

## **Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law\***

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This Article is about tribal issues and sexual assault, and it is directed not so much at “beyond prosecution” as it is “beyond jurisdiction.” It focuses on an invisible legal challenge in addressing sexual violence. The focus is not on the federal or state system, but rather the “third sovereign”<sup>1</sup> in this nation, the tribal justice system. There are over 550 federally-recognized tribal governments in the United States, each with a separate and distinct judicial system. Tribal justice systems can have a tremendous impact on the survivors of sexual violence, particularly Native American<sup>2</sup> survivors who reside in tribal communities.

This Article is designed with two audiences in mind. On one hand, it is to enlighten sexual assault scholars and practitioners about the importance of sovereignty in the analysis of rape law and reform. On the other hand, to persuade Indian law scholars and practitioners that the development of sexual assault jurisprudence is central to the struggle for sovereignty. Ultimately, this Article argues that it is impossible to separate theories of indigenous self-determination from theories on sexual assault jurisprudence. It is critical that a dual analysis be employed in both disciplines because sexual violence is so deeply imbedded in colonizing and genocidal policies.

Sexual assault law and legal reform is incomplete without a discussion about Federal Indian Law. There are three main reasons for this: Native American women suffer the highest rate of sexual assault in the United States, rape and sexual violence were historically used as weapons of war against indigenous peoples, and contemporary tribal governments have been deprived of the ability to prosecute many sex offenders. These three facts provide justification for an in-depth analysis of the intersection between sexual violence and Federal Indian Law. In explaining my perspective, this Article begins with some basic

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\* This Article is based on a speech that Sarah Deer delivered on April 16, 2004, as part of the *Beyond Prosecution: Sexual Assault Victim's Rights in Theory and Practice* symposium.

1. Nancy Carol Carter, *American Indians and Law Libraries: Acknowledging the Third Sovereign*, 94 LAW LIBR. J. 7, 7 (2002) (discussing Native American tribal justice system as “third sovereign”).

2. There is no consensus on the appropriate terminology for indigenous people in the United States. Legal scholars tend to use the term “Indian” whereas other disciplines tend to use the term “Native American.” This Article will use the terms interchangeably.

information about rape and sexual assault against Native American women. Next, I will provide a historical context for the information. Finally, I will explain the numerous legal challenges faced by tribal governments in addressing the problem.

Notably, the statistics published by the Department of Justice in the last five to six years indicate that Native American women, per capita, experienced more rape and sexual assault than any other racial group in the United States.<sup>3</sup> In fact, American Indian and Alaskan Native women experience a higher rate of violence than any other group, including African-American men and other marginalized groups.<sup>4</sup> One Justice Department report concluded that over one in three American Indian and Alaskan Native women will be raped during their lives.<sup>5</sup>

When I travel to Indian country, however, advocates tell me that the Justice Department statistics provide a very low estimate, and rates of sexual assault against Native American women are actually much higher. Many of the elders that I have spoken with in Indian country tell me that they do not know any women in their community who have not experienced sexual violence.

I want to briefly discuss the nature of rape against indigenous women in this country because the experience of Native American women, as captured in these national surveys, is significantly different than the experience of the mainstream population. Dr. Ronet Bachman, a statistician at the University of Delaware, recently reviewed the raw data from the National Crime Victimization Survey (NCVS) and presented new calculations.<sup>6</sup> I am going to cover just a few of her findings, which were based on ten years of surveys spanning 1992-2002. First, in accordance with the Justice Department reports, Dr. Bachman found that Native American women suffer the highest rate of sexual victimization when compared to other races.

Additionally, the physical nature of the violence shows a significant difference with respect to rape involving Native Americans and other races. In discussing these differences, I do not mean to suggest that rape itself is not always violent. American Indian women, however, more often experience sexual assault accompanied by other overt forms of violence. For example, when asked whether aggressors physically hit them during the assault, over

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3. See PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 22 (2000) (showing American Indian and Alaska Native women significantly more likely to report rapes than other racial groups).

4. See generally LAWRENCE A. GREENFELD & STEVEN K. SMITH, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME (1999); STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME (2004); CALLIE RENNISON, U.S. DEP'T OF JUSTICE, VIOLENT VICTIMIZATION AND RACE, 1993-1998 (2001).

5. See TJADEN & THOENNES, *supra* note 3, at 22.

6. See Ronet Bachman, Address at the U.S. Dep't of Justice Federal-Tribal Working Group on Sexual Assault (July 12, 2004) (accompanying powerpoint presentation on file with author) (using Justice Department data to analyze nature and extent of sexual assault against Native American women).

90% of female Native American victims responded affirmatively as compared to 74% of the general population.<sup>7</sup> Dr. Bachman also examined the number of women who reported suffering physical injuries. When asked if they suffered physical injuries in addition to the rape, 50% of female Native American victims reported such injuries, as compared to 30% of the general population, indicating a different level of violence. Although reluctant to compare traumas and declare that one person's rape was worse than another person's rape, when you see these numbers materialize consistently over a ten year period, you have to wonder why this is happening.

In general, very few rapes across the nation involve weapons. The NCVS results indicate that 11% of all reported rapes involve the use of a weapon. The numbers, however, are over three times as high, 34%, for female Native American victims.<sup>8</sup> What is going on here? Why are Native American women victimized in such a brutal way, and what is happening on the reservations that can explain these horrifying statistics?

This final statistic is perhaps the most startling of all, and will become even more so when discussing the jurisdiction issues. Criminologists who study rape have determined that the vast majority of rapes are intra-racial. For example, a white man tends to rape a white woman and a black man tends to rape a black woman. When examining rape involving American Indian women, however, we see that over 70% of the assailants are white.<sup>9</sup> The 1999 Department of Justice Bureau of Justice Statistics concluded that about nine in ten American Indian victims of rape or sexual assault had white or black assailants.<sup>10</sup> This discrepancy will factor into the later discussion about colonization.

One major weakness in these statistics is that none of the surveys identify whether the crime happened on land subject to tribal jurisdiction.<sup>11</sup> Until 1999, the NCVS did not include particularized questions about jurisdiction, except to distinguish between urban and rural areas.<sup>12</sup> Knowing where these crimes occur is critical because, due to a complicated legal history, the jurisdiction of tribal governments is much more limited than the jurisdiction of the state and federal system.

In order to analyze the legal response to sexual violence in Indian country, it is important to examine the 500 year history of rape of Native American women by Europeans. One of the historical angles from which to begin this analysis is the arrival of Christopher Columbus. Columbus is one of the major

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7. *Id.*

8. *Id.*

9. *Id.*

10. See GREENFELD & SMITH, *supra* note 4, at 7.

11. Stéphanie Wahab & Lenora Olson, *Intimate Partner Violence and Sexual Assault in Native American Communities*, 5 *TRAUMA VIOLENCE & ABUSE* 353, 357 (2004) (noting other limitations to data due to "sample size and design").

12. PERRY, *supra* note 4, at iii.

symbols of colonization in the Western hemisphere. Columbus' arrival not only represents the destruction of indigenous cultures, but also the beginning of rape of Native American women by European men. A passage from the diary of one of Columbus' aristocratic friends who accompanied him on the second voyage describes one such encounter:

When I was in the boat, I captured a very beautiful Carib woman . . . having brought her into my cabin, and she being naked as is their custom, I conceived desire to take my pleasure. I wanted to put my desire to execution, but she was unwilling for me to do so, and treated me with her nails in such wise that I would have preferred never to have begun. But seeing this . . . I took a rope-end and thrashed her well, following which she produced such screaming and wailing as would cause you not to believe your ears. Finally we reached an agreement such that, I can tell you, she seemed to have been raised in a veritable school of harlots . . . .<sup>13</sup>

So right away, upon contact, we are seeing immediate rape. We continue to see rape used as a tool of colonization and a tool of war against Native peoples for the next several hundred years, until the present day. Historian Susan Armitage writes, "It is well documented that Spanish-Mexican soldiers in Spanish California and New Mexico used rape as a weapon of conquest."<sup>14</sup> The legal community recognizes that rape is used as a weapon in war and international tribunals have address the issue.<sup>15</sup> This legal analysis, however, is rarely applied to historical events. There are instances throughout history of using rape and sexual violence as a means of destroying a people, of rendering them unable to protect their lives and their resources, especially as a means to remove them from land that was desired. Another historian, Albert L. Hurtado, notes of the California gold rush, "part of the invading population was imbued with a conquest mentality, fear and hatred of Indians that in their minds justified the rape of Indian women."<sup>16</sup>

Much change has been attempted in the Anglo-American approach to sexual assault in the last thirty years,<sup>17</sup> but things have not really changed for Native

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13. Michele de Cuneo, *Letter to a Friend*, in *THE DISCOVERY OF AMERICA AND OTHER MYTHS* 129 (Thomas Christensen & Carol Christensen eds., 1992).

14. Susan Armitage, *Women and the New Western History*, *OAH MAGAZINE OF HISTORY*, Fall 1994, at 22-26, available at <http://www.oah.org/pubs/magazine/west/armitage.html>.

15. See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (Judgment, Sept. 2, 1998), ch. 6.3.1, available at <http://www.icttr.org> (holding Jean Paul Akayesu criminally responsible for genocide in Rwanda, including acts of rape); see also Sherrie L. Russell-Brown, *Rape as an Act of Genocide*, 21 *BERKELEY J. INT'L L.* 350, 351 (2003) (explaining Rwandan Tribunal's definition of rape as genocide).

16. Albert L. Hurtado, *When Strangers Met: Sex and Gender on Three Frontiers*, in *WRITING THE RANGE: RACE, CLASS AND CULTURE IN THE WOMEN'S WEST* 52, 66 (Elizabeth Jameson & Susan Armitage eds., 1997).

17. Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 *JURIMETRICS J.* 119, 120-21 (1999); Kwong-leung Tang, *Rape Law Reform in Canada: The Success and Limits of Legislation*, 42 *INT'L J. OFFENDER THERAPY COMP. CRIM.* 258, 259-61 (1998) (establishing nearly all United State's jurisdictions have introduced some sort of rape law reform in last twenty-

American woman in about 500 years. Those in the anti-rape movement often talk about rape as an “equal opportunity” crime.<sup>18</sup> Such sentiment, however, is a little short-sighted in that those in the anti-rape movement need to look at the specific impact of sexual violence on marginalized populations and indigenous populations. We also need to acknowledge that the United States was founded, in part, through the use of sexual violence as a tool, that were it not for the widespread rape of Native American women, many of our towns, counties, and states might not exist. This kind of analysis informs not only indigenous scholars, but also anti-rape scholars. Thus, critical to contemporary anti-rape dialogues is the inclusion of a historical analysis of colonization.

Language of the early European explorers and invaders makes numerous references to the land of this continent as “virgin land” or a “woman” available for seizure and invasion.<sup>19</sup> The terminology used to describe so-called explorations and settlements sometimes has violent sexual connotations.<sup>20</sup> In fact, the language used in illustrating colonization often parallels the language of sexual violence. For example, words like “seize,” “conquer,” and “possess” are used to describe both rape and colonization. In fact, when speaking with Native American women who have survived rape, it is often difficult for them to separate the more immediate experience of their assault from the larger experience that their people have experienced through forced removal, displacement, and destruction. Both experiences are attacks on the human soul; both the destruction of indigenous culture and the rape of a woman connote a kind of spiritual death that is difficult to describe to those who have not experienced it.

Given the history of colonization and the statistics showing significantly high rates of sexual assault for Native American women, what are the contemporary sexual violence issues in the lives of indigenous nations in the United States today? Two of the most significant issues are jurisdiction and resources; in essence, two integral facets of sovereignty that are integral to self-governance.

Substantial erosion of tribal jurisdiction over sexual assault has occurred over the last 120 years. Contrary to popular myth, tribal governments have

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five years).

18. Wichita State University Police Department, *Crime Prevention: Sexual Assault*, at [http://www.webs.wichita.edu/police/sexual\\_assault.htm](http://www.webs.wichita.edu/police/sexual_assault.htm) (last visited Feb. 25, 2005) (stating “rape is an equal opportunity crime, regardless of gender or sexual orientation”).

19. Francis Jennings, *Virgin Land and Savage People*, 23 AM. Q. 519, 520 (1971) (exploring American conquest myth of “virgin land”); C. Richard King, *De/Scribing Squ\*w: Indigenous Women and Imperial Idioms in the United States*, AM. INDIAN CULTURE & RESEARCH J. 1, 6 (2003) (discussing Euro-American view of land as feminine).

20. Thomas Christensen & Carol Christensen, *From Genesis to Genocide*, in THE DISCOVERY OF AMERICAN & OTHER MYTHS 2 (1992) (noting “Europeans ravaged America as they settled it”); James V. Fenelon & Mary Louise Defender-Wilson, *Voyage of Domination, “Purchase” as Conquest, Sakakawea for Savagery*, 19 WICAZO SA REV. 85, 86 (2004) (describing “Thomas Jefferson’s thrust up the Missouri River”).

always had justice systems, but recognition of these systems by Europeans has not always occurred because of ignorance and prejudice.<sup>21</sup> Our histories and oral teachings reveal the effectiveness of these justice systems. As sovereign nations, we exercised full jurisdiction over our land and our people as well as people entering our land against our wishes or with our consent. Due to a series of federal laws, tribal governments have lost jurisdiction over the vast majority of sexual violence that happens to Native American women. Although these laws are numerous, this Article focuses on four: the Major Crimes Act,<sup>22</sup> Public Law 280 (P.L. 280),<sup>23</sup> the Indian Civil Rights Act (ICRA),<sup>24</sup> and the case law of *Oliphant v. Suquamish*.<sup>25</sup>

The Major Crimes Act was one of the first major intrusions of federal law into Indian country. Passed by Congress in 1885, the Major Crimes Act served as the first suggestions that the federal government would exercise authority over crimes that happened in Indian country. Rape was included in the initial list of crimes over which Congress authorized federal jurisdiction. At best, this Act can be interpreted as a benevolent, yet paternalistic act. More likely, Congress intended to infiltrate and control the indigenous populations through increased legal authority.<sup>26</sup> Interestingly, the Major Crimes Act itself never explicitly stripped the tribe of jurisdiction over the list of crimes. Although debate over the question of divestment has occurred over the years, most case law concludes that tribal governments retain concurrent jurisdiction over crimes enumerated in the Major Crimes Act.<sup>27</sup> The practical impact of the Major Crimes Act, however, is that fewer tribes pursue prosecution of crimes such as murder and rape. Instead of a rape case being handled within the community using the laws, beliefs, and traditions of indigenous people, rape cases have become the domain of the federal government.

Passed in 1953, P.L. 280 served to transfer criminal jurisdiction in certain states<sup>28</sup> from the federal government to the state government. Neither the states nor the tribes, however, consented to this arrangement and states were not provided with any additional resources with which to enforce crimes in Indian

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21. Robert B. Porter, *Introduction to The Tribal Law and Governance Conference: A Step Toward the Development of Tribal Law Scholarship*, 7 KAN. J.L. & PUB. POL'Y 1, 2 (1997) (noting Indian tribal law and Anglo-American law "not founded upon the same legal tradition").

22. 18 U.S.C. § 1153 (2004).

23. Act of August 15, 1953, ch. 505, 67 Stat. 588-590 (1953) (codified as 18 U.S.C. §1162, 25 U.S.C. §1360 and other scattered sections in chapters 18 and 28 of United States Code).

24. 25 U.S.C. §§ 1301-1303 (2000).

25. 435 U.S. 191 (1978).

26. See generally SIDNEY L. HARRING, *CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY* (1994) (exploring motives and intent of Congress in passing Major Crimes Act).

27. See *Westit v. Stafne*, 44 F.3d 823, 825 (9th Cir. 1995) (ruling tribes retain inherent sovereignty to prosecute Indians who commit crimes enumerated by Major Crimes Act).

28. 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).

country. Instead, this national legislation resulted in what Carole Goldberg at UCLA has called a sense of “lawlessness” in some local communities.<sup>29</sup> This occurs because the state government is supposed to assume responsibility for law enforcement, while at the same time, tribal governments develop their own justice systems, both lacking sufficient additional resources to do so effectively. Like the Major Crimes Act, the wording of P.L. 280 does not contain an explicit divestiture of concurrent tribal jurisdiction.<sup>30</sup> For all practical purposes, though, the tribal governments in P.L. 280 states have historically been at a distinct disadvantage when it comes to crime control.

The third law creating barriers for tribal governments to address sexual assault is the ICRA. The title of ICRA, passed in 1968, suggests that this legislation would serve to enhance and protect the rights of Indian people. ICRA actually served as yet another imperial effort to assimilate tribal governments, by imposing the United States Bill of Rights onto tribal governments. All tribal governments were required to protect Constitutional rights developed by the United States government, a foreign sovereign. Tribal governments were not hostile to civil rights; in fact tribal governments understood and honored individual autonomy in very sophisticated ways.<sup>31</sup> It was the imposition and lack of choice, however, in ICRA that implicitly continued to chip away at tribal sovereignty.<sup>32</sup>

More central to the discussion of felony jurisdiction, ICRA imposes a limit on the punishment that a tribe may impose on any particular criminal defendant. When the law first passed in 1968, the law limited the ability of a tribal court to sentence offenders. Incarceration was limited to six months and fines were limited to \$500.<sup>33</sup> Again, the message and implication is that tribal governments do not have jurisdiction over felony crimes. As with the Major Crimes Act and P.L. 280, however, there was no explicit divestiture of jurisdiction. Therefore, tribes could conceivably prosecute a murder or a rape—but could not imprison the defendant for more than six months. This resulted in an implied divestment of that felony jurisdiction, and today we find that very few tribes are prosecuting sexual violence.<sup>34</sup> Later, as part of drug

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29. See generally Carole E. Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405 (1997).

30. Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction under Public Law 280*, 47 AM. U. L. REV. 1627, 1667 (1998).

31. See generally James W. Zion, *Civil Rights in Navajo Common Law*, 50 U. KAN. L. REV. 523 (2002) (exploring concepts of civil rights in Navajo common law).

32. CARRIE E. GARROW & SARAH DEER, *TRIBAL CRIMINAL LAW AND PROCEDURE* 207 (2004).

33. 25 U.S.C. § 1302(7) (1968).

34. Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL'Y 121, 128-129 (2004). But see Navajo Nation v. Yellow, No. A-CR-03-93 (Navajo 1994), available at <http://www.Versuslaw.com>; Fort Peck Assinboine v. Martell, No. 090 (Fort Peck 1990), available at <http://www.fptc.org/Appellate%20Opinions/090.htm>. In addition to the Navajo Nation and the Fort Peck Indian Tribes, there is an account of an Alaska village prosecuting a sexual assault. PHYLLIS ANN FAST, *NORTHERN ATHABASCAN SURVIVAL: WOMEN, COMMUNITY, AND THE FUTURE* 136-37 (2002).

control legislation, ICRA was amended to allow tribes to sentence offenders to one year of incarceration, a \$5000 fine, or both.<sup>35</sup> Also important to note is that ICRA did not limit other forms of sanctions, such as restitution, probation, and banishment.

The fourth and final jurisdiction barrier is the 1978 Supreme Court decision in *Oliphant v. Suquamish*, which eliminated tribal criminal jurisdiction over anyone who is not a member of a federally recognized tribe.<sup>36</sup> If a non-Indian comes into a reservation and rapes a Native American woman, the tribe has absolutely no jurisdiction to punish the offender. Tribal police may be able to arrest a suspect if they are cross-deputized with a local or state government, but the tribal government cannot criminally prosecute that offender.

Since the *Oliphant* decision, tribal law enforcement and victim advocates report a large increase in the number of non-Indian criminals attracted to Indian country because of this gap in jurisdiction.<sup>37</sup> This is not limited to sexual predators. For example, there are wide reports of methamphetamine labs, drug trafficking, and other crimes happening at a large rate in Indian country. Now, ideally the federal or state governments can step in and prosecute the non-Indian perpetrator, but the practical reality is that this intervention is not happening to the extent necessary in sexual assault cases. Tribal leaders and others have vocalized their concern about the low rates of prosecution of rape and other violent crimes by the federal government.<sup>38</sup>

Certainly there have been prosecutions of non-Indian rapists, particularly in some areas where the federal or state government has developed strong relationships with the tribal governments.<sup>39</sup> But when compared to the numbers of Native American women who are experiencing rape with the number of prosecutions, there is a significant imbalance. In some cases, it is difficult to even gain access to prosecution statistics that specify Native victims, because American Indians and Alaskan Natives are often classified in the "other" racial category. In the case of the federal government, different bureaucracies<sup>40</sup> located in various departments have completely separate ways of counting and classifying sexual violence against adults.

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35. Pub. L. No. 99-570, tit. IV, § 4217, 100 Stat. 3207-146 (1986).

36. 435 U.S. 191, 195 (1978).

37. See Matthew L.M. Fletcher, *Sawnawgezowog: "The Indian Problem" and the Lost Art of Survival*, 28 AM. INDIAN L. REV. 35, 55 (2003) (noting "non-Indians feel completely free to commit whatever crimes they so desire").

38. See Stephen D. Easton, *Native American Crime Victims Deserve Justice: A Response to Jensen and Rosenquist*, 69 N.D. L. REV. 939, 941 (1993); Andrea Smith, *Sexual Violence and American Indian Genocide*, 1 J. RELIGION & ABUSE 31, 47 (1999).

39. John V. Butcher, *Federal Courts and the Native American Sex Offender*, 13 FED. SENTENCING REP. 85, \*1, available at 2000 WL 33522168 (2000) (establishing majority of defendants in federal sexual abuse cases Native American.)

40. Examples of the different bureaucracies and departments are the Federal Bureau of Investigation (Department of Justice), Indian Health Services (Department of Health and Human Services), and the Bureau of Indian Affairs (Department of Interior).

In addition to the multitude of legal barriers restricting tribal governments from taking action against sexual violence, tribal nations are notoriously under-resourced. The United States Civil Rights Commission issued a report in February 2003 that strongly critiques the lack of resources allocated to tribal governments.<sup>41</sup> A widely-quoted portion of this report notes that the federal government spends more per capita for health care in federal prisons than for health care on reservations.<sup>42</sup> The report, however, covers many different kinds of resource limitations, including law enforcement and tribal justice systems.

Despite the prevalence of crime, law enforcement in Native communities remains inadequate, with understaffed police departments and overcrowded correctional facilities. There are fewer law enforcement officers in Indian Country than in other rural areas and significantly fewer per capita than nationwide. In addition, per capita spending on law enforcement in Native American communities is roughly 60 percent of the national average.<sup>43</sup>

These resource limitations have resulted in inferior systems of justice at the tribal level. Even a reported rape may not result in a comprehensive investigation, because staffing shortages and low morale at the tribal level can interfere with their respective counterparts at the federal or state level. Despite these limitations, some tribal governments have successfully prosecuted sexual assault.<sup>44</sup>

Tribal governments face numerous barriers in adopting strong anti-rape laws and procedures. As a result, we have a situation in which all Native American people, namely women and children, are particularly vulnerable to sexual violence. A strong argument can be made that the high rates of violence are directly related to the lack of resources and the jurisdictional problems faced by tribal governments, as well as a continuation of the colonization process.

Due to these numerous barriers, I have attempted to determine how rape was dealt with by tribal nations prior to colonization, to see if there are some creative ways that contemporary tribal nations can address sexual violence even within the aforementioned limitations. The most important sources for this study are the oral traditions, the stories, the traditional belief systems, as well as statutes and contemporary tribal appellate case law that sometimes encompasses the traditional belief system.<sup>45</sup> History and anthropology can be helpful in a limited sense, but these disciplines have historically distorted the perception of tribal justice systems, so I refer to those kinds of materials with

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41. See generally U.S. COMM'N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY (2004), available at <http://www.usccr.gov/pubs/na0703/na0204.pdf>.

42. *Id.* at 45.

43. *Id.* at 68.

44. See *United States v. Lester*, 992 F.2d 174, 174 (8th Cir. 1993) (acknowledging defendant convicted of rape and simple assault by Standing Rock Sioux Tribal Court).

45. See *Winnebago Tribe v. Bigfire*, 24 Indian L. Rep. 6232, 6232 (Winnebago Tr. Ct. 1997) (noting Court may consult with elders regarding tribal tradition or culture under Winnebago Code §1-109).

caution.

In many tribal oral traditions, there are some interesting stories and dialogues describing the strength of women, the autonomy of women, and the right of women to sexual choice. These stories and traditions can be incorporated into contemporary tribal court systems. In fact, some tribal courts have requested elders to come in and testify as to traditional beliefs.<sup>46</sup> Therefore, even if the tribe does not have a codified rape law, it may be possible to address illegal behavior through the introduction of these traditional laws.

Many of these traditional laws contain beliefs about individual autonomy and describe sexuality as being something very prized and very respected. Historically, many Europeans were horrified that the Native people actually allowed women to make autonomous sexual choices.<sup>47</sup> Reviewing some historical letters and documents reveals that many tribal cultures allowed women to be leaders, to have multiple sex partners if they so chose and their sexuality was respected. If women did report a rape, they were believed. Moreover, there were significant punishments for rape and sexual assault including banishment and death.

As the federal government began to impose its laws and values upon Native peoples, many of the Anglo notions of rape assimilated into the tribal court systems.<sup>48</sup> For the most part, there are very few references to Native American customs and beliefs in today's anti-rape scholarship. Non-Indian academics may also mistakenly believe that Native American cultures have nothing valuable to contribute to the legal scholarship. In fact, evidence exists that Native American people have always had well-developed theories of safety, trauma, and victims' rights.

A few years ago, I researched the evolution of my own tribe's laws. The Muscogee (Creek) Nation first started writing down laws in English in 1824<sup>49</sup> and this is the rape law contained in that original codification: "And be it farther enacted if any person or persons should undertake to force a woman and did it by force, *it shall be left to woman* what punishment she should satisfied with to whip or pay *what she say it be law*."<sup>50</sup>

Noting the awkwardness of the writing and realizing that it was written by someone whose first language was not English, the last clause is particularly

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46. See generally Hepler v. Perkins, 17 Indian L. Rep. 6011 (Sitka Community Ass'n Tr. Ct. 1986).

47. See, e.g., KAREN ANDERSON, CHAIN HER BY ONE FOOT: THE SUBJUGATION OF NATIVE WOMEN IN SEVENTEENTH-CENTURY NEW FRANCE 78 (1991) (documenting outrage expressed by many Europeans regarding sexual freedom and autonomy of Native women); VIRGINIA M. BOUVIER, WOMEN AND THE CONQUEST OF CALIFORNIA, 1542-1840: CODES OF SILENCE, at 108-139 (2001); CAROL DEVENS, COUNTERING COLONIZATION: NATIVE AMERICAN WOMEN AND GREAT LAKES MISSIONS, 1630-1900, at 25-26 (1992).

48. See CAROLYN ROSS JOHNSTON, CHEROKEE WOMEN IN CRISIS 118 (2003).

49. See generally Pat Lauderdale, *Indigenous North American Jurisprudence*, 38 INT'L J. COMP. SOC. 131 (1997) (discussing how in most tribal cultures, law traditionally communicated orally).

50. LAWS OF THE CREEK NATION 24 (Antonio J. Waring, ed., 1960) (emphasis added).

interesting, in its mention of, “What she say, it be law.” Language acknowledging the perspective of the victim is noticeably absent from American or European laws that existed in 1824, when this Creek Nation law was drafted.<sup>51</sup> Instead, it is interesting to conceive of a justice system in which indigenous women were the central focus of adjudication of sexual violence.

For tribal governments, defining and adjudicating crimes such as sexual assault can be the purest exercise of sovereignty. What crime, other than murder, strikes at the hearts of its citizens more deeply than rape? Sexual violence impinges on our spiritual selves,<sup>52</sup> creating emotional wounds that can feed into community trauma. Some scholars have theorized that the historical trauma of sexual abuse compounds the negative experiences of Native American women who are raped today. For sovereign tribal nations, the question is not just about protecting and responding to individual women who are sexually assaulted but also addressing the foundational wellness of the community where it occurs. Even without criminal jurisdiction over non-Indians, there may be ways in which to empower Native American survivors through a series of civil laws, including protection orders.<sup>53</sup> The strength of the anti-rape sentiment in the community will ultimately illuminate the strength and resolve of the entire community to preserve and live healthy and happy lives.

This Article ends with the suggestion that we enlarge the mainstream dialogue about sexual violence to include the issues of tribal sovereignty and self-determination, not only because sexual assault is very common in the lives of Native American women, but also because the very system on which the United States bases its claim to this land has a long history of rape and sexual violence behind it. It is important that we not disregard the intersection between the rape of indigenous women and the destruction of indigenous legal systems. Anti-sexual assault work and decolonization work have a common philosophy and a common framework in which to develop appropriate legal responses.

Most importantly, if we cannot provide justice and accountability for the sex crimes that happen to the indigenous women, then we will continue to face a tremendous challenge in achieving justice for all women. It is so important that even those who do not work near Indian country become familiar with Federal Indian law and its impact on women because there were indigenous women in

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51. See Spohn *supra* note 17, at 117 (reflecting historical Anglo-American approaches to rape, wherein women often re-victimized in court).

52. See Lynne N. Henderson, *What Makes Rape a Crime*, 3 BERKELEY WOMEN'S L.J. 192, 225 (1988) (exploring emotional ramifications of sexual violence).

53. Cf. G. William Rice, *Of Cold Steel and Blueprints*, 7 KAN. J.L. & PUB. POL'Y 31, 49-50 (1997) (questioning why tribal governments must distinguish between criminal and civil law). See generally Sarah Deer, *Expanding the Network of Safety: Tribal Protection Orders for Victims of Sexual Assault*, 4 TRIBAL L.J. 3 (2004).

your area one time, and part of the reason that they are gone is because of forced removal and sexual violence. It is critical for anti-rape scholars to remember and honor the survivors of colonization in our work to hold perpetrators accountable. Likewise, it is critical that Federal Indian law scholars begin to engage in a dialogue concerning gendered violence and women's experiences in a more substantive way.