

Running for Missing and Murdered Native Women

EXPANSION OF TRIBAL COURT CRIMINAL JURISDICTION

By Robert O. Saunooke

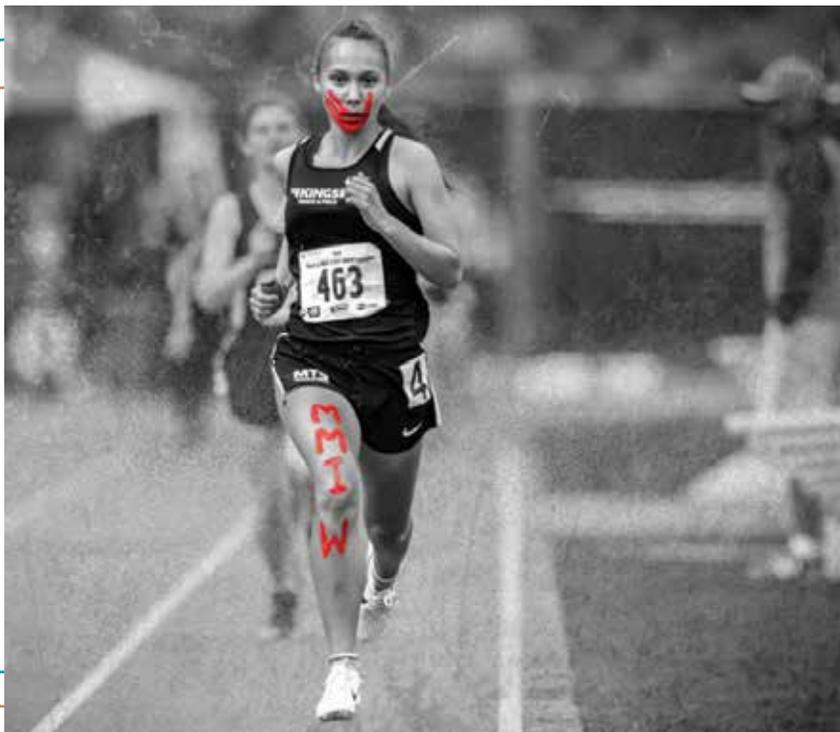


PHOTO BY ALEX FLETT

Currently there are over 4,000 murdered and missing indigenous women in the United States and Canada that no one is looking for or trying to find. Two indigenous women, Rosalie Fish and Jordan Marie Daniel, are running—physically running—for their people to draw attention to a tragedy that has, for the most part, been overlooked and ignored.

Rosalie Fish is an enrolled member of the Cowlitz Tribe of southern Washington State. She started running in middle school. In 2015, at the Tribal school, she started to run with a purpose. Often the only member of the track team, she trained by herself and competed by herself. She had no uniform and was the only member of her track team.

During one meet, Rosalie went to the bathroom and found the words “Indian Savages,” “Indian Drunks,” and “government handouts” written on the walls. Hurt and forlorn, these messages of hate only drove her to be better. On her own, she

trained, learned how to diet, and, by her junior year, was the state champion in the two-mile event. She felt strong on the track but weak in another area of her life.

When Rosalie was three, her aunt disappeared. The police found her body a year later, wedged under a tree on a creek. The police declared her death as “inconclusive.” She was not the first member of her community to die this way.

In the United States, murder is the third-leading cause of death for Native American women. In Canada, Native women are four times more likely to be murdered than non-Native women. The vast majority die at the hands of non-Native men, and more than 90 percent are never prosecuted.

In 2019, Rosalie learned about Jordan Marie Daniel, who ran the Boston Marathon with a red handprint over her mouth to symbolize women who had been silenced by violence and with “MMIW” (Missing and Murdered Indigenous Women) painted down her leg. She dedicated each mile of

her race to a different missing woman—26 women in all. Rosalie decided to follow Jordan’s example at the upcoming state championships. She painted her face and ran the mile race for her aunt—and won. But instead of feeling elated, she felt the weight of all those women that she was running for on her shoulders.

“It’s not just the fact that it’s an epidemic; it’s the details of some of the research that I do and finding the names that I want to run for and who I want to run for and dedicate it to,” Rosalie says. And it’s those details of what happened to them that are in my head and, you know, it’s creating a very dark environment for me.”

Jordan gave Rosalie words of encouragement, and Rosalie ran the 800 and two-mile and placed first in both races. All that was left was the 4,000, which she had never run before. “I know your legs are tired,” Rosalie recalls, “but you don’t care. You don’t care that your legs are tired. You don’t care that you haven’t had a break yet because you’re

running for more than this medal.”

Rosalie's coach came up to her and said, “You're running for Misty and Jackie and Renee and Alice. But you're also running for your little sister Solstice and your older sister Cedar, and you're running for my daughters Nyala and Khalil. And you're running for all of the little girls at Tribal school, and you're running for indigenous women everywhere.” And he said, “That matters most to you, not how tired you are.” She placed second.

The missing and murdered Native women for whom Rosalie and Jordan run do not represent only a few isolated incidents. Currently in the United States and Canada, incidences of domestic violence against Native women and children are an enormous problem. While Tribes readily acknowledge their responsibility to ensure the safety of Tribal citizens, the ability to do so is hindered by federal restrictions on the application and enforcement of Tribal laws on non-Native citizens.

Statistically, more than one-third of crimes committed against Native women and children are perpetrated by non-Native offenders. This presents a rate of abuse almost five times higher than any other racial group or population.¹ While this figure is alarming and unfortunate, why is it any different than any other statistic reflecting crimes against women and children? Simply put, the problem has become pervasive and has increased in frequency primarily due to untenable roadblocks and jurisdictional limitations on the prosecution of non-Native offenders by Tribes where violations occur.

In 1978, the U.S. Supreme Court decided *Oliphant v. Suquamish Indian Tribe*.² *Oliphant* held that Tribal Courts lack subject matter jurisdiction over non-Indians committing crimes in Indian Country. Prosecution of non-Indians committing crimes within Tribal boundaries became the responsibility of either the relevant state government or the federal government. For the next 40 years, Tribal victims saw the prosecution rate of violent offenders fall to less than 8 percent. Lack of funding, failure to understand Tribal cultures, and simply ignoring the problem all contributed to a rampant increase of

violence against Native women and children.

A study completed by Amnesty International titled *Maze of Injustice*³ classified the violence against women as one of the most hidden and “pervasive human rights abuses” as it takes place in intimate relationships, within families, and at the hands of strangers. Indigenous women, more than any other group, have faced deeply entrenched marginalization compounded by what has been a steady history by state and federal agencies to erode Tribal governments, under resourcing of law enforcement agencies and providers of services to Native communities.

In 2016, there were more than 5,700 cases of domestic or other violence reported against Native women and children. The U.S. Department of Justice (DOJ) logged only 116 of those cases into the DOJ database.⁴ That's less than two-tenths of 1 percent of the reports. Data on abuses suffered by Native women and children is difficult to obtain and, in actuality, the numbers are probably much higher. Misclassification or inaccurate listing of Native American racial profile by law enforcement, lack of proper identification of domestic violence, and failure to report or follow up on complaints have all contributed to the inability of Tribes to identify, react, and protect their citizens.

In places like the state of Washington, Native Americans make up only 2 percent of the state population but represent more than 5 percent of the state's missing or murdered citizens.⁵ Few, if any, non-Natives are prosecuted for these crimes by the state and federal government. Ironically, prosecution of Native offenders is often seen at rates five times higher than any other group. In Montana, Native Americans make up only 7 percent of the state's population but represent more than 25 percent of the state's prosecution and imprisonment population.⁶

Response and reaction to this racial disparity have been slow and ineffective. In 1994, with the passage of the Violence Against Women Act (VAWA), Tribes saw the first step in creating funding and programs to assist victims of domestic violence. However, it was not until 2013 that some

jurisdictional restrictions on prosecuting non-Native offenders were amended to permit very limited enforcement of domestic violence orders and allow Tribes to prosecute violators regardless of race.

The 2013 changes to VAWA, along with the expansion of the Indian Major Crimes Act under the 2010 Tribal Law and Order Act, provided an opportunity for Tribes to investigate, prosecute, and convict non-Natives who committed acts of domestic violence in Indian Country.⁷ However, the prosecution was dependent upon Tribes changing the manner and method by which non-Native offenders were prosecuted. Specifically, VAWA amended Section 904 (“Tribal jurisdiction over crimes of domestic violence”) and authorized a “Special Domestic Violence Criminal Jurisdiction” for those Tribes that chose to participate in the investigation and prosecution of non-Native offenders and violators of domestic violence restraining orders.

At first glance, these changes might appear to be steps in the right direction. However, the 2013 amendments to VAWA required that Tribal Courts meet certain federal mandates to exercise criminal jurisdiction over non-Indians committing certain statutorily enumerated crimes against Indian victims in Indian Country. These include appointment of legal counsel, jury rights, trial conditions, and compliance with provisions of the U.S. Constitution that previously had no application or enforcement within Indian Country. In other words, for a Tribe to “participate” in the prosecution of non-Natives who raped, beat, or otherwise abused Native citizens, the Tribe had to adopt and become more like a federal court, further eroding Tribal governments' sovereign authority to self-govern and protect its citizens.

These changes, while acknowledging new jurisdictional authority, failed to acknowledge the fact that Tribes had been and were exercising jurisdiction over Tribal members committing the same crimes without any change in the manner or method of how the Tribe's laws were enforced. Tribal Courts are extremely capable of exercising criminal jurisdiction over all perpetrators, Indian and non-Indian alike, who commit domestic violence and

ancillary crimes. Section 904 was far too narrow to protect child victims of domestic violence and ancillary crimes in Indian Country and failed to include violence committed in a host of other situations including dating, schools, or courtrooms, or against law enforcement.

In addition to the narrow expansion of limited criminal jurisdiction and the problems it created for Tribes that desire to participate in prosecuting non-Native offenders, the VAWA statute requires reauthorization and refunding every five years. The most recent reauthorization took place in 2019. At the time of this article, VAWA

most controversial involved the new provisions to lower the criminal threshold that would bar someone from buying or owning a gun to include misdemeanor convictions of domestic abuse or stalking charges. Current law applies to felony convictions. It would also close the so-called boyfriend loophole to expand existing firearm prohibitions to include dating partners convicted of abuse or stalking.⁸

The Senate has taken no action to move the House bill forward. Instead, the Senate has proposed new legislation and amendments to the House bill that would leave Native women and children less pro-

on the failure to include Tribes in the legislative discussion:

Tribal issues are nonpartisan issues. As a Native Woman and a survivor, I call on the Senate to stand with Native Women and survivors and not allowing partisan politics to get in the way of protecting the safety of Native Women and the sovereignty of Tribal nations. NIWRC remains committed to working with senators on both sides of the aisle to enhance safety for Native Women.⁹

The American Bar Association, along with a host of other voluntary bar associations, nonprofit groups, and others, have all passed resolutions and issued statements in support of not only the reauthorization of VAWA but the expansion of Tribal Court jurisdiction. It is abundantly clear that a basic necessity for any government is the ability to pass laws, enforce them, and protect their citizens. Before *Oliphant*, Tribal governments regularly exercised jurisdiction over non-Native citizens. The restrictions on Tribal Court jurisdiction voiced in *Oliphant* are the only restrictions affirmatively placed on a Tribe's inherent sovereignty to protect its citizens. It is a Supreme Court interpretation of statutory law and one that Congress could easily overcome by expanding Tribal Court jurisdiction. Expanding VAWA is the very least that should be done, as no one should oppose or have issue with actions of government to protect women and children from abuse and violence.

Felix Cohen, arguably the father of federal law as applied to Native Americans, once stated:

The Indian plays much the same role in our American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.¹⁰

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has not yet been fully funded or authorized. Instead, as in prior years, it continues to be a political football used by political parties and organizations for protection of gun laws, limitation of Tribal sovereignty, and negatively impacting Tribal citizens. While VAWA continues to be partially funded, it has not yet been reauthorized, leaving many Tribes working in limbo and fearful that actions they take will be overturned or restricted when, or if, VAWA is reauthorized.

The House of Representatives, in a bill that had bipartisan support, passed proposed legislation that expanded the coverage of VAWA to include transgendered victims and proposed funding that covers courtroom personnel, law enforcement, and teachers within reservation jurisdictions. The House bill also expanded gun ownership restrictions and temporary orders on gun ownership in certain situations. The gun lobby and many representatives faced a tough decision. The

protected and further limit or infringe on Tribal sovereignty. The Senate bill requires that trials held within Indian Country be presided over by federal magistrates, which would further destabilize Tribal justice systems by imposing undue burdens and restrictions on Tribal Courts far beyond those imposed on federal and state courts, including audits by the attorney general. It also would require that Tribes waive sovereign immunity, leaving Tribes vulnerable to lawsuits by defendants against the Tribe and its court system.

It seems hard to comprehend how anyone can debate the importance and necessity of protecting women and children. What is more difficult to understand is the fact that, in both the House and Senate process, there was no effort to work with, consult with, or hear from any Tribal groups, organizations, or those representing Tribal concerns. The National Indigenous Women's Resource Center recently commented

It is clear that the current method of criminal justice is failing in Indian Country. Even with the narrow expansion of Tribal Court jurisdiction, there has been an increase in acts of domestic violence and crimes against Native women and children, which have almost doubled in the past 10 years.¹¹ Prior actions by Congress that expanded jurisdiction only happened after women who had been victims of domestic violence bravely appeared and testified before Congress, telling their stories of abuse at the hands of non-Native offenders.¹²

The canary, as reflected in Indian Country criminal matters, is far past issuing any warning. The United States has failed in its trust obligations and protection of Tribal members—declination in prosecution, lack of investigative integrity, failure to report, and failure to enforce federal and Tribal laws. Failure to acknowledge the integrity and ability of Tribal Court systems that are currently prosecuting Tribal perpetrators under a false narrative concerning due process rights of defendants is both inaccurate and misleading. Expansion of jurisdiction over non-Indian offenders is the only way to protect Tribal women and children and to ensure respect and integrity of the Tribe and its ability to govern through self-determination.

U.S. Attorney General Loretta Lynch noted in her 2015 address, during the DOJ's Domestic Violence Awareness Month, that communicating what we as a society value and protect is best demonstrated "[b]y what and how we prosecute."¹³ In no place in the United States is this more readily absent than in the ability of Tribal Courts to protect their citizens through assuming jurisdiction over non-Native criminal offenders. Amending Section 904 of VAWA to allow Tribes to once again hold non-Indian criminals accountable for committing domestic violence and other crimes committed against Tribal members in Indian Country is the first and most simple way to protect and keep Native women and children safe.

In addition, appropriate funding for training of law enforcement, legal services, and the judiciary is needed to ensure an

appropriate understanding of how to deal with violence impacting Native women. Negative stereotypes and dehumanizing images of the Native American community are not simply an image from a far distant past. Cultural misappropriation of Native American images as seen in mascots, Halloween costumes, and television, movies, and the commercial industry play a role in desensitizing those who deal with the Native community. As recent as 1968, a federal appellate court ruling upheld a statute under which an American Indian man who committed a rape in Indian Country received a lower penalty if the victim was a Native woman.¹⁴

This legacy of historic abuses continues. Changing the dialogue requires training to break the perception of Native women that has become the fuel for ignoring the high rates of sexual abuse against them and the impunity by which the perpetrators are held accountable for their crimes. It is only within the Native American culture that the issue of "what race is the victim" plays a primary role in both the investigation and prosecution of the criminal. Such conjecture should no longer present an impediment to protecting the basic human rights of any person or group.

Until Congress takes action, expands jurisdiction, properly funds education and law enforcement, and fully acknowledges Tribal governments on at least the same level as other sovereigns, Rosalie and Jordan will continue to run for murdered and missing indigenous women, no matter how tired their legs are and no matter how long that list becomes. ■

Endnotes

1. STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUST., A BJS STATISTICAL PROFILE, 1992–2002: AMERICAN INDIANS AND CRIME 8 (1999), <http://www.bjs.gov/content/pub/pdf/aic02.pdf>.

2. 435 U.S. 191, 212 (1978).

3. AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2007), <https://www.amnestyusa.org/pdfs/mazeofinjustice.pdf>.

4. URBAN INDIAN HEALTH INST., MISSING AND MURDERED INDIGENOUS WOMEN & GIRLS

(Nov. 2018), <https://www.uihi.org/wp-content/uploads/2018/11/Missing-and-Murdered-Indigenous-Women-and-Girls-Report.pdf>.

5. Graham Lee Brewer, *The Crisis of Missing and Murdered Indigenous Women*, HIGH COUNTRY NEWS (May 4, 2018), <https://www.hcn.org/articles/indian-country-news-the-crisis-of-murdered-and-missing-indigenous-women>.

6. Council of State Gov'ts Justice Ctr., Report (Mar. 2016).

7. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54, 120–23 (amending 25 U.S.C. § 1304) [hereinafter VAWA].

8. Susan Davis, *House Passes Bill Protecting Domestic Abuse Victims; GOP Split over Gun Restrictions*, NPR (Apr. 4, 2019), <https://www.npr.org/2019/04/04/707685268/violence-against-women-act-gets-tangled-up-in-gun-rights-debate>.

9. Press Release, Nat'l Women's Resource Ctr., New Senate VAWA Bill Would Leave Native Women Less Protected and Infringe on Tribal Sovereignty (Nov. 21, 2019) (quoting Cherrah Giles, chair, Nat'l Indigenous Women's Resource Ctr. 2019).

10. Felix S. Cohen, *The Erosion of Indian Rights, 1950–53: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).

11. Auburn Wilcox, *Sexual Violence Rates Double Against Native American Women*, DAILY UNIVERSE (Jan. 23, 2019), <https://universe.byu.edu/2019/01/23/sexual-violence-rates-higher-against-native-women-in-america-1>.

12. One of the women testifying bravely detailed how her abuser would actually call the Tribal police and let them know that they were going to beat her, only to then learn that the Tribal police would not come and had no jurisdiction. Her story is poignantly told in the play "Sliver of a Full Moon," written by Mary Katherine Nagle.

13. Loretta E. Lynch, Atty Gen., Dep't of Justice, Opening Remarks at the Congressional Hispanic Caucus Institute Leadership Luncheon (Oct. 6, 2015), <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-opening-remarks-congressional-hispanic-caucus>.

14. Gray v. United States, 394 F.2d 96, 98 (9th Cir. 1968).