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Barriers to Justice for Victims of Sexual Violence in Indian Country

by Jeremy Braithwaite, Sarah Deer, and Heather Valdez Freedman

Sexual assault is acknowledged as a widespread problem in the United States, and American Indian/Alaska Native women are disproportionately affected. (Sarah Deer, *The Beginning and End of Rape* (2015); Patricia Tjaden & Nancy Thoennes, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women* (2000).) In terms of case attrition, it is believed that sexual assault leads all violent crimes, with only 16% to 39% of these offenses reported to law enforcement and only 2% of cases achieving a final court disposition. (Donna Vandiver et al., *Sex Crimes and Sex Offenders: Research and Realities* (2016).) Although previous research has identified systems-level barriers to access to justice for victims, including mistrust or fear of the criminal justice system, lack of support from prosecutors, and inconsistent implementation of evidentiary standards, Native victims uniquely experience additional systems barriers that may further impede case resolution. The various configurations of the criminal justice system in Indian Country make understanding the response to sexual violence on reservations

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Actuarial Scales Supplemented With Dynamic Instruments Offer Best Results

The developers of SPJs have made substantial contributions to the practice of sex offender risk assessment, so we do not disagree with them lightly. Nonetheless, our reading of the literature to date indicates that scoring mechanically (that is, by adding numerical scores), not qualitatively, results in the most accurate and well-researched risk assessments, and this is the scoring method we recommend.

Our review indicates that actuarial methods have the strongest research base. If actuarial scales are heavily weighted toward historical factors, they can be supplemented with empirically supported dynamic instruments, such as the Stable-2007 and Acute-2007, thus combining both static historical and dynamic current factors. (R.K. Hanson et al., Public Safety Canada Corrections Research, *Assessing the Risk of Sexual Offenders on Community Supervision: The Dynamic Supervision Project* (2007), User Report, *available at* www.PublicSafety.gc.ca/cnt/rsrcs/pblctns/ssssng-rsk-sxl-ffn-drs/index-en.aspx.) A risk management plan could then be based on the dynamic risk instruments.

To reiterate, we are not suggesting that a mechanically derived score on a SPJ measure be followed blindly. Instead, it should act as an anchor from which the evaluator can make adjustments if necessary. Adjustments should be made rarely and conservatively, given the evidence that clinical adjustment generally decreases accuracy of prediction. Similar to DeClue, we recommend limiting clinical adjustments to instances when, despite lack of other risk factors, there are indications that a subject intends to commit further sex offending—the rare Broken Leg cases that have served as useful cautionary tales of the field for more than half a century.

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especially complex and warrant critical inquiry. (***Author's Note:*** *The term "Indian Country" means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation; (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.)*

Patterns of Sexual Assault in Indian Country Reprise Historical Injuries

Historically, sexual violence was used in the colonization process as a weapon of domination and dehumanization of Native peoples. The forced removal of Native Americans from their land and homes (for example, the Trail of Tears and the Long Walk) was wrought with the sexual victimization of Native women by White men. (Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 Kan. J. L. Pub. Pol'y 121 (2004).) The effect of this legacy, along with other colonizing influences, has disrupted the once balanced gender roles of Native communities. Because of this historical injury, it is important to consider the rape of a Native woman as an assault both on her person and on her community.

Unfortunately, racism and the effect of colonization and brutality persist today. One of the manifestations is the continuation of the tradition of rape and sexual assault against Native American women. The current data indicate that Native women are raped at more than two-and-a-half times the rate of all other women and that 56.1% of American Indian/Alaska Native women have experienced sexual violence in their lifetime. (Andre B. Rosay, *Violence Against American Indian and Alaska Native Women and Men* (2016), *available at* www.NCJRS.gov/pdffiles1/nij/249736.pdf.)

Targeting Native Women for Victimization. Some scholars and law enforcement officers in Indian Country believe that there are rapists who specifically target Native women for sexual assault because the victim is Native. (David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 Violence & Victims 73 (2002).) While Native women may be targeted due to animus and/or discrimination (i.e., a hate crime), they may also be targeted because of the impunity enjoyed among offenders, particularly non-tribal members.

Law Enforcement Responses Hindered by Systemic Problems. In spite of the comparatively higher rates of sexual

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violence, the ability of the criminal justice system in Indian Country to effectively respond to and adjudicate crimes of sexual violence is hindered by systemic flaws. For example, there is a widespread shortage of tribal law enforcement officers, 911 systems, and tribal jails. (Stewart Wakeling et al., *Policing on American Indian Reservations* (2001).) Often, tribal law enforcement officers must patrol large geographic areas alone and have limited access to advanced training on sexual assault and to state-of-the-art forensic equipment.

Many perpetrators of sexual assault in Indian Country are never held accountable, because the complexities of criminal jurisdiction in Indian Country and lack of effective collaborations with state and federal law enforcement create gaps in the system. Other barriers to justice for Native victims include victim-blaming, racism, and conflicts between Indigenous and Western value systems that affect treatment methods. Basic communication challenges arise from the lack of linguistic parallels between the English language and those of the Native American cultures for the concept of sexual assault. (Jeremy Braithwaite, *Colonized Silence: Confronting the Colonial Link in Rural Alaska Native Survivors' Non-disclosure of Child Sexual Abuse*, 27 J. Child Sexual Abuse 589 (2018).)

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Tribal Criminal Justice Systems

Criminal jurisdiction in Indian Country has been aptly characterized as a maze. (Robert M. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503 (1976).) Tribal justice systems operate under an array of different jurisdictional arrangements with law enforcement outside Indian Country. Also, within Indian Country, tribal legal infrastructure is unevenly developed. Both have some bearing on the criminal justice response to sexual violence.

Overlapping Jurisdiction. For most tribal nations in the lower 48, the federal government has concurrent criminal jurisdiction with tribes in Indian Country. This principle dates back to the late 1880s and the Major Crimes Act, which enumerated crimes that the federal government would have jurisdiction over, but did nothing to divest tribes of their inherent jurisdiction.

Authority to arrest and prosecute depends on where the crime occurred, whether the victim or defendant is Indian, the nature of the crime, and whether the reservation is subject to Public Law 280, outlined below, or some other federal statute authorizing state jurisdiction.

Limited Jurisdiction Over Non-Indians. With specific regard to sexual assault in Indian Country (18 U.S.C. § 1151), a complicated legal calculation determines what law will apply and who will be the first responders. In the U.S. Supreme Court decision **Oliphant v. Suquamish,** 435 U.S. 191 (1978), the Court virtually extinguished tribal criminal authority over non-Indians. Therefore, until very recently, tribal governments could not criminally prosecute an offender who is not considered "Indian." That changed in 2013 under the reauthorization of the Violence Against Women Act (VAWA 2013).

VAWA Reauthorization Provides Tribal Jurisdiction Over Non-Indians for Certain Categories of Crimes. Tribal jurisdiction over non-Indians for specific crimes was recently addressed in VAWA 2013, which refers to this jurisdiction as "Special Domestic Violence Criminal Jurisdiction" (SDVCJ). The provision sets out a series of requirements tribes must satisfy to exercise authority over non-Indians in designated circumstances. Once those specific requirements are met, tribes are authorized to exercise SDVCJ. Under VAWA 2013, tribes may prosecute non-Indians for three categories of crimes—domestic violence, dating violence, and violations of protection orders—provided the tribe satisfies the prerequisites. Sexual assault is not part of SDVCJ.

Jurisdictional Maze. As noted above, the jurisdictional maze that results from various federal Indian laws and policies and U.S. Supreme Court decisions includes an analysis of who the victim is, who the perpetrator is, where the crime occurred, and what type of crime was committed. As such, innumerable scenarios exist, each with its own unique procedural outcome. For example, a sexual assault of an Indian committed by an Indian on a reservation that is not subject to state jurisdiction via federal statute would fall under the concurrent jurisdiction of federal and tribal authorities; if a sexual assault were committed by a non-Indian upon a non-Indian, the state would have exclusive authority.

Although not all tribal law enforcement agencies have the authority to arrest non-Indian offenders, tribal law enforcement officers can detain non-Indians for a reasonable amount of time until the appropriate state or federal law enforcement officers arrive. Tribal law enforcement officers have the authority to arrest and detain both Indians and non-Indians for sexual assault crimes committed in Indian Country under the following certain circumstances and conditions:

- When there is probable cause to believe that an Indian has committed the crime of sexual assault against another Indian;
- When there is probable cause to believe that an Indian has committed the crime of sexual assault against a non-Indian;
- When tribal law enforcement officers have been cross-deputized, which allows them to arrest and detain both Indians and non-Indians on behalf of the certifying agency; and
- When they are in hot pursuit of the suspect, tribal law enforcement officers may arrest and detain Indian and non-Indian suspects outside of Indian Country.

Primary Responders. Within these jurisdictional frameworks, there are several possible law enforcement agencies that could be the primary responders; these include tribal police contracted with the BIA through what is commonly referred to as a "638 contract," BIA police, and/or tribally funded tribal police. Each of these situations comes with unique challenges and levels of tribal control.

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1. "638 departments": Tribal police departments that are contracted under 638 contracts are administered by the tribe under compact with the BIA. While officers in "638 departments" are tribal employees, the contract with the BIA sets out organizational framework and performance standards. (Wakeling et al., *supra*.) This is the most common type of law enforcement department in Indian Country.
2. Departments administered by the BIA: The second most common scenario are departments that administered by the BIA. In these departments, law enforcement officers are federal employees and under the complete control of the BIA.
3. Tribally funded tribal police: The least common law enforcement arrangement in Indian Country are departments that are completely supported through tribal funds. Officers in these departments are hired and regulated by tribal communities.

Federal Underfunding of Tribal Police and Courts. Further complicating this picture are reservations subject to state criminal jurisdiction, under a law commonly known as Public Law 280. Passed in 1953, PL 280 transferred federal criminal jurisdiction to the states in six mandatory states: California, Oregon (except Warm Springs), Minnesota (except Red Lake), Nebraska, Wisconsin, and Alaska (at statehood). The provision allows other states to opt in at a later date. While tribes subject to PL 280 continue to share the same concurrent jurisdiction with states as they would with federal authorities in the absence of PL 280, additional hurdles exist to exercising that jurisdiction. (Carole Goldberg & Heather Valdez Singleton, *Law Enforcement Under Public Law 280: Research Priorities* (2005), *available at* www.NCJRS.gov/pdffiles1/nij/209839.pdf.)

Misunderstandings about the effect of PL 280 have led to drastic federal underfunding of tribal police and courts on PL 280 reservations and, as a result, on many reservations subject to PL 280 (particularly California) the most common law enforcement scenario is one in which sheriff's deputies from the surrounding county (or counties, when the reservation covers more than one county) provide the primary law enforcement to the reservations. Other possible law enforcement arrangements include the following:

- Contracted services with the county for "enhanced" services;
- Tribal law enforcement with deputization agreement with the county; and
- Tribal law enforcement without cross-deputization with county law enforcement.

In limited cases, city or state law enforcement authority prevails. Generally speaking, in PL 280 jurisdictions, there is less tribal control over law enforcement than in non-PL 280 jurisdictions.

Both in a PL 280 context and outside of PL 280, one can imagine the unique set of obstacles that might exist to reporting crimes of sexual assault. It is not known whether one jurisdictional scenario is more highly correlated with reporting than another. In a PL 280 situation, women may feel uncomfortable reporting to county law enforcement, who may or may not respect tribal culture or values. One study showed that tribal members often feel that state law enforcement are indifferent and sometimes hostile to calls from reservations within their jurisdiction. (Sarah Deer et al., *Final Report: Focus Group on Public Law 280 and Sexual Assault of Native Women* (2007).)

Tribal prosecutors may be able to "max and stack" criminal charges and sentences against Indian defendants in tribal courts.

Legal Infrastructure Development

While tribal authorities may share jurisdiction with federal and/or state authorities for criminal actions, unlike federal and state authorities, tribes operate under severe restrictions on punishments they can impose. Under the Indian Civil Rights Act, tribes are restricted to one year of imprisonment and a $5,000 fine; however, recent changes in the law now allow certain tribes to sentence up to three years and/or impose a fine up to $15,000. Some tribes have the ability to levy these fines through their tribal courts and impose prison sentences, while many others lack a tribal court, specific codes addressing criminal behavior, and/or a detention facility. According to a recent survey of published by the Bureau of Justice Statistics, about 23% of all tribes provide a detention facility. The remaining tribes rely on federal, state, or county facilities, depending on the jurisdictional arrangement and any specific agreements that may have been negotiated.

Among tribes that have the legal infrastructure to address sexual assault, including tribes that have codes that specifically address the crime, there is considerable variability in the strength and efficacy of the codes themselves. (Sarah Deer, *Contemporary Tribal Laws on Sexual Violence* (2006).) It is important to note that Indian perpetrators can be convicted in tribal court of the crime of sexual assault in addition to any other crimes committed during the course of the sexual assault. Tribal prosecutors may be able to "max and stack" criminal charges and sentences against Indian defendants in tribal courts, resulting in significantly more jail time than in cases in which the perpetrator is charged solely with the sexual assault crime.

Research With Native Populations

The conundrum outlined above is an area that is ripe for systematic investigation to unpack the ways in which the complex configurations of criminal justice operations in Indian Country condition the effect of sexual assault on victims and their communities. However, for many reasons, there are significant challenges to conducting such research in Indian Country.

Research Synonymous With Disrespect and Colonialism. As noted previously, Native Americans have a long history of exploitation at the hands of the United States government and the dominant population. Research has become synonymous in many Native communities with loss, disrespect, and colonialism. (Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (1999).) Historically, research has been done from the point of view of the colonizing society and strictly for its benefit. There has been no benefit to the communities being researched and their responses have frequently been misunderstood or misrepresented. The outrage

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of Native people regarding these practices has dismissed or silenced. Indigenous ways of knowing have been marginalized by mainstream researchers who consider themselves superior to the people they are researching.

Practical Challenges to Conducting Research. In addition to the mistrust and stigma attached to most research initiated and conducted by outsiders, there are practical challenges to conducting research in Indian Country. Due to the high rates of poverty, many people living on reservations have poor access to telephones; therefore, research using random digit dialing may not return the best results. Similarly, due to both poor access to phones and a lack of sampling frames for households living on reservations, the most common methods of randomly selecting participants are not easily available to a researcher. Other factors that may pose challenges to the researcher are language and the geographic isolation of reservations. There are currently 573 federally recognized tribes in the United States and about 175 languages are spoken. (Patricia Cohen, *Indian Tribes Go in Search of Their Lost Languages*, NY Times, Apr. 5, 2010, *available at* www.NYTimes.com/2010/04/06/books/06language.html.) In addition, Indians were historically relegated to some of the most isolated and desolate land in the U.S., making travel to many reservations a long and difficult trip.

Reducing Barriers to Successful Research. While some challenges can be more easily overcome than others, there are ways to reduce the barriers to conducting successful research in Indian Country. Ideally, a Native community would invite a researcher to help them conduct research or Native peoples would conduct research in their own communities. A researcher from the same culture as the people being researched may frame questions differently and perceive problems and priorities differently than a researcher from a western culture. Much of this involves subtle differences and subconscious ways of posing questions, knowing how and when to probe and redirect, and what would be considered rude, invasive, or exploitive.

Existing relationships that have engendered trust can make it easier to gain access to the community. Additionally, the research design and methods can be developed—or at least modified—based on collaborative working relationships with members of the community. Finally, training people from the tribal community to conduct research, thereby creating insider researchers, can increase the likelihood of success.

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