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BYSTANDER NO MORE? IMPROVING THE FEDERAL RESPONSE  
TO SEXUAL VIOLENCE IN INDIAN COUNTRY

Sarah Deer\*

*If the Tribal Law and Order Act had existed 16 years ago, my story would be very different . . . [After I was sexually assaulted in 1994] I received medical treatment at the Indian Health Services hospital but no doctors talked to me about the rape. I had to wait all night for someone to collect DNA. Tribal police suspected a local man but no federal investigators interviewed me. Federal authorities declined to get involved because the attacker had not used a weapon . . . He was never prosecuted for raping me.<sup>1</sup>*

*Lisa Marie Iyotte  
July 29, 2010  
The White House  
Washington, D.C.*

*When one in three Native American women will be raped in their lifetimes, that is an assault on our national conscience; it is an affront to our shared humanity; it is something that we cannot allow to continue.<sup>2</sup>*

*President Barack Obama  
July 29, 2010  
The White House  
Washington, D.C.*

INTRODUCTION

In contemporary discussions about sexual assault prevention, the role of bystanders has become a common theme. Efforts to educate potential bystanders to identify “red flags” for potential sexual assault are thought to enhance the likelihood that there will be intervention in problematic situations before an assault takes place. In general, the obligations of bystanders are fraught with different legal philosophies about the moral or legal duty of one who observes, but does not intervene.<sup>3</sup> Black’s Law Dictionary defines bystander as “One who stands near; a chance looker-on; hence one who has not concern with the business being

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<sup>1</sup> The Obama White House, *Signing the Tribal Law and Order Act*, YOUTUBE (July 29, 2010), <https://youtu.be/h4K1UYCC0dQ>.

<sup>2</sup> President Barack Obama, Remarks by the President Before Signing the Tribal Law and Order Act (July 29, 2010), <https://obamawhitehouse.archives.gov/realitycheck/the-press-office/remarks-president-signing-tribal-law-and-order-act>.

<sup>3</sup> See, e.g., Thomas E. Hill, *Moral Responsibilities of Bystanders*, 41 J. SOC. PHILOS. 28–39 (2010).

transacted. One present but not taking part, looker-on, spectator, beholder, observer.”<sup>4</sup> This generic legal definition of bystander does not assign blame. However, the moral culpability of bystanders has been invoked on those who failed to intervene in the Holocaust, for example.<sup>5</sup> The concept of a bystander is not just applicable to individuals. Corporations, organizations, and even countries can be implicated as culpable bystanders in the context of international human rights concerns and genocide.<sup>6</sup>

This Article frames the United States as a culpable bystander in the high rates of sexual violence perpetrated against Native women and children, which developed over time due to policies of official indifference. Because of the unique responsibilities of the United States toward Indian nations, the application of bystander culpability offers a coherent critique of the federal response to the rape of Native women. The Supreme Court has framed the United States’ responsibility to Native people as “moral obligations of the highest responsibility and trust.”<sup>7</sup> By failing to address sexual assault in a pro-active way, the federal government has evaded its responsibility. Assigning blame, however, does not always yield specific recommendations for change. To this end, this Article offers some specific remedies and proposals that are imperative for a true reckoning of the role of the United States in creating and cultivating this human rights crisis.

This Article also acknowledges that the Obama administration, for the first time in the history of the United States, made significant changes to the federal response to rape on tribal lands. However, I argue that the reforms do not go far enough. Policy improvements must be institutionalized for the long term. At the same time, the United States must empower tribal governments to respond to this widespread crisis on their own terms.

This Article proceeds in three parts. In Part I, I provide the foundation for my argument that the high rates of sexual violence in tribal communities has largely been attributable to federal Indian laws and policies. I argue that the United States has been a culpable bystander for allowing this dynamic to remain unabated for hundreds of years. In Part II, I explain the Sexual Assault Response Team (SART) model and its relevance to sex crimes in Indian country. In addition, I argue the federal government must improve its response to Native rape victims by implementing the SART model throughout Indian country. In Part III, I explain the specific achievements of the Obama administration with regards to the rape of Native women and the work that remains to be done. The Article concludes with some proposed next steps to build on the improvements made by the Obama administration.

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<sup>4</sup> Bystander, BLACK’S LAW DICTIONARY (5th ed. 1979).

<sup>5</sup> See generally AMOS N. GUIORA, *THE CRIME OF COMPLICITY: THE BYSTANDER IN THE HOLOCAUST* (2017).

<sup>6</sup> See generally Jena Martin Amerson, *What’s in a Name? Transnational Corporations as Bystanders Under International Law*, 85 ST. JOHN’S LAW REV. 1 (2011).

<sup>7</sup> *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

## PART 1: CULPABILITY

Native people suffer (by far) the highest rates of interpersonal violence in the nation.<sup>8</sup> Sexual violence is one of the most common crimes that Native people experience. In fact, the most recent data available from the Department of Justice concluded that *over half* of Native people have experienced some form of sexual violence.<sup>9</sup> In 2010, at the Tribal Law and Order Act signing ceremony, President Obama reflected on the latest available data from the Bureau of Justice Statistics when he remarked: “When one in three Native American women will be raped in their lifetimes, that is an assault on our national conscience; it is an affront to our shared humanity; it is something that we cannot allow to continue.”<sup>10</sup> All three branches of the federal government have acknowledged these high rates of violence against Native women in a variety of contexts.<sup>11</sup> In 2007, human rights organization Amnesty International pointedly referred to these high rates to argue that the United States has failed to protect Native women from sexual violence, allowing sexual assault to occur with impunity.<sup>12</sup>

*A. History*

Identifying the origin or cause of this high rates of sexual violence is difficult. Prior to 1999, there was virtually no national data about crime in Indian country.<sup>13</sup> Thus, from a purely *statistical* standpoint, we can’t be entirely certain whether the high rate of violence against Native women is of recent origin or not. However, historical evidence and the narratives of Native women suggest that high crime victimization rates in Native communities are not a late 20th century phenomenon, but date back rather to the earliest days of contact between European men and Native women.<sup>14</sup> Historians, social scientists, and tribal elders have repeatedly

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<sup>8</sup> ANDRE B. ROSAY, VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN 18 (National Institute of Justice May 2016), <https://www.ncjrs.gov/pdffiles1/nij/249736.pdf>.

<sup>9</sup> *Id.*

<sup>10</sup> President Barack Obama, *supra* note 2.

<sup>11</sup> Congress has noted these statistics in Findings and Purposes sections of both the Tribal Law and Order Act (124 Stat. 2258) and the 2013 reauthorization of the Violence Against Women Act (PUBLIC LAW 113–4). The Executive Branch has acknowledged these data through signing statements, including the reauthorization of the Violence Against Women Act. This data has also been cited in the federal courts. *See, e.g.*, *United States v. Bryant*, 136 S. Ct. 1954, 1959 (2016).

<sup>12</sup> AMNESTY INTERNATIONAL, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 5 (2007), <http://www.amnestyusa.org/pdfs/mazeofinjustice.pdf>.

<sup>13</sup> *See* Sarah Deer, *Criminal Justice in Indian Country*, 37 AM. INDIAN L. REV. 347 (2013) (citing the 1999 American Indians and Crime report as “the first national exposure of Native victimization in the United States.”).

<sup>14</sup> *See, e.g.*, Bethany R. Berger, *Indian Policy and the Imagined Indian Woman*, 14 KANSAS J. LAW PUBLIC POLICY 103, 106 (2004) (“The sexuality of Indian women created

noted that Native women have been experiencing sexual assault at very high rates for the last several hundred years beginning with European colonization and continuing to this day.<sup>15</sup>

By the time the United States was established in the late 18th century, Native women had been exposed to sexual violence on a vast scale. The Spanish exploration and settlement was particularly brutal,<sup>16</sup> but sexual abuse continued under the auspices of settlement from all European countries.<sup>17</sup>

Violence against Native women thus predated the United States, but has continued unabated to the present day. The United States military was used to forcibly remove and kill Indian people during some of the most tumultuous times in history, but widespread rape was also used as a tactic of war.<sup>18</sup> Some wars with Indian nations arose, in part, due to the failure of the United States to stop their soldiers from sexually abusing Native women. Historical documents demonstrate that tribal leaders often complained to the United States that their women were being brutalized by non-Indians.<sup>19</sup>

After the wars ended and civilian control took over the lives of Native people, the high rates of sexual abuse continued. Even Indian agents, assigned for the “protection” of Indian people, were themselves abusers of Native women.<sup>20</sup> Historical events such as the Oklahoma Land Rush and the California Gold Rush, brought huge influxes of non-Natives into tribal lands, and often physical and sexual violence against Native people became a common occurrence. Between the 1880s and 1960s, Native children were sent (often forcibly) to government and

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both an opportunity and a mission for the colonizers. The settlers delighted in imagining themselves as the objects of affection to these half-clothed, lustful women and believed they could use these affections as a way of gaining access to Indian people.”)

<sup>15</sup> See, e.g., Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J. L. & PUB. POL’Y 121, 123 (2004); Hilary N. Weaver, *The Colonial Context of Violence: Reflections on Violence in the Lives of Native American Women*, 23 J. INTERPERS. VIOLENCE 1552, 1556–58 (2008).

<sup>16</sup> Susan Armitage, *Women and the New Western History*, 9 OAH MAG. HIST. 22, 23 (1994) (“It is well documented that Spanish-Mexican soldiers in Spanish California and New Mexico used rape as a weapon of conquest.”).

<sup>17</sup> See, e.g., SHARON BLOCK, RAPE AND SEXUAL POWER IN EARLY AMERICA 80 (2006) (explaining that “Both African American and Native American women were far more likely than white women to be the victims of sadistic and horrific sexual violence that women beyond the gratification of men’s sexual desires and starkly expressed relations of subordination through intentional sexual cruelty.”).

<sup>18</sup> See generally Andrea Smith, *Not an Indian Tradition: The Sexual Colonization of Native Peoples*, 18 HYPATIA 70, 71 (2003).

<sup>19</sup> See SARAH DEER, THE BEGINNING AND END OF RAPE 33–34 (2015).

<sup>20</sup> Petition, Tehama County citizens to the Secretary of the Interior (1859), in ROBERT F. HEIZER, THE DESTRUCTION OF CALIFORNIA INDIANS 137–39 (1974) (quoting a letter to the Secretary of the Interior which reported that the California Indian agent V.E. Geiger, was “compelling the squaws, even in the presence of their Indian husbands to submit to their lecherous and beastly desire”).

church-run boarding schools with very little oversight.<sup>21</sup> Decades later, it has become clear that sexual abuse was a common experience for many of these children as many survivors have spoken out and even sued their abusers in tribal court.<sup>22</sup> The legacy of widespread rape and sexual abuse—with no adequate intervention—still affects Native people today. Native women suffer from the highest rates of sexual violence in the nation.

### *B. The Harm Done by Sexual Violence*

The harm done to tribal nations through sexual violence is incalculable. *Doctors Without Borders* has classified rape as a “medical humanitarian emergency.”<sup>23</sup> Sexual assault victims generally suffer from high rates of mental and physical health problems, including Post-Traumatic Stress Disorder (PTSD), depression, anxiety, and suicidal ideation.<sup>24</sup> Widespread sexual assault in Native communities contributes to other significant health problems, including substance abuse and suicide.<sup>25</sup> Beyond the acute issues of injury, unwanted pregnancy, and sexually transmitted infections (STIs), victims of sexual assault can experience long-range physical health problems, some seemingly unrelated to injuries that may have been inflicted by the assault itself.<sup>26</sup> Communities suffer greatly when multiple community members have been victims. The impact of sexual violence spreads throughout communities, especially those that are small and close-knit.

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<sup>21</sup> See generally DAVID WALLACE ADAMS, *EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875–1928* (1995).

<sup>22</sup> See, e.g., *John Doe BF v. Diocese of Gallup*, No. SC-CV-06-10, at 1–3 (Nav. Sup. Ct. Sept. 9, 2011).

<sup>23</sup> MEDECINS SANS FRONTIERES, *SHATTERED LIVES: IMMEDIATE MEDICAL CARE VITAL FOR SEXUAL VIOLENCE VICTIMS* 129 (2009), [http://www.doctorswithoutborders.org/sites/usa/files/MSF\\_Shattered-Lives\\_Sexual-Violence.pdf](http://www.doctorswithoutborders.org/sites/usa/files/MSF_Shattered-Lives_Sexual-Violence.pdf) [hereinafter MEDECINS SANS FRONTIERES] [<https://perma.cc/CNM9-DSVD>].

<sup>24</sup> See, e.g., Kaitlin A. Chivers-Wilson, *Sexual Assault and Posttraumatic Stress Disorder: A Review of the Biological, Psychological and Sociological Factors and Treatments*, 9 MCGILL J. MED. 111, 112 (2006); see also Thema Bryant-Davis et al., *Ethnic Minority Women and the Mental Health Effects of Sexual Assault*, 10 TRAUMA, VIOLENCE, & ABUSE 330, 346 (2009) (“Ethnic minority women in the United States are often confronted with the realities of historical trauma and the contemporary trauma of societal oppression such as racism and poverty.”).

<sup>25</sup> Diane K. Bohn, *Lifetime Physical and Sexual Abuse, Substance Abuse, Depression, and Suicide Attempts Among Native American Women*, 24 ISSUES MENT. HEALTH NURS. 333, 342 (2003).

<sup>26</sup> See, e.g., Sandra L. Bloom, *Understanding the Impact of Sexual Assault: The Nature of Traumatic Experience*, in *SEXUAL ASSAULT: VICTIMIZATION ACROSS THE LIFESPAN* 405, 432 (A. Giardino, E. Datner, & J. Ashwer eds., 2003) (“Victims of trauma, abuse and neglect often suffer from a multitude of physical disorders not directly related to whatever injuries they have suffered.”).

*C. Federal Responsibility to Respond to Sexual Violence*

The federal government has been in a position to address these high rates of sexual assault since at least the late 19th century as a result of Major Crimes Act (MCA), passed in 1885. In the MCA, Congress unilaterally claimed criminal jurisdiction over major (felony) crimes occurring on all Indian reservations.<sup>27</sup> It is this law that puts the United States Attorneys and the Federal Bureau of Investigation at the forefront of rape and sexual abuse cases reported in most tribal nations in the lower 48 United States.<sup>28</sup> Tribal nations theoretically have concurrent jurisdiction to prosecute sexual assault under tribal laws, but can only prosecute defendants who are Indians. Moreover, tribal courts can only sentence offenders to a maximum of 3 years per offense. This means that without a prominent federal engagement, many offenders will not be held accountable.

The federal government does not have criminal jurisdiction on every single Indian reservation in the United States, including the tribal nations in Alaska. Post-MCA, as a result of federal legislation such as Public Law 280, some state governments (rather than the federal government) have criminal jurisdiction on certain Indian reservations in the United States. To the extent that federal leadership and oversight could help to improve the rates of state prosecution of sexual violence occurring on Indian land, the policies promoted in this Article could serve to improve the relationship between states and tribal governments. However, the remainder of this Article focuses on the *federal response* to sexual violence in Indian country in districts where the federal government has authority over sexual assault.

Unfortunately, granting federal officials the authority to prosecute major crimes does not mandate that they do so. Many tribal members can recall stories of rape cases that went uninvestigated and unprosecuted for decades. Advocates throughout Indian country often told similar stories; that women who reported assault rarely saw any follow-through from any government official. Such anecdotal examples of federal indifference circulated widely for years, but there was no way to quantifiably prove that the federal government was failing Native survivors of sexual assault. One data point that simply was not available was the number of reported cases of sexual assault that were ultimately declined for prosecution by federal prosecutors.

Allegations that federal officials ignore rape cases in Indian country led to a demand for a release of official declination rates—which were sought by some high-profile media outlets in the years leading up to the Tribal Law and Order Act

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<sup>27</sup> 18 U.S.C. § 1153 (West 2017). Child sexual abuse was not added to the Major Crimes Act until 1986. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (Sept. 13, 1994) (“Section 1153(a) of title 18, United States Code, is amended by inserting ‘(as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years’ after ‘serious bodily injury.’”).

and the Violence Against Women Act.<sup>29</sup> Initially, it was difficult to quantify the extent of the declinations because the U.S. Attorneys' offices were not required to release such statistics to the public. In response to tribal leaders' request for this information, in 2008, Drew Wrigley, the U.S. Attorney for North Dakota testified before the U.S. Senate Committee on Indian Affairs that providing regularly published declination rates "would simply create fodder for false comparisons that would inevitably prove corrosive."<sup>30</sup> However, the Denver Post, working with Syracuse University, which regularly issues Freedom of Information Act (FOIA) requests to the U.S. Attorneys for prosecution statistics, had already published the following finding in 2007: between 1997 and 2006, federal prosecutors rejected nearly two-thirds of the reservation cases brought to them by FBI and Bureau of Indian Affairs investigators, more than twice the rejection rate for all federally prosecuted crime.<sup>31</sup>

In 2010, the General Accounting Office published a report examining the federal declination rates.<sup>32</sup> That report found that, between fiscal years 2005 and 2009, federal prosecutors "declined to prosecute . . . 67 percent of sexual abuse and related matters [occurring on tribal land]."<sup>33</sup> Now, as part of the 2010 Tribal Law and Order Act, Congress now requires United States Attorneys to publish declination rates in annual reports to Congress.<sup>34</sup> The 2015 report indicates that

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<sup>29</sup> See, e.g., Michael Riley, *Promises, Justice Broken*, DENVER POST (Nov. 11, 2007, 12:48 PM), [http://www.denverpost.com/ci\\_7429560](http://www.denverpost.com/ci_7429560) [<https://perma.cc/BYY4-UJBC>] ("Between 1997 and 2006, federal prosecutors rejected nearly two-thirds of the reservation cases brought to them by FBI and Bureau of Indian Affairs investigators, more than twice the rejection rate for all federally prosecuted crime."); see also Laura Sullivan, *Rape Cases on Indian Lands Go Uninvestigated*, NATIONAL PUBLIC RADIO (July 25, 2007, 4:00 PM), <http://www.npr.org/templates/story/story.php?storyId=12203114> [<https://perma.cc/3FQJ-3CZ3>] ("Justice officials and local U.S. attorneys say they can not provide the number of sexual assault cases they decline from Indian reservations or even the number of cases they take.").

<sup>30</sup> *Declination Reporting: Hearing Before S. Comm. Indian Affairs*, 110th Cong., at 7 (2008) (Statement of Drew H. Wrigley, United States Attorney for the District of North Dakota Department of Justice), [http://indian.senate.gov/public/\\_files/DrewWrigleytestimony.pdf](http://indian.senate.gov/public/_files/DrewWrigleytestimony.pdf) [<https://perma.cc/PAU8-SV7B>].

<sup>31</sup> Riley, *supra* note 29.

<sup>32</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-167R, U.S. DEPARTMENT OF JUSTICE DECLINATIONS OF INDIAN COUNTRY CRIMINAL MATTERS (2010), <http://www.gao.gov/new.items/d11167r.pdf> [<https://perma.cc/B9RW-HE4S>].

<sup>33</sup> *Id.* at 3.

<sup>34</sup> "Section 212 of TLOA requires the Attorney General to submit an annual report to Congress detailing investigative efforts by the Federal Bureau of Investigation (FBI) and dispositions of matters received by USAOs with Indian country responsibility." U.S. DEP'T OF JUSTICE, INDIAN COUNTRY INVESTIGATIONS AND PROSECUTIONS 3 (2015), <https://www.justice.gov/tribal/page/file/904316/download> [hereinafter INDIAN COUNTRY INVESTIGATIONS] [<https://perma.cc/8QKY-5ZGB>].

“the majority of declinations involve physical assaults or sexual assaults, sexual exploitation, or failure to register as a sex offender.”<sup>35</sup>

To be sure, sexual assault is notoriously difficult to prosecute.<sup>36</sup> It is also historically the least likely of violent crimes to result in conviction.<sup>37</sup> U.S. Attorneys have sometimes been quick to point out that many of their Indian country sexual assault declinations are not related to the veracity of the claim of rape or lack of concern about sexual violence, but rather evidentiary issues that interfere with the capacity to put together a provable case.<sup>38</sup> In fact, in the same 2010 report, the General Accounting Office identified the five most common reasons for declination of a federal criminal case in Indian country:<sup>39</sup> weak or insufficient admissible evidence; no federal offense evident (includes jurisdictional issues); witness problems (includes reluctant victims); lack of evidence of criminal intent; and suspect to be prosecuted by other authorities. A 2015 Report by the Urban Institute came to similar conclusions regarding reasons for declination rates.<sup>40</sup> The SART model proposed later in this Article is designed to remedy these very evidentiary problems.<sup>41</sup>

In short, the federal declination rates tell us that the majority of reported sexual assault cases in Indian country are never prosecuted. Because of the limited way data has been collected, there is simply no way to determine how long this problem has existed. But unfortunately, there has been a perception among many Native people that federal officials do not care.

Mistrust of white authorities, and a history of inadequate response, account for low reporting rates in Indian communities.<sup>42</sup> It is difficult to overstate how

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<sup>35</sup> INDIAN COUNTRY INVESTIGATIONS, *supra* note 34, at 41.

<sup>36</sup> See Teresa Scalzo, *Prosecuting Rape Cases: Trial Preparation and Trial Tactic Issues*, in PRACTICAL ASPECTS OF RAPE INVESTIGATION 287, 287 (Robert R. Hazelwood & Ann Wolbert Burgess eds., 2016) (acknowledging that “rape cases are typically the most difficult cases to successfully prosecute”).

<sup>37</sup> Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1024 (1991) (describing rate myths that contribute to conviction rates for rape being as low as 4%). Between 2003 and 2004, only 217 convictions resulted out of 1,184 reports of sexual violence made to law enforcement in Alaska. S. JUDICIARY COMM., MEMORANDUM: REPORT AND RECOMMENDATIONS: REDUCING SEXUAL ASSAULT IN ALASKA 1 (Alaska 2009) (on file with the *Utah Law Review*).

<sup>38</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 32, at 6–7.

<sup>39</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 32, at 10.

<sup>40</sup> WILLIAM ADAMS ET AL., THE URBAN INST., EXAMINING INDIAN COUNTRY CASES IN THE FEDERAL JUSTICE SYSTEM 21 (2015), <https://www.ncjrs.gov/pdffiles1/bjs/grants/248656.pdf> [<https://perma.cc/9LNH-RM6V>] (noting that “the most commonly cited reasons for declining to proceed with federal prosecution concerned insufficient evidence”).

<sup>41</sup> See *infra* Part II.

<sup>42</sup> Stéphanie Wahab & Lenora Olson, *Intimate Partner Violence and Sexual Assault in Native American Communities*, 5 TRAUMA, VIOLENCE, & ABUSE 353, 356 (2004).

ingrained the level of distrust in the system is in some communities.<sup>43</sup> This distrust is often a direct result of reported but unpunished crimes.<sup>44</sup> Decades of indifference have also resulted in very low reporting rates. Of course, it is impossible to prosecute a sexual assault if it is never reported. If a victim does not report a crime because she distrusts the system (regardless of the justification), the legal system has no chance of holding the perpetrator accountable.<sup>45</sup> The system must improve if we expect more victims to come forward.

One instinct to address the problem of low federal prosecution rates would be to turn to tribal criminal justice systems. From a purely technical standpoint, tribal governments retain full criminal jurisdiction over all crimes committed by Indians in Indian country.<sup>46</sup> But responding to sexual assault has been significantly hampered by a variety of limitations, including the Indian Civil Rights Act (ICRA), which capped sentencing authority of tribal courts to 1 year (with exceptions allowing for longer sentencing in limited circumstances).<sup>47</sup> Tribal nations are also currently prohibited from prosecuting non-Indians for any crime, with the exception of some domestic violence cases.<sup>48</sup> As noted earlier, the majority of perpetrators of sexual assault are non-Indian.<sup>49</sup> This leaves many survivors to depend solely on the actions of the federal government to seek justice in criminal court.

Even if a tribal prosecutor can proceed with a sexual assault case against a Native defendant, one of the challenges tribal prosecutors have faced is the lack of

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<sup>43</sup> The Indian Law and Order Commission remarked, “nontribally administered criminal justice programs are less likely to garner Tribal citizen confidence and trust . . . .” INDIAN LAW AND ORDER COMMISSION, A ROADMAP FOR MAKING NATIVE AMERICA SAFER 4 (2013), [http://www.aisc.ucla.edu/iloc/report/files/A\\_Roadmap\\_For\\_Making\\_Native\\_America\\_Safer-Full.pdf](http://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf) [<https://perma.cc/RNZ5-CSYP>].

<sup>44</sup> See, e.g., JENNIFER FAHEY ET AL., CRIME & JUSTICE INST., CRIME AND JUSTICE IN INDIAN COUNTRY: A SUMMARY OF TALKING CIRCLE FINDINGS AND THE TRIBAL LAW AND ORDER ACT OF 2010 17–18 (2011), [http://www.crj.org/page/-/cjifiles/Talking\\_Circles\\_Report\\_Final\\_Jul11.pdf](http://www.crj.org/page/-/cjifiles/Talking_Circles_Report_Final_Jul11.pdf) [<https://perma.cc/SP9S-796S>].

<sup>45</sup> See generally Debra Patterson et al., *Understanding Rape Survivors’ Decisions Not to Seek Help from Formal Social Systems*, 34 HEALTH & SOC. WORK 127, 132 (2009) (explaining how rape survivors may choose not to report based on concerns about the flaws in the system response).

<sup>46</sup> See *Westit v. Stafne*, 44 F.3d. 823, 826 (9th Cir. 1995) (holding that the Major Crimes Act did not divest tribes of criminal jurisdiction over Indians); see also Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1665 (1998) (explaining that tribal nations in Public Law 280 states retain concurrent jurisdiction over crimes committed by Indians).

<sup>47</sup> 25 U.S.C. §§ 1302 (West 2017).

<sup>48</sup> The Supreme Court ruled in 1978 that tribal nations lacked authority over non-Indians. *Olyphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978). As of 2017, there is a pending bill in Congress that would expand the restoration of tribal criminal jurisdiction over non-Indians who commit acts of sexual violence. S. 3523 (114th Congress). Introduced 12.8.2016

<sup>49</sup> ROSAY, *supra* note 8, at 18.

a clear protocol for evidence sharing between the federal and tribal authorities.<sup>50</sup> One tribal judge explained the problem to a reporter in 2011:

The FBI is a black hole . . . The [Bureau of Indian Affairs] police get the evidence and they submit it to the FBI lab and we never see it again. We had a homicide, it was a hit-and-run where the front bumper of the car was in an FBI laboratory and eighteen months had gone by and they still hadn't returned it, nor had they prosecuted. We've had DUIs where the toxicology report has been gone over a year. And it never comes back.<sup>51</sup>

A tribal public defender added, "Most significantly, the rape kits never come back. They will not prosecute, yet they won't send the information down so the tribe can prosecute. We never, ever see the results of a rape kit."<sup>52</sup>

In 2011, the General Accounting Office confirmed these problems, reporting that six of the twelve tribes studied indicated that:

[W]hen criminal matters are declined, federal entities generally do not share evidence and other pertinent information that will allow the tribe to build its case for prosecution in tribal court. This can be especially challenging for prosecuting offenses such as sexual assault where DNA evidence collected cannot be replicated should the tribe conduct its own investigation following notification of a declination, according to officials.<sup>53</sup>

As a result of federal indifference and tribal limitations, it is fair to characterize the federal government as having been a historical culpable bystander—failing to intervene. This dynamic has had profound implications for the lives of Native women and children. Survivors have been left with nowhere to turn. Moreover, in smaller, close-knit communities, the failure to intervene in even a single sexual assault case will have implications for years, if not decades.<sup>54</sup>

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<sup>50</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-252, INDIAN COUNTRY CRIMINAL JUSTICE: DEPARTMENTS OF THE INTERIOR AND JUSTICE SHOULD STRENGTHEN COORDINATION TO SUPPORT TRIBAL COURTS 17 (2011), [http://tloa.ncai.org/document\\_library/2011/04/tribalcourtsgao.pdf](http://tloa.ncai.org/document_library/2011/04/tribalcourtsgao.pdf) [hereinafter INDIAN COUNTRY CRIMINAL JUSTICE] [<https://perma.cc/EWZ2-5WFX>] (noting that some tribes "oftentimes [] did not know whether criminal investigators—most commonly, BIA or FBI—had referred the criminal investigation to the USAO for prosecution").

<sup>51</sup> Kathy Dobie, *Tiny Little Laws: A Plague of Sexual Violence in Indian Country*, HARPER'S MAG., Feb. 2011, at 55, 64.

<sup>52</sup> *Id.*

<sup>53</sup> See INDIAN COUNTRY CRIMINAL JUSTICE, *supra* note 50, at 17.

<sup>54</sup> When sexual assault happens, there are usually ramifications that ripple throughout the community. Family and friends of a victim may struggle with their own responses to their loved one's assault. Fear can also percolate through a community if there have been unsolved sexual assaults. It may impact people's day-to-day lives—how they think about

Fortunately, a change in direction has recently begun as various federal agencies have attempted to remedy this history.<sup>55</sup> But more needs to be done to address the evidentiary and witness challenges that have hampered the federal government's ability to pursue sexual violence cases. The Sexual Assault Response Team (SART) model is one such solution.

## PART II REMEDY: SEXUAL ASSAULT RESPONSE TEAMS

The culpability of the United States can only be adequately remedied by deliberate, long-term policy and protocol changes. Native women living on tribal lands must have at least the same access to sexual assault intervention available to non-Indians.<sup>56</sup> One central way to correct the legacy of indifference is to be sure that survivors of sexual assault on tribal lands can turn to a formalized local Sexual Assault Response Team (SART) in the aftermath of an assault. A SART is a comprehensive, multi-disciplinary response to assault described in more detail below. Given the extraordinarily high rates of violence, it is imperative to ensure that the very best response systems be operating at the local tribal levels. The literature tells us that the SART model, in general, is far superior to other ways of responding to sexual violence. Thus, SART must be deployed throughout Indian country in a sustained and stable way.

Unfortunately, implementing this model in Indian country is more complicated than in any other context. Thus, it is not enough for the federal government to embrace the SART model as an aspirational standard—there is a need for particularized and focused attention dedicated to the effort. This section considers both the benefits of the SART model as well as the challenges to implementation in Indian country.

### A. Overview and History of SART

A Sexual Assault Response Team (hereafter SART) is a multi-disciplinary team of professionals and advocates who respond in a coordinated fashion to sexual assault cases in a particular community.<sup>57</sup> The typical SART includes representatives from victim advocacy, health care, law enforcement, and prosecutors. Some SARTs, depending on local circumstances, include other

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the basic safety in their community. Anger is often an outgrowth of these community concerns. Without intervention, anger can fester in a community and emerge in unhealthy ways.

<sup>55</sup> See discussion of Obama administration achievements, *infra* Part III.

<sup>56</sup> *Law Enforcement in Indian Country: Hearing Before Comm. Indian Affairs United States S.*, 110th Cong., at 17 (2007) (Statement of Bonnie Clairmont, Victim Advocacy Program Specialist, Tribal Law and Policy Institute), <https://www.indian.senate.gov/sites/default/files/upload/files/June212007.pdf> [<https://perma.cc/9S9Q-598N>].

<sup>57</sup> Jennifer Cole, *Structural, Organizational, and Interpersonal Factors Influencing Interprofessional Collaboration on Sexual Assault Response Teams*, 31 J. INTERPERS. VIOLENCE 1, 1–2 (2016).

disciplines, such as crime lab technicians, psychologists, defense attorneys, and spiritual leaders. The cornerstone of an operational SART is a written protocol, which outlines the roles and responsibilities of each agency in responding to a sexual assault. The written protocol is developed through a series of collaborative meetings, in which all parties meet to discuss the best ways to respond to a reported sexual assault in that particular community. After the protocol is complete, SARTs meet on a regular basis to discuss the efficacy of the protocol and make adjustments where necessary. Central to any SART is a trained medical professional—often called a SANE (Sexual Assault Nurse Examiner) or a SAFE (Sexual Assault Forensic Examiner) who actually provides the physical care of the victim and the collection of evidence from the body of the victim by performing a forensic exam. Such evidence can be crucial in prosecution outcomes as will be noted later. The SART model has been nearly universally embraced by local governments as a way to enhance victim well-being, as well as increase the likelihood of prosecution and conviction.

The SART model has its origins in United States anti-rape activism beginning in the late 1960s.<sup>58</sup> The SART model has gradually developed over the past 40 years, spearheaded by a variety of professions and advocates around the globe who have sought to improve the way legal systems respond to sexual assault.<sup>59</sup> The SART model addresses many deficiencies in the historical Anglo-American response to sexual assault. Organizers of the first SARTs were responding to a multitude of concerns related to the investigation of sexual assault.<sup>60</sup> At that time, the mainstream criminal justice response to sexual assault lacked coordination and specialized expertise. When victims reported assault, there was no guarantee that the local community service providers were communicating with one another, and very few interagency protocols existed. There was virtually no expert training on performing sexual assault forensic exams until the late 1970s.

In the pre-SART days, law enforcement and the health care system often operated independently. As a result, rape victims had to navigate through an inconsistent and confusing system. Moreover, such “ad hoc” approach to victims of sexual assault made prosecution difficult because there was no consistent expectation for communication and collection of evidence. Studies that have reviewed the long-term consequences of poorly coordinated rape response show that survivors are more likely to suffer long-term physical and mental health problems.<sup>61</sup> Untrained providers mishandle evidence, fail to address injuries, and

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<sup>58</sup> *Id.*

<sup>59</sup> Myrna S. Raeder, *Litigating Sex Crimes in the United States: Has the Last Decade Made Any Difference?*, 6 INT’L COMMENT ON EVID., issue 2, art. 5, at 37 (2009).

<sup>60</sup> Patricia A. Furci, *The Sexual Assault Nurse Examiner: Should the Scope of the Physician-Patient Privilege Extend that Far?*, 5 QUINNIPIAC HEALTH L. J. 229, 230 (2002).

<sup>61</sup> This dynamic has been referred to as “secondary victimization” or “the second rape.” See, e.g., Rebecca Campbell, *Rape Survivors’ Experiences with the Legal and Medical Systems: Do Rape Victim Advocates Make a Difference?*, 12 VIOLENCE AGAINST WOMEN 30, 30 (2006).

do not provide appropriate referrals to services.<sup>62</sup> Practitioners and advocates often noted that victims might wait hours in the emergency room (because no trained examiner could be located), they might be questioned about the rape by multiple people (often without any advocate), and were often not given enough information about their options to provide truly informed consent.<sup>63</sup> Untrained patrol officers were often unprepared for the task of interviewing traumatized victims. Victims often reported that the confusing experience could be as traumatic as the assault itself. The SART model addresses each of these concerns.

### *B. Benefits of the SART Model*

A SART is designed to lessen the trauma that victims experience in the aftermath of an assault because it stresses continuity of care and minimizes the number of times that a victim has to relive her victimization.<sup>64</sup> The SART model also enhances the capacity of partners to provide coordinated care to victims. As a result, a multitude of national and international medical organizations endorse the SART model as a “best practice” due to the increased capacity to provide adequate healthcare for survivors of sexual assault.<sup>65</sup> The SART model has also been endorsed by a variety of American criminal justice organizations, including law

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<sup>62</sup> In addition, untrained professionals may also run the risk of re-victimizing women who report through conscious or sub-conscious victim-blaming. Bryant-Davis et al., *supra* note 24, at 331 (describing how the societal traumas of ethnic minority woman can exasperate the trauma of sexual assault).

<sup>63</sup> Debra Patterson et al., *Sexual Assault Nurse Examiner (SANE) Program Goals and Patient Care Practices*, 38 J. NURSING SCHOLARSHIP 180, 180 (2006).

<sup>64</sup> Stacey Beth Plichta et al., *The Emergency Department and Victims of Sexual Violence: An Assessment of Preparedness to Help*, 29 J. HEALTH HUM. SERV. ADMIN. 285, 289 (2006).

<sup>65</sup> These organizations include the International Association of Forensic Nurses (The IAFN is the only entity that credentials SANEs in the United States.), the American Medical Association (<https://archive.ahrq.gov/research/victsexual/victsex2.htm>), the Emergency Nurses Association (Emergency Nurses Association Position Statement: Care of Sexual Assault and Rape Victims in the Emergency Department, (2007) <https://www.ena.org/SiteCollectionDocuments/Position%20Statements/Archived/SexualAssaultRapeVictims.pdf>), and the American Congress of Obstetricians and Gynecologists (<http://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Sexual-Assault>).

A 2007 report commissioned by the World Health Organization suggests that forensic exam protocol (also called medico-legal evidence collection) is increasingly being implemented internationally as the preferred standard response to sexual violence. JANICE DU MONT & DEBORAH WHITE, THE USES AND IMPACTS OF MEDICO-LEGAL EVIDENCE IN SEXUAL ASSAULT CASES: A GLOBAL REVIEW (2007). Doctors Without Borders says that “an optimum package of services [for rape victims] should include medical care, psychological support, medical-legal certificates which can be used as evidence in court.” MEDECINS SANS FRONTIERES, *supra* note 23, at 129.

enforcement and prosecutor membership associations.<sup>66</sup> In some states, the model is required by state statutory law.<sup>67</sup> As a matter of federal policy, the United States government has endorsed the SART model through a variety of initiatives, largely through two DOJ agencies: the Office for Victims of Crime and the Office on Violence Against Women. The Department of Justice (DOJ) has released four significant publications in the last seventeen years that provide direct guidance to responding to sexual assault using the SART model. These include a *SANE Operation Guide* (1999),<sup>68</sup> a *SAFE protocol* (2004),<sup>69</sup> *SAFE training guidelines*

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<sup>66</sup> The FBI's Law Enforcement Bulletin published an article endorsing the SART model in 2002. Craig R. Wilson, *Police and the Sexual Assault Examination*, FBI LAW ENFORCEMENT BULLETIN, 2002, at 14–17. The International Association of Chiefs of Police has promoted the use of Sexual Assault Response Teams. See International Association of Chiefs of Police, SEXUAL ASSAULT RESPONSE POLICY AND TRAINING CONTENT GUIDELINES (2011), [http://www.theiacp.org/Portals/0/documents/pdfs/IACP\\_SexualAssaultResponsePolicyandTrainingContentGuidelines.pdf](http://www.theiacp.org/Portals/0/documents/pdfs/IACP_SexualAssaultResponsePolicyandTrainingContentGuidelines.pdf) (noting that “Law enforcement should consider partnering with community organizations and advocates to create a more supportive atmosphere for victims throughout the reporting and investigation process . . . A SART . . . provides immediate, specialized response to victims of recent sexual assault, support during the medical examination, and medical care and follow-up.”). The National District Attorneys Association has developed a series of documents and trainings that emphasize the efficacy of the SART model. See, e.g., JENIFER R. MARKOWITZ, THE ROLE OF THE SEXUAL ASSAULT NURSE EXAMINER IN THE PROSECUTION OF DOMESTIC VIOLENCE CASES (2007), [http://www.ndaa.org/pdf/pub\\_role\\_sexual\\_assault\\_nurse\\_examiner.pdf](http://www.ndaa.org/pdf/pub_role_sexual_assault_nurse_examiner.pdf). (encouraging the use of SART model to respond to sexual violence and domestic violence.)

<sup>67</sup> See, e.g., New Jersey, Title 52, Subtitle I, Chapter 4B; Kentucky, Title XVIII, Chapter 216B; Indiana Title 16, Article 21, Chapter 8; Virginia, Title 9.1, Chapter 1, Article I; Pennsylvania Title 35, Chapter 50.

<sup>68</sup> Linda E. Ledray, SEXUAL ASSAULT NURSE EXAMINER DEVELOPMENT AND OPERATION GUIDE (1999).

<sup>69</sup> U.S. DEP'T OF JUSTICE OFFICE ON VIOLENCE AGAINST WOMEN, A NATIONAL PROTOCOL FOR SEXUAL ASSAULT MEDICAL FORENSIC EXAMINATIONS (2004), <https://www.ncjrs.gov/pdffiles1/nij/206554.pdf>. This 2004 publication was not unanimously well-received due to the lack of information about emergency contraception. Many health care workers and advocates expressed concern because of the failure to include emergency contraception as a necessary medical option. See, e.g., Annie Lewis-O'Connor, Holly Franz & Lucia Zuniga, *Limitations of the National Protocol for Sexual Assault Medical Forensic Examinations*, 31 J. EMERG. NURS. 267–70 (2005) (“The overt omission of clear procedures to address [emergency contraception] clearly does not ‘address the patients concerns’ and does not ‘minimize the trauma they may experience.’ Frankly, to state that ‘the examination and the related responsibilities of health personnel are the focus of this protocol’ is a misnomer because the omission of [emergency contraception] is not congruent with the guidelines of the American Medical Association, the American College of Emergency Physicians, and the American College of Obstetricians and Gynecologists. Even the Vatican supports emergency interception when a woman has been raped. It appears that politics may have taken precedence over the medical and emotional needs of a female victim of sexual assault.”). In 2013, the Department of Justice issued a second edition of the protocol which included emergency

(2006),<sup>70</sup> and a *SART Toolkit: Resources for Sexual Assault Response Teams* (2011).<sup>71</sup>

Moreover, the federal government has provided grants to countless local organizations and jurisdictions to develop local SANE-SART protocols.<sup>72</sup> In addition, DOJ requires that all state, tribal, and territorial governments who receive federal dollars under the Violence Against Women Act certify that they are in compliance with the revised forensic medical examination requirements of the Violence Against Women Act of 2005.<sup>73</sup> The Department of Defense has mandated that sexual assault response protocols be implemented on all military bases.<sup>74</sup> Not surprisingly, tribal leaders have also expressed support for the model. In 2005, activism on the part of many Native women's advocates resulted in the National Congress of American Indians (NCAI), the largest (and oldest) Washington presence for tribal governments, to call for "the adoption and implementation of the national policy and protocols on rape and sexual assault within the Indian Health Service Unit emergency rooms and Contract Health Care facilities/providers."<sup>75</sup>

When a SART is effectively deployed, all partners should know their role and expectations. For example, a law enforcement officer who is called to the scene is already familiar with the emergency room services available to perform a forensic exam; a victim advocate knows the protocol for reaching a prosecutor with any questions; the prosecutors are able to communicate directly with law enforcement about interview protocol, and so on. Victims themselves might even consult the protocol as a way to understand the system and their role. Researchers have concluded that an effective, comprehensive response to sexual assault requires an intricate coordination between the health care system and the law enforcement system, with victim advocacy at the center.

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contraception provisions. U.S. DEP'T OF JUSTICE OFFICE ON VIOLENCE AGAINST WOMEN, A NATIONAL PROTOCOL FOR SEXUAL ASSAULT MEDICAL FORENSIC EXAMINATIONS (2nd ed., 2013), <https://www.ncjrs.gov/pdffiles1/ovw/241903.pdf>.

<sup>70</sup> U.S. DEP'T OF JUSTICE OFFICE ON VIOLENCE AGAINST WOMEN, NATIONAL TRAINING STANDARDS FOR SEXUAL ASSAULT MEDICAL FORENSIC EXAMINERS (2006), <https://www.prearesourcecenter.org/sites/default/files/library/nationaltrainingstandardsforsexualassaultmedicalforensicexaminers.pdf>.

<sup>71</sup> Dept. of Justice interactive website with videos and publications to help develop a SART. OFFICE FOR VICTIMS OF CRIME, SART TOOLKIT: RESOURCES FOR SEXUAL ASSAULT RESPONSE TEAMS (2011), <https://ovc.ncjrs.gov/sartkit/index.html>.

<sup>72</sup> See, e.g., Susan B. Carbon, STATEMENT OF SUSAN B. CARBON, DIRECTOR OF THE OFFICE ON VIOLENCE AGAINST WOMEN (2012), [http://www.ncdsv.org/images/OVW\\_CarbonTestimonyJudCmteOVWOversight\\_2-16-2012.pdf](http://www.ncdsv.org/images/OVW_CarbonTestimonyJudCmteOVWOversight_2-16-2012.pdf).

<sup>73</sup> 42 USCA 3796gg et seq. (2005).

<sup>74</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-579, MILITARY JUSTICE: OVERSIGHT AND BETTER COLLABORATION NEEDED FOR SEXUAL ASSAULT INVESTIGATIONS AND ADJUDICATIONS (2011), <http://www.gao.gov/new.items/d11579.pdf>.

<sup>75</sup> National Congress of American Indians, THE NATIONAL CONGRESS OF AMERICAN INDIANS RESOLUTION # TUL-05-101 NATION 3 (2005).

Improved response to sexual assault can benefit a community in at least two ways. First, individual victims will find that the system is more compassionate, more accommodating, and better equipped to respond to their needs.<sup>76</sup> Whether they choose to participate in criminal justice system or not, victims deserve to be provided with the opportunity to participate in a process which could provide a prosecutor or law enforcement officer with potential evidence needed to ensure accountability for the crime. While a possible benefit of implementing SART is a greater likelihood of conviction, the most important outcome is the likelihood that a compassionate, holistic response to the crime victim will alleviate some of the most severe ramifications of trauma on victims. Early intervention has been identified as a key predictor in alleviating mental health symptoms.<sup>77</sup> Perhaps more important, though, is that the improved response will encourage more victims to come forward and receive medical attention and advocacy services. Finally, if the system increases the likelihood that perpetrators will be apprehended and prosecuted, then the community is safer in the long-run, and rates of victimization decrease.

Second, the SART model provides specific advantages for prosecutors in two critical ways. First, some studies indicate that the SART model enhances victim psychological well-being.<sup>78</sup> Since victim testimony is often the heart of a prosecutor's case, a victim who feels empowered by the system is more likely to stay engaged. The failure to respond in a sensitive manner alienates victims from continuing to participate in the criminal justice system. Victims are less likely to cooperate with the government in the prosecution, and future victims are disinclined to report.<sup>79</sup>

Second, the SART model also has the potential to increase conviction rates. In the past decade, several studies have been conducted to determine whether or not the availability of forensic evidence as collected by a SANE have any impact on prosecution outcomes. Existing data confirms that the model does provide some

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<sup>76</sup> Social scientists have determined that a key factor in resolving mental and emotional challenges after assault is social support. *See generally* Courtney E Ahrens, *Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape*, 38 AM. J. COMMUNITY PSYCHOL. 263–74 (2006); Bryant-Davis et al., *supra* 24, at 330–57. Thus, even short delays in services can have devastating consequences. Patricia Frazier et al., *Correlates of Levels and Patterns of Positive Life Changes Following Sexual Assault*, 72 J. CONSULT. CLIN. PSYCHOL. 19 (2004).

<sup>77</sup> Chivers-Wilson, *supra* note 24.

<sup>78</sup> Rebecca Campbell, Debra Patterson & Lauren F Lichy, *The Effectiveness of Sexual Assault Nurse Examiner (SANE) Programs: A Review of Psychological, Medical, Legal, and Community Outcomes*, 6 TRAUMA. VIOLENCE ABUSE 313, 319 (2005) (noting that “[R]esearch suggests that, at the very least, rape survivors perceive SANEs as helpful and supportive.”).

<sup>79</sup> Debra Patterson, Megan Greeson & Rebecca Campbell, *Understanding Rape Survivors' Decisions Not to Seek Help from Formal Social Systems*, HEALTH SOC. WORK 127–37 (2009) (“Survivors perceived formal social systems personnel as hurtful, often based on their own prior experiences with the systems or based on the experiences of people within their social network.”).

unique advantages and can add to the strength of a criminal case.<sup>80</sup> One key reason that convictions become more likely is because there is more likelihood of having physical evidence of the crime due to the emphasis on forensic exams.

A central component of the SART is a forensic medical exam conducted by a trained medical professional—usually a Sexual Assault Nurse Examiner (SANE). A forensic exam in the context of sexual assault is sometimes referred to as a “rape kit.”<sup>81</sup> A more accurate phrase would be “sexual assault evidence collection kit.” A SANE can identify and collect evidence which may contribute to proving the elements of sexual assault.<sup>82</sup> Health care professionals who understand how to document injuries and collect physical evidence are more likely to do so in a way that enhances the likelihood of apprehension and prosecution.<sup>83</sup>

A cautionary note that must underline all of this information: sexual violence *can* be successfully prosecuted without a forensic exam and without victim engagement with a SART. This is commonly seen in the context of “delayed reporting”—where a victim reports the crime to law enforcement days, weeks, months, and even years after the fact. In delayed reporting cases, a forensic exam rarely leads to useful evidence. Nonetheless, a successful case can be built using victim and witness testimony. Still, there is a constant concern in prosecutor circles about the so-called “CSI-effect”—that juries expect all legitimate crime reports should be followed by a detailed summary of the physical evidence, and that any minor misstep in the science or slight gaps in the investigation automatically results in acquittal.<sup>84</sup> Thus, an overemphasis on the importance of the forensic exam is risky because it tends to reinforce this expectation, and presents the possibility that young or inexperienced prosecutors will balk at pursuing a case that does not have the detailed forensic evidence. Therefore, prosecutors should be

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<sup>80</sup> See, e.g., MARGARET C. HARRELL ET AL., A COMPENDIUM OF SEXUAL ASSAULT RESEARCH (2009). *But see* Sameena Mulla, *In Mother’s Lap: Forging Care and Kinship in Documentary Protocols of Sexual Assault Intervention*, 20 LAW, CULT. HUMANIT. 1–21 (2010) (suggesting that “documentary requirements of forensic examination reflect or erase the lived realities of sexual assault victims and their families while reproducing rape myths in the daily functions of the institutions themselves”).

<sup>81</sup> Sometimes referred to as a biological forensic examination kit (Bio Kit), Physical Evidence Recovery Kit (PERK) or SAEK (Sexual Assault Evidence Kit).

<sup>82</sup> Local studies have found that SANEs provide higher quality evidence with fewer mistakes. See, e.g., THE EFFICACY OF ILLINOIS’ SEXUAL ASSAULT NURSE EXAMINER (SANE) PILOT PROGRAM (2003), [http://www.icjia.state.il.us/public/pdf/Research \[hereinafter ILLINOIS’ SEXUAL ASSAULT\]](http://www.icjia.state.il.us/public/pdf/Research%20-%20SANE%20Pilot%20Program.pdf).

<sup>83</sup> The National Protocol for Sexual Assault Forensic Examinations encourages the use of peer review to improve services. U.S. DEP’T OF JUSTICE OFFICE ON VIOLENCE AGAINST WOMEN, A NATIONAL PROTOCOL FOR SEXUAL ASSAULT MEDICAL FORENSIC EXAMINATIONS 26 (2nd ed. 2013), <https://www.ncjrs.gov/pdffiles1/ovw/241903.pdf>.

<sup>84</sup> See generally Hon. Donald E. Shelton, Young S. Kim & Gregg Barak, *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the “CSI Effect” Exist?*, 9 VANDERBILT J. ENTERTAIN. TECHNOL. LAW 331–68 (2006).

trained and prepared to prosecute crimes without physical evidence.<sup>85</sup> Other forms of evidence, including corroborating witness testimony and testimony from prior victims are often adequate to prove a case beyond a reasonable doubt.<sup>86</sup>

But to be sure, medical evidence can provide important indications of identity, force, and even consent. This evidence has proven to be very powerful ammunition for prosecutors in building a case.<sup>87</sup>

The thoroughness of the evidence collection procedures by the SANE program can help identify suspects, create stronger cases, and directly supports increased prosecution. Essentially, a SANE-conducted medical forensic exam was a new resource to police and prosecutors because the quality and quantity of information now available was unlike anything they had before.<sup>88</sup>

Implementing a SART leads immediately to modest improvements, which, according to most analysis, increase substantially over time.<sup>89</sup> Conclusions in most reports advocate for a wider implementation of the model.<sup>90</sup> The successful implementation of SANE/SART at the reservation/village level has the potential advantages of crime control and general wellness of the community.<sup>91</sup>

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<sup>85</sup> Jennifer Gentile Long, Viktoria Kristiansson & Charlene Whitman-barr, *Establishing Penetration in Sexual Assault Cases Know Your Law: The Legal Definition of Penetration*, STRATEGIES IN BRIEF (Æquitas, Washington, DC), Jan. 2015, at 1–8, <http://www.aequitasresource.org/Establishing-Penetration-in-Sexual-Assault-Cases-SIB-24.pdf> (“A sexual assault charge can be proven beyond a reasonable doubt solely with credible victim testimony; no corroboration is required in order to establish the elements.”).

<sup>86</sup> For a full exploration of requirements of corroboration in sexual assault cases, see Vitauts M. Gulbis, *Modern Status of Rule Regarding Necessity for Corroboration of Victim’s Testimony in Prosecution for Sexual Offense*, 31 AM. LAW REPORTS 120 (2011). See also Allan R. DeJong & Mimi Rose, *Legal Proof of Child Sexual Abuse in the Absence of Physical Evidence*, 88 PEDIATRICS 506 (1991).

<sup>87</sup> Rebecca Campbell, Debra Patterson & Giannina Fehler-Cabral, *Using Ecological Theory to Evaluate the Effectiveness of an Indigenous Community Intervention: A Study of Sexual Assault Nurse Examiner (SANE) Programs*, 46 AM. J. COMMUNITY PSYCHOL. 263 (2010) [hereinafter Campbell et al.,].

<sup>88</sup> *Id.*

<sup>89</sup> Philip Bulman, *Increasing Sexual Assault Prosecution Rates*, NIJ J. 14–17 (2009).

<sup>90</sup> See, e.g., ILLINOIS’ SEXUAL ASSAULT, *supra* note 82; NATIONAL SEXUAL VIOLENCE RESOURCE CENTER, FIRST NATIONAL SANE COORDINATOR SYMPOSIUM: FINAL REPORT AND RECOMMENDATIONS (2009), <http://www.nsvrc.org/sites/default/files/sane-symposium-report.pdf>.

<sup>91</sup> Such outcomes are not inevitable, however. See, e.g., GARY BLACKMER, SEXUAL ASSAULT RESPONSE AND INVESTIGATION: PORTLAND EFFORTS FALL SHORT OF A VICTIM-CENTERED APPROACH (2007), <https://www.portlandonline.com/shared/cfm/image.cfm?id=158873> (finding that the Portland sexual assault response did not meet established standards in 2007 despite the existence of a SART since 2002).

### C. *Establishing a SART*

The process for establishing a SART in a local community depends on the unique aspects of that locale. Each local SART develops its own interagency protocol based on the unique circumstances and resources in the local community. In an ideal situation, a SART meets periodically to develop and refine protocol, which will determine how a sexual assault victim is to be treated from the point of disclosure. The goal is to prevent gaps in services and communication, and ensuring that victims encounter a coordinated system. The challenge is to bring together and coordinate a group of individuals who represent agencies with different focuses. However, in the context of tribal communities, there is a rich heritage of providing coordinated services: “The traditional Indigenous response when someone in the village experienced a tragedy is a response of people or relatives encircling that person or family with support, resources, caring and compassion.”<sup>92</sup> An effective, coordinated response to sexual assault, then, can also be part of a larger effort to revitalize the traditional tribal response to crime. An ideal response to sexual assault in Indian country would include unique tribal-centric SARTs, which reflect the needs of survivors in particular communities.<sup>93</sup>

Such a cohesive system requires a coordinated approach ensuring law enforcement and medical health professionals are using the same set of expectations. Because protocol specifies the role of each agency and outlines how they will communicate, participants implement a step-by-step protocol when sexual assault is reported. In addition to the protocol, part of the development of a SART includes cross-training. In some communities, the advocates train the prosecutors; the prosecutors train the law enforcement officers, and so on. The goal is to ensure that each agency understands the roles and duties of the other agencies. Transparency and careful definition of roles is important.

### D. *Barriers to Successful SART Implementation in Tribal Communities*

The SART model has become a clear directive for all American communities—with one glaring exception: *There is no clear, coordinated federal interagency mandate for SART in Indian country.* As noted earlier, authority over crimes in Indian country is greatly fractionated because of over a century of misguided legislation and imprudent legal decisions. The conflicting laws and policies that govern law enforcement are numerous and complex. Even tribes within a single state are subject to differing regulations in some cases. Therefore, the implementation of SARTs in tribal communities is fraught with complexities

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<sup>92</sup> Donald Wayne Clark, *Domestic violence screening, policies, and procedures in Indian health service facilities*, 14 J. AM. BOARD FAM. PRACT. 252 (2001).

<sup>93</sup> Jennifer B. Unger, Claradina Soto & Natalie Thomas, *Translation of Health Programs for American Indians in the United States*, 31 EVAL. HEALTH PROF. 124 (2008) (“Health promotion interventions for AI/ANs should be delivered in ways that are consistent with the norms and values of AI/AN cultures.”).

not anticipated by the mainstream model. As a result, there is a dearth of fully-functioning SARTs operational in Indian communities. This Article argues that the United States, in fulfilling its treaty obligations and trust obligations to tribal people, should establish a national (federal) inter-agency task force to support the implementation of a tribal-centered SART for every Indian reservation under federal jurisdiction.

A study of SARTs in Indian Country showed that, as of 2011, only 30.7 percent of Native American lands were within a one-hour driving distance to a program with a trained nurse examiner and/or a SART.<sup>94</sup> The same study concluded that 381 tribal lands had no examiner/SART at all—more than two thirds of tribal lands.<sup>95</sup> Earlier, in 2004, a grassroots organization called the Native American Women’s Health Education Resource Center found that 30 percent of Indian Health Service facilities did not have a protocol on sexual assault, and that 44 percent facilities did not have anyone trained to perform forensic exams.<sup>96</sup> One major barrier to implementing SART in Indian country is cost.

[F]unding for services critical to Native Americans—including health care, law enforcement, and education—is disproportionately lower than funding for services to other populations. . . Under-funding violates the basic tenets of the trust relationship between the government and Native peoples and perpetuates a civil rights crisis in Indian Country. . . . In every area reviewed—health, housing, law enforcement, education, food distribution—funding and services are inadequate, as they have been historically.<sup>97</sup>

This is a long-standing and seldom addressed issue. IHS is tragically underfunded.<sup>98</sup> There are not enough law enforcement services, not enough victim services. SARTs may save money in the long-run, but sometimes are financially difficult to initiate. The federal government must endeavor to ensure that tribal communities have the financial resources necessary to establish SARTs in each community.

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<sup>94</sup> Ashley Juraska et al., *Sexual Assault Services Coverage on Native American Land*, 10 J. FORENSIC NURS. 92 (2014), <http://www.ncbi.nlm.nih.gov/pubmed/24847872>. More SANE/SART programs have been established since the data was collected in 2011.

<sup>95</sup> *Id.*

<sup>96</sup> JULIE ANDREWS, BRYONY HEISE & CHARON ASETOYER, *INDIGENOUS WOMENS REPRODUCTIVE JUSTICE: A SURVEY OF SEXUAL ASSAULT POLICIES AND PROTOCOLS WITHIN INDIAN HEALTH SERVICE EMERGENCY ROOMS* (2004).

<sup>97</sup> U.S. COMMISSION ON CIVIL RIGHTS, *QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY* 61 (2003).

<sup>98</sup> *See generally* DAVID H. DEJONG, *PLAGUES, POLITICS, AND POLICY: A CHRONICLE OF THE INDIAN HEALTH SERVICE, 1955–2008* (2011) (noting that “[i]n 2003, critics of the Indian Health Service charged that the agency was funded at just 52 percent of the appropriate level of need, with an unmet healthcare need of over \$3 billion”).

Assuming that funding is available for sexual assault response, the next focus should be on cross-agency collaboration. An effective SART at the local level in Indian country requires close collaboration between federal, tribal, and sometimes state entities. But the unique services needed to implement a fully-functioning SART model in Indian country are often provided by completely independent federal agencies, each headed by a presidentially-appointed Secretary who issues policy from Washington, D.C. At least three federal agencies are implicated when conceiving of a SART in tribal communities—the Department of Interior (which houses the Bureau of Indian Affairs), the Department of Justice (which houses the Federal Bureau of Investigation and the U.S. Attorneys), and the Department of Health and Human Services (which houses the Indian Health Service). No other population of Americans needs these particular agencies to formally collaborate on sexual assault protocol other than Native women. These federal agencies are responsible for enforcing law and policy as provided in statutory law, so a failure to communicate at the headquarters level (that is, Washington, D.C.) translates to a failure to communicate at the local level. Because of the unique synergy that must develop in order to ensure that Native women have access to the standard of care for sexual assault response, this section explains how the proposed federal task force can help to ensure that all federal agencies are working in harmony to develop localized responses to sexual assault.

The necessity of federal partner engagement cannot be overstated. In a district where the F.B.I. is the primary sexual assault investigator, a tribal SART cannot succeed without the FBI at the table. The same principle applies for all federal agencies. Cross-department communication is critical. For example, effective investigation of sexual assault involves the collection, preservation, and transfer of sensitive physical evidence. If there is no clear protocol between the FBI and BIA regarding such evidence, the likelihood that important evidence is lost or mishandled increases. Failure to communicate effectively across agencies is often problematic for tribal nations.<sup>99</sup> A national task force could determine how to resolve such problems.

The proposed centralized task force, discussed more directly in Part IV, must include federal officials who have specialized knowledge and experience about Native women and sexual assault in order to reduce the historically high rates of sexual assault against Native women.

### PART III: SUCCESSES OF THE OBAMA ADMINISTRATION

The federal government's efforts to address sexual violence in Indian country in recent years have been laudable, but disjointed. Great strides were made in the Obama administration, which has operated with a renewed understanding of the

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<sup>99</sup> In 2011, for example, the General Accounting Office (GAO) documented the lack of communication between Bureau of Indian Affairs and Department of Justice regarding important aspects of tribal court development. INDIAN COUNTRY CRIMINAL JUSTICE, *supra* note 50.

vital importance of communication between federal officials and tribal leaders. To that end, several prominent legislative reforms and policy changes have made it more likely that the SART model can be implemented throughout Indian country. Below, I highlight just a few of the many policy and legislative changes that improve the likelihood of establishing a long-term cross-disciplinary approach to sexual assault in Indian country.

#### A. *Tribal Law and Order Act (2010)*

Passed by Congress with the support of the White House, the Tribal Law and Order Act of 2010 (“TLOA”) was widely lauded as a step forward in addressing crime in Indian country. On the whole, the TLOA legislation signaled a fresh reminder to federal agencies that crime control in Indian country should be a sustained priority for the nation.<sup>100</sup> Importantly, the legislation also includes specific provisions that make the likelihood of a SART model being implemented. For example, prior to the passage of the TLOA, there was no statutory mandate for United States Attorneys to communicate regularly with tribal leaders regarding criminal data. Now the Department of Justice must regularly report on its efforts to intervene in crime on Indian reservations. New provisions are also designed to ensure that tribal governments are better equipped to respond to violent crimes on their own terms, using their own laws and court systems. For example, the sentencing cap imposed on tribal courts through the Indian Civil Rights Act has been raised from one (1) to three (3) years.

The TLOA also created the Indian Law and Order Commission, which released its report, *A Roadmap for Making Native America Safer*, in November 2013.<sup>101</sup> The *Roadmap* report contains several key recommendations that are relevant to the SART or multi-disciplinary model.<sup>102</sup>

#### B. *Violence Against Women Act Reauthorization (2013)*

The Violence Against Women Act was originally passed in 1994 and is updated every five or six years. The major change that came as part of Violence Against Women Act (“VAWA”) in 2013, was the restoration of tribal sovereignty over non-Indian domestic abusers. However, the partial Oliphant-fix does not extend to sexual violence unless committed by a domestic partner. Nonetheless, VAWA signaled another strong effort to improve the lives of Native women. The monies distributed as a result of the funding from VAWA continue to be vital for

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<sup>100</sup> Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258, 2280 (2010).

<sup>101</sup> INDIAN LAW AND ORDER COMMISSION, *A ROADMAP FOR MAKING NATIVE AMERICA SAFER* (2013), [http://www.aisc.ucla.edu/iloc/report/files/A\\_Roadmap\\_For\\_Making\\_Native\\_America\\_Safer-Full.pdf](http://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf).

<sup>102</sup> *Id.* at xix: “Stronger coordination among Federal, State, and Tribal law enforcement can make Native nations safer and close the public safety gap with similarly situated communities.”

tribal governments who are attempting to improve the response to sexual violence. Most of the grassroots anti-violence organizations on tribal lands are funded by VAWA.

*C. Improvements at the Indian Health Services (2011, 2015)*

Indian Health Services (“IHS”) is the primary health care provider for most Indian reservations. As of 1999, IHS agency facilities were provided screening for domestic violence,<sup>103</sup> but there was no similar mandate for training health care providers in evidence collection or participating in a SART until the TLOA was passed, which required IHS to develop policies and protocols. The IHS sexual assault guidelines were issued on March 2011.<sup>104</sup> A revised policy was issued in 2013.<sup>105</sup> Supportive initiatives have also been developed by IHS, including online “virtual training” for forensic health care providers.<sup>106</sup> Thanks to the work of grassroots activism, the IHS now also has policies on providing emergency contraception to Native women and girls upon request, even if they choose not to report a crime.<sup>107</sup>

*D. Funding SART Projects and Training Programs*

The Department of Justice has demonstrated a commitment to the development of tribal-centric SARTs through funding programs and initiatives that increase the likelihood of collaboration among agencies. Several non-profit organizations have received funding to develop SART-specific products and initiatives. For example, in 2008, the Tribal Law and Policy Institute developed a guidebook for developing SARTs in tribal communities which is available for free download.<sup>108</sup> Companion guidebooks help tribal governments navigate the requirements for exercising jurisdiction under TLOA and VAWA.<sup>109</sup> Some organizations have also developed a tribal-centric sexual assault advocacy training

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<sup>103</sup> Clark, *supra* note 92.

<sup>104</sup> INDIAN HEALTH SERVICE, *Sexual Assault*, in INDIAN HEALTH MANUAL (2011), [https://www.ihs.gov/IHM/index.cfm?module=dsp\\_ihm\\_pc\\_p3c29](https://www.ihs.gov/IHM/index.cfm?module=dsp_ihm_pc_p3c29).

<sup>105</sup> DEPARTMENT OF HEALTH AND HUMAN SERVICES, *Sexual Assault*, [https://www.ihs.gov/newsroom/includes/themes/newihstheme/display\\_objects/documents/2013\\_Letters/03-22-2013\\_LetterIHS\\_SAPolicy.pdf](https://www.ihs.gov/newsroom/includes/themes/newihstheme/display_objects/documents/2013_Letters/03-22-2013_LetterIHS_SAPolicy.pdf).

<sup>106</sup> TRIBAL FORENSIC HEALTHCARE, <http://www.tribalforensichealthcare.org/>.

<sup>107</sup> INDIAN HEALTH SERVICE, *Emergency Contraception*, in INDIAN HEALTH MANUAL (2011), [https://www.ihs.gov/ihm/index.cfm?module=dsp\\_ihm\\_pc\\_p1c15](https://www.ihs.gov/ihm/index.cfm?module=dsp_ihm_pc_p1c15).

<sup>108</sup> Bonnie Clairmont, SEXUAL ASSAULT RESPONSE TEAMS RESOURCE GUIDE FOR THE DEVELOPMENT OF A SEXUAL ASSAULT RESPONSE TEAM ( SART ) IN TRIBAL COMMUNITIES LAW & POLICY (2008), <http://www.tlpi.org>.

<sup>109</sup> Companion guidebooks are located at <http://www.tribal-institute.org/lists/assault.htm>.

program to provide Native women with the knowledge and skills necessary to be effective advocates.<sup>110</sup>

The Southwest Center for Law and Policy, a non-profit organization funded by the Department of Justice recently developed a completely new approach to forensic exams through a project known as SAFESTAR, which is described as a “unique model of care” for Native sexual assault victims.<sup>111</sup> The SAFESTAR program is designed to empower Native women to help other women after sexual assault, by providing “compassionate and holistic” assistance.<sup>112</sup> Trained SAFESTARs know how to render emergency first aid, provide referrals for follow-up care, and even securely collect forensic evidence.<sup>113</sup> The SAFESTAR program has made forensic exams more accessible in the communities where it has been implemented.<sup>114</sup> When Indian Health Resources are spread too thin, and access to a SART program is unavailable, the SAFESTAR program may be the only option for some survivors. Most important, SAFESTAR initiatives are originated and implemented by local community women themselves, some using traditional practices (such as prayers, songs, and ceremonies) to provide the compassionate care.

#### *E. Department of Justice Improvements*

The Office for Victims of Crime launched the American Indian/Alaska Native SANE/SART Initiative in 2010.<sup>115</sup> The Initiative has included several components, including funding, training, dedicated federal personnel, and federal advisory group on the responding to sexual assault in Indian country which issued recommendations to the Attorney General in 2012.<sup>116</sup>

Federal and tribal prosecutors have more opportunities for training in prosecuting sexual assault cases. The Department of Justice now offers free in-person training on prosecuting sexual assault for tribal prosecutors and their

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<sup>110</sup> The Minnesota Indian Women’s Sexual Assault Coalition as a Native-centric 40-hour training program for sexual assault advocates, available at <http://www.nativewomenssociety.org/?p=601>. Another Native organization, Red Wind Consulting, offers Native SART trainings and can be found at <http://www.redwind.net/programs/page24/>.

<sup>111</sup> SAFESTAR, *Sexual Assault Forensic Examinations, Support, Training, Access and Resources*, <http://www.safestar.net/>.

<sup>112</sup> *Id.*

<sup>113</sup> Joshua Armstrong, *Women touched by sexual assault learn to help assaulted women in their tribe*, CRONKITE NEWS, December 15, 2011, <http://cronkitenewsonline.com/2011/12/former-sexual-assault-victims-learn-to-help-assaulted-women-in-their-tribe/>.

<sup>114</sup> Melodie Edwards, *Native Americans Turn to “Safe Stars” for Help with Sexual Assaults*, NPR, October 13, 2015, <http://www.npr.org/2015/10/13/446058978/native-americans-turn-to-safe-stars-for-help-with-sexual-assaults>.

<sup>115</sup> OFFICE FOR VICTIMS OF CRIME, AMERICAN INDIAN/ALASKA NATIVE SANE-SART PROGRAM INITIATIVE, <https://www.ovc.gov/AIANSane-Sart/>.

<sup>116</sup> Disclosure: The author of this Article was the chair of the federal advisory committee.

partners, which is offered several times a year at the National Advocacy in South Carolina.<sup>117</sup>

And we know that collaboration can be effective. There are several federal Districts that have received recognition for the development of effective inter-agency cooperation in response to Indian Country crime. One success story was described by an Assistant United States Attorney for the District of Montana in an essay published in the *Montana Law Review*.<sup>118</sup> She explained how the District had developed an Indian Country Law Enforcement Initiative Operational Plan, which requires collaboration during investigations, communication with tribal prosecutors, and federal agent cooperation with tribal courts.<sup>119</sup> The District of Montana has also participated in the establishment of SARTs in the six Montana reservations, along with state and local officials.<sup>120</sup>

The successes in the District of Montana clearly were, in part, directed by the main Department of Justice. In January 2010, the Department embraced the SART model and encouraged United States Attorneys to participate in a SART. In his memo, the Deputy Attorney General wrote:

Many sexual assault cases arising in Indian Country require a team investigative effort involving FBI, tribal police, and BIA. Successful multijurisdictional investigations and prosecutions also require a collaborative working relationship. Tribal Liaisons and Assistant U.S. Attorneys assigned to cases of child sexual abuse on the reservations currently use the multidisciplinary model . . . with great success. USAOs are encouraged to consider also using this team approach in cases where adult women are the victims of sexual assault. EOUSA will provide further guidance on this issue in coming weeks.<sup>121</sup>

In June, 2016, Attorney General Loretta Lynch went even further by issuing a directive mandating that all U.S. Attorneys within Indian country develop written responses and protocols for written guidelines in collaboration with the BIA, FBI, and IHS.<sup>122</sup> In January 2017, the Obama Administration reported that all U.S. Attorneys have submitted guidelines to the Executive Office of United States

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<sup>117</sup> UNITED STATES DEPARTMENT OF JUSTICE, OFFICES OF THE UNITED STATES ATTORNEYS, <https://www.justice.gov/usao/training>.

<sup>118</sup> Danna R. Jackson, *Cooperative (and Uncooperative) Federalism at Tribal, State, and Local Levels: A Case for Cooperative Charging Decisions in Indian Country*, 76 MONT. L. REV. 127 (2015).

<sup>119</sup> *Id.* at 140–41.

<sup>120</sup> *Id.* at 142.

<sup>121</sup> DAVID W. OGDEN, DEPUTY ATTORNEY GENERAL, MEMORANDUM FOR UNITED STATES ATTORNEYS WITH DISTRICTS CONTAINING INDIAN COUNTRY (Jan. 11, 2010) <https://www.justice.gov/dag/memorandum-united-states-attorneys-districts-containing-indian-country>.

<sup>122</sup> OFFICE OF THE ATTORNEY GENERAL, MEMORANDUM FOR ALL UNITED STATES ATTORNEYS (June 27, 2016), <https://www.justice.gov/tribal/page/file/922801/download>.

Attorneys.<sup>123</sup> This may be the closest that the federal government has come to developing a comprehensive SART policy for Indian country. There is still more to do, however. The DOJ does not have the authority to issue directives to employees of the Interior or the Indian Health Service. The Department of Justice, on its own, cannot modify the policies and procedures of Indian Health Service, for example. Thus, an interagency approach is needed.

#### PART IV: MOVING FORWARD

The widespread adoption of the SART model throughout Indian country is a primary way that the United States can ensure that the legacy of indifference to sexual violence will be truly remedied. To build on the momentum begun in the Obama administration, Congress and/or the White House should establish a formal Inter-Agency Indian Country Sexual Assault Task Force (Task Force) to oversee the federal response to sexual assaults on reservations where the federal government has the responsibility to prosecute sexual assault. Implementing SART programs throughout Indian country will require agency involvement from the top leadership positions in all federal agencies. This section offers a specific proposal for the specialized Task Force and also some recommendations for assessing success of such programs.

##### *A. Inter-Agency Indian Country Sexual Assault Task Force*

The Task Force should, at a minimum, include federal officials from the following agencies: Department of Justice, Department of Interior, and Indian Health Service. This Task Force must be developed in such a way that it will pierce the individual bureaucracy of each agency and create a seamless, focused team that meets regularly to consult tribal leaders, and propose guidance for federal agencies. It is important that Task Force formulate directives to federal partners only. Tribal nations retain separate sovereignty to dictate to their own tribal officials.

In developing national strategy that is designed to make an impact on the local level, it is critical to establish concrete, foundational goals. I propose three goals which I believe are in the best interest of Native victims of sexual violence and tribal governments and consistent with all 4 federal agencies' missions as well as the intentions of Congress.

1. Ensure the safety and well-being of individual victims of sexual assault.
2. Ensure the safety and well-being of tribal communities.
3. Hold perpetrators accountable for their behavior.

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<sup>123</sup> EXECUTIVE OFFICE OF THE PRESIDENT, A RENEWED ERA OF FEDERAL-TRIBAL RELATIONS (Jan. 2, 2017), [https://www.whitehouse.gov/sites/default/files/docs/whncaa\\_report.pdf](https://www.whitehouse.gov/sites/default/files/docs/whncaa_report.pdf).

Note that this is not a recommendation for a uniform, nationwide one-size-fits-all policy. Rather, this is a recommendation for sustained coordinated inter-agency effort to provide leadership from the top down. The first duty of the team will be to assess the existing responses to sexual assault—basically an inventory of resources and programs already in existence. The Task Force should also gather more detailed information about federal declinations to identify specific problems with evidence.<sup>124</sup> Once the reasons for declination are more carefully documented, the Task Force can recommend policy changes or training topics for law enforcement, prosecutors, or victim-witness specialists. The Task Force should also be directed to develop template interagency protocols for SART participation that can be customized by local communities.

The Task Force could begin its work by holding a series of focus group meetings throughout Indian country. It is critical that survivors and victim advocates from tribal communities have early and regular input as the federal protocol is developed. Based on the information gathered at these focus groups, the Task Force should identify key priorities in improving inter-agency collaboration and cooperation. Memorandums of Understanding might be one key way in which the three federal bureaucracies can improve the likelihood that local efforts to response to rape will be coordinated.

I offer the proposal of creating yet a new layer of federal bureaucracy with some trepidation. There is a valid and cogent critique that it is paternalistic to continue to engage the federal government as the ultimate solution to Indian country problems.<sup>125</sup> The problem, of course, is that federal oversight is laden with colonial intentions and history. I admit that it is unusual for an advocate for tribal self-sufficiency and self-reliance to encourage the development of a new layer of bureaucracy within the federal government. However, the crisis of sexual violence requires immediate action. Ideally, tribal nations could take over all aspects of running a comprehensive criminal justice system without federal oversight. Until that day comes, however, the lives of Native women and children are under constant threat. While tribal nations will continue to press for the recognition of full tribal sovereignty and independence, we must remember that such change takes time, and more Native women and children are experiencing sexual assault every day. The emergency nature of predation on some reservations has the very nature of tribal sovereignty on the cusp of implosion. People must feel safe in their communities, or they will not be able to support tribal efforts to sustain themselves. When Native women have come to expect that rape is an integral part of their existence as Native women, the sexual predators have already won. America's role as bystander is laid bare.

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<sup>124</sup> Michael Edmund O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME LAW REV. 221, 225 (2003) ("If the government wants to re-focus its prosecutorial efforts, it is vital to understand the nature of cases that have been prosecuted in the past, and whether criminal matters that have been declined fall into any discernable patterns.").

<sup>125</sup> Kevin K. Washburn, *What the Future Holds: The Changing Landscape of Federal Indian Policy*, HARVARD LAW REV. ONLINE (forthcoming 2017).

A word must also be said about the Anglo-American criminal justice paradigm, which is not a panacea for addressing the problems facing Native women; indeed, the traditional Anglo-American system has often been used as a tool of oppression. Some may read my proposal to suggest that the best way for a Native survivor to find justice is in the federal criminal justice system. Each survivor is different, and the ultimate goal is to ensure that survivors have the resources and tools necessary to address her unique needs. While outside the direct scope of this Article, I believe that tribal nations are in the best position to develop a legal system that best meets the needs of the community.<sup>126</sup> Native women do not need to be “rescued” by the white system, but they do deserve the same options as those available to mainstream American communities.

The ultimate aspiration of any entity addressing sexual assault should be to eliminate its own necessity. While it may not be currently feasible for most tribal governments to assume complete control over sexual assault due to jurisdictional and resource limitations, the federal government needs to make plans to eventually shift the responsibility from the federal or state governments to tribal governments. Transitioning to local control and accountability is crucial.

### *B. Assessing Success*

Responding to sexual assault in Indian country is a challenge, but there are tools that will be helpful in improving system. However, we cannot expect the reporting and prosecution numbers to change overnight. A numerical goal, such as a certain percentage increase in convictions, is probably unrealistic (at least initially).<sup>127</sup> It may take many years for tribal communities and individuals to begin to rebuild the trust that eroded during decades of indifference. It would be a mistake, for example, to declare “the prosecution rate of sexual assaults in Indian country will increase by 25% in the next five years.” Establishing a high benchmark focused on prosecution or conviction may result in a sense of failure if it is not achieved. Failure to achieve such outcomes might also be the justification for abandoning the effort. If our goal is not to achieve any certain numerical benchmark, then we must provide an alternative way to measure success. “It is important to identify not only whether an intervention is effective, but also how

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<sup>126</sup> *Id.* at \*13 (explaining that tribal governments are more effective than the federal government “because tribal officials have a significant comparative advantage over federal officials in meeting the needs of Indian country: they are more accountable to tribal constituents, more knowledgeable about tribal problems and culture, and, significantly, can often provide federal services more economically and more efficiently than the federal government”).

<sup>127</sup> *But see* JO LOVETT & LIZ KELLY, DIFFERENT SYSTEMS, SIMILAR OUTCOMES? TRACKING ATTRITION IN REPORTED RAPE CASES ACROSS EUROPE (2009), [http://www.cwasu.org/filedown.asp?file=different\\_systems\\_03\\_web\(2\).pdf](http://www.cwasu.org/filedown.asp?file=different_systems_03_web(2).pdf) (demonstrating that quantitative data regarding attrition can be gathered and analyzed in relatively short order).

and why it is successful.”<sup>128</sup> Qualitative analysis will be useful and can be undertaken at the federal or local level.

In order to assess the response at the local level without simply looking at numerical data, several communities have developed an “audit” method of evaluation that serves to identify weaknesses and gaps in the system as they pertain to victims of crime.<sup>129</sup> One of the benefits of such an audit is that it identifies systemic weaknesses without necessarily pointing to a single individual person or agency for blame. Moreover, this approach allows researchers to collect and document insightful qualitative data regarding victim experience. This will center victim experiences in both administration and analysis, which is more meaningful to community members and probably closer to an indigenous model of research. Whereas numbers of reports and prosecutions may be slow to change, the qualitative data provides quicker feedback. In 2011, the Duluth, Minnesota community completed a system audit of the response to sexual assault perpetrated against Native women.<sup>130</sup> This audit report provides practical, real-world recommendations that are based on the stories of real victims who experienced the system.

Success will be achieved if victims feel a sense of compassion and justice, and the community feels safer. These are standards that cannot be measured by a review of the arrest rate or prosecution success.

#### CONCLUSION: BYSTANDER NO MORE?

For better or worse, the federal government has taken responsibility for providing for the protection of Native people. So long as the federal government refuses to allow tribes to govern themselves completely and independently, it is imperative that the federal government enact policies empowering Native survivors of sexual assault. The federal government must do more to protect tribal members from sexual predators, to safeguard reservations not only from career criminals but also to ensure that federal agencies like the Bureau of Indian Affairs and the Indian Health Services do not hire men with a history of violence against women or children. Further, when attacks do occur, the federal government must investigate and prosecute these crimes in a timely manner.

Encouragingly, the official response to the suffering of Native people improved dramatically under the Obama administration. Thanks to a groundswell

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<sup>128</sup> Campbell et al., *supra* note 87, at 263–76.

<sup>129</sup> See, e.g., BLACKMER, *supra* note 91. The “Safety Audit” methodology, originally pioneered by Dr. Ellen Pence for use in evaluating community response to domestic violence, is a collaborative research model. See Ellen Pence & Martha McMahon, *Working from Inside and Outside Institutions: How Safety Audits Can Help Courts’ Decision Making Around Domestic Violence and Child Maltreatment*, JUV. FAM. COURT J. 133–48 (2003).

<sup>130</sup> REBECCA ST. GEORGE & STERLING HARRIS, SAFETY AND ACCOUNTABILITY AUDIT OF THE RESPONSE TO NATIVE WOMEN WHO REPORT SEXUAL ASSAULT IN DULUTH, MN (2008).

of activism and action on the part of Native women and their allies to ensure that rape cases do not fall through the cracks, Congress has taken notice and made some improvements to aid tribes in protecting women and children from domestic violence and increased the criminal sentencing authority of tribes.

It may take years—even decades—to completely reverse the epidemic of sexual assault on reservations. In the meantime, the United States must take its responsibilities to tribes seriously. It cannot be a silent bystander watching as tribal women and children are raped and murdered and their attackers go free.