

DECOLONIZING RAPE LAW:
A Native Feminist Synthesis of Safety and Sovereignty

Sarah Deer

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extremely rare in tribal communities.⁴ Arguably, the imposition of colonial systems of power and control has resulted in Native women being the most victimized group of people in the United States.⁵ Moreover, statistics indicate that most perpetrators of rape against Native women are white.⁶ As a result of a 1978 U.S. Supreme Court decision, tribal governments have been denied their authority to criminally prosecute non-Indian perpetrators.⁷

Rape and sexual violence are deeply embedded in the colonial mindset.⁸ Rape is more than a metaphor for colonization – it is part and parcel of colonization. Paula Gunn Allen notes that “...for many people the oppression and abuse of women is indistinguishable from fundamental Western concepts of social order.”⁹ Sexual assault mimics the worst traits of colonization in its attack on the body, invasion of physical boundaries and disregard for humanity. A survivor of sexual assault may experience many of the same symptoms as a people surviving colonization such as self-blame, loss of identity and long-term depression and despair. The perpetrators of sexual assault and colonization thrive on power and control over their victims. The United States government, as a perpetrator of colonization, has attempted to assert long-lasting control over land and people – usurping governments, spirituality and identity.

Paradoxically, today authority over most sexual assaults on Indian reservations falls under the auspices of the federal government.¹⁰ Unlike most rapes in the United States, which are prosecuted by the state court systems, rape of Native women on Indian reservations falls within the purview of the U.S. Attorney’s offices throughout the nation. However, as noted by Indian legal scholar Kevin K. Washburn, “the system designed to address criminal justice and public safety in Indian country simply does not work.”¹¹ Depending on an outside government, especially a government established and created by the colonizers (the historical perpetrators of rape), is not the solution to violent crimes committed upon Native women.

Washburn goes on to note that “the institutions of federal criminal justice may well feel like a vestige of a colonial power.”¹² Defendants, if convicted, are held accountable by a foreign government using foreign mechanisms of justice. Moreover, federal trials rarely have Native

people on the juries.¹³— This creates the problem of true community accountability – something prized in tribal nations.

If a defendant does not feel the weight of his or her own community’s moral judgment, the accused may not be confronted with the truth of the wrong-fulness of his or her own actions that would bring about regret for the criminal offense. ... When the defendant does not perceive that it is his or her own community making that judgment, the person who is found guilty may not feel the bite of the verdict in the same way. Indeed, because the federal government is sometimes viewed as a villain in Indian country, defendants may sometimes even see themselves as martyrs and may be able to evade the most difficult aspects of introspection that can be produced by a judgment of guilt.¹⁴—

Historically, few rapes against Native women have ever been adjudicated by the colonizer’s legal system.¹⁵— This lack of response has been documented in other colonized societies, such as Australia.¹⁶— In fact, the origins of many U.S. rape laws were racialized – that is, only white women could be raped in the eyes of the law.¹⁷— Moreover, Native women were not even allowed to testify in many Anglo courts until the late 19th century.¹⁸—

Aside from the philosophical problem of having the federal government prosecute rapists who prey on Native women, there are numerous practical problems as well. These include geographical distances, language and cultural barriers. The length of time between the assault and the sentencing, assuming a conviction is achieved, can be lengthy. For instance, the sentencing in the two example cases took place more than 2 years after the sexual assaults. Federal prosecutors are often very selective about the cases they pursue, leaving many victims without recourse. As Holcomb points out, “having the power to prosecute such offenses does not mean government has the obligation to do so.”¹⁹— Federal prosecutorial decision-making is “largely hidden from public scrutiny”²⁰—, leaving many victims feeling abandoned. Indeed, most rapes in the United States are never reported to law enforcement. Anderson writes that “women have little to no faith in the formal structures of police power to remedy violence motivated by gender animus.”²¹—

The current construction of the criminal justice system, as conceived by Anglo-American jurisprudence, is clearly inadequate to address sexual assault against Native women. Therefore,

we must next address the question of how contemporary tribal women themselves can respond to such crimes. Even within the limitations imposed by the federal government, tribal nations in the United States retain concurrent criminal jurisdiction over sex crimes unless committed by non-Indians.²²— Can contemporary indigenous nations in the United States adequately address sexual violence? If so, what kinds of systems will address sexual violence in ways that promote safety and sovereignty for Native women? A Native feminist critique is warranted in order to address decolonization and healing as well as self-determination.

There are numerous reasons why most contemporary tribal governments have struggled in developing comprehensive mechanisms for responding to sex crimes. First and foremost, sexual assault crimes are relatively recent phenomena in tribal communities.

According to the oral traditions within our tribal communities, it is understood that prior to mass Euro-American invasion and influence, violence was virtually nonexistent in traditional Indian families and communities. The traditional spiritual world views that organized daily tribal life prohibited harm by individuals against other beings. To harm another being was akin to committing the same violation against the spirit world.²³—

Reckoning with a new level of violence is only one part of the difficulty faced by tribal governments in responding to sexual assault. Tribal criminal justice systems have been severely compromised by the United States government and this has weakened tribal authority over serious crimes in Indian country. Beginning with the Major Crimes Act in 1885, numerous federal laws and U.S. Supreme Court decisions have sought to replace traditional tribal legal systems with the federal penal system.²⁴—

I contend that tribal nations can and should respond to sexual assault cases against their citizens by reclaiming this history of non-violence and respect for humanity. For tribal nations, defining and adjudicating sexually-motivated crimes is the purest form of sovereignty. Protecting women – the life-bearers and life-givers of nations – is central to the well-being of nations. Resisting rape means resisting colonization. Defining our own communities as havens of safety will necessarily require revolutionary social change. The challenge is in developing appropriate responses that take into account the safety of victims and entire communities. Taking a closer

look at tribal history and unique cultural attributes will aid in forming a coherent response to sexual violence in our communities.

This chapter will explore the strengths and weaknesses of both the adversarial (Anglo-American) model of justice as well as the peacemaking model of justice as applied (and potentially applied) to rape cases. I conclude that neither paradigm is wholly appropriate for responding to rape of Native women in Indian country. Instead, I advocate for a Native woman-centered model of adjudication – one that is feminist, and therefore decolonizing, looking to grassroots organizing as well as the “rape courts” of South Africa as a model to develop possible responses to the rape of Native women in the U.S.

Problems With Applying Anglo-American Model in Rape Cases

While some tribal governments adopted Anglo-American-style governments long before the 1930s, it was the 1934 Indian Reorganization Act which formally encouraged tribal governments in the United States to develop court systems modeled after the Anglo-American judicial system.²⁵ Prior to this effort to assimilate tribal nations into Western-style governments, most tribal governments operated on open and accessible legal systems of oral tradition.

For most North American Indians law was accessible to everyone since the oral tradition allowed it to be carried around as part of them rather than confined to legal institutions and inaccessible experts who largely control the language as well as the cost of using the law.²⁶

The Anglo-American model of justice, on the other hand, depends on a strictly adversarial system of justice. This runs contrary to the traditional jurisprudence of most Native cultures: Court rules are regimented and formal and focus heavily on defendants’ rights, and procedures are based on written statutes and case law. As applied in tribal communities, the Anglo-American model rarely allows for the incorporation of tribal custom, tradition, or oral laws.²⁷ Moreover, the narrative and direction of a rape case in Anglo-American law are dictated by the government and not the voices of the victimized women. Koss has written of the “inherent

traumatizing features of adversarial justice” – noting that even women who see their rapist convicted pay a “psychic price.”²⁸

The adversarial Anglo-American system provides multiple rights to defendants, with little to no regard for victim’s rights. The defendant, for example, has a right to “remain silent” and not testify. In most cases, the victim is required to testify in order to obtain a conviction. This imbalance and lack of accountability on the part of defendants may be seen as contradictory to traditional indigenous perspectives on justice, in which the accused was often required to make statements regarding his behavior, whether in defense or admission of the crime. A communal system of justice favors a group or family response to violence as opposed to an isolated individual response. In other words, an American doctrine such as “innocent until proven guilty” is not necessarily consistent with traditional indigenous principles of justice. In early accounts of Creek culture, for instance, a defendant who became too boisterous about his rights in a criminal dispute could be punished simply for his assertions (regardless of his culpability in the alleged crime).²⁹ In this conception of addressing violence, the accused must answer to the larger community.

Women’s truths about sexual violence are often lost in the Anglo-American model of justice. Kristin Bumiller notes “even as stories unfold in the courtroom, the value of the “facts” the court will call evidence has been predetermined by the social mechanisms that privilege certain forms of communication.”³⁰ Native women, by nature of their marginalized status in the United States, can hardly hope to find justice in a system that was developed to destroy them. Anglo-American rape law has its roots in traditional property law. In this construct, women were conceived as the “property” of men – and rape was merely a trespass to chattels. Native women will always struggle to find justice in a legal system that was designed to undermine their humanity.

The Anglo-American criminal justice system also relies heavily on incarceration as a response to violent crime. While removing a violent perpetrator from a community may be necessary to achieve immediate safety, many indigenous people are concerned that long-term

incarceration with no possibility of rehabilitation is not the solution to violent crime in Indian country. It has been established that the federal courts, where a large majority of Native rapists are adjudicated, send their prisoners to a system which has no sex offender treatment program.³¹ These perpetrators are then released from prison, free to return to their communities. They may have become more dangerous during their time behind bars.

The discussion around incarceration, though, must be broadened to include a more societal scope. Numerous scholars have noted that the prison-industrial complex, as run by the state and federal systems, has disproportionately incarcerated persons of color and has served to oppress tribal communities.³² Whether or not this analysis applies in cases of Native people incarcerating their own is another question. Most historians and sociologists agree that jails did not exist in most traditional tribal societies.³³ As tribal correctional facilities have developed during the last century, they have mimicked the problems with contemporary non-Native prisons and jails. Certainly there are serious concerns regarding contemporary tribal jails. A September 2004 Report from the Bureau of Indian Affairs' Office on the Inspector General found serious safety concerns as well as human rights violations stemming from multiple tribal jails.³⁴ Most of these concerns are arguably the result of resource limitations and lack of training for tribal jail personnel.

But the broader question is whether such jails can ever be appropriate places for Native sexual assault offenders. Ideally, tribal jails could be reformed in such a way that they provide safety for communities as well as accountability and rehabilitation for offenders. However, some believe that sex offenders cannot be rehabilitated. If this is the case, then tribal governments will have to continue to wrestle with the question of what to do once a sex offender has been identified and convicted. Many tribal cultures traditionally banished a rapist permanently from the community. In contemporary settings, however, banishment does not carry the same significance as it once did. A rapist or pedophile who is "banished" may simply move to a new community and continue to perpetrate on other victims. A Native feminist model of justice must

address the long-term consequences of sexual violence, keeping in mind the nature of predatory behavior and the likelihood of recidivism.

Problems With The Peacemaking Model in Rape Cases: Limits of Restorative Justice

Many scholars of indigenous law – mostly men – have suggested that one of the solutions to violent crime in Indian country is to develop “peacemaking” sessions to address criminal behavior. Most of these models purport to be more “indigenous” than the Anglo-American model because they include talking circles, family meetings, and restorative principles. A Native feminist approach necessarily approaches this construct with a skeptical lens, for it is possible that any system of jurisprudence can unwittingly play into the hands of predators, who will often use any and all means to excuse, mitigate, or minimize their behavior.

There are a variety of models of peacemaking in the United States, the most well-known being the Navajo Nation Peacemaking Courts. Peacemaking may be an appropriate avenue for seeking resolutions to many kinds of conflicts within a tribal nation – including property disputes, probate matters, custody and juvenile delinquency. However, the question of applying Peacemaking for felony cases such as sexual assault is much more controversial. There are numerous concerns in this application of “peacemaking” to cases of sexual assault. Some have suggested that peacemaking or other restorative models are *never* appropriate in cases of sexual abuse or rape.³⁵ However, the recent book “Navajo Nation Peacemaking” describes the use of Peacemaking in the context of sexual assault:

An Indian Health Service (IHS) psychologist who specialized in the treatment of sex offenders called the Office of the Chief Justice for assistance. He explained that he operated a special program for sex offenders and that a Navajo abuser had reported himself to it. The man had dropped his denial, and the IHS official felt that peacemaking would be an effective means of dealing with his sexual abuse. Arrangements were made for a referral to peacemaking, with protections of confidentiality, given the likelihood that the Federal Bureau of Investigation did not know about the underlying crime (emphasis added).³⁶

There are at least two significant problems with this account. First, there is no evidence that the man's victim (or victims) were willing or able to go to Peacemaking. (Note that the victim(s) are not even mentioned in this passage.) Second, while the avoidance of the FBI may be beneficial to the offender, the lack of accountability for perpetrating sexual abuse may endanger both the victim and the community-at-large. This tendency to protect the offender from the "white man's system" without an alternative response is dangerous as it can potentially lead to further victimization.

The passage in "Navajo Nation Peacemaking" regarding sex offenses continues:

This [peacemaking in sex abuse cases] is a controversial subject that is clouded by the anger that sex offenses generate, leading to a lack of focus on solutions. While James W. Zion, one of the co-editors of this book, was teaching a Navajo common law course, a student who was a lawyer asked his opinion about a case in which the child was being sexually abused but the lawyer did not know if the abuser was the child's father or maternal grandmother. He asked how peacemaking would address such a case. Zion explained that he had seen a similar case in which the family, with the assistance of the peacemaker, had put the problem on the table in the hope that the ensuing discussion would prompt a confession. The lawyer then asked what would happen if neither admitted it. In the case that Zion was citing, the family isolated the child from both people and made sure the child was never alone with either. The lawyer expressed his amazement at the simplicity of the approach and said that he has been so focused on the notion of identifying and punishing the wrongdoer that he had not thought about simply protecting the child in the future."⁵⁷—

Again, this passage has several alarming aspects. First, the child's victimization is treated as a mere family conflict instead of a violent crime. There is no evidence that the Peacemaking system acknowledged the psychological harm suffered by the child – and simply isolating suspected sex offenders from a child does not directly address the underlying criminal behavior. Perpetrators of sexual assault are not limited to physical abuse but often exert emotional, intellectual, and spiritual power over their victims. Therefore, the physical isolation proposed as a solution in this scenario does not address these fundamental violations. There is no enforcement mechanism in place to prevent future harm. Furthermore, because the offender is

not held criminally accountable by the system, he or she is apparently free to commit offenses on other children.

Most notably, however, the author suggests that “anger” is somehow misplaced and inappropriate in regards to these cases (anger “clouds” the subject). A Native feminist analysis, in contrast, can incorporate such emotions into a legal remedy for victims. In other words, why should anger and outrage not play a critical role in responding to outrageous crimes? Consider the role of ceremony and poetry of Native rape survivors, such as Connie Fife.

*i am the one who was raped by my father then
my uncle
and spent years hiding then decided to change it all
and used all my rage to castrate my memory of them
and healed myself with love/
I am the one who late at night screams and howls
And hears voices answer/
I am the one whose death was intended
And didn't die*³⁸
-Connie Fife, Cree—

Some of the problems with applying a “peacemaking” model of justice when applied to rape include safety, coercion, excusing criminal behavior, and recidivism. Each of these concerns merits separate and serious consideration, for they create an atmosphere which could ultimately lead to re-victimizing a survivor of sexual assault as well as excusing the behavior of the rapist, thus feeding into the vicious cycle of victimization in tribal communities. Moreover, imposing a “traditional” remedy for behavior (sexual violence) that is not “traditional” is counter-intuitive. There is a tendency to over-romanticize the peacemaking process as one that can “foster good relationships” and heal victims.³⁹ In fact, traditionally, many tribal cultures imposed the death penalty (as well as banishment) for sex crimes.⁴⁰

As noted earlier, rape is intricately connected to colonization and genocide. It is doubtful that a “peacemaking” model would be appropriate in cases of genocide and colonization – therefore it is questionable whether peacemaking is culturally appropriate in cases of sexual violence. (It is somewhat akin to suggesting that the survivors of the Wounded Knee massacre sit

in a circle facing the soldiers that attacked them.) A legal mechanism designed for interpersonal quarrels and disagreements does not translate to violent crime. While additional research (designed and implemented by indigenous people) may provide data to support the effectiveness of restorative justice on recidivism, prevention and deterrence, the existing literature suggests that Native survivors of violence are much less likely to find a restorative justice less satisfying than offenders.⁴¹—

Safety

For a victim of sexual assault, safety is a paramount issue. A survivor of rape may have well-justified fears about retaliation – often sex offenders will threaten their victims with further harm should they report the crime. Beyond efforts to provide immediate physical security, it is important to consider other forms of psychic and spiritual safety.

If peacemaking system is too informal or relaxed, it has the potential to replicate some of the troubling dynamics from the adversarial system (such as requiring the victim and perpetrator to sit in the same room). Without specific measures established to provide some degree of separation between the victim and the defendant, peacemaking risks re-victimizing the survivor by placing her in direct communication with the defendant. Requiring survivors to face their perpetrator in an informal, relaxed setting could result in re-traumatization. Resolving the violence, if that is possible, is not only a matter of stopping future occurrences, but also one of victim healing. If a crime victim does not feel safe in the forum, then the forum itself runs a risk of re-victimization.

A well-known Canadian model of using restorative justice for intra-family sexual abuse, the Hollow Water model, has been the subject of much praise in the restorative justice literature. One article indicates that Hollow Water operates on the premise that the only way an abused person can rebuild her life is to “expose his or her pain in the abuser’s presence...[so that] the abuser actually feels the pain that he or she created.”⁴²— In other words, the survivor’s well-being is predicated on the perpetrator’s ability to empathize. This notion puts a tremendous amount of

pressure on a survivor – not only must she describe the violation that happened to her, she is also, at some level, responsible for her perpetrator’s response. In this regard, a survivor could experience some of the same dynamics as she would in an Anglo-American criminal trial – an exposure of graphic, intimate details of a horrific experience without any guarantee of justice. The Hollow Water model literature does provide for extensive support for the victim(s) – before, during, and after the Healing Contract.⁴³ However, this ultimatum (“your healing is dependent upon the offender’s response”) still presents a variety of safety issues. These concerns about safety are closely related to another aspect of re-victimization – coercion.

Coercion

Because a peacemaking court may be deemed to be more “indigenous” than an Anglo-American model, there is the risk that survivors may be coerced into participating, compounding the trauma. While the Navajo Peacemaking court claims that it provides the option of Peacemaking without requiring it, it does not account for the unofficial methods of pressuring and coercing a woman to take part in the system. Donna Coker, in her recent examination of Navajo Peacemaking as applied in domestic violence cases, writes that there are “problems of coerced participation and inadequate attention to the victim’s safety.”⁴⁴

A related problem with the restorative justice literature is that the primary focus appears to be on the perpetrator(s) rather than the victim(s). In the Hollow Water model, each person (including, presumably, the victim(s)) is required to “sign on” to the process.⁴⁵ This “Healing Contract” then binds the signers to a two to five year process. The literature does not indicate whether the victim(s) have the opportunity to withdraw from the process. At the conclusion of the “Healing Contract”, the “Cleansing Ceremony” is held to “honor the victimizer.”⁴⁶ In my critique of this approach, I do not mean to insinuate that survivors of sexual violence can never find solace in such a process. Certainly the individual needs of survivor vary dramatically. Instead, a Native feminist concern is that survivors may be pressured to participate in this healing process which may put them in direct contact with the person who raped and sodomized them.

Pressure to participate in the “Healing Contract” may be implicit or explicit, but the literature indicates that the “alternatives are either looking the other way on rampant sexual abuse or having their people sent off to prison, which is another form of genocide.”⁴⁷ The message to survivors then, could be construed as “either participate in this process or send dad/grandpa/uncle to prison and participate in genocide.” Levis notes that “determining whether the victim is really a willing participant is more problematic than we can know.”⁴⁸

Restoration / restorative justice assumes some degree of pre-existing equality between the parties – and clearly a rape survivor and her perpetrator are at unequal places. Moreover, since the goal of Navajo peacemaking is “reconciliation of the parties in dispute”⁴⁹ a victim of sexual assault may feel as though she has failed if she does not “make peace” with her rapist. Rape and sexual violence are criminally violent acts – not mere disputes or misunderstandings. A Native feminist analysis requires accountability and responsibility rather than acquiescence and acceptance.

Excusing Criminal Behavior

Some peacemaking models are predicated on the assumption that “conflict” is resolved through “compromise” – but a Native woman-centered analysis does not concede that there should be compromise for rape. A compromise model assumes that both parties share the responsibility (if not for the crime, then for its resolution). Moreover, rape is much more than a mere “conflict” and should not be treated as such. Rape is a fundamental violation of the soul. This reality should not be minimized. Framing rape and sexual abuse as “interpersonal conflict” circumvents the larger issues of hierarchical power and control. Addressing rape in isolated forums does not promote social change. This is a problem for both the adversarial and the peacemaking model of justice. Treating sexual violence as a one-time mistake or misunderstanding precludes the larger issue of perpetrators using rape as a means to control and subjugate women.

However, acknowledging the larger social issues which have exacerbated the rates of sexual violence against Native women presents other problems. Most Native activists and scholars, for example, agree that sexual violence was once a rare occurrence in their communities prior to contact with Western systems. In this sense, the entire fabric of Native communities has been victimized by sexual assault. Rape and sexual abuse do not happen in a vacuum – they are individualized manifestations of a larger societal problem. The challenge, then, is to decolonize rape law by acknowledging this history without allowing perpetrators to minimize personal responsibility.

Because it tends to resemble mediation or negotiation, peacemaking has the potential to provide leniency in rape cases – providing excuses for a rapist’s behavior. For example, if a rapist was mistreated as a child or has an alcohol and/or drug problem, he may be able to manipulate the peacemaking system into allowing him to excuse or mitigate his behavior. Many people are mistreated as children and do not proceed to perpetrate sexual violence on others. Therefore, these excuses cannot and should not be tolerated in a contemporary tribal response.

Moreover, a mediation-like approach may open the door for an exploration of a particular victim’s “culpability” in an assault. For example, if the victim had substance abuse problems that the perpetrator took advantage of, a macro-level analysis runs the risk of framing the victim’s “bad behavior” (alcoholism) and the perpetrator’s “bad behavior” (rape) as equally bad products of colonization. In other words, we are all victims of colonization in the same way – perpetrators and victims alike. A feminist analysis, in this regard, can provide some important jurisprudential distinctions which elevate sexual violence above other social ills without abandoning the historical analysis. LaRocque notes, “Political oppression does not preclude the mandate to live with personal and moral responsibility within human communities.”⁵⁰

Restorative justice models also may not address the high degree of recidivism among sex offenders – thus do not address the cyclical nature of sexual violence. Consider the painful experience that a victim might have if her perpetrator re-offends after the conclusion of a peacemaking process. Her disclosure that this person has continued to violate women and

children has the potential to disrupt not only her life, but the entire community that may have supported the offender’s reintegration. This scenario could be exacerbated if the process was closely intertwined with spiritual or ceremonial benchmarks. Levis explains: “...[T]he problem of people not reporting non-compliance is a conspiracy of silence of a different sort.”⁵¹—

Sexual assault is more than a violent crime – its impact has been described as “soul murder”. Extreme caution is warranted to ensure that a peacemaking or restorative approach does not replicate traditional Anglo-American constructs of victim-blaming, shame and secrecy. Any model that avoids naming and establishing rape as a political (or even gendered) crime will likely fail to fully address the inequities faced by contemporary Native women.

Transcending the Existing Models

Rape can be seen as an individualized manifestation of colonization. Perhaps we can use the same tools to address rape as we do to address colonization. Tribal nations have been forced, to some extent, to adopt the legal methodology and philosophy of the colonial state in responding to rape. Taiaiake Alfred and Jeff Corntassel explain:

Colonial legacies and contemporary practices of disconnection, dependency and dispossession have effectively confined Indigenous identities to state-sanctioned legal and political definitional approaches. This political-legal compartmentalization of community values often leads Indigenous nations to mimic the practices of dominant non-Indigenous legal-political institutions and adhere to state-sanctioned definitions of Indigenous identity.⁵²—

Fear becomes entrenched in contemporary tribal governments, manifesting itself in assertions such as “tribal governments have no jurisdiction over rape – that’s a federal issue.”

Alfred and Corntassel continue:

[O]ur people must transcend the controlling power of the many and varied fears that colonial powers use to dominate and manipulate us into complacency and cooperation with its authorities. The way to do this is to confront our fears head-on through spiritually grounded action; contention and direct movement at the source of our fears is the only way to break the chains that bind us to our colonial existences.⁵³—

Instead of being trapped by a false dichotomy of choosing between the Anglo-American adversarial model and the mediation-like peacemaking model, Native women should develop alternative responses to sexual violence. Indigenous women should be at the forefront of the development of contemporary tribal remedies for rape. Incorporating a unique indigenous vision for justice, survivors of sexual violence can develop a model which transcends both the male-dominated adversarial model of justice and the male-dominated peacemaking model. A long-term vision for radical change requires both immediate measures to address sexual violence coupled with a forward-looking effort to dismantle the culture of rape which has infiltrated tribal nations.

I have two recommendations as starting points for tribal communities seeking ways to address rape and sexual assault in their communities. The first, a civil protection order process, allows a victim of sexual assault to obtain a protection order against her assailant.⁵⁴ The second recommendation concerns criminal courts to some extent, but goes further by suggesting a re-examination of the nature of contemporary criminal jurisprudence. In short, the first recommendation can be considered part of a short-term “band-aid” plan for immediate safety. A long-term social change movement in a particular indigenous community will ultimately illuminate a variety of different approaches to ending sexual violence.

The first recommendation, the “protection order” model, may not be feasible in every community, although numerous tribal courts currently issue protection orders. This civil legal remedy, a legal tool developed by mainstream feminist activists (with some basic roots in Anglo-American law), is usually confined to cases of domestic violence, wherein the victim and the perpetrator have a pre-existing intimate relationship. However contemporary tribal courts can consider expanding the protection order laws to include victims of sexual violence. There are at least two reasons why a particular victim might benefit from a protection order process. First, the process allows the victim to assert herself and exert some control in the legal process. The decision to file a protection order lies with the victim herself, not with a government prosecutor. Protection orders, while not a perfect solution, allow some remedy for rape by providing a public

record which prohibits the respondent from having further contact with the victim. A second reason why protection orders can be a vital tool for Native women is the problem of non-Native perpetrators. As noted earlier, most sexual assaults of Native women are committed by non-Indians. Because tribal governments have been stripped of their criminal authority over such perpetrators, the only remaining remedy lies in a civil process. Once a civil order has been issued, tribal governments may choose to banish non-Indians who violate the terms of the order. The second recommendation concerns conceptions of criminal authority. There are some potential alternatives to the existing Anglo-American model. In recent years, for example, South Africa has developed a specialized court system to deal with sexual violence. South Africa, for many years, has been considered the “rape capital” of the world. The rape courts are designed to be dedicated solely to sexual-assault crimes with specialized prosecutors and judges who are trained to provide victim-centered justice.⁵⁵— The specialized courts allow quicker responses to sexual violence as well as higher conviction rates. One might envision a tribal “rape court” in which women elders in the community gather to respond to the report of a sexual assault. Advocates could be trained to represent the victim’s perspective and wishes in the system. Because of U.S. Supreme Court decisions and resource limitations, many tribal governments must carefully consider how to legally respond to non-Native offenders. Elected tribal leaders and court personnel, then, must consider whether or not non-Native men will be held to the same standards of behavior as Native men in their community – and if so, how will that standard of behavior be enforced. Grassroots Native women’s activism, though, is not necessarily bound to this rigid interpretation of subject-matter jurisdiction. Social change work is central to the future of tribal nations. In a society where at least one-third of Native women experience sexual violence, only committed activism and action will lead to a reversal of this devastating trend. Braveheart-Jordan and DeBruyn note:

...[H]ealing Native American Indian women must involve the incorporation and reclaiming of the communal traditional spiritual, social, and cultural power of Indian women, regardless of, and with all respect for, different individual Indian women’s beliefs and religious affiliations of modern times.⁵⁶—

One of the principal sources of strength for Native women survivors of violence today is found within relationships and kinship circles. Karen Anderson writes, “Women’s power [traditionally] derived in large part from the actual structure of kin relations and residence patterns.”⁵⁷—

Re-instilling the importance of clan and family into the legal process will serve to empower survivors and lessen the isolation and shame that so often accompanies sexual violence.

Integrating family responses to rape will necessarily result in social change. It should be noted, however, that family responses must be informed by Native feminist belief systems.

Paula Gunn Allen describes one such scenario in her book Off the Reservation:

Having failed to persuade the governing body to enact and enforce regulations combating violence against women, a number of older women banded together. When abuse of a woman occurred, the “aunties” confronted the abuser, chastised him, shamed him by making him aware that his mother, grandmother, aunts, nieces, and daughters knew about and condemned the abuse. In other words, the women of the community took total responsibility for ending the crime that they recognized was directed against them all. They held men to the standard set by women, and by making community life woman-centered, their safety and that of the entire community⁵⁸ was ensured. I hear that violence against women doesn’t occur there anymore.—

It becomes important, then, for tribal governments to construct rape not only as an attack on an individual woman – but also an attack on the entire community. The connections to family, clan, and community also have significant relevance for sex offenders as well. Luana Ross notes that the offender and his family are responsible to the victim and must pay compensation.⁵⁹—

Native women who have survived rape and who have advocated on behalf of rape victims should be at the center of the response to sexual violence. Our voices will serve to guide communities in developing appropriate responses which take into account both safety and dignity for survivors. Community activism, speak-outs, public education will necessarily continue to be part of responding to sexual violence. These activities are not limited to tribal lands – indeed, the Native anti-rape movement in the United States includes large populations of

urban women and others who live outside of federally-defined “Indian country” (such as most villages in Alaska).

Kevin Washburn writes, “a community that cannot create its own definition of right and wrong cannot be said in any meaningful sense to have achieved true self-determination.”⁶⁰ In keeping with that philosophy, it is critical to acknowledge that rape threatens the very existence of our nations. Responding to sexual violence is central to restoring and maintaining sovereignty as indigenous nations. Integrating ceremony, song, and stories into the legal process will encompass both safety and sovereignty, ultimately restoring the respect and dignity that sexual violence has attempted to destroy.

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The Praxis Safety and Accountability Audit

Praxis International has developed and pioneered the use of the Safety Audit process as a problem-solving tool for communities that are interested in more effective intervention in domestic violence cases. The Safety Audit is a tool used by interdisciplinary groups and domestic violence advocacy organizations to further their common goals of enhancing safety and ensuring accountability when intervening in cases involving intimate partner violence. Its premise is that workers are institutionally organized to do their jobs in particular ways—they are guided to do jobs by the forms, policies, philosophy, and routine work practices of the institution in which they work. When these work practices routinely fail to adequately address the needs of people it is rarely because of the failure of individual practitioners. It is a problem with how their work is organized and coordinated. The Audit is designed to allow an interagency team to discover how problems are produced in the structure of case processing and management.

Philosophical Overview

When a woman who is beaten in her home dials 911 for help, she activates a complex institutional apparatus responsible for public safety. Within minutes, her call for help is translated into something that makes her experience something that institutions can act upon. Her experience has become a domestic assault case.

Over the next twenty-four hours, up to a dozen individuals will act on her case. They hail from as many as five agencies and represent four levels of government. Over the next year, the number of agencies and people who work with her case—and therefore her safety—will more than double. 911 operators, dispatchers, patrol officers, jailers, court clerks, emergency room doctors and nurses, detectives, prosecuting attorneys, law enforcement victim specialists, prosecutor's victim specialists, child protection services workers, civil court judges, criminal court judges, family court judges, guardians ad litem, family court counselors, therapists, social workers, probation officers, shelter advocates, children's advocates, legal advocates, and support group facilitators at the local shelter may all become involved in a chain of events activated by her original call for help.

In the past twenty years, every state and hundreds of communities have initiated criminal and civil justice reforms in order to improve victim safety and offender accountability in that chain of events. Laws have been changed, policies written, procedures revised, and training conducted. Domestic violence coordinating councils, task forces, and response teams have been formed. Are communities now safer for domestic violence victims and their children? Are offenders held accountable for violence and coercion? Have our good intentions and reforms helped or hurt?

The Audit helps answer these questions from the standpoint of battered women and their children. While the Audit team is compelled to ask questions from the standpoint of women who are battered, the team itself is made up of practitioners in the system and domestic violence advocates and experts. It is a way to look at how a woman's experience is retained or disappears in the handling of the case and whether or not safety and accountability are incorporated into daily

routines and practices of workers who act on the case. Because it is structured to reflect the actual experiences and job functions of those who intervene in domestic violence, it engages workers in the system in a practical, useful change process.

The Audit is not a review of individual performance or effectiveness, but a close look at how workers are institutionally coordinated, both administratively and conceptually, to think about and act on cases. The Audit team uncovers practices within and between systems that compromise safety. The team examines each processing point in the management of cases through interviews, observations, review of case files and an analysis of institutional directives, forms, and rules that shape a worker's response. The team's analysis provides direction on specific changes in technology and resources, rules and regulations, administrative procedures, system linkages, and training. The analysis also accounts for how, in attending to the safety of the victim, institutions account for diverse social status factors that affect safety and accountability—for example, race, class, addiction, employment, literacy, immigration status, language, and sexual orientation.

Methodology

The Safety Audit uses a local team to look at how work routines and ways of doing business strengthen or impede safety for victims of battering.¹ By asking *how* something comes about, rather than looking at the individual in the job, an Audit discovers systemic problems and produce recommendations for longer lasting change. The Safety Audit is designed to leave communities with new skills and perspectives that can be applied in an ongoing review of its coordinated community response.

The Safety Audit is built on a foundation of understanding 1) institutional case processing, or how a victim of battering becomes “a case” of domestic violence; 2) how response to that case is organized and coordinated within and across interveners; and, 3) the complexity of risk and safety for each victim of battering. To learn about victims' experiences and institutional responses, the Audit team conducts interviews, including victim/survivor focus groups; observes interveners in their real-time-and-place work settings; and, reads and analyzes forms, reports, case files, and other documents that organize case processing. Over a series of debriefing sessions, the team makes sense of what it has learned in order to articulate problem statements, support them with evidence, and frame the kinds of changes that need to occur.

Since the Safety Audit focuses on institutional processes rather than individual workers, there are no systematic sampling procedures. Instead, interviews, observations, and text analysis sample the work process at different points to ensure a sufficient range of experiences. Interviews and observations are conducted with practitioners who are skilled and well-versed in their jobs. Their knowledge of the institutional response in everyday practice and their first-hand experience with

¹ Praxis International, Inc., (651) 699-8000; www.praxisinternational.org. Over forty communities nationwide have used the Safety and Accountability Audit to explore criminal and civil legal system response to domestic violence, the intersection of domestic violence and child abuse, and the role of supervised visitation and exchange in post-separation violence.

the people whose cases are being processed supply many of the critical observations and insights of the Audit.

Safety Audit data collection and analysis pay attention to eight primary ways that institutions standardize actions across disciplines, agencies, levels of government, and job function. These “Audit trails” help point the way to problems and solutions.

1. Rules and Regulations: any directive that practitioners are required to follow, such as policies, laws, memorandum of understanding, and insurance regulations.
2. Administrative Practices: any case management procedure, protocols, forms, documentary practices, intake processes, screening tools.
3. Resources: practitioner case load, technology, staffing levels, availability of support services, and resources available to those whose cases are being processed.
4. Concepts and Theories: language, categories, theories, assumptions, philosophical frameworks.
5. Linkages: links to previous, subsequent, and parallel interveners.
6. Mission, Purpose, and Function: mission of the *overall process*, such as criminal law, or child protection; purpose of a *specific process*, such as setting bail or establishing service plans; and, function of a worker in a *specific context*, such as the judge or a prosecutor in a bail hearing.
7. Accountability: each of the ways that processes and practitioners are organized to a) hold abusers accountable for their abuse; b) be accountable to victims; and, c) be accountable to other intervening practitioners.
8. Education and Training: professional, academic, in-service, informal and formal.

In a Safety Audit, the constant focal point is the *gap* between what people experience and need and what institutions provide. At the center of the interviews, observations, and case file analysis is the effort to see the gap from a victim’s position and to see how it is produced by case management practices. In locating how a problem is produced by institutional practices, team members simultaneously discover how to solve it. Recommendations then link directly to the creation of new standardizing practices, such as new rules, policies, procedures, forms, and training.

"Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA"

A Summary of Amnesty International's Findings

Sexual violence against Indigenous women in the USA is widespread -- and especially brutal. According to US government statistics, Native American and Alaska Native women are more than 2.5 times more likely to be raped or sexually assaulted than other women in the USA. Some Indigenous women interviewed by Amnesty International said they didn't know anyone in their community who had not experienced sexual violence. Though rape is always an act of violence, there is evidence that Indigenous women are more like than other women to suffer additional violence at the hands of their attackers. According to the US Department of Justice, in at least 86 per cent of the reported cases of rape or sexual assault against American Indian and Alaska Native women, survivors report that the perpetrators are non-Native men.

Sexual violence against Indigenous women is the result of a number of factors including a history of widespread and egregious human rights violations against Indigenous peoples in the USA. Indigenous women were raped by settlers and soldiers in many infamous episodes including during the Trail of Tears and the Long Walk. Such attacks were not random or individual; they were tools of conquest and colonization. The underlying attitudes towards Indigenous peoples that supported these human rights violations committed against them continue to be present in society and culture in the USA. They contribute to the present high rates of sexual violence perpetrated against Indigenous women and help to shield their attackers from justice.

Treaties, the US Constitution and federal law affirm a unique political and legal relationship between federally recognized tribal nations and the federal government. There are more than 550 federally recognized American Indian and Alaska Native tribes in the USA. Federally recognized Indian tribes are sovereign under US law, with jurisdiction over their citizens and land and maintaining government to government relationships with each other and with the US federal government. The federal government has a legal responsibility to ensure protection of the rights and wellbeing of Native American and Alaska Native peoples. The federal government has a unique legal relationship to the tribal nations that includes a trust responsibility to assist tribal governments in safeguarding the lives of Indian women.

Tribal law enforcement agencies are chronically under-funded -- federal and state governments provide significantly fewer resources for law enforcement on tribal land than are provided for comparable non-Native communities. The lack of appropriate training in all police forces -- federal, state and tribal -- also undermines survivors' right to justice. Many officers don't have the skills to ensure a full and accurate crime report. Survivors of sexual violence are not guaranteed access to adequate and timely sexual assault forensic examinations which is caused in part by the federal government's severe under-funding of the Indian Health Service.

The Federal Government has also undermined the authority of tribal governments to respond to crimes committed on tribal land. Women who come forward to report sexual violence are caught in a jurisdictional maze that federal, state and tribal police often cannot quickly sort out. Three justice systems -- tribal, state and federal -- are potentially involved in responding to sexual violence against Indigenous women. Three main factors determine which of these justice systems has authority to prosecute such crimes:

- whether the victim is a member of a federally recognized tribe or not;
- whether the accused is a member of a federally recognized tribe or not; and
- whether the offence took place on tribal land or not.

The answers to these questions are often not self-evident and there can be significant delays while police, lawyers and courts establish who has jurisdiction over a particular crime. The result can be such confusion and uncertainty that no one intervenes and survivors of sexual violence are denied access to justice.

Tribal prosecutors cannot prosecute crimes committed by non-Native perpetrators. Tribal courts are also prohibited from passing custodial sentences that are in keeping with the seriousness of the crimes of rape or other forms of sexual violence. The maximum prison sentence tribal courts can impose for crimes, including rape, is one year. At the same time, the majority of rape cases on tribal lands that are referred to the federal courts are reportedly never brought to trial.

As a consequence Indigenous women are being denied justice. And the perpetrators are going unpunished.

In failing to protect Indigenous women from sexual violence, the USA is violating these women's human rights. Indigenous women's organizations and tribal authorities have brought forward concrete proposals to help stop sexual violence against Indigenous women – but the federal government has failed to act.

Amnesty International is calling on the US government to take the first steps to end sexual violence against American Indian and Alaska Native women:

- Work in collaboration with American Indian and Alaska Native women to obtain a clear and accurate understanding about the prevalence and nature of sexual violence against Indigenous women;
- Ensure that American Indian and Alaska Native women have access to adequate and timely sexual assault forensic examinations without charge to the survivor.
- Provide resources to Indian tribes for additional criminal justice and victim services to respond to crimes of sexual violence against Native American and Alaska Native women.

This report and action is part of the international SVAW campaign project on stopping violence against Indigenous women globally. This project will encompass not only this current work on sexual violence against Indigenous women in the USA, but also ongoing work on AI Canada's 2004 report "Stolen Sisters: Discrimination and Violence Against Indigenous Women in Canada", and work now under development by other sections and I.S. country teams.



Published on RAINN / Rape, Abuse & Incest National Network (<http://www.rainn.org>)

Rape Trauma Syndrome

Rape Trauma Syndrome is a common reaction to a rape or sexual assault. It is the human reaction to an unnatural or extreme event.

There are three phases to Rape Trauma Syndrome

1. Acute Phase

This phase occurs immediately after the assault and usually lasts a few days to several weeks. In this phase individuals can have many reactions but they typically fall into three categories of reactions:

1. **Expressed-** This is when the survivor is openly emotional. He or she may appear agitated or hysterical, he or she may suffer from crying spells or anxiety attacks.
2. **Controlled-** This is when the survivor appears to be without emotion and acts as if "nothing happened" and "everything is fine." This appearance of calm may be shock.
3. **Shocked Disbelief-** This is when the survivor reacts with a strong sense of disorientation. He or she may have difficulty concentrating, making decisions, or doing everyday tasks. He or she may also have poor recall of the assault.

2. The Outward Adjustment Phase

During this phase the individual resumes what appears to be his or her "normal" life but inside is suffering from considerable turmoil. In this phase there are five primary coping techniques:

1. **Minimization-** Pretends that "everything is fine" or that "it could have been worse."
2. **Dramatization-** Cannot stop talking about the assault and it is what dominates their life and identity.
3. **Suppression-** Refuses to discuss, acts as if it did not happen.
4. **Explanation-** Analyzes what happened- what the individual did, what the rapist was thinking/feeling.
5. **Flight-** Tries to escape the pain (moving, changing jobs, changing appearance, changing relationships, etc.).

There are many symptoms or behaviors that appear during this phase including:

- Continuing anxiety
- Severe mood swings
- Sense of helplessness
- Persistent fear or phobia
- [Depression](#) [1]
- Rage
- Difficulty sleeping (nightmares, insomnia, etc.)
- Eating difficulties (nausea, vomiting, compulsive eating, etc.)
- Denial
- Withdrawal from friends, family, activities
- Hypervigilance
- Reluctance to leave house and/or go places that remind the individual of the assault
- Sexual problems
- Difficulty concentrating
- [Flashbacks](#) [2]

All of these symptoms and behaviors may make the individual more willing to seek counseling and/or to discuss the assault.

3. The Resolution Phase

During this phase the assault is no longer the central focus of the individual's life. While he or she may recognize that he or she will never forget the assault; the pain and negative outcomes lessen over time. Often the individual will begin to accept the rape as part of his or her life and chooses to move on.

NOTE: This model assumes that individuals will take steps forward and backwards in their healing process and that while there are phases it is not a linear progression and will be different for every person.

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Links:

[1] <http://www.rainn.org/effects-of-rape/depression.html>

[2] <http://www.rainn.org/effects-of-rape/flashbacks.html>

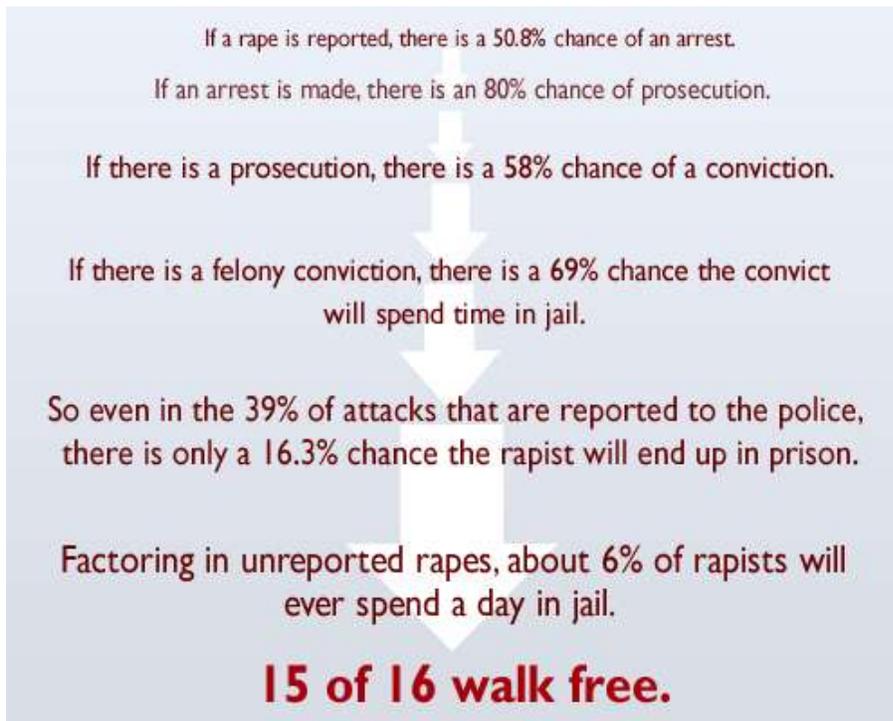
Reporting Rates

Sexual assault is one of the most underreported crimes, with 60% still being left unreported.

Males are the least likely to report a sexual assault, though they make up about 10% of all victims.

What happens to Rapists When They are Caught and Prosecuted?

60% of rapes/sexual assaults are not reported to the police. Those rapists, of course, never spend a day in prison according to a statistical average of the past 5 years. Factoring in unreported rapes, only about 6% of rapists ever serve a day in jail.



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