor to “shut off the circuit” that provides them with the awareness of what is happening to their bodies, oftentimes causing them to appear “spaced-out.”<sup>124</sup> During an interview, for example, someone who has experienced trauma may stare off into space “while being either non-responsive, or minimally responsive, to questions or other stimuli.”<sup>125</sup>

## 2. Tonic Immobility

Tonic immobility prevents a person from being able to move or speak, although they may still be alert and aware of their surroundings.<sup>126</sup> When an individual is solely experiencing tonic immobility and not dissociation, they are “‘totally present’ for, and tormented by, the horrifying bodily sensations and emotions of being sexually assaulted.”<sup>127</sup> Examples of tonic immobility can be illustrated by victim statements such as “‘I tried to scream, but I couldn’t or ‘I couldn’t move. I tried to push him away, but I couldn’t move.’”<sup>128</sup> There are four known conditions that can trigger tonic immobility: “(1) extreme fear; (2) physical contact with the perpetrator; (3) physical restraint; and (4) the perception of inescapability.”<sup>129</sup> When an individual experiences tonic immobility, there is a strong chance that the “horror, helplessness, isolation, pain, and feeling of worthlessness” associated with the assault will result in psychological scarring that may have a long-term effect on both personal and interpersonal functioning.<sup>130</sup> The long-term effects that an individual may face include a detrimental impact on the ability to access feelings of safety, mastery, or worth.<sup>131</sup>

## 3. Collapsed Immobility

Like tonic immobility, collapsed immobility results in loss of speech and movement.<sup>132</sup> However, unlike tonic immobility, collapsed immobility includes a drastic drop in heart rate and blood pressure, as well as loss of muscle tone.<sup>133</sup> These biological conditions cause the victim to ‘play possum,’ “which erroneously suggests a conscious choice that is not actually available to the person...at the time.”<sup>134</sup> The body is likely to respond with collapsed immobility in order to “deprive the predator’s brain of the stimuli that trigger the killing and eating of prey; resistance is needed in order to stimulate these responses.”<sup>135</sup> Like tonic immobility, collapsed mobility is

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 20.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> URLICH F. LANIUS ET AL., NEUROBIOLOGY AND TREATMENT OF TRAUMATIC DISSOCIATION: TOWARDS AN EMBODIED SELF 136 (2014).

<sup>131</sup> *Id.*

<sup>132</sup> WILSON ET AL., *supra* note 97, at 20.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

triggered by “(1) extreme fear; (2) physical contact with the perpetrator; (3) physical restraint; and (4) the perception of inescapability.”<sup>136</sup>

### C. Trauma and Memory Recall

Memory is created when a person is exposed to a new event.<sup>137</sup> However, the sights, sounds, and emotions that a person experiences are merely “points of data” until they are integrated and entwined into a coherent narrative, or memory.<sup>138</sup> Once integrated and entwined, memories become “‘sample’ fragments” of the experience, merely representing “short time slices of experience,” and never fully represent an experience.<sup>139</sup> There are three processes involved in memory: encoding, storage, and recall.<sup>140</sup>

When encoding new memories, the brain will activate the hippocampus and the amygdala.<sup>141</sup> The hippocampus is responsible for storing experiences in a chronological order.<sup>142</sup> Once the experiences have been sorted through the hippocampus, the experiences become explicit memories and can be retrieved by the prefrontal cortex.<sup>143</sup> The amygdala “catalogues past sensory experiences as implicit memories.”<sup>144</sup> Normally, the amygdala merely encodes fear memory traces, and the hippocampus focuses on the context of fear.<sup>145</sup> However, when experiencing a traumatic event, the amygdala activity is increased, and hippocampal function is decreased resulting in a reinforcement of more intense and episodic memories.<sup>146</sup>

#### 1. How Stress Hormones Affect Memories

When experiencing a traumatic event, the brain may experience a surge of adrenaline.<sup>147</sup> During the upswing of adrenaline, memory pathways are strengthened resulting in “flashbulb memories.”<sup>148</sup> Like adrenaline, high levels of cortisol are often released during a traumatic event.<sup>149</sup> When the two hormones are released simultaneously the hippocampus “super-encodes”

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<sup>136</sup> *Id.* at 20-21.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 9.

<sup>139</sup> Katrin Hohl & Martin A. Conway, *Memory as Evidence: How Normal Features of Victim Memory Lead to the Attrition of Rape Complaints*, 17 *CRIMINOLOGY & CRIM. JUST.* 248, 250 (2017).

<sup>140</sup> HASKELL & RANDALL, *supra* note 99, at 18.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 19.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 19-20.

<sup>147</sup> *Id.* at 20.

<sup>148</sup> *Id.* at 20; Ayesha Perera, *Flashbulb Memories*, SIMPLY PSYCH. (March 3, 2021), <https://perma.cc/BM8E-UX8H>. A flashbulb memory is a highly vivid and detailed ‘snapshot’ of a moment in which a consequential, surprising and emotionally arousing piece of news was learned.

<sup>149</sup> *Id.* at 21.

early, intense moments of the event.<sup>150</sup> If the threat continues and the hippocampus remains flooded with stress hormones, it may become temporarily impaired, resulting in fragmented memories with minimal contextual details.<sup>151</sup>

#### D. *The Carceral State's Failure to Acknowledge that Trauma Affects Survivor Testament*

A survivor's memory of an assault may not be as detailed and nuanced as one might expect. The fundamental way in which a survivor remembers a traumatic event plays a crucial role in how they are treated within the carceral system. Furthermore, survival reflexes may prevent an individual from being able to respond to an assault in a manner stereotypical to an attack such as fighting off an aggressor or screaming. The lack of understanding surrounding trauma often results in poor treatment of victims throughout the carceral state.

##### 1. Poor Police Training<sup>152</sup>

Many police officers are unaware of the complexities that are likely to arise during an interview with a survivor. Not only are police officers likely to be dismissive and disparaging towards a survivor, but they are also likely to reject survivor testimony completely.<sup>153</sup> We will review how police officers are trained to better understand why they have a hard time applying trauma-informed care and interviewing methods into their work.

##### 2. Interview Techniques Used by Police

Because police officers have historically been taught effective investigative techniques for suspect-based crimes, such as homicide and burglary, they are more likely to conduct interviews with skepticism, search for inconsistencies, and rely on physical evidence to determine the truth.<sup>154</sup> Customarily, police officers have been trained to elicit as much fine-grained detail as possible, including peripheral details of the alleged assault.<sup>155</sup> Further, police officers have been trained to detect lying while zeroing in on discrepancies to obtain a confession that establishes key facts and an event-specific timeline.<sup>156</sup> However, these approaches are dangerous when interviewing survivors of sexual assault. As mentioned above, the trauma response may result in several

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Although some interviewers are federal agents, I will solely be using police in my illustrations.

<sup>153</sup> Emma Younger, *When Police Misjudge Domestic Violence, Victims Are Slapped With Intervention Order Applications*, ABC NEWS (Aug. 14, 2018), <https://perma.cc/6MAK-RGVV>.

<sup>154</sup> Emma Lathan et al., *The Promise Initiative: Promoting a Trauma-Informed Police Response to Sexual Assault in a Mid-Size Southern Community*, 47 J. CMTY. PSYCH. 1733, 1735-36 (2019).

<sup>155</sup> Hohl & Conway, *supra* note 139, at 253.

<sup>156</sup> Lathan et al., *supra* note 154, at 1736.

inconsistent memories and fragmented thoughts, all of which directly oppose most police officers' interview techniques.<sup>157</sup>

Although police officers demonstrate some awareness that survivors of sexual assault are likely to have memory recall issues, they are also quick to doubt the victim's credibility when unresolved memory discrepancies arise.<sup>158</sup> When police officers doubt the credibility of the victim, they are more likely to drop the sexual assault case.<sup>159</sup> Examples of the attribution that police officers give to gaps and omissions in a victim's statement are in their notions of "false allegations."<sup>160</sup> For example, police officers are quick to label rape as false if "the victim forgets, omits or incorrectly relays - deliberately or not - aspects of a genuine rape."<sup>161</sup> In their Training Bulletin, Dr. Christopher Wilson, Dr. Kimberly A. Lonsway, and Sgt. Joanne Archambault highlight notes taken by a detective following an interview with a sexual assault victim that he believed to be lying:

My initial questions to [the victim] were to provide me with a detailed account of the assault. Her response was very abbreviated and when I asked her to be more specific, she would pause and appear to 'retrieve' the answer. She had difficulty in answering my questions when I asked her for specific details. She would appear to pause and or stall and then ultimately provide an answer.

Much of my interview turned into a question and answer session where I now believe my questions lead her to an answer.

I asked where her legs were during the vaginal assault and if they were out, or wrapped around the suspect, and then she said that he had asked her to wrap her legs around him. \*\*She didn't mention this [earlier]. I asked her, and she said, "yes." WHY? <sup>162</sup>

The detective's notes evidently illustrate the danger of inadequate trauma-informed training amongst the police.

Lack of sexual assault training seriously impacts victims, resulting in more harm.<sup>163</sup> "Police officer's overall decision to further investigate a sexual assault often depends on the presence of variables associated with perceptions of reduced victim credibility typically arrived at during the

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<sup>157</sup> *Id.* Interviewing sexual assault survivors requires trauma-informed interviewing skills such as: (1) allowing the victim to voice their experience uninterrupted, even if the narrative is disjointed; (2) understanding that trauma memory can be fragmented and restored across time; and (3) learning that perpetrators often deliberately choose vulnerable victims.

<sup>158</sup> Hohl & Conway, *supra* note 139, at 253.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> WILSON ET AL., *supra* note 97, at 28.

<sup>163</sup> Lathan et al., *supra* note 154, at 1736.

initial interview.”<sup>164</sup> Factors include: “age, race, sex, sexual orientation, victim’s moral character, criminal history, and/or mental stability, intoxication victim culpability, victim-perpetrator relationship, inconsistency of statements, and timeliness of reporting.”<sup>165</sup> Notably, perceived victim credibility impacts case attrition, including whether sexual assault kits will be submitted for testing and the likelihood of prosecution.<sup>166</sup>

## V. TRIBAL SOVEREIGNTY AND ABOLITION OF THE CARCERAL STATE AS THE ROAD TO JUSTICE FOR NATIVE SURVIVORS

To provide Native women the justice they deserve, we must first return tribal sovereignty in its entirety. Tribal governments should have the freedom to decide how they handle sexual assault cases regardless of whether the perpetrator was Native or not. In this section, I will address the importance of tribal sovereignty and touch on some steps that tribal nations are taking to protect Native survivors. Additionally, as those who benefit from settler colonialism, we must rethink and restructure how we handle crime – especially sexual assault. The carceral state is harmful to survivors and the only way to fix it is to abolish it. This section will address how the carceral state empowers gender-based harm and touch on alternative approaches that can be utilized as harm-reduction.

### A. Restoring Tribal Jurisdiction and Sovereignty

Although obvious that tribal authority must be restored, “[r]estoring tribal criminal authority will only end violence against [Native] women if Indian nations have the institutional capacity and readiness to exercise such jurisdiction.”<sup>167</sup> Currently, several Indian nations are developing the framework for tribal justice systems to protect Native women and girls within their territories.<sup>168</sup> Many Indian nations have “domestic violence codes; training for tribal law enforcement, tribal courts, prosecutors, and probation officers; and various programs for domestic violence offenders.”<sup>169</sup> After obtaining institutional capacity, tribal governments should have the ability to prosecute anyone that commits a crime against a member of their tribe. For those worried about unfair treatment towards non-Natives, “[t]ribal law does not prejudice nonmembers. As tribal courts develop and grow, hearing more cases involving more complex issues, there is evidence to suggest that tribal courts do not treat nonmembers in an unfair manner.”<sup>170</sup>

The Safe Women, Strong Nations project contributes to restoring tribal jurisdiction and sovereignty by assisting Indian nations and Native women’s organizations in increasing the

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Ending Violence Against Native Women*, INDIAN L. RES. CTR. (last visited Apr. 17, 2021), <https://perma.cc/P2D6-A4ST>.

<sup>168</sup> *Id.* Including tribal police departments, codes, and courts.

<sup>169</sup> *Id.*

<sup>170</sup> Fletcher, *supra* note 39, at 163.

capacity of Indian nations to “investigate, prosecute, and punish those who commit violence against Native women and restore safety to Native women.”<sup>171</sup> With this program, Native women’s organizations and Indian nations will have a better understanding of criminal jurisdiction in Indian country.<sup>172</sup>

## B. *Abolishing the United States’ Carceral System*

Not only is the history of the police force in the United States steeped in racism, but it also does not ensure safety for all.<sup>173</sup> Rather than protecting survivors, the criminal justice system regularly neglects, harms, and/or works against them.<sup>174</sup> And, while many survivors do not trust the police, they are forced to call 911 when they are in need of emergency assistance because they are not aware of access to other options.<sup>175</sup> “Sexual assault must not be used as a cloak to rationalize a need for police,”<sup>176</sup> and reform is not enough – only through the abolition of the carceral state will we see change.

In 1986, Prison abolitionist Thomas Mathiesen warned, “[r]ather than helping in constructing ‘alternatives’ which actually become add-ons to the prison solution, we should see it as our task to strive towards ‘shrinking’ the system.”<sup>177</sup> “We see the add-on phenomenon frequently in the gender violence context, as activists’ transformative ideas and programs are taken over by prosecutors and court administrators and become yet another reason to maintain penal intervention.”<sup>178</sup> However, prison-abolitionist groups such as Critical Resistance have drawn

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<sup>171</sup> INDIAN L. RES. CTR., *supra* note 167.

<sup>172</sup> *Id.*

<sup>173</sup> Alison Turkos & Shivana Jorawar, *We Survived Rape. Don’t Use Us to Support the Police*, COSMOPOLITAN (Jul. 8, 2020), <https://perma.cc/UB3Q-HCM6>. “The police force in the United States was created to catch runaway slaves and protect white wealth.”

<sup>174</sup> *Id.* “For instance, look at the story of 19-year-old Oluwatoyin ‘Toyin’ Salau, who was found dead on June 15 in Tallahassee, Florida, after being sexually assaulted earlier that month. Salau reported her assault to the police but was dismissed and told more evidence would be needed to investigate. The police failed to operate from a survivor-centered approach, and they failed Salau when they would not move forward with her case, invalidating her experience and putting her safety at risk. Unfortunately, Salau’s story is not unique. In fact, police sexual violence is the second most reported form of police misconduct. As Beth Richie and Luana Ross describe in their research, women of color are generally in prison as a direct or indirect result of gender-based violence. Many are arrested during domestic violence disputes because their abuser claims they were also violent or because they were trying to defend themselves. This was the case of 31-year-old Marissa Alexander, who spent three years behind bars after firing a warning shot when her husband attacked and threatened to kill her. In 2012, a jury convicted her in 12 minutes and she was originally sentenced to 20 years in prison. The year before, Ky Peterson, a transgender rape survivor, met a similar fate. Peterson was walking home from a convenience store when he was attacked and knocked unconscious. When he awoke, Ky was being raped. Afraid for his life, he fought back and ultimately killed his attacker. He was sentenced to 15 years in prison. The nurse who performed an examination of Peterson confirmed that he had been brutally raped yet felt the need to point out that Ky ‘didn’t act like a woman who had been raped,’ misgendering him in the process.”

<sup>175</sup> Turkos & Jorawar, *supra* note 162. “In crisis, we have desperately sought emergency assistance from law enforcement because we didn’t think we had access to other good options.”

<sup>176</sup> *Id.*

<sup>177</sup> Aya Gruber, *The Carceral State Will not be Feminist*, THE GENDER POL’Y REP. (Aug. 4, 2020), <https://perma.cc/6CMF-4PBW>.

<sup>178</sup> *Id.*

distinctions between “reformist reforms” that “continue or expand the reach of policing” and “abolitionists steps” that “chip away” at the carceral system.<sup>179</sup> One example of an abolitionist step that would chip away at the carceral system is to “depolic[e] non-criminal ‘quality of life’ incidents and replac[e] armed officers with crisis intervenors.”<sup>180</sup>

Another dangerous component of the carceral system is that of carceral feminism. “Carceral feminists believe that police, prosecution, and prison are the best way to address gender and sexual violence; abolition feminists argue that locking men up in cages reinforces violent behavior and never addresses the problem of sexual violence and its victims. Instead, the carceral state criminalizes and locks up women, transgender, and gender non-conforming communities and perpetuates racial and gender violence against our communities.”<sup>181</sup> In her article, *The Carceral State Will not be Feminist*, Aya Gruber suggests that when replacing the carceral paradigm, those fighting to abolish the carceral state should not take a “neofeminist’ approach that recognizes gender crimes as pressing social problems” but that we should adopt “Mathiesen’s ‘abolitionist stance’ of ‘a constant and deeply critical attitude to prisons and penal systems as human (and inhumane) solutions.’”<sup>182</sup> “With a neofeminist perspective, reformers would, among other things, oppose new or expanded substantive gender crimes and higher sentences. They would characterize violence as a function of social conditions rather than of individual evil men. They would expend capital on reforms that provide material aid to the women most vulnerable to violence.”<sup>183</sup> “We have important work to do to free policymakers of the fear that rejecting criminal law equals promoting gender violence and take one more step down the long road of unmaking American mass incarceration.”<sup>184</sup>

## 1. Gender-Based Violence and the Abolition of the Carceral State

With the social uprising following the murder of George Floyd in May of 2020 came conversations surrounding defunding the police and prison abolition – and with those conversations came questions like, “who are we going to call for help if we are sexually assaulted?” and “what about rape?” To many, the thought of abolishing the systems that “keeps us safe” is

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.* (<https://perma.cc/989E-ML8R>) “The city of Eugene, Oregon, takes a different approach. For 30 years, the CAHOOTS (Crisis Assistance Helping Out On The Streets) programme has been sending teams of unarmed civilians to deal with 911 calls that elsewhere are dealt with by police. Each team consists of a mental health crisis worker and an EMT (emergency medical technician, or paramedic). Between them, they have the skills and training to deal with mental health issues, homelessness, intoxication, substance abuse, disorientation and dispute resolution. In 2019, CAHOOTS responded to 24,000 calls, and only required back-up from police 150 times. Eugene’s police department acknowledges that the CAHOOTS teams are often far better equipped to deal with situations where a police response is not the best option. Eugene Police Chief Chris Skinner told CNN the two organizations have a ‘symbiotic relationship.’ ‘When they show up, they have better success than police officers do. We’re wearing a uniform, a gun, a badge – it feels very demonstrative for someone in crisis.’”

<sup>181</sup> Robin D. G. Kelley, *What Abolition Looks Like, From the Panthers to the People*, LEVEL (Oct. 25, 2020), <https://perma.cc/2QDN-XRCY>.

<sup>182</sup> Gruber, *supra* note 177.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

incredulous. However, many survivors of sexual assault believe in ending the carceral system.<sup>185</sup> In fact, many survivors of sexual assault believe that “the police fail victims by not making them feel heard, supported, safe, or believed,” which has resulted in more and more survivors calling for the abolition of the police state.<sup>186</sup>

### a. Police as Sexual Offenders

Often left out of the conversation surrounding the abolition of the carceral state is that police sexual violence is the second most reported form of police misconduct.<sup>187</sup> Over the past decade, there have been approximately 3,145 allegations of rape, child molestation, and other sexual misconduct against police officers – and while there are *thousands* of sexual assault allegations, *less than 10%* of officers in most forces are investigated.<sup>188</sup> Additionally, at least 40 percent of police officers are known domestic abusers, and guards and staff commit 60 percent of prison rapes – a horrifying reality for incarcerated women, 90 percent of which are survivors.<sup>189</sup>

## 2. Reconceptualizing Prevention and Harm-Reduction

Calling the police when in trouble is so engrained in white people that the thought of not being able to terrifies them,<sup>190</sup> and while many white people were taught to dial 911 at a young age, other communities “are forced to engage in the devastating task of teaching their children how to not get murdered by the police—as if they have a say.”<sup>191</sup> Not only does abolition involve overturning and disestablishing, but it also involves the process of creating something new by addressing all of the enabling conditions.<sup>192</sup> The phrase ‘defund the police’ addresses both the negative and reconstructive processes required for the abolition of the carceral state.<sup>193</sup> Examples of using both negative and reconstructive processes include, “[g]ender violence services instead of the police. Literacy instead of the police. Mental and physical healthcare services instead of the police. Jobs instead of the police. Housing instead of the police.”<sup>194</sup>

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<sup>185</sup> Turkos & Jorawar, *supra* note 173.

<sup>186</sup> *Id.* “As survivors of sexual assault who believe in ending the carceral system, we fear our stories will be used to promote police power and state violence. We have seen police, civilians, and elected officials—including Donald Trump—use survivors like us in a last-ditch effort to make communities believe police are needed. Victims of sexual assault are told time and again ‘the right thing’ to do is report.”

<sup>187</sup> Turkos & Jorawar, *supra* note 173.

<sup>188</sup> John Kelly & Mark Nichols, *We Found 85,000 Cops Who’ve Been Investigated for Misconduct. Now You Can Read Their Records*, USA TODAY (Jun. 11, 2020), <https://perma.cc/HLR3-ZSG3>.

<sup>189</sup> Kylie Cheung, *What ‘Defund the Police’ Means for Sexual Assault Survivors* DAME (Jul. 6, 2020), <https://perma.cc/BJ7B-26DR>.

<sup>190</sup> Often times, there is no trouble – but rather a false of trouble created by the systemic racism that thrives in America.

<sup>191</sup> Maeve Barry, *White Women We Need to Do Better* MS. MAG. (Jun. 2, 2020), <https://perma.cc/9F5Z-MGJK>.

<sup>192</sup> Walker, *supra* note 7.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

“The safest communities don’t have the most cops; they have the most resources.”<sup>195</sup> Multiple resources providing alternatives to calling the police are readily available thanks to organizations like Freedom to Thrive, “a national convener of Black and brown organizations fighting for reinvestment in their communities and an end to the punishment-based criminal and immigration systems.”<sup>196</sup> Other resources include the Anti-Violence Project, Childhelp, Darkness to Light, Day One, loveisrespect, RAINN, and Safe Horizon.<sup>197</sup>

“In 2001, INCITE! Women of Color Against Violence and Critical Resistance issued a statement calling for ‘strategies and analyses that address both state and interpersonal violence, particularly violence against women,’ and the development of safe, community-based responses to violence independent of the criminal justice system and accountable to survivors of sexual and domestic violence.”<sup>198</sup> For example, after the police killing of two teenaged women of color, “Brooklyn-based collective Sista II Sista, created ‘Sistas Liberated Ground’ as an alternative to calling the police to deal with gendered violence.”<sup>199</sup> By training women in self-defense and conflict resolution, street performances, video screenings, discussions, and direct interventions Sistas Liberated Ground dealt with gender violence as a community issue, making their community safer without police.<sup>200</sup>

## VI. CONCLUSION

“Rape was uncommon in traditional matrilineal Native societies, but that changed with the arrival of Europeans who misconstrued nudity and sexual autonomy for promiscuity and immorality, while in their world it was perfectly moral and legal to murder, rape and displace Native populations.”<sup>201</sup> The development of the carceral state by settler-colonialists has not only allowed white men to continue harming Native women but has also shielded them from legal recourse. Legislation often praised as restoring tribal jurisdiction remains inadequate. VAWA, for example, “allocates two-thirds of funding to law enforcement and just one-third to victim services and maintains an arrest requirement that places victims in danger of criminalization.”<sup>202</sup> Although a restorative approach may not bring justice to survivors, a complete reversal of the carceral state may prevent more harm from being done in the future.

The current system harms sexual assault survivors by not investigating or prosecuting assailants, which results in a lack of reporting. In the chance that an assault is investigated, sexual

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<sup>195</sup> Turkos & Jorawar, *supra* note 173 (quoting Jillian Johnson).

<sup>196</sup> *Id.*

<sup>197</sup> Jezmina Von Thiele, *Resources for Sexual Assault and Domestic Abuse Survivors Who Aren’t Sure Where to Turn*, GREATIST (Aug. 2, 2019), <https://perma.cc/2X35-VR59>.

<sup>198</sup> Robin D. G. Kelley, *What Abolition Looks Like, From the Panthers to the People*, LEVEL (Oct. 25, 2020), <https://perma.cc/6GF5-VSCV>.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> Giselle Gerolami, *Rape as Colonial Legacy*, AGAINST CURRENT (July – Aug., 2016), <https://perma.cc/3BPK-UJUY> (Reviewing Sarah Deer’s *The Beginning and End of Rape*).

<sup>202</sup> Cheung, *supra* note 189.

assault survivors are often further harmed because the most fundamental components of sexual assault and trauma are not considered such as how trauma affects memory, and therefore testimony. Further, police are often known to be sexual assailants themselves, and when called to the scene of an assault, they may also charge the victim of a crime. Clearly, the system is not helping. Only by restoring complete tribal sovereignty to tribal governments and by abolishing the carceral state while reinvesting in community care can we hope to protect Native women in the future.