

American Diagnosis Podcast

Season 4 Episode 5: *Power to Police Perpetrators*

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TRANSCRIPT

Céline Gounder: Hi everyone, this is Dr. Céline Gounder, the host of the show. Just so you know, this episode contains descriptions of intimate partner violence. If you or someone you know is experiencing intimate partner or sexual violence, help is available.

Here are two resources. You can **call the National Domestic Violence Hotline at 1-800-799-7233.**

StrongHearts Native Helpline provides culturally appropriate support and advocacy for Indigenous women. **Call 1-844-7-NATIVE or text the corresponding number; 1-844-762-8483.**

Please take care how you listen, and with whom. All right, here's the show.

Lisa Brunner: Predators are very calculated. They're very methodical. And highly intelligent. They *know* what they're doing. You know, we're invisible to this country. We're invisible when our women go missing and we make for the perfect predatory hunting grounds.

Céline Gounder: Lisa Brunner is a member of the White Earth Ojibwe Nation in Minnesota. She has worked as an advocate for Indigenous survivors of domestic abuse and human trafficking for nearly 20 years. Lisa says many Native women living on reservations lack the most basic access to help when they're in danger.

Lisa Brunner: Who do you call when you're in trouble, when you need help? 911.

Céline Gounder: Lisa says if there's an emergency on a reservation in the United States and someone calls 911, they may get asked if they're Native.

Lisa Brunner: And if you said yes, they said, "Well, you need to call tribal law enforcement." And then they would hang up on you. *911* would hang up on our members calling for help.

Céline Gounder: Lisa has testified before the Inter-American Court [of] Human Rights about the limits of 911 services and other hurdles to help Native women. She knows what it's like to be overlooked. Lisa says growing up there was a lot of violence around her. When family called 911, oftentimes it was a woman reporting an abusive partner. They got the same message — there's nothing we can do.

Lisa Brunner: As Native people, that was my understanding of our legal system, 'cause nothing ever happened to the man.

Céline Gounder: Indigenous people face high rates of violence in the United States. The Centers for Disease Control and Prevention lists homicide among the 10 leading causes of death for Native men. A 2015 survey of transgender people in the United States found that more than half of the Indigenous respondents reported they have been sexually assaulted. In an analysis of a 2010 national survey by the CDC, about half of Native women respondents said they had experienced intimate partner and/or sexual violence.

Lisa Brunner: So, when we're disappearing and are going murdered at such astronomical rates, and we're less than 2% of the total U.S. population, um, we're in some — we're in serious trouble.

Céline Gounder: Among Native survivors of violence — more than 90% reported they had experienced violence from a perpetrator who was non-Native. That's according to a survey funded by the U.S. Department of Justice. That distinction — who is or isn't Native — has big implications for how intimate partner violence is policed and prosecuted in the United States. Historically, laws limited the ability of tribal authorities to prosecute non-Native offenders on Native land, a loophole that critics, like Lisa, say creates a culture of impunity on reservations. Lisa says non-Native criminals know this when they enter a reservation with bad intentions. She calls it “hunting.”

Lisa Brunner: Non-natives, in particular white men, know they can come into tribal communities and they can hunt us as Native women with impunity, because they know that we can't touch them.

Céline Gounder: Our producer Avery Lill spoke with Lisa.

Avery Lill: I know that I've talked to some people who've said that they've been told that, like, the perpetrator will say, “I'm white; there's nothing that you can do about it.”

Lisa Brunner: Oh yes. Yep. That would be in *Sliver of a Full Moon*.

Céline Gounder: *Sliver of a Full Moon* is a play about Native women survivors of violence and abuse, and their fight to empower tribal authorities to protect their communities. The playwright, a Cherokee lawyer named Mary Kathryn Nagle, interviewed Lisa and other Native women about their real-life experiences.

Mary Kathryn combined those individual stories and recast and fictionalized them to represent the experience of many Native women. Here's Lisa — and other women — reading during a performance of the play at Harvard University.

Excerpt from Silver of a Full Moon: I must have called a hundred times. Please. Can't you do something? The answer was always the same. We can't, he's not enrolled. He's not Indian, so we don't have jurisdiction, but I kept calling. I called the police. Please help, 911, 911, 911. I need your help. But every time I called, no one showed up, they would just write a report. They always let him go.

Céline Gounder: In this episode, we're going to look at how laws and law enforcement endanger Native people.

Alfred Urbina: I would just imagine your own community where certain people didn't have to abide by the law.

Céline Gounder: Lisa Brunner and other Indigenous people are fighting to change the system.

Lisa Brunner: I worked hard with other Native women in the country to pass VAWA 2013.

[Theme music up]

Céline Gounder: VAWA, the Violence Against Women Act. It's been around since the mid-1990s, but in 2013, when it was reauthorized, Congress added a new provision — one that would expand the jurisdiction of tribal courts over non-Native people on tribal land. And just days before we released this episode, there was a development.

Archival tape of Sen. Chuck Schumer: I'm particularly thrilled to say that, after a decade of false starts, this package will finally reauthorize the Violence Against Women Act.

Céline Gounder: In March 2022, after nearly 10 years, Congress acted on VAWA again, something advocates say will further empower tribal authorities to protect Native women.

I'm Dr. Céline Gounder, and this is *American Diagnosis*.

[Theme music fades]

Céline Gounder: Lisa Brunner says the violence Indigenous people experience today is not random. Laws and court decisions from decades, even centuries, ago shape the lives of Indigenous people in this country.

One way this history lives on is through something called the Marshall Trilogy. That's a series of Supreme Court cases from the early 1800s. Those decisions became the legal foundation for how the U.S. government thinks about tribal sovereignty.

We unpacked one of these cases in our first episode this season. That case — *Johnson v. M'Intosh* — was about whether or not Indigenous people had the right to sell their land to non-Native settlers. Even though Indigenous people have lived on and cared for the land since before the arrival of Colonial settlers, the court decided Native people could not sell it, because they never owned it.

Sounds convoluted, right? But the case established that the federal government owns tribal land. In the majority opinion from the court, here's how Chief Justice John Marshall explained that. He said Native nations couldn't claim land.

Mary Kathryn Nagle: Because they are, quote, "savages and heathens."

Céline Gounder: That's Mary Kathryn Nagle.

Mary Kathryn Nagle: I am a citizen of the Cherokee Nation and I'm an attorney. I'm a partner at Pipestem & Nagle Law and I'm also a playwright.

Céline Gounder: Mary Kathryn also says the shortfalls in the legal system today are rooted in history.

Mary Kathryn Nagle: The discriminatory reality that led to a lot of the legal regimes that supported violence against Native women, you know, have not been examined, dismissed, overturned, and, until they are, the violence is just going to continue.

Céline Gounder: We're going to dig into just one of the ways U.S. law creates loopholes for non-Native offenders. It arises from another Supreme Court case, *Oliphant v. Suquamish Indian Tribe*.

The 1978 decision builds on the definition of tribal sovereignty established by the Marshall Trilogy. The fallout from *Oliphant* will eventually lead us to the Violence Against Women Act — right to today.

So, let's get into *Oliphant*. Mary Kathryn sets the scene. It's late August in 1974.

Mary Kathryn Nagle: We are at the Suquamish Indian Tribe's reservation. They're a tribal nation located in the state of Washington today.

[Faint audio of crowd noises]

Céline Gounder: It's Chief Seattle Days ... an annual festival that honors a Suquamish leader who died in the mid-1800s. There are usually canoe races, a salmon bake-off, music, and a ceremony at Chief Seattle's gravesite. The celebration that day drew thousands of people. One of them is Mark Oliphant, a 21-year-old plumber who grew up and lives on the reservation. Mark is white. He's not a member of the Suquamish Tribe, a fact that's about to be really important.

[Crowd noises fade out]

Céline Gounder: Late in the evening, Mark Oliphant gets into an altercation. He is charged with assaulting a tribal officer and resisting arrest, but he takes the case to federal court — arguing that he was unlawfully detained.

Mary Kathryn Nagle: He said, "Nope, you can't arrest or prosecute me. I'm a non-Indian. And it violates my constitutional rights to be arrested and prosecuted for my behavior on your land." He took that argument all the way up to the Supreme Court.

Archival tape of Warren Burger: *We'll hear arguments first this morning in Oliphant against the, uh, Suquamish Indian Tribe. Mark Oliphant, you may proceed whenever you are ready.*

Céline Gounder: Mark Oliphant's attorney said that the Suquamish Tribe only has authority over crimes on Suquamish land that Suquamish citizens commit. On the other hand, attorneys supporting the Suquamish Tribe argued that if the crime took place on tribal land, then tribal authorities should be able to take action — regardless of who committed the crime. Barry Ernstoff was the lawyer for the Suquamish that day. He told the justices that denying tribes the

right to police their reservations could have troubling consequences. It would make tribes completely dependent on the federal government for their protection.

Archival tape of Barry Ernstoff: Indian reservations are generally far from urban centers. I can tell you as attorney for the tribe how difficult it is to get the FBI to come out to an Indian reservation to investigate something other than a major crime.

Céline Gounder: This was a problem the Suquamish had already been dealing with. Ernstoff reminded the justices that before the day Mark Oliphant was arrested, tribal law enforcement *had* requested help from the county and federal government.

Archival tape of Barry Ernstoff: The county gave one deputy for an eight-hour period, and the federal government provided no one. Had the tribal police not effected this arrest, and had the tribe prosecuted it, Oliphant would've gone unpunished.

Céline Gounder: Justice William Rehnquist announced the decision. The court ruled in favor of Mark Oliphant. As of March 6, 1978, tribal courts no longer had the right to try non-Native defendants for crimes committed on their land.

Archival tape of William Rehnquist: By submitting to the overriding sovereignty of the United States, Indian tribes necessarily gave up their power to try non-Indian citizens of the United States, except in a manner acceptable to Congress.

[Pause]

Excerpt of “Sliver of a Full Moon”: I remember when I read “Oliphant.” I can't believe it. My dad called me. Tribal Council convened an emergency meeting. Said you better read this.

Céline Gounder: That’s a recording of Mary Kathryn Nagle’s play *Sliver of a Full Moon*, which dramatized the reaction to the *Oliphant* decision. The loss of jurisdiction shocked many Indigenous leaders. Tribal nations with their own court systems — like the Cherokee — had been prosecuting non-Native people in tribal courts for crimes on tribal land as early as the 1820s. It wasn’t long before some non-Native people living on reservations realized they were untouchable. Again, *Sliver of a Full Moon*:

Excerpt of “Sliver of a Full Moon”: My stepfather, my husband, he's not Native, not enrolled. And after “Oliphant,” he began to realize. After “Oliphant,” he figured it out. After “Oliphant,” he knew. It didn't matter if I had bruises or cuts or bleeding or a broken bone. Because of “Oliphant,” he could kill me, and it wouldn't matter.

[Pause]

Céline Gounder: Alfred Urbina is the attorney general for the Pascua Yaqui Tribe in southern Arizona. Before that, he was a police officer. He's been dealing with the world *Oliphant* created his entire career.

Alfred Urbina: I would just imagine your own community where certain people didn't have to abide by the law. And what does that do to a community, when that happens?

Céline Gounder: Alfred testified in front of the Senate Committee on Indian Affairs that *Oliphant* has created "safe havens" in Indian Country for non-Native offenders.

Alfred Urbina: You know, you have violence that continues to get worse over time. It escalates, it leads to violent crime, like stabbings and shootings.

Céline Gounder: He says when tribal law enforcement responds to an incident, the first step isn't to decide *how* they can help. First, they have to determine *if* they can help.

Alfred Urbina: You're looking at who's a tribal member, who's not a tribal member, and whether or not the crime that's been committed is a crime that we have jurisdiction for, before you can figure out where this crime is going to be prosecuted, whether it's state court, tribal court or federal court.

Céline Gounder: If it sounds confusing, that's because it is.

Alfred Urbina: It's so convoluted and complex. There's this patchwork of laws that create a system, that makes it hard for people to receive any type of justice.

Céline Gounder: Alfred says when tribal law enforcement responds to an incident and doesn't have jurisdiction over the person who committed the crime, there aren't many options.

Alfred Urbina: The most you could do is drive them off reservation, hoping that they don't come back.

Céline Gounder: But he says that often people *do* come back, especially if they're in a relationship with someone else who lives on the reservation.

Alfred Urbina: They know that tribes don't have jurisdiction. We were told often, "You guys can't do anything to me."

Céline Gounder: So, who's left to help? According to the *Oliphant* decision, the federal government. But that's cold comfort for many living on Pascua Yaqui land. In his experience as attorney general, Alfred says many cases aren't deemed serious enough for federal involvement.

Alfred Urbina: Imagine if you had to wait until you were stabbed or shot or strangled for a case to be picked up by the federal government.

Céline Gounder: The federal government declines to prosecute a third of crimes in Indian Country. That's according to a recent Department of Justice report. Two-thirds involve assault, murder, or sexual assault.

[Pause]

Céline Gounder: The Supreme Court had stripped tribes from going after non-Native offenders. It would take an act of Congress to give back that power. Here's Lisa Brunner again.

Lisa Brunner: When our tribal coalitions met in 2002, it was asked if we could have anything or everything to protect us as Native women, what would it be? I said, "We need to have criminal jurisdiction over non-Natives on our lands." That was the first thing out of my mouth.

Céline Gounder: Back in the early 2000s, Lisa joined a coalition of Native domestic abuse survivors, tribal leaders, and other allies to make that happen. They decided that their best chance was the Violence Against Women Act, or VAWA. The law was originally passed in 1994 and it was up for reauthorization in 2013. They wanted to add a provision that would give back some jurisdiction to the tribal courts.

The 2013 VAWA reauthorization passed the Senate. But it faced an uphill battle in the House. Advocates like Lisa Brunner, Mary Kathryn Nagle and others shared their stories ... tribal leaders like Alfred Urbina lobbied lawmakers. Then on the day of the vote, the ayes started coming in ...

Alfred Urbina: I remember watching on TV as the votes were counted. And then, as the law was passed.

Mary Kathryn Nagle: I was there when President [Barack] Obama signed the Violence Against Women Act into law on March 7, 2013. And I witnessed him say in front of all these people who

were there, he said “Today, we're restoring and we're recognizing and affirming the inherent right of tribal nations to protect their women.”

Archival tape of Barack Obama: Tribal governments have an inherent right to protect their people and all women deserve the right to live free from fear. And that is what today is all about. [applause]

Mary Kathryn Nagle: And I just ... Never in a million years did I think I would hear a United States president say those words. But there was one big exception — the state of Alaska. When we come back, we'll hear about the limitations of VAWA 2013, and how they inspired reforms in the new 2022 law. That's after the break.

[MIDROLL]

Céline Gounder: President Barack Obama signed the reauthorization of the Violence Against Women Act into law in 2013. It expanded tribal nations' authority over non-Native people who commit crimes on their lands, within limits. The letter of the law says VAWA 2013 only applies to tribes in “Indian Country.” We could do a whole other episode about the story behind that, but for now, just know that the previous law excluded more than 200 federally recognized tribes in Alaska. VAWA 2013 only covered *one* tribe in the entire state. Alaska wasn't the only exception. Several reservations in Maine were also excluded.

Even tribes that can implement VAWA are dealing with their own limitations. The 2013 law was very narrow — it only covered violations of protection orders and domestic violence. It's important to remember that domestic violence has a legal definition. It refers to crimes committed by a current or former spouse, or an intimate partner — which is legalese for people who are dating or another relationship outside marriage.

It also meant that if a Native woman were attacked on tribal land by a non-Native person she didn't know — a stranger — the tribal courts would once again have had their hands tied. VAWA 2013 also did not cover crimes related to children. All this troubled Alfred Urbina, the Pascua Yaqui attorney general.

Alfred Urbina: There's specific gaps in the system that we saw and that we could not plug. And so, our data that we collected from these cases revealed that we had dozens of kids who witnessed this violence or who were actually assaulted.

[Pause]

Céline Gounder: VAWA 2013 may have been narrow in its scope but it did start to have an impact. The Pascua Yaqui were one of the first tribes approved by the Department of Justice to start enforcing the law. The tribe boosted investments in its police force and court system. Attorney General Alfred Urbina says some couldn't believe it when police started arresting people on domestic violence charges.

Alfred Urbina: Some of them were like, "hey, you can't arrest me!" One of them said, "You don't have jurisdiction!" They were surprised.

Céline Gounder: Then, in 2017, the Pascua Yaqui court's ability to prosecute domestic violence was tested for the first time since VAWA passed. The case involved a non-Native man who lived on the Pascua Yaqui reservation. He had pleaded guilty to strangling his wife the year before, according to a press release from the tribe.

Alfred Urbina: He was on probation. He went back to the house, and he destroyed property.

Céline Gounder: The property of his wife ... a Pascua Yaqui citizen.

Alfred Urbina: The tribe arrested him and prosecuted him. Eventually that case went to a jury trial. They found him guilty for that crime.

Céline Gounder: Alfred says the details of the case weren't exceptional. What *was* exceptional was that the case happened in a *tribal* court.

Alfred Urbina: That was the first jury trial conviction of a non-Indian offender since the 1978 *Oliphant* case.

Céline Gounder: Before VAWA 2013, the tribe couldn't address cases like these.

Alfred Urbina: These victims were being left without any recourse. They were going to bed at night afraid.

Céline Gounder: Alfred says he watched violence escalate on the reservation in the decades after *Oliphant* because non-Native abusers weren't held accountable. Now that the tribe is able to address intimate partner violence cases, he says, that's changing.

Alfred Urbina: I believe that this program, and these types of cases have made our community safer.

Céline Gounder: Attorney General Alfred Urbina says VAWA has had a positive impact on the Pascua Yaqui reservation. But many tribal nations can't say the same. Under the 2013 version of VAWA, only 27 of the more than 500 federally recognized tribes were able to use their new powers. Alfred says this has a human cost.

Alfred Urbina: It is depressing to know that those are victims that are in the exact same situation that our victims were a few years ago.

Céline Gounder: Tribes got expanded jurisdiction under the 2013 law, but not the resources to enforce it. The population size and resources of tribal nations vary widely across the United States. About half of tribes don't have their own police departments. Nearly a third don't have a tribal court. One of these tribes is the White Earth Nation. That's the tribe that Indigenous rights activist Lisa Brunner belongs to.

Lisa Brunner: VAWA is not instituted by my tribe here, at this time, because we don't have the ability to develop the infrastructure that it requires.

Céline Gounder: When VAWA 2013 passed, Lisa says she didn't realize how much time and money it would take for White Earth Nation to satisfy federal requirements. Facility upgrades, new tribal codes, building new jails, attorneys and judges, it all adds up.

Lisa Brunner: After the fact, I'm like, "Oh my God, all that work."

Céline Gounder Lisa made peace with it. She says VAWA 2013 was a huge success, even if her own tribe wouldn't benefit from it.

Lisa Brunner: Especially when we were told as Native women that this was never going to happen.

Céline Gounder: But that might be changing ...

On the evening of March 10, 2022, Sen. Chuck Schumer urged the Senate to pass a new spending bill. Between the line items to keep the federal government open, there was a bipartisan bill to renew and expand VAWA.

Archival tape of Sen. Chuck Schumer: This very needed, important bill to protect those who are abused has languished in limbo for far too long.

Céline Gounder: The Senate debated the spending bill for hours, and then the votes came in.

Archival tape of Sen. Chuck Schumer: On this vote, the yeas are 68. The nays are 31.

Céline Gounder: Congress passed VAWA 2022.

In the wake of that news, we reached out again to activist Lisa Brunner.

Lisa Brunner: So, I just happened to be scrolling on Facebook and I see one of my Facebook friends posted it, and I'm like, "Wait, what?! What do you mean?!" And I start reading through that. I'm like, "Oh my God. [*gasps excitedly*] Oh my God! Oh my God, we got it!"

Céline Gounder: Lisa worked for years to get the 2013 law passed. And she saw firsthand how limited it was. There were so many crimes that tribal courts still couldn't punish. Now, with the new 2022 law, tribes would be able to prosecute non-Native offenders for a longer list of crimes. Things like child violence, sexual and dating violence, obstruction of justice, assaulting tribal law enforcement, stalking, violating protection orders, and sex trafficking. VAWA 2022 also guaranteed that the tribes in Alaska and Maine, tribes left out from the previous law, now finally had these powers too.

Lisa Brunner: Our tribes now have the jurisdiction, the criminal jurisdiction to hold non-Native offenders accountable for the crimes and the violence they commit against our peoples.

Céline Gounder: But Lisa has seen over the years how expensive it can be to make that right a reality. Remember, her own tribe didn't have the resources to implement VAWA back in 2013. The 2022 law provides \$25 million a year to help tribes like hers build capacity, so they can handle these cases too.

[*Pause*]

Céline Gounder: As the day passed, Lisa's delighted surprise at the news started to mellow.

Lisa Brunner: As I sit and reflect, I'm like, "Why the hell? Why the hell does it take 20 years? Why does it take 20 years for the United States government to pass an act to completely hold all offenders accountable and to, at least, finally protect us?" It just makes me want to cry, you know?

Céline Gounder: Playwright Mary Kathryn Nagle interviewed Lisa for the play *Sliver of a Full Moon* shortly after VAWA 2013 passed. They were in Washington, D.C., at the National Museum of the American Indian.

Lisa Brunner: It's dark out. And we're sitting in the Native American museum.

Mary Kathryn Nagle: I asked her, “What does the passage of VAWA mean to you? What does this signify?”

Lisa Brunner: And I thought about that for a moment. And I looked outside and as I was looking at the moon said, “VAWA is just a sliver of a full moon of what *we* need to be protected as Native women.”

Mary Kathryn Nagle: I thought that concept, that image, what she said, so captured what we're trying to do. A “Sliver of a Full Moon.” I just said, “Can I make this the title of the play?” And she said, “Absolutely.”

[Music up]

Céline Gounder: That moon got a little fuller with the passage of VAWA 2022.

Lisa Brunner: It's not the totality of everything that we need, right? But, you know, the full moon is bright. And we're just starting with the moon. I'm after the universe *[laughs]*.

CREDITS

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I'm Dr. Céline Gounder. Thanks for listening to *American Diagnosis*.

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