

Tribal Legal Code Resource:

Sexual Assault and Stalking Laws

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*Guide for Drafting or Revising
Victim-Centered Tribal Laws Against
Sexual Assault and Stalking*

April 2017



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Revised and Updated April 2017

A product of:

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VIOLENCE AGAINST NATIVE WOMEN RESOURCES

COMMUNITY-BASED LEGAL DEVELOPMENT

With support from the Office on Violence Against Women, the Tribal Law and Policy Institute has developed the following resources to assist tribal governments in creating a comprehensive, community-based, victim-centered response to violence against Native women. Each resource is designed to help your tribal government customize laws and policies that fit your community's values, principles, and capacities. These resources are all freely available for downloading on the Tribal Law and Policy Institute publication page (www.home.tlpi.org), except the textbook.

[Tribal Legal Code Resource: Domestic Violence Laws](#)

This guide for drafting or revising victim-centered tribal laws against domestic violence is written with a philosophy that tribal laws should reflect tribal values. In addition, writing a tribal law usually requires careful consideration of how state and/or federal laws might apply in the community. This resource guide includes sample language and discussion questions that are designed to help tribal community members decide on the best laws for their community.

[Listen to the Grandmothers Video and Video Discussion Guidebook](#)

Listen to the Grandmothers is designed to assist tribal programs with incorporating cultural traditions into contemporary responses to violence against Native women. The *Listen to the Grandmothers* video features Native elders speaking to the problem of violence against Native women. The video provides a historical overview of violence against Native women, traditional responses, and an analysis concerning the incorporation of cultural traditions into contemporary responses to violence against women.

[Sharing Our Stories of Survival: Native Women Surviving Violence](#)

This textbook is a general introduction to the social and legal issues involved in acts of violence against Native women; this book's contributors are lawyers, advocates, social workers, social scientists, writers, poets, and victims.

[Tribal Legal Code Resource: Tribal Laws Implementing TLOA and VAWA 2013](#)

This guide is designed to be a resource for tribes interested in implementing the Tribal Law and Order Act sentencing enhancement provisions and/or Violence Against Women Act 2013's Special Domestic Violence Criminal Jurisdiction. The resource focuses on the tribal code and rule changes that may be needed should a tribe elect to implement the increased tribal authority in either or both statutes. It discusses the concerns and issues that need resolution in implementation and provides examples from tribal codes and tribal court rules.

www.TribalProtectionOrder.org

This website is designed to provide tribal and nontribal entities with a clearinghouse of information and resources pertaining to the issuance and enforcement of tribal protection orders.

[Tribal Domestic Violence Case Law: Annotations for Selected Tribal Cases Related to Domestic Violence](#)

This resource is designed to assist tribal judicial officers in understanding how some tribal governments have handled certain legal issues within the context of domestic violence cases. Although a great deal of research has been done on case law in the state systems, little to no analysis has been done on the tribal judicial approach to domestic violence. This compendium, developed as part of an overall code-writing workshop curriculum for tribal governments, will assist tribal legislators as well. Understanding how laws are interpreted by the court systems may impact the development of laws that provide safety to tribal citizens.

TRIBAL SEXUAL ASSAULT RESOURCE SERIES

COMMUNITY-BASED LEGAL DEVELOPMENT

With support from the Office on Violence Against Women, the Tribal Law and Policy Institute, in collaboration with the Southwest Center for Law and Policy and other national leaders in tribal law, has developed a series of publications to assist tribal governments in creating a comprehensive, community-based, victim-centered response to sexual violence and stalking against adult victims. Each publication is designed to help your tribal government customize laws and policies that fit your community's values, principles, and capacities. They are ideal for a community with a strong grassroots victim advocacy program.

[Tribal Legal Code Resource: Sexual Assault and Stalking Laws](#)

This guide for drafting or revising victim-centered tribal laws against sexual assault and stalking is written with a philosophy that tribal laws should reflect tribal values. In addition, writing a tribal law usually requires careful consideration of how state and/or federal laws might apply in the community. This resource guide includes sample language and discussion questions that are designed to help tribal community members decide on the best laws for their community.

[Tribal Law Enforcement Protocol Resource: Sexual Assault](#)

This guide for drafting or revising tribal law enforcement agency's protocols responding to sexual assault (including a model sexual assault protocol) is a tool for improving the investigation of sexual assault crimes. Effective investigations increase the likelihood of victim participation and increase the probability of convictions in tribal, state, and federal courts. This guide focuses on the development of an internal protocol for law enforcement. A law enforcement protocol can enhance the efforts of all community agencies in addressing sexual violence. Once your tribal government has strong laws in place, this publication will help you create policies and protocols for your law enforcement agency to enforce your laws.

[Tribal Prosecutor Protocol Resource: Sexual Assault](#)

This guide for drafting or revising tribal prosecutor's protocols responding to sexual assault (including a model sexual assault protocol) is a tool for improving the prosecution of sexual assault crimes. Holding offenders accountable for their actions is a key part of making your community safe. This publication is designed to help your prosecutor's office ensure consistency and compassion for all survivors. This guide focuses on the development of an internal protocol for tribal prosecution. A prosecutor protocol can enhance the efforts of all community agencies in addressing sexual violence.

[Tribal Sexual Assault Response Team \(SART\) Resource](#)

This guide for development of a Sexual Assault Response Team (SART) in tribal communities is a guide to creating cohesive policies between tribal agencies. Victims of sexual assault deserve a coordinated, comprehensive response from a variety of community agencies. This SART resource provides a starting point for developing victim-centered SART teams in your community.

[Tribal Judges Sexual Assault Bench Book and Bench Card](#)

This guide is a resource for tribal judges who hear sexual assault cases in tribal court. It provides background information on important sexual assault and jurisdictional issues, as well as providing guidance on handling key issues at various stages of a sexual assault criminal trial.

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SECTION 1

BACKGROUND INFORMATION

American Indians and Alaska Natives (AI/AN) are victims of violence to a greater extent than any other ethnicity. More than four in five AI/AN women (84.3 percent) have experienced violence in their lifetime. This includes:

- 56.1 percent who have experienced sexual violence;
- 55.5 percent who have experienced physical violence by an intimate partner;
- 48.8 percent who have experienced stalking; and
- 66.4 percent who have experienced psychological aggression by an intimate partner.

Overall, more than 1.5 million AI/AN women have experienced violence in their lifetime.¹

More than one in three AI/AN women (39.8 percent) have experienced violence in the past year. This includes:

- 14.4 percent who have experienced sexual violence;
- 8.6 percent who have experienced physical violence by an intimate partner;
- 11.6 percent who have experienced stalking; and
- 25.5 percent who have experienced psychological aggression by an intimate partner.

Overall, more than 730,000 AI/AN women have experienced violence in the past year.²

More than four in five AI/AN men (81.6 percent) have experienced violence in their lifetime. This includes:

- 27.5 percent who have experienced sexual violence;
- 43.2 percent who have experienced physical violence by an intimate partner;
- 18.6 percent who have experienced stalking; and
- 73.0 percent who have experienced psychological aggression by an intimate partner.

Overall, more than 1.4 million AI/AN men have experienced violence in their lifetime.³

More than one in three AI/AN men (34.6 percent) have experienced violence in the past year.

¹ Andre B. Rosay, PhD, [National Institutes of Justice Research Report: Violence Against American Indian and Alaska Native Women and Men](#) (May 2016).

² Ibid.

³ Ibid.

This includes:

- 9.9 percent who have experienced sexual violence;
- 5.6 percent who have experienced physical violence by an intimate partner;
- 3.8 percent who have experienced stalking; and
- 27.3 percent who have experienced psychological aggression by an intimate partner.

Overall, more than 595,000 AI/AN men have experienced violence in the past year.⁴

The statistics demonstrate that AI/AN women are far more likely to be victims of sexual assault and stalking than AI/AN men. However, the number of AI/AN men who have experienced sexual assault and stalking are significant.

All governments should be very concerned about the violence facing Natives, and tribal governments across the United States are creating programs to improve response to violent crime. As sovereign governments, Native Nations can assert concurrent criminal jurisdiction in many cases. Tribal criminal laws are, with a few limited exceptions, a prerequisite for intervention by tribal criminal justice agencies, including law enforcement and prosecutors. This resource focuses on developing or revising tribal laws to maximize the sovereignty of Native Nations in responding to sexual violence and stalking. Much has been done on the issue of domestic violence, but that is addressed in other TLPI resources.⁵

There is a close relationship between stalking, sexual assault, and murder. Thirty-one percent of female victims of intimate-partner stalking indicate that they have been sexually assaulted by their stalker.⁶

- 76 percent of intimate partner femicide victims have been stalked by their intimate partner;
- 89 percent of femicide victims who had been physically assaulted had also been stalked in the twelve months before their murder;
- 79 percent of abused femicide victims reported being stalked during the same period that they were abused; and
- 54 percent of femicide victims reported stalking to police before they were killed by their stalkers.⁷

⁴ Ibid.

⁵ See [Tribal Legal Code Resource: Implementing TLOA Enhanced Sentencing and VAWA Enhanced Jurisdiction](#) and [Tribal Legal Code Resource Domestic Violence Laws](#) and [other resources](#).

⁶ Patricia Tjaden and Nancy Thoennes, [Full Report of the Prevalence, Incidence and Consequences of Violence Against Women](#), National Institute of Justice and the Centers for Disease Control and Prevention (1998).

⁷ [Stalking Fact Sheet](#), Stalking Resource Center, the National Center for Victims of Crime (January 2015).

This section of the resource provides background information on developing criminal codes related to sexual assault and stalking, as well as information on how best to use this resource.

- [Chapter 1](#): “Introduction to the Resource” provides information on how to use the resource in your community in the review of your Nation’s laws relating to sexual assault and stalking. It provides some suggestions on organizing a team to review and revise your laws.
- [Chapter 2](#): “Information to Consider” provides important information on rapists as well as some important common problems with tribal sexual assault laws, which often model older Western criminal laws.
- [Chapter 3](#): “Criminal Jurisdiction” provides an overview of criminal jurisdiction in Indian country, as well as discussing important federal laws that relate to sexual assault and stalking. Both concurrent federal and concurrent state jurisdiction are addressed. This chapter takes on the workbook style, providing examples of tribal codes, commentary, and exercises/questions to discuss with the code development team.

CHAPTER 1

INTRODUCTION TO THE RESOURCE

This resource guide was developed to provide a starting point for drafting or revising tribal criminal laws on sexual assault and stalking. It is written with a philosophy that tribal laws should reflect tribal values. In addition, writing a tribal law usually requires careful consideration of how state and/or federal laws might apply in the community. This resource guide includes sample language and discussion questions that are designed to help tribal community members decide on the best laws for their community. The sample laws may not be appropriate for every community and are provided as examples only.

Hyperlinks are provided in the text to laws, codes, and publications that appear online. They are current as of August 2016, so accessing an online version of this resource aids in further research.

The main goal of this resource guide is to offer suggestions on how tribal criminal laws can be drafted in a way that provides safety and support for adult survivors of sexual assault and stalking.

Developing a statutory response to child sexual abuse cases is beyond the scope of this resource guide. Child sexual abuse cases require separate statutory attention for a variety of important reasons.

What This Resource Guide Can Do

This resource guide is designed for nonattorneys. It assumes that tribal governments already have the ability to draft their own laws. Tribal beliefs, cultures, and language already include good words about protecting women and children. Tribal leaders and community members are usually the best people to decide what is needed in the laws. Attorneys can be important to the process, but are not always required. However, final review by an attorney is recommended.

We encourage you to create a work group to discuss the ideas in this guide and develop a plan for moving forward. Bringing a facilitator who is experienced in sexual assault and stalking laws can be helpful. The facilitator can help move discussions forward, establish plans for action, and provide overall structure to the process.

Point of Discussion: What questions should our community ask?

Comprehensive criminal laws are often viewed as such because they answer six important types of questions:

1. **WHO** is the law designed to protect?
2. **WHAT** kind of behavior is the law designed to address?
3. **WHERE** does the court have authority to assert jurisdiction?
4. **WHEN** has a crime been committed?
5. **WHY** is this law important? Why does this law exist?
6. **HOW** is the statute enforced?

Answering these six questions helps build strong tribal laws that address safety and accountability.

What This Resource Guide Cannot Do

This resource guide cannot teach about the dynamics of sexual assault and stalking. The exercises and language assume that you have a basic understanding of these crimes. If you do not have training in the dynamics of sexual assault and stalking, we strongly encourage you to contact one of the tribal coalitions to end domestic violence and sexual assault. A listing of these organizations appears on the [National Indigenous Women's Resource Center website](#).

A Few Words of Caution

Protocol development (how the systems in your community respond to sexual assault and stalking cases) is a separate but critical discussion. This resource guide is not a replacement for training or protocol development. It is very important that all people who come into contact

with survivors of sexual assault and stalking receive specific training and education on the appropriate responses to victims. Even the best law in the world is not effective if people do not understand it and support it.

This resource guide is not a model code. Your tribal community is the best judge of what language works best for your people. There are advantages and disadvantages to certain kinds of legal language, and not every tribal government has the same needs or resources. Most importantly, the sample language in this guide is not necessarily consistent with every tribe's culture and traditional practices. The exercises and discussion questions are provided to help you design a code that fits your community.

How Should We Proceed?

You should consider different ideas before making a final decision about how to use this resource guide. Some Native Nations may spend several days in a row working through the questions and exercises. Others may hire a facilitator to help organize meetings and community forums. You may want to consider creating a community team to tackle the issue over a longer period of time. There are many ways to develop a code that meets the needs and customs of your tribe. You should develop a plan that is consistent with your needs, goals, and resources.

Keep in mind that this resource guide provides a very broad overview of important points of criminal law. It does not include every detailed legal issue, so you probably need to do additional research to develop more detailed laws.

Writing a tribal code can sometimes be a very long process. Be realistic about the time needed to complete this process. Making decisions about how to respond to sexual assault and stalking is important. Take the time to do the job right, keeping in mind that you need to listen to many different opinions.

***Point of Discussion:
Create a realistic timeline***

- Consider the resources in your community, including:
- How large is our tribal nation?
- How many people will be involved in writing the code?
- Do we have a budget for training and/or facilitators?

A Note on Terminology

Tribal governments use a variety of terms to describe their laws, including *statutes*, *ordinances*, and *codes*. Generally, the term *code* refers to an organized listing of all laws for a given subject matter, while a specific subsection may be entitled a *statute* or *ordinance*. In this resource guide, the terms will be used interchangeably in order to be relevant to a wide variety of audiences.

When using this guide and throughout the drafting process, it is a good idea to keep at least one dictionary by your side. We recommend using one or more of the following:

- A general dictionary, such as Merriam-Webster's dictionary
- A law dictionary, such as *Black's Law Dictionary*
- A law dictionary for nonlawyers, such as *Law Dictionary for Non-Lawyers* by Daniel Oran

***Point of Discussion:
English language and tribal law***

- How many people in our community speak your traditional language?
- Does English always reflect our tribal community values accurately?
- Are there legal terms in our traditional language that might be important to use in your tribal laws?

This resource guide also includes a glossary.

What Is Included in This Resource?

There are five main sections to this guide:

- I. Background Information
- II. Criminal Sexual Assault Statute
- III. Evidence in Sexual Assault Cases
- IV. Criminal Stalking Laws
- V. Protection Orders for Sexual Assault and Stalking Survivors

[Section I](#) starts with an overview with statistical information and then moves to other background information in chapters 1 through 3.

- [Chapter 1](#) provides information on what is included in this resource and how best to use the resource guide.
- [Chapter 2](#) offers information on rapists as well as some common problems to look for in tribal sexual assault codes.
- [Chapter 3](#) provides a helpful review of criminal jurisdiction in Indian country considering both Public Law 280 (PL 280) and non-PL 280 Nations. The chapter also discusses important federal laws that may impact sexual assault and stalking cases in Indian country.

[Section II](#) starts with an overview and then focuses on the criminal sexual assault statute in chapters 4 through 6.

- [Chapter 4](#) concentrates on defining sexual assault in a criminal statute.
- [Chapter 5](#) discusses sexual assault by a spouse or intimate partner. This chapter touches on specific federal laws such as Violence Against Women Act (VAWA) 2013 and its impact on tribal laws.
- [Chapter 6](#) focuses on sanctions in criminal sexual assault statutes.

[Section III](#) provides important information on evidence particularly relevant to criminal sexual assault cases in chapters 7 through 9.

- [Chapter 7](#) addresses rape shield laws.
- [Chapter 8](#) discusses the victim-advocate privilege.
- [Chapter 9](#) focuses on the admissibility of the defendant's prior bad acts in a sexual assault trial.

[Section IV](#) starts with an overview of criminal stalking laws and then moves into helpful information in chapters 10 through 12 on stalking criminal statutes.

- [Chapter 10](#) provides background information on stalking, including the technology that may be used to stalk.
- [Chapter 11](#) discussed the specifics of a criminal stalking statute.
- [Chapter 12](#) focuses on sanctions in criminal stalking cases.

[Section V](#) provides an important discussion on civil protection orders for sexual assault and stalking victims in Chapter 13. It also discusses the ramifications of Special Domestic Violence Criminal Jurisdiction (SDVCJ).

Each chapter except the introductory chapters are divided into four parts.

1. Overview
2. Tribal Code Examples
3. Tribal Code Commentary
4. Exercises

The **overview** introduces you to the chapter. Reading the overview should give you basic background on the issue.

The **tribal code examples** provide language from existing codes. Whenever possible, we have included laws that other Native Nations have written to address sexual assault or stalking.

After tribal code examples, **tribal code commentary** is provided. This commentary is designed to help you consider the variety of possibilities when constructing statutory language.

The **exercises** are probably the most important part of this resource guide. They are designed to help you think about and discuss the important issues and select the words that will fit your community.

There are several ways to use the exercises. Consider having each member write answers to the exercises separately, and then come together and share your individual answers as a group. You may also choose to go through the exercises together. A facilitator may be helpful in this process.

At the closing of each of the five sections **additional resources** are provided. This is a list of books, articles, and websites that you can use for further research.

Who Should Write the Laws?

We encourage you to think broadly about the community members who may have information that will help draft good laws. The following is a checklist of people/agencies that may be useful in drafting codes—but each community is different.

- Survivors of sexual assault and stalking and their advocates
- Tribal prosecutors
- Tribal court personnel
- Tribal law enforcement/tribal probation/parole
- Elders
- Family services/social services
- Medical personnel
- Corrections
- Defense attorneys
- Traditional healers/spiritual leaders
- Child protective services/Indian Child Welfare Act (ICWA) workers
- Housing authority
- School system
- Youth council
- Legal aid
- Casino/tribal businesses
- Others _____

Point of Discussion:

What are the benefits of using a team approach?

Writing a law is not the only benefit of working with a multidisciplinary team. Other possibilities include:

- Educating more community members about sexual assault/stalking;
- Sharing ownership of the problem and responsibility to solve it; and
- Communicating about tribal values.

Ten Tips for Working as a Team

Writing or revising a tribal law usually does not happen quickly or easily. Code writing involves a great deal of time, effort, and cooperation. There is no one “right” way to research and draft laws. The following tips come from successful efforts of other tribal nations.

1. The primary work should be done by a group of “problem solvers.”

The effort will not succeed if it simply becomes a process of finger pointing and blaming others for weaknesses in the current law. The best laws are developed one step at a time by a group that is committed to brainstorming and reviewing possible solutions to problems.

2. There should be equal representation from various tribal agencies and advocacy programs.

Equal representation is important. The code-development process is not the “property” of any one agency or group.

3. The work should be completed in a setting of mutual respect.

The setting should be a safe environment in which the group can share, learn, and explore. It is okay to acknowledge differences of opinion, but not in a stereotypical or judgmental manner. The safety of women must be respected.

4. The agenda should be focused upon areas of mutual concern or shared interest.

Try to focus on areas of common interest instead of differences. A shared vision (such as “a safe community”) can create confidence and trust.

5. The participants should be willing to examine not just the way things are but also to explore ways of improving the laws.

All participants must be willing to explore new ways to help make sure that women are safe. However, different people may have different ideas. Listen to and learn from each other.

6. The participants should be willing to be creative and persistent.

To be successful, you must be willing to be creative and persistent. The process will undoubtedly have frustrations and difficult times. Think “outside the box.”

7. The participants should be willing to share the burden.

The participants must also be willing to share in the burden of the process by sharing resources, training, technical assistance, and limited available funding. Make an effort to alternate locations of meetings and focus groups.

8. All agencies should be allowed input into draft statutes prior to finalization.

All tribal agencies involved should have a chance to review the draft laws before they are completed. Because each agency will have to follow the law, they need to know what is going to be proposed.

9. Consider traditional/culturally appropriate strategies.

In some cultures, it is important to share and provide food for participants. You will be spending a great deal of time together, so make sure everyone is comfortable. (Please note that there are substantial restrictions on the use of federal grant funds for food. The safest practice is to use nongrant funds for food. If you are considering using federal grant funds, be sure to check with your grant manager.)

10. Expect to spend a great deal of time working together.

It cannot be stressed enough that this is a lengthy project, but one that is well worth the effort. Your cooperation in creating these new laws will help protect the women and families in your community.

Sexual Assault and Stalking Code Development Dos and Don'ts

DO . . .	DON'T . . .
Select code-development members with various viewpoints who have demonstrated interest, expertise, or experience in addressing the safety of women.	Select code-development members based only on their position within the tribal judicial system or elsewhere.
Incorporate the perspective of survivors of sexual assault and stalking.	Disregard the importance of traditional beliefs and customary law.
Proceed in phases with set time frames, including a study phase in which issues are identified before drafting recommended provisions.	Devote resources to drafting before a consensus is reached concerning priority issues and recommendations.
Design a process that invites broad-based participation in identifying issues and making recommendations.	Be discouraged by a lack of participation or lack of progress.
Assign manageable tasks to team members or subcommittees to be accomplished within established time frames.	Delay too long before dividing the work of the committee into tasks that can be accomplished within the time frames established.
Emphasize creative solutions to jurisdictional issues that avoid compromising the safety of women.	Emphasize jurisdictional limitations.
Emphasize person-to-person communication and education to address difficult issues.	Seek to address difficult issues solely through large-scale change in the law or legal system.

Before You Begin . . .

As you sit down together to begin the process of developing sexual assault and/or stalking statutes for your tribe, keep your main goal in mind.

You should review your constitution and bylaws or other foundational legal documents. Additionally, it is important to understand the federal and/or state laws that impact your tribe. Review VAWA, the Indian Civil Rights Act (ICRA), and other federal laws aimed at protecting women.

It is also important to evaluate the sexual assault and stalking laws that are already in place in your community. Be sure to analyze the strengths and weaknesses in any current sexual assault or stalking laws. Review any tribal court opinions your tribe has issued on sexual assault, stalking, and full faith and credit (for both criminal and civil cases).

If appropriate, you should review your traditions and stories, as well as your customs, regarding healing and justice. This research may be done by interviewing elders within your community. In addition, you can also consult anthropological documentation about your tribe, historical records, or other Native Nations that share similar cultural or linguistic ties.

Keep in mind that crimes against women may be located in different places throughout the tribal code—check the criminal, civil, and family laws.

Many times, existing tribal laws may have originated in the laws from another tribe or from a city, state, or county. Take the time to go through a review of your current laws to:

- Evaluate them for relevance to your particular community and situation;
- Analyze how they have been working;

***Point of Discussion:
What is our goal?***

Consider writing down your ultimate goal and reviewing it at the beginning of each meeting.

Example: *Write laws that support the safety of Native women and reflect our community's cultural, legal, and spiritual needs.*

***Point of Discussion:
What documents should we review?***

Consider creating a binder for all team members that includes:

- * Tribal constitution and/or bylaws;
- * Current tribal laws;
- * Tradition, custom, and stories (if appropriate); and
- * Copies of any tribal court opinions your tribe has issued on sexual, stalking, and full faith and credit for both criminal and civil cases.

- Discuss the weaknesses; and
- Determine if they represent how your tribe wants to respond to sexual assault and stalking.

Be prepared to remove or edit entire sections as necessary.

CHAPTER 2

INFORMATION TO CONSIDER

Facts about Rapists

Most rapes are not committed by strangers. Seventy-seven percent of all rapes are committed by someone who knows the victim (an acquaintance).⁸ When you review your Nation’s laws, think about the behavior you are trying to stop. Many times, we have been programmed to believe that rape is something that happens when a stranger attacks a woman and uses a great deal of violence. The reality is different.

David Lisak, PhD,⁹ a leading researcher in the area of acquaintance rapists, has found that acquaintance rapists fit the following patterns:¹⁰

A. Rapists who attack acquaintances usually plan their crimes in advance.

- They trick their victims into places where they will be alone—in a room, car, or private area.
- They often give their victims alcohol and/or drugs—or they target women who have already used alcohol and/or drugs.
- Like other kinds of criminals, rapists are very good at picking out vulnerable women: women who are least likely to fight, scream, and report the crime once it has been committed.

B. Rapists who attack acquaintances do not always use a great deal of physical violence.

- They may threaten the victim with violence. (Example: “If you don’t do what I say, I will beat you up.”)
- They may scare their victims into not telling anybody. (Examples: “You’re drunk—no one will believe you,” or “If you tell anyone, you

***Point of Discussion:
Examples to Consider***

Forcing a person to have sex is always wrong. Some examples of situations that may constitute sexual assault are when a person:

- does not agree to have sex;
- has been drinking excessively or using drugs;
- is unconscious;
- is disabled and unable to assent as a result;
- is afraid to say “no” or “stop”;
- is threatened—including verbal threats; and/or
- is physically forced.

⁸ Bureau of Justice Statistics (1997).

⁹ David Lisak, PhD, is an associate professor of psychology at the University of Massachusetts Boston and a leading expert on the behavior of men who commit sexual assault.

¹⁰ David Lisak, [The Rape Fact Sheet](#) (March 2002).

will lose your kids.”)

- They usually don’t need a weapon. They can use their body weight and arms to pin down their victims. Victims often say they were terrified.

When you write your tribal sexual assault law, you want to consider all kinds of “excuses” and “defenses.” See the following box for examples.

Corroboration Requirement

Older Anglo-American laws looked very suspiciously at the complaining witness (victim) of sexual assault. Many tribal laws were modeled after these laws. These special laws allowed the judge to tell the jury that there needs to be evidence of the assault beyond the statement of the victim (corroborating evidence). When you review your current laws if you identify a corroboration requirement consider removing it. Other crimes do not have this corroboration requirement. Most experts say that these laws were based on the belief that women lie about rape. There are tribal governments that still retain this type of law.

Point of Discussion: Corroboration requirements

The following passage represents a corroboration requirement specific to sexual assault.

Whenever appropriate in any prosecution before a jury regarding a sexual offense in this Code, the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private, when such are not otherwise corroborated.

This type of law may allow a judge to instruct a jury to view victim-witness testimony in a sexual assault case with skepticism that wouldn't apply in other types of cases.

The following is a law confirming that no corroboration of the victim's testimony is required.

Corroboration of Victim's Testimony. The testimony of a victim need not be corroborated in prosecutions under any section of the criminal sexual conduct code.

Prompt Complaint

Along with the idea that women tend to “lie” about sexual assault, older Anglo-American laws said that women should report the crime immediately after it happens. As most advocates know, most victims of sexual assault wait several days (or weeks or years) before they tell anyone what happened.

It is always easier for a prosecutor to make a case if the crime is reported right away. Prompt reporting is helpful in the conviction of all crimes. Many sexual assault victims, however, are unable to come forward until they have established a strong support system, so requiring reporting within a short time frame allows rapists to escape consequences. Review your current law to see if there is a prompt complaint requirement that needs removal.

Point of Discussion: Prompt complaint

The following passage represents a restrictive prompt complaint requirement. No prosecution may be instituted or maintained for rape, deviant sexual contact or sexual assault unless the alleged offense was brought to the notice of the tribal police department or other law enforcement official or agency **within thirty (30) days after its occurrence**, except when the alleged victim is less than sixteen (16) years of age or otherwise incompetent to make complaint at the expiration of the thirty (30) day period. . . .

High Bar for Proving Rape: Strict Force Requirement

Older sexual assault laws may require a certain level of physical injury in order to prove rape. A statute may include language requiring that there be proof that force was used, or death or serious bodily injury threatened, and that the victim believed the threat. **When this is the only definition of sexual assault, it eliminates the possibility of holding most rapists accountable. Most victims of sexual assault do not have physical injuries.** Review your current law to ensure that you do not have barriers that prevent inappropriate sexual touching and rape without physical injury from being punished.

Point of Discussion: High bar

The following passages represent specific thresholds for sexual assault crimes.

- (1) A person commits the offense of sexual assault knowingly making sexual contact with another without consent.
- (2) “Without consent,” as used in this section means:
 - (a) The victim is **compelled to submit by force** against himself, herself, or another, or,
 - (b) As used in subsection (2)(a), the term “**force**” means;
The infliction, attempted infliction, or threatened infliction of bodily injury or the commission of a forcible felony by the offender.

Another example of a statutory threshold requirement:

A person who engages in a sexual act with another, or who causes another to engage in a sexual act, is guilty of rape if:

- (a) The defendant compels the other person to submit **by force or by any threat that would render a person of reasonable firmness incapable of resisting. . . .**

CHAPTER 3

CRIMINAL JURISDICTION

Jurisdiction refers to the power of a government to regulate conduct and to enforce those regulations through a court system. Jurisdiction is generally tied to territory and the power of a government over its territory. This is particularly true in criminal jurisdiction, at least for the federal and state governments. The federal and state government possess the ability to prosecute an offender if any significant element of a crime occurred within the territory of that government. This territorial approach is not, however, the approach used with respect to criminal jurisdiction in Indian country. Instead, a series of statutes and court decision have declared that a tribal government's criminal jurisdiction in Indian country is centered primarily on the identity of the people involved in the crime (both the victim and the perpetrator), and not only on the place where the conduct occurred.¹¹ However, location is also an important factor: whether a crime took place inside or outside of Indian country or on fee or trust land (e.g., in Washington state's optional PL 280 jurisdiction).

From the perspective of a Native Nation, tribal jurisdiction is based upon sovereignty, an independent, inherent power by which a tribe can govern itself. Tribal jurisdiction has been negatively impacted by federal laws. However, tribal governments still have the power to address sexual violence and stalking in many circumstances.

Point of Discussion: Tribal inherent authority

Tribal authority to prosecute crimes committed by Indians has not been eliminated by federal law.

An important basic philosophy to remember is: **If a tribal government power has not been specifically taken away by federal law, then that power still exists because the tribal government is a sovereign authority.**

This resource guide focuses on criminal jurisdiction, but does discuss civil sexual assault and stalking protection orders in Chapter 13: "Protection Orders for Sexual Assault and Stalking Survivors."

Criminal jurisdiction refers to the power of a court to prosecute a crime. If a person is found

¹¹ See General Guide to Criminal Jurisdiction in Indian Country (including chart) at <http://www.tribal-institute.org/lists/jurisdiction.htm>; accessed March 16, 2016.

guilty of a crime, the penalty may be incarceration. The state, tribe, or United States is the party prosecuting a criminal proceeding or action.

Civil jurisdiction generally refers to the power of a court to handle lawsuits or actions between two private persons or parties. In sexual assault and stalking cases, a victim may bring a civil action by petitioning for a protection order against her offender or suing the offender for damages. Chapter 13 in this resource discusses sexual assault and stalking protection orders. If you are interested in developing or strengthening tribal laws on domestic violence protection orders, please refer to the website [Tribal Protection Order Resources](#) or TLPI's domestic violence publication, [A Victim-Centered Approach to Domestic Violence Against Native Women: Resource Guide for Drafting or Revising Tribal Laws Against Domestic Violence](#).

Review part 5 of the resource mentioned in the preceding text for information about civil jurisdiction, protection orders, and full faith and credit. Much of this information is relevant to developing civil protection order statutes for victims of sexual assault and/or stalking.

Tribal jurisdiction laws need to address three important areas in order for a court to have the power to act.

1. Personal Jurisdiction

Power of a court over a specific person.

2. Territorial Jurisdiction

Power of a court to hear a case that occurs within a specific area of land.

3. Subject Matter Jurisdiction

Power of a court to deal with the general subject involved in the action.

It is rare to have a jurisdiction law that is specific to a certain crime (like sexual assault). Therefore, you will be reviewing your tribe's current criminal jurisdiction laws (if they exist) to decide if they need revisions.

Criminal jurisdiction is a critical part of the right of self-governance. It refers to the right of Native Nations to protect their people from criminal behavior. Holding perpetrators accountable can include fines, jail/prison time, probation, restitution, and other sanctions. In tribal communities, criminal jurisdiction is limited by federal law. It is important to understand these limits when drafting tribal jurisdiction statutes. Tribal governments may choose to assert their maximum rights in regard to criminal prosecution.

Two Important Limitations to Criminal Jurisdiction

First, the U.S. Supreme Court decision [*Oliphant v. Suquamish*](#)¹² limits the ability of Native Nations to criminally punish non-Indians. Therefore, tribal governments cannot criminally prosecute a sex offender who is not considered “Indian.” The [Violence Against Women Act Reauthorization of 2013](#) has modified this slightly, opening up the possibility that at least some non-Indian offenders may be punished in tribal courts. This could include sex and stalking offenders in certain situations. This is discussed later in this chapter in the section: Important Federal Laws and Crimes to Consider and in Chapter 5: “Sexual Assault: Spouse, Intimate Partner, or Dating Partner” and in Chapter 13: “Protection Orders for Sexual Assault and Stalking Survivors.”

Second, [ICRA](#)¹³ limits a Native Nation’s ability to incarcerate for any one crime up to one year in jail and/or a \$5,000 fine unless certain conditions are met. If a person is convicted of more than one crime (e.g., domestic violence and kidnapping), federal law allows up to one year for each offense. The [Tribal Law and Order Act of 2010](#) (TLOA) amended ICRA, thus increasing tribal court authority to incarcerate for up to three years and/or fine up to \$15,000 for one offense.¹⁴ However, if a tribal court orders incarceration for more than one year, it must:

- Provide licensed legal counsel for an indigent defendant at tribal expense (The defense attorney must be licensed to practice law by a tribe, state, or federal government in a manner that ensures professional competence and responsibility.);
- Ensure that tribal court judges are law trained and licensed;
- Publish criminal laws, rules of evidence, and procedure; and
- Maintain an audio or video record of the criminal trial.¹⁵

Incarceration for more than a year also requires that the defendant either was previously convicted of the crime or that the crime is one that would carry a penalty of more than a year if prosecuted in a state or federal court. The TLOA also allows for the defendant to be convicted of more than one offense at a time, allowing incarceration for up to nine years.¹⁶ ICRA does not limit other forms of sanctions—including restitution, banishment, and probation.

¹² 435 U.S. 191 (1978).

¹³ 25 U.S.C. §§ 1301-03.

¹⁴ 25 U.S.C. § 1302.

¹⁵ 25 U.S.C. § 1302(b), (c).

¹⁶ 25 U.S.C. § 1301(a)7D.

Important Federal Laws and Crimes to Consider

The United States has jurisdiction in Indian country when it comes to federal crimes that apply throughout the United States. There are a number of federal crimes that significantly impact sexual violence. Among these important crimes is [domestic assault by a habitual offender](#).¹⁷ The law makes it a federal crime when any person, who was previously convicted of at least two domestic violence type of offenses in tribal, state, or federal court, commits domestic assault in Indian country. The previous offenses need to qualify under federal law as assault, sexual abuse, an offense under [Chapter 110A](#),¹⁸ or a violent felony against a spouse or intimate partner. A conviction as a “habitual offender” under this statute can result in imprisonment for up to five years, and that could be increased to ten years if there is serious bodily injury.

Additionally, a number of U.S. attorney’s offices have reached agreements with tribal prosecutors allowing tribal prosecutors to use federal authority to prosecute non-Indians for federal crimes in federal court. The tribal prosecutors are appointed Special Assistant U.S. attorneys (SAUSAs) to prosecute minor crimes and crimes not subject to tribal authority such as non-Indian domestic violence. The appointment of Indian country SAUSAs is encouraged under the [TLOA](#),¹⁹ and this has been a significant tool to hold offenders accountable since the passage of TLOA.

The TLOA also enhances the Special Law Enforcement Commissions that allow the deputization of tribal police officers to enforce federal laws in Indian country. Tribal law enforcement with the special commissions may arrest non-Indians on federal crimes. The Bureau of Indian Affairs (BIA) has the authority to issue the Special Law Enforcement Commissions. Memorandums of understanding are required to guarantee that the tribal officers are treated as federal officers.²⁰

VAWA, enacted in 1994 and amended in 1996, 2000, 2006, and 2013, has a number of general crimes that give the United States jurisdiction in Indian country as well as other U.S. territories. [Interstate domestic violence](#),²¹ [interstate stalking](#),²² and [interstate violation of a protection order](#)²³ apply to all persons who cross state or tribal boundaries to commit or attempt to commit domestic violence, stalk, or violate a protection order. Domestic violence, stalking, and protection orders are defined in the statutes.

¹⁷ 18 U.S.C. § 117.

¹⁸ Chapter 110 offenses refer to 18 USC 2251- 2260A.

¹⁹ Tribal Law and Order Act, Public Law 111-211 (2010).

²⁰ 25 U.S.C. § 2804 (Pub. L. No. 101-379); 25 C.F.R. 12; and TLOA (Pub. L. No. 111-211).

²¹ 18 U.S.C. § 2261.

²² 18 U.S.C. § 2261A.

²³ 18 U.S.C. § 2262.

Firearms Laws

Additionally, the [U.S. firearms laws](#)²⁴ are of great importance to the elimination and prosecution of sexual violence in Indian country. Possession of a firearm or ammunition by Indians or non-Indians may also constitute a crime separate from the sexual assault. Under federal law it is a crime for certain enumerated persons to possess any firearms or ammunition.²⁵ Conviction under these federal “[prohibited possessor](#)” statutes in federal court carry a maximum penalty of up to ten years of incarceration.

Some examples of persons who are prohibited possessors under federal law include:

- Convicted felons and persons under indictment for felonies;
- Persons subject to qualifying orders of protection with an exemption for official use by law enforcement officers;
- Persons who have been convicted of misdemeanor crimes of domestic violence with no exemption for law enforcement officers;
- Persons who have been dishonorably discharged from the military;
- Fugitives from justice; and
- Persons who have previously been committed to a mental institution by court order.²⁶

It is also important to remember that possession of a firearm or weapon during the commission of the crime of sexual assault can result in enhanced or additional criminal penalties.²⁷

Persons subject to a qualifying protection order are prohibited from possessing firearms under federal law with some exceptions and those convicted of a misdemeanor crime of domestic violence are prohibited from possession with no exceptions under federal law.²⁸ A qualifying protection order under the federal statute is one in which a respondent/defendant has had notice and an opportunity to respond. The order could be issued in either a criminal or civil action provided the following criteria are met.

The order must restrain a person from

- Harassing, stalking, or threatening an intimate partner of the person, or a child of the person or of the intimate partner, or
- Engaging in other conduct that would place an intimate partner in reasonable fear of

²⁴ 18 U.S.C. § 921 et seq.

²⁵ 18 U.S.C. § 922(g)(1-9).

²⁶ 18 U.S.C. § 922(g)(1-9).

²⁷ 18 U.S.C. § 924.

²⁸ 18 U.S.C. § 922(g).

bodily injury to the partner or child.

A qualifying order also must include **either**:

- A finding that the person subject to the order represents a credible threat to the physical safety of an intimate partner or child, **or**
- An explicit prohibition against the use, attempted use, or threatened use of physical force against an intimate partner or child that would reasonably be expected to cause bodily injury.²⁹

This federal statute would apply to the sexual assault protection orders only against an intimate partner.³⁰ *Intimate partner* is defined as a current or former spouse, co-parent, or one who cohabits or has cohabited with the subject of the protection order.³¹

It is good practice for a drafting committee to consider how the tribal and federal statutes intersect. Ensuring that Native victims receive maximum protection through federal and state, as well as tribal justice systems requires careful consideration both of the tribal statutes and of the forms developed for tribal protection orders.

VAWA Enhanced Jurisdiction

The fragmented and complex jurisdictional system impacting Native Nations makes it particularly difficult to address domestic violence committed against Native women by non-Native men.³² The federal prohibition restricting Native Nations from prosecuting non-Indians meant that Native Nations were unable to prosecute non-Indians for domestic violence, even when it occurred on the reservation. States were unable to prosecute (except in PL 280 and similarly situated states) because the victim was Native, and federal prosecutors were generally uninterested in such cases unless serious injury or death occurred.

These restrictions also impacted the tribe's ability to enforce protection orders and prosecute violation of those orders. Most protection orders are issued by civil courts, but are enforced (at least in states) through the criminal justice process. The federal prohibition restricting Native Nations from prosecuting non-Indians meant that Native Nations were limited to imposing civil

²⁹ 18 U.S.C. § 922(d)(8).

³⁰ Many sexual assault protection orders are designed for nonintimate partners or those victims that do not qualify for a domestic violence protection order due to the relationship with the perpetrator.

³¹ 18 U.S.C. § 921(a)(32).

³² According to the Bureau of Justice Statistics, U.S. Department of Justice, Office of Justice Program, at least 70 percent of the violent victimizations experienced by American Indians are committed by persons not of the same race. Lawrence Greenfeld and Steven Smith, "[American Indians and Crime](#)," Bureau of Justice Statistics, U.S. Department of Justice Office of Justice Programs, February 1999.

sanctions on non-Indian who violate protections orders.

Congress enacted VAWA 2013 in part to address this problem. VAWA 2013 recognized the ability of Native Nations to prosecute non-Indians who commit domestic violence in Indian country. VAWA 2013 refers to this as [SDVCJ](#), and sets out a series of requirements in ICRA that Native Nations must satisfy if they want to exercise this recognized authority. Native Nations that opt into this jurisdiction by meeting the requirements of the law may prosecute non-Indians for three categories of crimes—domestic violence, dating violence, and violations of protections orders. Because some sexual violence and stalking intersects these crimes, it is important to understand SDVCJ for the purposes of code development in these areas of tribal law. For a full discussion on code development and implementation of TLOA and VAWA 2013, refer to the TLPI resource [Tribal Laws Implementing TLOA Enhanced Sentencing and VAWA Enhanced Jurisdiction](#) (February 2015, updated February 2016).

Concurrent Federal Jurisdiction

Concurrent jurisdiction means that more than one government can take action. In most cases of sexual assault, your tribe shares criminal jurisdiction with either the federal (U.S.) government or the state government. Federal (U.S.) courts have concurrent jurisdiction over violent cases under the [Major Crimes Act](#)³³ (MCA) in many tribal communities. The MCA currently refers to the following crimes:

- Murder
- Manslaughter
- Kidnapping
- Maiming
- Felonies under chapter 109A (includes sex crimes)
- Incest
- Assault with intent to commit murder
- Assault with a dangerous weapon
- Assault resulting in serious bodily injury
- Assault of a person under the age of sixteen
- Felony child abuse or neglect
- Arson
- Burglary
- Robbery
- Felonies under 661 (stealing property worth more than \$1,000)

Point of Discussion: What is the history of sexual assault within the MCA?

- * Rape (unlike domestic violence, stalking, and most other criminal offenses) was one of the original seven major crimes in MCA in 1885.
- * For the next one hundred years, most federal officials interpreted MCA as giving the federal government exclusive federal jurisdiction for rape/sexual assault.
- * Many tribal codes have never included rape because the Department of Interior (through the BIA) refused to approve tribal rape laws.

Additionally, through the [General Crimes Act](#),³⁴ criminal jurisdiction over general federal

³³ 18 U.S.C. § 1153.

³⁴ 18 U.S.C. § 1152.

offenses is extended to Indian country when the offenses are between Indians and non-Indians. Non-Indians could be prosecuted by the federal government for crimes against Indians under this law for general federal crimes. This law also incorporates the [Assimilative Crimes Act](#),³⁵ the federal law that allows for the use of state law where there is no federal crime. The General Crimes Act does not extend to Indian against Indian crimes or Indian against non-Indian crimes if the tribe already prosecuted the offense or a treaty stipulated that the power to prosecute members was exclusively reserved to the tribe.

It should also be noted that, absent treaty provisions to the contrary, the state would have criminal jurisdiction of a non-Indian versus non-Indian crime in Indian country.³⁶

Point of Discussion: Double jeopardy?

If the state or federal government prosecutes a person for sexual assault, this does not eliminate the ability of the tribe to prosecute. Because a tribe is considered to be an independent sovereign, the laws against double jeopardy do not apply.³⁷

Example:

Joe, a Native man, commits a sex offense on the reservation. The federal government files charges against him in federal court under MCA. The tribal prosecutor files separate charges in tribal court under the tribal sexual assault criminal statute. In this case, there could theoretically be two trials. (However, it will likely be important for the federal prosecutor and the tribal prosecutor to coordinate their efforts.)

³⁵ 18 U.S.C. § 13.

³⁶ See *United States v. McBratney*, 104 U.S. 621 (1882); and *Draper v. United States*, 164 U.S. 240 (1896).

³⁷ [United States v. Wheeler](#), 435 U.S. 313 (1978).

Criminal Jurisdiction on Reservations Not Affected by PL 280/State Jurisdiction

<i>Indian Status</i>	<i>Type of Crime</i> <i>Major Crime</i> <i>(as defined by MCA)</i>	<i>All Other Crimes</i>
Indian perpetrator, Indian victim*	Federal (under MCA) and tribal jurisdiction	Tribal jurisdiction
Indian perpetrator, non-Indian victim**	Federal (under MCA) and tribal jurisdiction	Federal (under General Crimes Act) and tribal jurisdiction
Non-Indian perpetrator, Indian victim	Federal jurisdiction (under General Crimes Act)***	Federal (under General Crimes Act) jurisdiction***
Non-Indian perpetrator, non-Indian victim	State jurisdiction	State jurisdiction

* If the offense is listed in MCA, there is federal jurisdiction, exclusive of the state, but not the tribe. If the listed offense is not otherwise defined and punished by federal law applicable in the special maritime and territorial jurisdiction of the United States, state law is used in federal courts. See section 1153(b). If not listed in MCA, the tribal jurisdiction is exclusive.

** If listed in MCA, there is federal jurisdiction, exclusive of the state, but probably not of the tribe. If the listed offense is not otherwise defined and punished by federal law applicable in the special maritime and territorial jurisdiction of the United States, state law is used in federal courts. If not listed in MCA, there is federal jurisdiction, exclusive of the state, but not of the tribe, under the General Crimes Act. If the offense is not defined and punished by a statute applicable within the special maritime and territorial jurisdiction of the United States, state law is used in federal courts under 18 U.S.C. § 13. The United States can prosecute an Indian for a non-MCA crime, provided the tribe has not prosecuted.

*** Tribal jurisdiction for crimes under VAWA 2013 Title IX, when the tribe has opted in to SDVCJ.

Note: There is federal jurisdiction in Indian country for crimes of general applicability.

Concurrent State Jurisdiction: Public Law 280

In 1953 the U.S. Congress passed a law that substantially affected criminal jurisdiction in Indian country. [PL 280](#)³⁸ transferred federal jurisdiction over crimes occurring in Indian country to certain states. Six states (California, Minnesota, Nebraska, Oregon, and Wisconsin with certain exempted reservations and then Alaska upon statehood) were required to accept the transfer of jurisdiction. The other states were given the option of asserting jurisdiction.

Dissatisfaction with PL 280 has led to the partial or full retrocession (return of jurisdiction from the state to the federal government) of thirty-one reservations once covered by PL 280. In addition, concerns that some states and local governments were not addressing crimes on reservations in PL 280 states, led to an amendment to PL 280 in Section 221 of TLOA.³⁹ The amendment allows tribal governments in PL 280 states to request that the federal government exercise concurrent jurisdiction over reservation crimes. This is different than retrocession as the state continues to have jurisdiction as well. The requests require approval by the U.S. Attorney General. Some Native Nations have submitted requests to the U.S. Attorney General and the White Earth Nation's request was approved in March 2013.⁴⁰

Crimes of general applicability apply to all of Indian country. The specific crimes mentioned in the previous section entitled *Important Federal Laws and Crimes to Consider* relating to domestic violence and firearms, also apply to Indian country in PL 280 states.

If you are on a reservation in which the state still exercises full criminal jurisdiction under PL 280 (or similar acts such as those affecting Kansas and New York), then the following chart would apply.

³⁸ 18 U.S.C. § 1162.

³⁹ 25 U.S.C. § 1321(a)(2).

⁴⁰ See <https://www.justice.gov/opa/pr/united-states-accept-concurrent-jurisdiction-over-white-earth-reservation-minnesota>; accessed 10/7/2016.

Criminal Jurisdiction for States and Reservations Where PL 280 Applies

<i>Indian Status</i>	<i>Type of Crime Major Crime (as defined by MCA)</i>	<i>All Other Crimes</i>
Indian perpetrator, Indian victim*	State and tribal jurisdiction	State and tribal jurisdiction
Indian perpetrator, non-Indian victim*	State and tribal jurisdiction	State and tribal jurisdiction
Non-Indian perpetrator, Indian victim*	State jurisdiction**	State jurisdiction**
Non-Indian perpetrator, non-Indian victim	State jurisdiction	State jurisdiction

*Under TLOA, a tribal government may request federal concurrent over crimes in PL 280 states, subject to approval of the U.S. Attorney General.

Note: There is federal jurisdiction in Indian country for crimes of general applicability.

** Tribal jurisdiction for crimes under VAWA Title IX, when a tribe has opted in to SDVCJ.

Tribal Code Examples

Native Nations with Concurrent Federal Jurisdiction

**Poarch Band of Creek Indians
(Current as of March 2016)**

[Tribal Constitution](#)

ARTICLE III - - TERRITORY AND AUTHORITY OF GOVERNMENT

Section 1. - Territory

The jurisdiction of the Poarch Band of Creek Indians shall extend to all lands now held in the name of the Band or which hereafter may be acquired for or by and held in the name of the Poarch Band of Creek Indians.

Section 2. - Authority

The authority of the government established by this Constitution shall extend over all persons and property now or hereafter included within the jurisdiction of the Poarch Band of Creek Indians, except and only as limited by this Constitution and the Laws of the United States. The government shall not inhibit any person's right to enjoy freedom of worship, conscience, speech, press, assembly and association, and other rights enumerated by Federal Law

**Poarch Bank of Creek Indians
(Current as of March 2016)**

Tribal Ordinances

Title 4: [Jurisdiction](#)

Section 4-1-1 Omitted

Sec. 4-1-2 - Personal Jurisdiction—Criminal

The Tribal Court shall have criminal jurisdiction over the person as follows:

- a) All enrolled Tribal Members, or other federally recognized Indians for any violation of a criminal offense contained in the Tribal Criminal Code or other ordinance of the Poarch Band of Creek Indians when the criminal offense is alleged to have occurred on or within the Reservation or within the territorial jurisdiction of the Poarch Band of Creek Indians;
- b) All enrolled Tribal Members, or other federally recognized Indians who commit a criminal offense as set out in the Tribal Criminal Code or other ordinance of the Poarch Band of Creek Indians, by their own conduct or the conduct of another for which they are legally accountable if:
 - (1) The conduct occurs either wholly or partially on or within the Reservation or territorial jurisdiction of the Poarch Band of Creek Indians;
 - (2) The conduct which occurs outside the Reservation or territorial jurisdiction of the Poarch Band of Creek Indians constitutes an attempt, solicitation, or conspiracy to commit an offense within the Reservation or territorial jurisdiction of the Poarch Band of Creek Indians and an act in furtherance of the attempt or conspiracy occurs within the Reservation or territorial jurisdiction of the Poarch Band of Creek Indians; or

(3) The conduct which occurs within the Reservation or territorial jurisdiction of the Poarch Band of Creek Indians constitutes an attempt, solicitation, or conspiracy to commit in another jurisdiction an offense prohibited by the Tribal Criminal Code or other ordinance of the Poarch Band of Creek Indians and is also prohibited by the other jurisdiction

Sec. 4-1-3 Omitted

Sec. 4-1-4 - Subject Matter Jurisdiction

- a) The Tribal Court shall have subject matter jurisdiction over all civil actions in which the Tribal Court has jurisdiction over the person or property; or
- b) The Tribal Court shall have jurisdiction over all criminal matters alleged to be committed by Tribal Members, or members of other federally recognized Tribes within the Reservation and jurisdiction of the Tribal Court.

Sec. 4-1-5 - Original and Exclusive Jurisdiction

- a) The Tribal Court shall have original and exclusive jurisdiction over all civil matters within the jurisdiction of the Tribal Court.
- b) The Tribal Court shall have original and exclusive jurisdiction over all criminal offenses committed within the territorial jurisdiction of the Poarch Band of Creek Indians by enrolled members of the Poarch Band of Creek Indians or other federally recognized Indians, except to the extent that the Major Crimes Act or other federal laws provide for criminal jurisdiction on Indian reservations or within the territorial jurisdiction of Indian tribes, and in that event, the jurisdiction shall be concurrent with the United States Government. The State of Alabama shall have no jurisdiction, criminal, or civil, within the Reservation or territorial jurisdiction of the Poarch Band of Creek Indians, and there shall be no concurrent jurisdiction with the State of Alabama with respect to the jurisdiction of the Poarch Band of Creek Indians for civil or criminal matters, unless and only to the extent that approval has been given for the same by the Tribal Council.

**[Constitution of the White Mountain Apache Tribe of the Fort Apache Indian Reservation of Arizona](#)
(Current as of March 2016)**

ARTICLE I - TERRITORY & JURISDICTION

Section 1. Territory. The authority of the white Mountain Apache Tribe, of Arizona, shall extend to all of the territory within the exterior boundaries of the Fort Apache Indian Reservation as established by the Act of Congress, June 7, 1897, and to such other lands as the United States may acquire for the benefit of the Tribe, or which the Tribe may acquire for itself. The territory of the White Mountain Apache Tribe shall include, to the fullest extent possible under Federal law, all lands, property, airspace, surface rights, subsurface rights, other natural resources and any interest therein, tenements hereditaments, all water rights and all accretions, which are either now or in the future owned by the Tribe or owned by the United States for the benefit of the Tribe or for individual tribal members, notwithstanding the issuance of any right-of-way.

Section 2. Jurisdiction. The White Mountain Apache Tribe shall have jurisdiction over all persons, subjects, property and all activities occurring within the boundaries of the

reservation or on other lands within its territory as defined by this Article. Nothing in this Article shall be construed to limit the ability of the Tribe to exercise its jurisdiction within or without its territory based upon Federal law or upon its inherent sovereignty as an Indian Tribe.

[White Mountain Apache Criminal Code](#)
Sec. 1.2 Jurisdiction (Effective Aug. 2014)

The White Mountain Apache Tribe has original and absolute jurisdiction on any basis consistent with its sovereignty, constitution and laws to prosecute any person for acts covered under this code, except as may be expressly limited by the laws of the United States. This jurisdiction is not affected by, nor shall it be deemed to preclude, any federal prosecution.

Native Nations with Concurrent State Jurisdiction

[The Constitution of the White Earth Nation](#)
(Current as of March 2016)
CHAPTER 1: TERRITORY AND JURISDICTION

The White Earth Nation shall have jurisdiction over citizens, residents, visitors, altruistic relations, and the whole of the land, including transfers, conferrals, and acquisitions of land in futurity, water, wild rice, public and private property, right of way, airspace, minerals, natural resources, parks, and any other environmental estates or territories designated by and located within the boundaries of the White Earth Reservation, as established and described in the Treaty of March 19, 1867, and over the reserved rights within the ceded waterways and territories of the Treaty of 1855.

[White Earth Band of Chippewa Judicial Code](#)
(Current as of March 2016)

Title 1: Courts
Ch. 2: Jurisdiction,
Section 1. White Earth Band Tribal Court Jurisdiction.

The jurisdiction of the Tribal Court shall extend to:

- (a) All actions arising under the White Earth Band Conservation Code, and to all persons alleged to have violated provisions of the Code, provided that the action or violation occurs within the boundaries of the White Earth Reservation, including all lands, islands, waters, roads and bridges or any interests therein, whether trust or non-trust status and notwithstanding the issuance of any patent or right-of-way, within the boundaries of the Reservation.
- (b) All actions arising under the Codes, Laws, and Ordinances of the White Earth Band of Chippewa, and to all persons alleged to have violated provisions of those Ordinances, provided that the action or violation occurs within the boundaries of the White Earth Reservation, including all lands, islands, waters or any interest

therein hereafter added to the Reservation. Hereinafter, reference to “Reservation” shall include all lands and waters described in this paragraph.

(c) The White Earth Band of Chippewa Tribal Court shall have jurisdiction over all Band members, and over all persons whose actions involve or affect the White Earth Band of Chippewa or its members, and over persons who enter into consensual relationships with the Band or its members through commercial dealings, contracts, leases, or other arrangements. For the purposes of this Code, “person” shall mean all natural persons, corporations, joint ventures, partnerships, trusts, trust funds, public or private organizations, or any business entity of whatever kind, whether members or non-members of the White Earth Band of Chippewa.

(d) The White Earth Band of Chippewa Tribal Court shall have criminal jurisdiction over all persons who violate any Band codes, laws or ordinances provided that such violation occurs within the boundaries of the White Earth Reservation, including all lands, islands, waters or any interest therein hereafter added to the Reservation.

(e) All civil causes of action arising at common law including, without limitation, all contract claims (whether the contract at issue is written or oral or existing at law), all tort claims (regardless of the nature), all property claims (regardless of nature), all insurance claims, and all claims based on commercial dealings with the Band, its agencies, sub-entities, and corporations chartered pursuant to its laws, and all nuisance claims. The Court shall have original jurisdiction whether the common law cause of action is one which has been defined by the Tribal Council as Band common law, or is one which exists at common law in another jurisdiction and which is brought before the Tribal Court based upon reference to the law of that other jurisdiction. For the purposes of this Code, “common law” shall mean the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs, or from the judgments and decrees of courts recognizing and affirming such usages and customs, and is generally distinguished from statutory law.

(f) The Court shall have jurisdiction over any and all matters upon the adoption by the White Earth Tribal Council of an appropriate code. This shall include but not be limited to codes concerning domestic relations, juvenile matters and child protection. Upon the adoption of such a code by the White Earth Tribal Council no further action shall be needed to empower the tribal court to hear cases pursuant to such codes.

(g) Other actions arising under the laws of the White Earth Band of Chippewa, as provided in those laws.

(h) The jurisdiction invoked by this Code over any person, cause of action, or subject shall be concurrent with any valid jurisdiction over the same of the courts of the United States, any state, or any political subdivision thereof; provided, however, this Code does not recognize, grant, or cede jurisdiction to any other political or governmental entity in which jurisdiction does not otherwise exist in law.

(i) The Court shall have jurisdiction to interpret all provisions of the Minnesota Chippewa Tribal Constitution and all other organic documents which pertain to the governing authority of the White Earth Band of Chippewa.

Section 2. No Acceptance of State Jurisdiction.

Nothing in this Code shall be deemed to constitute acceptance of or deference to the jurisdiction of the State of Minnesota over any civil or civil regulatory matter or crime associated thereto, where such jurisdiction does not otherwise exist.

[The Constitution of the Ho-Chunk Nation](#)

ARTICLE I - TERRITORY AND JURISDICTION

Section 1. Territory.

The territory of the Ho-Chunk Nation shall include all lands held by the Nation or the People, or by the United States for the benefit of the Nation or the People, and any additional lands acquired by the Nation or by the United States for the benefit of the Nation or the People, including but not limited to air, water, surface, subsurface, natural resources and any interest therein, notwithstanding the issuance of any patent or right-of-way in fee or otherwise, by the governments of the United States or the Ho-Chunk Nation, existing or in the future.

Section 2. Jurisdiction.

The jurisdiction of the Ho-Chunk Nation shall extend to all territory set forth in Section 1 of this Article and to any and all persons or activities therein, based upon the inherent sovereign authority of the Nation and the People or upon Federal law.

Ho-Chunk Nation Code

**Title 1, Ho-Chunk Nation Judiciary Establishment and Organization Act
(Amended April 2015)**

[Section 4. Jurisdiction.](#) The Ho-Chunk Judiciary shall exercise jurisdiction over all matters with the power and authority of the Ho-Chunk Nation including controversies arising out of the Constitution of the Ho-Chunk Nation; laws, statutes, ordinances, resolutions, and codes enacted by the Legislature; and such other matters arising under enactments of the Legislature or the customs and traditions of the Ho-Chunk Nation. The jurisdiction extends over the Nation and its territory, persons who enter its territory, its members, and persons who interact with the Nation or its members wherever found.

Native Nations with Enhanced Jurisdiction Under VAWA 2013

Pascua Yaqui Tribal Code

TITLE 3 – COURTS AND RULES OF COURT

PART I – COURTS.

CHAPTER 1-1 – JURISDICTION

Section 20 Jurisdiction (3 PYTC § 1-1-20)

Except where limited by Federal Law or Pascua Yaqui Law, the jurisdiction of the Pascua Yaqui Tribal Courts shall extend to:

All persons natural and legal of any kind; and to

All subject matters which, now and in the future, are permitted to be within the jurisdiction of any Tribal Court of any Indian tribe recognized by the United States of America.

Tulalip Tribal Code (Current through February 7, 2015)

Title IV. YOUTH, ELDERS AND FAMILY

Chapter 4.25. Domestic Violence

4.25.030 General Jurisdiction

Jurisdiction over domestic and family violence matters shall be in accordance with TTC Title 2. In addition, the Tulalip Tribal Court shall retain jurisdiction over members of federally recognized Indian tribes and any violations of Orders of Protection entered pursuant to this Chapter which are alleged to have occurred outside of the boundaries of the Tulalip Indian Reservation where such orders are entitled to recognition outside reservation boundaries as a matter of full faith and credit.

Tulalip Tribal Code (Current through February 7, 2015)

Title IV. YOUTH, ELDERS AND FAMILY

Chapter 4.25. Domestic Violence

4.25.040 Special Domestic Violence Criminal Jurisdiction

- (1) The Tulalip Tribes hereby exercises “Special Domestic Violence Criminal Jurisdiction” as a “participating tribe,” as defined within 25 U.S.C. §1304 (2013), subject to applicable exceptions defined therein, in the Tulalip Tribes Domestic Violence Court.
- (2) In all proceedings in which the tribal court is exercising Special Domestic Violence Criminal Jurisdiction as a participating tribe, all rights afforded by Chapter 2.25 TTC shall apply and those enumerated in the Indian Civil Rights Act, 25 U.S.C. §1302 to all defendants. Should there be any inconsistency between Chapter 2.25 TTC and 25 U.S.C. 1302, those of 25 U.S.C. 1302 shall apply.
- (3) Every defendant has the privilege of the writ of habeas corpus to test the legality of his or her detention by order of the Tulalip Tribes and may petition the court to stay further detention pending the habeas proceeding.
 - (a) A court shall grant a stay if the court-
 - (i) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and

- (ii) after giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.
- (4) The Tulalip Tribes hereby declares its Special Domestic Violence Criminal Jurisdiction over any person only if he or she:
 - (a) Resides within the jurisdiction of the Tulalip Tribes; or
 - (b) Is employed within the jurisdiction area of the Tulalip Tribes, or;
 - (c) Is a spouse, intimate partner, or dating partner of:
 - (i) A member of the Tulalip Tribes; or,
 - (ii) A member of another Indian Tribe who resides within the jurisdiction of the Tulalip Tribes;

4.25.050 Special Jurisdiction; Criminal Conduct Applicable

The Tulalip Tribes exercises the special domestic violence criminal jurisdiction of a defendant for criminal conduct that falls into one or more of the following categories:

- (1) Domestic Violence and Dating Violence: An act of domestic violence or dating violence that occurs within the jurisdiction of the Tulalip Tribes.
- (2) Violations of Protection Orders: An act that occurs within the jurisdiction of the Tulalip Tribes, and:
 - a. Violates the portion of a protection order that:
 - i. Prohibits or provides protection against violent or threatening acts of harassment against, sexual violence against, contact or communication with, or physical proximity to, the person protected by the order.
 - ii. Was issued against the defendant
 - iii. Is enforceable by the Tulalip Tribes, and is consistent with 18 U.S.C. § 2265 (b).

[Statutes of the Confederated Tribes of the Umatilla Indian Reservation](#)

(As Amended through Resolution No. 14-018 (March 24, 2014))

Chapter 1. Definitions, Tribal Courts, Judges, Court Personnel and Attorneys

SECTION 1.02 JURISDICTION

(Section A. Omitted)

- B. **Criminal Jurisdiction over Non-Indian Domestic or Dating Violence.** The Umatilla Tribal Court is vested with jurisdiction to enforce all provisions of this Code against a non-Indian who has committed an act of Dating Violence or Domestic Violence against an Indian victim within the Confederated Tribes' Indian country provided the non-Indian has sufficient ties to the Confederated Tribes.
 - 1. A non-Indian has sufficient ties to the Confederated Tribes for purposes of jurisdiction if they:
 - a) reside in the Confederated Tribes' Indian country;
 - b) are employed in the Confederated Tribes' Indian country; or
 - c) are a spouse, intimate partner, or dating partner of either:

- i. a member of the Confederated Tribes, or
- ii. a non-member Indian who resides in the Confederated Tribes' Indian country.

C. **Criminal Jurisdiction Over Non-Indian Protection Order Violations.** The Umatilla Tribal Court is vested with criminal jurisdiction to enforce all provisions of this Code related to violations of protection orders against a non-Indian that has sufficient ties to the Confederated Tribes as identified in Section 1.02(B)(1), and who has violated a protection order within the Confederated Tribes' Indian country provided the protected person is an Indian, and following conditions are met:

1. The protection order was issued against the non-Indian,
2. The protection order is consistent with [18 U.S.C. 2265\(b\)](#), and

The violation relates to that portion of the protection order that provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, the protected person.

Tribal Code Commentary

Each of the examples comes from a general criminal jurisdiction law. These laws are not specific to sexual assault. It is not common to have a separate law on sexual assault jurisdiction that differs from general criminal jurisdiction.

Tribes with Concurrent Federal Jurisdiction

The Poarch Band of Creek Indians and the White Mountain Apache are examples of Native Nations with concurrent federal jurisdiction. Frequently, as in these two examples, jurisdiction is addressed in the Nations' constitution, as well as the tribal code. The territory over which the Nation asserts jurisdiction is generally described in the constitution, as it is addressed in both the Poarch Band's constitution and White Mountain Apache's constitution.

The Poarch Band's constitution provides broad authority over all persons and property within the territorial jurisdiction, except where limited by federal law. Its tribal code provides a more limiting jurisdiction, indicating criminal jurisdiction over all enrolled tribal members and members of other federally recognized tribes. This is consistent with federal restrictions post *Olyphant* and a Nation that has not opted into VAWA 2013's enhanced jurisdiction over non-Indians in some situations. The Poarch Band of Creek Indians' law acknowledges shared (concurrent) jurisdiction with the federal government in dealing with crimes in MCA (which includes sexual assault) or other federal laws.

The White Mountain Apache's constitution acknowledges broad authority over all persons and all activities within its territory. Nothing in the constitution should be construed to limit the ability the Nation to exercise its jurisdiction within or without its territory based upon federal law or upon its inherent sovereignty. The White Mountain Apache Criminal Code expresses the tribe's sovereign right to prosecute criminal cases. It acknowledges limitations on its jurisdiction due to U.S. laws. However, it states that the prosecution by the federal government of a crime does not affect the Nation's criminal jurisdiction.

Tribes with Concurrent State Jurisdiction

The White Earth Nation's constitution, similar to the constitutions in the examples of Native Nations' constitutions with concurrent federal jurisdiction, provides a broad statement of jurisdiction over people and property within the boundaries of the reservation, as established by the Treaty of 1867. The court has jurisdiction over all matters, upon adoption of an appropriate code.

The White Earth Band of Chippewa Judicial Code acknowledges concurrent jurisdiction with a state (Minnesota) or with the federal government, as it is currently a tribe affected by PL 280. It also recently requested that the federal government also assist in prosecution under a special agreement allowed under TLOA, as it was dissatisfied with the effort made by the state. It specifically states in its code that “nothing in this code shall be deemed to constitute acceptance of or deference to the jurisdiction of the State or MN, where such jurisdiction does not otherwise exist.”

The Ho-Chunk Nation describes its territorial jurisdiction in its constitution, and in both the constitution and its code it provides a broad description of the people over whom it may assert jurisdiction, including “persons who enter its territory, its members and persons who interact with the Nation or its members wherever found.” Tribal codes are not required to mention federal or state laws. The example from the Ho-Chunk Nation asserts its broad authority without acknowledging other governments.

Tribes with Enhanced Jurisdiction under VAWA 2013

Several Native Nations have opted to enhance their criminal jurisdiction under VAWA 2013, which allows Native Nations to reestablish criminal jurisdiction over non-Indians in a few instances related to domestic violence. The resource, [Tribal Laws Implementing TLOA Enhanced Sentencing and VAWA Enhanced Jurisdiction](#), provides the steps to take if a Nation is interested in criminal jurisdiction over non-Indians through SDVCJ. The examples in this section show changes that were made in the jurisdictional code sections of the Pascua Yaqui Nation and the Umatilla Nation. If there were limitations in the tribal constitutions preventing them from prosecuting non-Indians, a constitutional amendment was required in addition to the code revisions. Expanding jurisdiction to include SDVCJ requires many changes in tribal laws, not simply the sections relating to jurisdiction.

The Pascua Yaqui Code now states that the Nation has jurisdiction over all persons and all subject matters permitted to be within the jurisdiction of any tribal court. The Umatilla Nation’s code specifically describes criminal jurisdiction over non-Indian domestic violence or dating violence, as it is outlined in [Title IX of VAWA 2013](#).⁴¹ It also takes the language of criminal jurisdiction over non-Indians protection orders from VAWA 2013.

⁴¹ ICRA was amended. See 25 U.S.C. §§1301-1304.

Exercises

These exercises are designed to guide in reviewing and revising your tribal criminal jurisdiction laws.

Step 1: Examine your current situation

Does our constitution and tribal code already contain provisions concerning criminal jurisdiction?

Yes (If yes, write the citations here) _____

No

Does our constitution provide a broad definition of *criminal jurisdiction*, so that no amendment to the constitution would be needed if federal laws continue to recognize jurisdiction over non-Indians?

Is your territorial jurisdiction adequately defined?

Point of Discussion: Are our criminal jurisdiction laws sufficient?

Are our laws broad enough to cover sexual assault and stalking crimes?

Do our laws address personal, territorial, and subject matter jurisdiction?

Which government has concurrent (shared) power to prosecute sexual assault cases that occur in your tribal community?

Federal (U.S.) government

State government under PL 280

State government under another federal law

Point of Discussion: Concurrent jurisdiction

Should our tribal law refer to or acknowledge the government that shares jurisdiction in sexual assault cases?

(For PL 280 jurisdictions) How would our community benefit or not benefit by having the federal government (in addition to the state) assert concurrent criminal jurisdiction through the TLOA? Is this something our tribal government should pursue?

Is your Nation affected by PL 280 or another law that gives criminal authority to the state government?

Yes

No

If your reservation is affected by PL 280 (state jurisdiction), what is the citation (or reference number) for the state's criminal sexual assault statute? (You can skip this section if federal laws apply.)

To find the state laws on sexual assault, [TLPI's website](#) will link you to state laws. State sexual assault coalitions also frequently have links to or sections of their websites referencing their state's sexual assault laws.

Point of Discussion: State law

What are the most important parts of the state laws?

How does the state government define *sexual abuse* or *sexual assault*?

What is effective or positive about the state laws?

What is ineffective or negative about the laws?

Is the state law broad enough to convict rapists who use methods to sexually assault acquaintance (known) victims?

Are there parts of the state law you think would be effective in tribal courts and consistent with your culture?

Point of Discussion: Federal law

If federal sexual abuse laws apply to your community, think about:

What are the most important parts of the federal laws?

How does the federal government define *sexual abuse*?

What is effective or positive about the federal laws?

What is ineffective or negative about the laws?

Is the federal law broad enough to convict rapists who use methods to sexually assault acquaintance (known) victims?

Are there parts of the federal law you think would be effective in tribal court and consistent with your culture?

Step 2: Discuss principle provisions

Are you interested in enhancing your criminal jurisdiction through opting into SDVCJ? If so, refer to [*Tribal Laws Implementing TLOA Enhanced Sentencing and VAWA Enhanced Jurisdiction.*](#)

List any problems you see in the jurisdictional provisions of your constitution or code and discuss fully.

Step 3: Capture key provisions

Use your answers to Steps 1 and 2 to capture key provisions of your code.

List any problems you see in your constitution's jurisdictional provisions.

Additional Resources

Books

Sarah Deer, *The Beginning and End of Rape: Confronting Sexual Violence in Native America* (University of Minnesota Press, 2015).

Sarah Deer, Bonnie Clairmont, Carrie A. Martell, and Maureen L. White Eagle, *Sharing Our Stories of Survival: Native Women Surviving Violence* (AltaMira Press, 2008).

Carrie E. Garrow and Sarah Deer, *Tribal Criminal Law and Procedure*, 2nd ed. (AltaMira Press, 2015).

Melissa L. Tatum, Miriam Jorgensen, Mary E. Guss, and Sarah Deer, *Structuring Sovereignty: Constitutions of Native Nations* (University of California Los Angeles, American Indian Studies Center, 2014).

Nell Jessup Newton, ed., *Cohen's Handbook of Federal Indian Law 2012 Edition* (Lexis-Nexis, 2005).

Justin R. Richland and Sarah Deer, *Introduction to Tribal Legal Studies*, 2nd ed. (AltaMira Press, 2010).

Reports and Resources

[Special Domestic Violence Criminal Jurisdiction Pilot Project Report](#), National Congress of American Indians (June 2016).

Indian Law and Order Commission, [A Roadmap for Making Native America Safer](#), Report to the President and Congress (May 2015).

[General Guide to Criminal Jurisdiction in Indian Country](#), Tribal Law and Policy Institute (2016).

[Indian Country Jurisdictional Chart](#), Department of Justice (2014).

[Indian Country Prosecution and Investigations](#), U.S. Department of Justice (2014).

National Congress of American Indians, [Special Domestic Violence Criminal Jurisdiction Pilot Project Report](#) (October 2015).

Andre Rosay, [Violence Against American Indian and Alaska Native Women and Men](#), National Institute of Justice Research Report (May 2016).

Natalie Wilkins et al., [Connecting the Dots: An Overview of the Links among Multiple Forms of Violence](#), Centers for Disease Control and Prevention and Prevention Institute (March 2016).

[Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA](#), Amnesty International (2007).

Articles

Amy Radon, ["Tribal Jurisdiction and Domestic Violence: The Need for Non-Indian Accountability on the Reservation,"](#) 37 Michigan Journal of Law Reform 1275 (2004).

SECTION 2

CRIMINAL SEXUAL ASSAULT STATUTE

AI/AN women are victims of sexual assault at a higher rate than any other population. One in two AI/AN women experience sexual violence during their lifetime.⁴² In the last year 14.4 percent of AI/AN women have experienced sexual violence.⁴³ One in four AI/AN men experience sexual violence during their lifetime.⁴⁴ Only 16 to 32 percent of rape victims report the crime to law enforcement authorities.⁴⁵

Making sure that your tribal code defines sexual assault and stalking as **crimes** is one way (but not the only way) for a Native Nation to respond to sexual assault.

Point of Discussion: Why have a law?

Why should we have tribal criminal laws against sexual assault?

1. It sends a message that we do not accept violent and abusive behavior.
2. It gives tribal law enforcement the power to arrest suspects.
3. It gives tribal prosecutors the power to prosecute suspects.
4. It gives tribal judges the power to punish people who commit sexual assault and stalking.

Some tribes do have criminal laws against sexual assault. However, many of these tribal laws were copied from state or federal statutes many years ago. States and the federal government have significantly changed their laws through “rape law reform,” which began in the 1970s. Many tribes have not changed their sexual assault laws since they were enacted.

Sexual assaults that occur on reservations are generally criminally prosecuted in federal court unless criminal jurisdiction has been transferred from the federal government to the state under PL 280 or similar federal legislation.⁴⁶ However, the tribe also has the power to prosecute sexual assault cases. On a PL 280 affected reservation, the state and tribe have concurrent

⁴² 56.1 percent experience sexual violence. Andre Rosay, [Violence Against American Indian Women and Men, National Institute of Justice Research Report](#), May 2016.

⁴³ Ibid.

⁴⁴ 27.5 percent have experienced sexual violence. Ibid.

⁴⁵ National Institute of Justice, *The Sexual Victimization of College Women*, U.S. Department of Justice (2000).

⁴⁶ For more information concerning PL 280, see C. Goldberg, *Planting Tail Feathers: Tribal Survival and Public Law 280*, UCLA American Indian Studies Center (1997); C. Goldberg and H. Valdez Singleton, *Public Law 280 and Law Enforcement in Indian Country: Research Priorities* (No. NCJ 209839), U.S. Department of Justice, Office of Justice Programs (2005); A. P. Melton and J. Gardner, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country* (2000). Available at <http://www.tribal-institute.org/articles/gardner1.htm/>; accessed May 12, 2012.

jurisdiction. If a reservation is not affected by PL 280 or similar laws, then the federal government and the tribe have concurrent jurisdiction.

This section focuses on the drafting of a criminal sexual assault law.

- [Chapter 4](#) concentrates on defining *sexual assault* in a criminal statute, which includes defining *consent* and *a sexual act*.
- [Chapter 5](#) discusses sexual assault by a spouse or intimate partner. This chapter touches on specific federal laws such as VAWA 2013 and its impact on tribal laws.
- [Chapter 6](#) focuses on sanctions in criminal sexual assault statutes.

Having a law is just the beginning. The ability to enforce and prosecute is very important. Cooperation and sharing information and evidence between jurisdictions is vital. Agreements and protocols with other tribes, states, and the federal government are often necessary.

All federally recognized tribes have the right to prosecute some sexual assault cases—even if they are not doing it right now. The federal government has limited tribal sovereignty by restricting who tribes can punish criminally and how much punishment they can impose. Tribes cannot prosecute non-Indians.⁴⁷ Tribes cannot impose more than a one-year sentence or a \$5,000 fine for each criminal violation,⁴⁸ unless they meet the requirements of TLOA. Even then, tribes are limited in sentencing to three years and/or \$15,000, although they can stack up to three offenses.⁴⁹ Yet, many tribes are enforcing criminal sexual assault laws and updating sexual assault, stalking, and sex-offender registration laws. The limitations do not prevent the tribe from taking action.

Point of Discussion: Limitations on prosecutions

Limitations on tribal criminal response:

1. Cannot prosecute non-Indians unless SDVCJ applies.
2. Cannot sentence to more than one year per offense and/or \$5,000 fine unless the tribe can meet the requirements of the TLOA.
3. Cannot sentence to more than three years per offense, and/or \$15,000 fine, even if the requirements of TLOA are met.

⁴⁷ Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). Limited prosecution of non-Indians for sexual assault may be permitted if the tribe has “special domestic violence jurisdiction” under VAWA 2013.

⁴⁸ Indian Civil Rights Act, 25 U.S.C. § 1301-1303.

⁴⁹ Under TLOA tribes can stack up to three offenses with a maximum penalty of three years for each offense.

If a state or federal government is already prosecuting a person for sexual assault or stalking, why should the tribe use its limited resources to prosecute the same offender? There are many possible reasons.

- A federal or state prosecution may take a long time. The tribe may have the benefit of being the first on the scene of a crime and the first to investigate and can act quickly. Imagine the difficulty a victim has when her rapist or stalker is freely moving about the community sometimes for months and years, while cases are prepared.
- There may also be variations between a tribe's sexual assault and stalking laws and the federal/state law, which make a difference in the ability to prosecute a particular case.
- If a particular stalking case does not rise to the level of MCA or one of the federal stalking or cyberstalking statutes (these are so-called misdemeanor or no-contact stalking cases), then the tribe may have exclusive jurisdiction.
- The main reason to prosecute is that the victims are members of your tribal community, and your Nation has a responsibility to protect them to the best of its ability.
- The Nation may want to protect tribal sovereignty by using their sovereignty to the maximum in order to safeguard its citizens.

Federal Criminal Sexual Assault Laws

Most tribes with criminal court systems have concurrent jurisdiction with the federal government for sexual assault prosecutions.⁵⁰ Consequently, this section reviews the federal law on sexual assault. It is important to understand the federal law, so that the tribe can develop laws that are more effective and comprehensive. The federal laws use the term *sexual abuse* rather than *sexual assault* or *rape*.

If your Nation is in a PL 280 state or otherwise has concurrent jurisdiction with a state, knowing your state laws is an important first step in revising your tribal laws. Additionally, even if you are a Nation with concurrent federal jurisdiction, but your citizens frequently live, work, or play outside of your jurisdiction, it is well advised to be aware of the state laws.

Point of Discussion: Concurrent jurisdiction

What is *concurrent jurisdiction*?

1. *Concurrent* means at the same time.
2. *Concurrent jurisdiction* means that more than one sovereign government has power.
3. *Concurrent* does not mean that the tribal power is any less important than the federal/state power.

(Review [Chapter 3: “Criminal Jurisdiction”](#) for information on criminal jurisdiction.)

[MCA](#)⁵¹ gives federal courts the jurisdiction to prosecute Indian suspects for rape occurring in Indian country.

The [General Crimes Act](#)⁵² gives federal courts authority to prosecute non-Indian suspects when the victim is Indian.

Tribal sexual assault laws do not have to match the federal laws. Tribal laws may be stricter or more comprehensive than federal laws. It is important for Native Nations to understand the federal laws so that the laws fit together to provide the maximum safety.

Both MCA and the General Crimes Act refer to the following federal statutes (included in the appendix):

U.S.C. Title 18 – Crimes and Criminal Procedure

⁵⁰ Tribes affected by PL 280 are much less likely to have contemporary criminal court systems.

⁵¹ Major Crimes Act, 18 U.S.C. § 1153.

⁵² General Crimes Act, 18 U.S.C. § 1152.

Part I – Crimes

Chapter 109A – Sexual Abuse

[2241. Aggravated sexual abuse](#)

[2242. Sexual abuse](#)

[2243. Sexual abuse of a minor or ward](#)

[2244. Abusive sexual contact](#)

[2245. Offenses resulting in death](#)

[2246. Definitions for chapter](#)

[2247. Repeat offenders](#)

The federal sexual assault laws distinguish between “types” of sexual abuse on the basis of the degree of force or threat of force.

The federal laws are gender neutral. It doesn’t matter if the victim is a man or a woman.

Federal law has four main categories of sexual assault: aggravated sexual abuse, sexual abuse, sexual abuse of a minor or ward, and abusive sexual conduct.

Aggravated sexual abuse ([18 U.S.C. § 2241](#)) is the most serious federal sex offense. This crime carries a statutory maximum term of life imprisonment and a minimum of thirty years when a child is involved.

- It is aggravated sexual abuse for a person to knowingly engage in a sexual act through the use of force (violence) or threats of serious physical harm.
- It is aggravated sexual abuse to use other ways (other than force) to commit a sexual assault, such as administering by force, threat of force, or without the knowledge or permission of that person a drug, intoxicant, or similar substance that substantially impairs the ability of the other to appraise or control conduct.
- Any sexual act with a child under the age of twelve is aggravated sexual abuse. A child under the age of twelve can never agree or consent to sexual behavior.
- If a child is between the ages of twelve and fifteen, and the suspect is more than four years older than the child, it is aggravated sexual abuse to use force, threats, or drugs/alcohol to commit sexual assault and results in a minimum imprisonment of thirty years.

Sexual abuse ([18 U.S.C. § 2242](#)) is considered a “less serious” crime than aggravated sexual abuse. (This does not mean that the victim doesn’t experience serious harm.) Sexual abuse carries a maximum term of twenty years of imprisonment.

- It is sexual abuse to cause someone to engage in a sexual act by threatening or placing the other person in fear, but not fear of serious bodily injury, kidnapping, or death (as is

required in aggravated sexual abuse).

- It is sexual abuse when one engages in a sexual act with another who is incapable of understanding the conduct or is physically incapable of declining participation.

The following information is needed in order to determine whether to charge aggravated sexual abuse or sexual abuse under federal law.

- The victim's state of mind at the time of the crime (fear of death or serious bodily harm);
- The victim's physical and psychological injuries (to assist in classification);
- Types of unwanted acts that were committed (to assist in classification);
- Types of force or coercion used by the perpetrator; and
- The ages of the victim and the perpetrator.

Sexual abuse of a minor or ward ([18 U.S.C. § 2243](#)) makes it illegal for anyone to engage in a sexual act with a child between the ages of twelve and fifteen, if the person engaging is at least four years older. This does not require force or threat of force, as required in aggravated sexual abuse. The federal conviction carries a maximum penalty of fifteen years in prison. Likewise, if someone engages in a sexual act with another person who is in detention and under the custodial authority of the person so engaging, it is sexual abuse of a ward.

Abusive sexual contact ([18 U.S.C. § 2244](#)) is another federal crime, but it does not require sexual penetration. It includes intentional touching of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. If the victim is under twelve years of age, the penalties double.

CHAPTER 4

DEFINING SEXUAL ASSAULT

Sexual assault is often defined as any “nonconsensual sexual contact.” Nonconsensual sexual contact is defined by the laws of each jurisdiction. Many jurisdictions criminalize any nonconsensual sexual contact that includes one or more of the following types of conduct:

- Contact, touching, or penetration of a victim’s vulva or vagina by a penis, finger, mouth, or foreign object.
- Contact, touching, or penetration of a victim’s anus by a penis, finger, mouth, or foreign object.
- Oral contact with a victim’s vulva, vagina, or anus.
- Contact or touching of a victim’s breast by a finger, hand, mouth, or foreign object.

It is important to remember that sexual assault need not include penile-vaginal penetration. Perpetrators of sexual assault often use foreign objects in the commission of the crime. Victims of sexual assault do not need to be unclothed during the assault. Over-the-clothes contact with a victim’s breast, vagina, or anus may also constitute sexual assault under the laws of many jurisdictions.

The trend has been to define sexual violence as a **consent-based** crime as opposed to a **force-based** crime. Many tribal laws have been modeled after older federal statutes or older state statutes and contain similar requirements of force, but do not contain other options that do not require force. However, tribes are increasingly redefining sexual assault as a **lack of consent**.

What is the meaning of *consent*? In relation to sex, consent is usually considered to be an agreement that two people make if they want to have sex. However, criminal sexual assault statutes define consent in a variety of ways, and how you define consent is an important consideration in developing your criminal sexual assault statutes.

Point of Discussion: Defining Consent Discussion Box

What is consent? Consider the following situations:

- One person is unconscious, drunk, stoned, or sleeping;
- One person is a boss, a police officer, a teacher, or a spiritual leader (or other person in authority);
- One person doesn't actually say "no"—but implies "no" through other words or behavior;
- One person changes his or her mind and wants to stop; and/or
- One person is too young to consent.

There are different methods to address "consent."

Some laws define *consent* using words such as *voluntarily* or *knowingly*. Other laws don't define *consent*, but instead define *nonconsensual sex*.

The definition section of the sexual assault statute is a very important portion of the statute. The definition of the crime lays the foundation for prosecution and sentencing.

Tribal Code Examples

The following tribal sexual assault laws are provided as illustrative examples.

Fort Peck Tribal Code

Title 7—Criminal Offenses

Chapter 2. Crimes Against Persons

Subchapter C. Sexual Offenses

Sec. 220. Rape. (Amended 4/11/2012)

A person who engages in a sexual act with another, or who causes another to engage in a sexual act, is guilty of rape if:

- (a) The defendant compels the other person to submit by force or by any threat that would render a person of reasonable firmness incapable of resisting; or
 - (b) The defendant or someone else, with the defendant's knowledge, has substantially impaired the other person's power to appraise or control the person's conduct by administering or employing, without the other person's knowledge, intoxicants, drugs or another similar substance with intent to prevent resistance; or
 - (c) The other person is unconscious; or
 - (d) The defendant knows that the other person submits because the other person falsely supposes the defendant to be someone else;
 - (e) The other person is under 12 years of age; or
 - (f) The defendant knows that the other person suffers from a mental disease or defect which renders that person incapable of understanding the nature of his/her conduct;
 - (g) The other person is in official custody or otherwise detained in a hospital, prison, or other similar institution and the defendant has supervisory or disciplinary authority over the detained person.
 - (h) Sexual act means:
 - (1) Contact between the penis and vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however, slight;
 - (2) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
 - (3) The penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
 - (4) The intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. Rape is a felony.
-

Hopi Code (Enacted 2/2012)

Title III. Criminal Code

Chapter 1. General Provisions

3.1.10 Definition of Terms

In this Code, unless the context or subject matter otherwise requires:
(Sections omitted)

36. "Sexual contact" means any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such contact with the intent to abuse, humiliate, harass, degrade, arouse or gratify the sexual desire of any person.

Hopi Code (Enacted 2/2012)

Title III. Criminal Code

Chapter 10. SEXUAL OFFENSES AND RELATED OFFENSES

3.10.2 SEXUAL ASSAULT.

A. A person who engages in sexual contact with another person, without his or her consent, is guilty of a sexual assault, a serious offense. "Without consent" includes any of the following:

1. The victim is coerced by the immediate use or threatened use of force against a person or property.
2. The victim is incapable of consent by reason of mental disorder, mental defect, drugs, alcohol, sleep or any other similar impairment of cognition and such condition is known or should have reasonably been known to the defendant. For purposes of this subsection, "mental defect" means the victim is unable to comprehend the distinctively sexual nature of the conduct or is incapable of understanding or exercising the right to refuse to engage in the conduct with another.
3. The victim is intentionally deceived as to the nature of the act.
4. The victim is intentionally deceived to erroneously believe that the person is the victim's spouse.

B. A person who engages in sexual acts or oral sexual acts with another person, without his or her consent, is guilty of aggravated sexual assault, a dangerous offense.

Tribal Code Commentary

The Fort Peck Tribal Code uses the term *rape*, instead of *sexual assault*. Sexual assault is more commonly used in state's laws, and is commonly thought to be a broader more inclusive term. However, the range of its application depends on how it is defined in the statute. The statutory definition is the most important aspect of the sexual assault code. Fort Peck defines *rape* in its statute as a sexual act with another who causes another to engage in a sexual act, if

- The other person is compelled by force, or by threat of force; or by any threat that would render a person of reasonable firmness incapable of resisting; or
- The other person's power to appraise or control conduct has been substantially impaired by the defendant or someone else with the defendant's knowledge by administering drugs, intoxicants, or another substance with the intent to prevent resistance; or
- The other person is unconscious; or
- The defendant knows the other person submits because the other person falsely supposes the defendant to be someone else; or
- The other person is under twelve years of age; or
- The defendant knows the other person suffers from a mental disease or defect which renders that person incapable of understanding the nature of his or her conduct; or
- The other person is in custody or otherwise detained in a hospital, prison, or other similar institution and the defendant has supervisory or disciplinary authority over the detained person.

The definitions of *rape* describe the situations in the Fort Peck Nation where consent is not freely given due to force or threats or those situations in which the other person is not able to consent because of age, mental capacity, or state of mind.

The definition of *sexual act* includes contact between a sex organ and a sex organ, mouth, hand, finger, or any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. It could also be the intentional touching, not through clothing, of another person who has not attained the age of sixteen years with an intent to abuse, humiliate, harass, degrade or arouse, or gratify the sexual desire of any person. Some Nations might include intentional touching through clothing as a sexual act as well.

The Hopi code defines *sexual assault* as a person engaging in sexual contact with another person without his or her consent. *Sexual contact* means any touching, fondling, or manipulating any part of the genitals, anus, or female breast by any part of the body or by any object. A *lack of consent* includes coercion by the immediate or threatened use of force against

the person or property. It also could mean that the victim is incapable of consent due to a mental defect, mental disorder, drugs, alcohol, sleep, or any other similar impairment of cognition and such condition is reasonably known to the defendant. *Lack of consent* could also mean that a victim is intentionally deceived as to the nature of the act or erroneously believed that person to be his or her spouse.

Exercises

Step 1: Examine the Current Situation

- If you currently have a criminal statute covering sexual assault or rape, review the definition of *sexual assault* or *rape*.
- How does the current law define *consent* or *nonconsensual sexual contact* or similar terms?
- Is the current law *forced based* only or does it have other alternatives?
- Describe any shortcoming in the current law. Use the examples earlier in the chapter to determine whether certain situations are considered a sexual assault under your law.
- Have the concurrent (state or federal) jurisdiction's sexual assault statute available to examine its shortcomings.

Step 2: Establish a Vision for the Future

- How will you define *sexual assault*? What should be required to prove that a sexual assault happened?
- What are the situations that indicate a lack of consent? How does a person consent to sexual activity?
- How will you define *consent*?
- Will you have a *forced-based* and a *consent-based crime* of sexual assault? Why or why not?
- If the victim does not have physical injuries, are there other ways to prove a crime was committed?

Step 3: Drafting Law

Use your answers to Step 1 and Step 2 to draft the key points for this section of your code.

CHAPTER 5

SEXUAL ASSAULT: SPOUSE, INTIMATE PARTNER, OR DATING PARTNER

Most sexual assaults are perpetrated by someone known by the victim, often referred to as acquaintance rape. A portion of those acquaintance assaults are committed by intimate partners, dating partners, and sometimes spouses. Because there is federal law that specifically addresses acts of violence by intimate partners, dating partners, and spouses in Indian country, this chapter reviews the amendments to ICRA required by VAWA 2013 and provides a brief overview of Special Domestic Violence Criminal Jurisdiction (SDVCJ) over non-Indians, as it relates to sexual assault and stalking.

Before discussing SDVCJ, a brief discussion of marital immunity is addressed. Most nontribal U.S. governments did not traditionally recognize that a man could rape his wife (or ex-wife). This means that a man forcing his wife (or ex-wife) to have sex was not considered a crime—no matter how violent. This was called *marital immunity*.

Nearly all states and the District of Columbia have now eliminated total immunity (exception) for sexual assault crimes for perpetrators who are married to the victim. Many tribal laws, however, still retain this immunity provision. It is important that you review your current statute to eliminate marital immunity.

Point of Discussion: Marital immunity

The following passages represent marital immunity statutory language.

“It shall be unlawful to intentionally, wrongfully and without consent subject another, **not his/her spouse**, to any sexual contact. . . .”

“The provisions related to sexual offenses **shall not apply to conduct between married persons**. . . .”

These provisions mean that a prosecutor cannot take action if the accused is married to the victim.

Special Domestic Violence Criminal Jurisdiction

SDVCJ recognizes Native Nation's inherent ability to hold non-Indians offenders accountable and removes some restrictions imposed by *Oliphant*. Statistics have indicated that non-Indians are the primary perpetrators of crimes against Native women in both domestic violence and sexual assault. If a Native Nation opts into SDVCJ under VAWA 2013 it must adopt the requirements of the act, which are more fully described in the TLPI resource [Tribal Laws Implementing TLOA Enhanced Sentencing and VAWA Enhanced Jurisdiction](#).

If the Native Nation elects to implement SDVCJ, it may exercise jurisdiction over a sexual assault committed by a non-Indian under certain circumstances (charging the sexual assault under the Nation's SDVCJ statute), if the non-Indian has sufficient connection to the tribe, by either

- Residing in Indian country of the participating tribe, or
- Being employed in Indian country of the participating tribe, or
- Being the spouse, intimate partner, or dating partner of a tribal member, or
- Being the spouse, intimate partner, or dating partner of an Indian who resides in Indian country of the participating tribe.⁵³

The domestic violence offenses designated by VAWA SDVCJ are defined in [ICRA](#) as follows:

- **DATING VIOLENCE**—The term *dating violence* means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of the interaction between the persons involved in the relationship.
- **VIOLATION OF A PROTECTION ORDER**—The term *protection order* means any temporary or permanent, civil or criminal order issued to prevent violent or threatening acts or to prohibit contact, communication, or physical proximity to the interaction between the persons involved in the relationship.
- **DOMESTIC VIOLENCE**—The term *domestic violence* means violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family-violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs.⁵⁴ The violation must occur in Indian country of the

⁵³ [25 U.S.C. § 1304b.4B](#).

⁵⁴ [25 U.S.C. § 1304\(a\)\(2\)](#).

participating nation.⁵⁵

The definition of *dating violence* seems to eliminate hookups or casual sexual relationships. **Sexual assault and stalking are covered if the activity is within the definition of domestic violence, meets the requirements of dating violence or violates a protection order and is committed by a non-Indian with sufficient ties.** The tribal statute regarding domestic violence may include familial relationships that do not meet the federal definition of domestic violence in VAWA 2013, and tribes may need to create a definition that is consistent with the federal definition.

⁵⁵ [25 U.S.C. § 1304\(c\)\(2\)\(A\).](#)

Tribal Code Examples

The following tribal sexual assault laws are provided as illustrative examples.

Tulalip Tribal Code (Current through February 7, 2015)

Title IV. YOUTH, ELDERS AND FAMILY

[Chapter 4.25. Domestic Violence](#)

4.25.010 Purpose

Article I General Provisions

The Purpose of this Chapter is to recognize domestic violence and family violence as serious crimes against society, the Tribes, and the family, and to provide the victim of domestic violence or family violence the maximum protection from further violence that the law, and those who enforce the law, can provide. Furthermore, the purpose of this Chapter is to recognize that the strength of the Tribes is founded on healthy families, and that the safety of victims of domestic and family violence, especially children, must be ensured by immediate intervention of law enforcement, prosecution, education, treatment, and other appropriate services.

It is the intent of the Tulalip Tribes that the official response of domestic violence and family violence shall stress the enforcement of the laws to protect the victim and to hold the perpetrator accountable, which will in turn communicate the Tribes' policy that violent behavior against intimate partners or family members is criminal behavior and will not be excused or tolerated. This in turn will promote healing of families and the tribes where possible, and promote cultural teachings and traditional tribal values so as to nurture nonviolence and respect within families. This chapter shall be interpreted and applied to give it the broadest possible scope to carry out these purposes.

4.25.020 Legislative Findings

It is the intent of the Tulalip Board of Directors and the tribal community that the official response to domestic violence and family violence shall be that the Tribes will not tolerate or excuse violent behavior under any circumstances. All people, whether they are elders, male, female, or children of our Tribes, or of the entire community residing on the Tulalip Reservation, are to be cherished and treated with respect.

Domestic violence and family violence are not acceptable and are contrary to traditional Tulalip tribal culture and values of honoring the family, and are contrary to the interest of our community and sense of well-being and growth. Domestic violence and family violence will not be tolerated.

The Tribes find that domestic violence and family violence imperils the very subsistence of the tribal community and the residents of the reservation. The Tribes recognize the Department of Justice findings that one in three Native women is sexually assaulted in her lifetime and that 70% of *reported* assaults are committed by non-Native men against Native women. A community response to domestic and family violence is necessary because domestic and family violence crimes and incidents impact the community as a whole. These crimes redirect tribal resources—whether personnel, financial, public safety or other resources—elsewhere and

require an immediate response. As a result of this impact on tribal resources, the Tribes deem it necessary to address domestic violence and family violence to the fullest extent permitted by laws existing now or as may be adopted or amended in the future.

The Tribes further recognize that there is a distinction between intimate partner domestic violence and family member violence. Domestic violence involves an intimate partner relationship and dynamics of power and control are overwhelmingly present in the action. Family violence is committed against all other family or household members. Both are reprehensible actions that require specialized recognition and enhanced provisions than what might be otherwise available to victims of crimes, or remedies available in civil actions.

4.25.030 General Jurisdiction

Jurisdiction over domestic and family violence matters shall be in accordance with Chapter 2. In addition, the Tulalip Tribal Court shall retain jurisdiction over members of federally recognized Indian tribes and any violations of Orders of Protection entered pursuant to this Chapter which are alleged to have occurred outside of the boundaries of the Tulalip Indian Reservation where such orders are entitled to recognition outside reservation boundaries as a matter of full faith and credit.

Tulalip Tribal Code (Current through February 7, 2015)

Title IV. YOUTH, ELDERS AND FAMILY

[Chapter 4.25. Domestic Violence](#)

4.25.050 Special Domestic Violence Criminal Jurisdiction

(1) The Tulalip Tribes hereby exercise “Special Domestic Violence Criminal Jurisdiction” as a “participating tribe,” as defined within 25 U.S.C. §1304 (2013), subject to applicable exceptions defined therein, in the Tulalip Tribes Domestic Violence Court.

(2) In all proceedings in which the tribal court is exercising Special Domestic Violence Criminal Jurisdiction as a participating tribe, all rights afforded by TIC 2.25 shall apply and those enumerated in the Indian Civil Rights Act, 25 U.S.C. §1302 to all defendants. Should there be any inconsistency between TIC 2.25 and 25 U.S.C. § 1302, those of 25 U.S.C. § 1302 shall apply.

(3) Every defendant has the privilege of the writ of habeas corpus to test the legality of his or her detention by order of the Tulalip Tribes and may petition the court to stay further detention pending the habeas proceeding.

(a) A court shall grant a stay if the court-

(i) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and

(ii) after giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.

(4) The Tulalip Tribes hereby declares its Special Domestic Violence Criminal

Jurisdiction over any person only if he or she:

- (a) Resides within the jurisdiction of the Tulalip Tribes; or
- (b) Is employed within the jurisdiction area of the Tulalip Tribes, or;
- (c) Is a spouse, intimate partner, or dating partner of:
 - (i) A member of the Tulalip Tribes; or,
 - (ii) A member of another Indian Tribe who resides within the jurisdiction of the Tulalip Tribes;

4.25.050 Special Jurisdiction; Criminal Conduct Applicable

The Tulalip Tribes exercise the special domestic violence criminal jurisdiction of a defendant for criminal conduct that falls into one or more of the following categories:

- (1) Domestic Violence and Dating Violence: An act of domestic violence or dating violence that occurs within the jurisdiction of the Tulalip Tribes.
- (2) Violations of Protection Orders: An act that occurs within the jurisdiction of the Tulalip Tribes, and:
 - (a) Violates the portion of a protection order that
 - (i) Prohibits or provides protection against violent or threatening acts of harassment against, sexual violence against, contact or communication with, or physical proximity to, the person protected by the order.
 - (ii) Was issued against the defendant
 - (iii) Is enforceable by the Tulalip Tribes, and is consistent with 18 U.S.C. § 2265 (b).

(sections omitted)

4.25.100 Definitions

As used in this chapter, the following terms shall have the meanings given below:

(sections omitted)

- (9) "Dating relationship" means a social relationship of a romantic nature. In determining whether parties have a "dating relationship," the trier of fact shall consider:
 - (a) The length of time the relationship has existed;
 - (b) The nature of the relationship; and
 - (c) The frequency of the interaction between the parties.
- (10) "Dating violence" means a crime committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.
- (11) "Domestic violence" means a crime committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic violence laws of the Tulalip Tribes.

Domestic violence can take many forms such as but not limited to use of intimidation, contact as defined within this chapter, manipulation, isolation, coercion, fear and/or violence, as well as other tactics of power and control to establish and maintain a relationship of dominance over an intimate partner, but

does not include acts of self-defense. The following are examples of what form the domestic violence action may take, but are not an exhaustive list, merely illustrative:

- (a) Attempting to commit or committing any criminal offense as defined by [TTC Title 3](#) against an intimate partner;
 - (b) Physically harming, attempting to physically harm, or placing an intimate partner in reasonable fear of physical harm to himself or herself. Reasonable fear may be produced by behavior which induces fear in the victim, including, but not limited to, harassment, stalking, destruction of property, or physical harm or threat of harm to household pets;
 - (c) Emotional or mental abuse of the intimate partner, including physical or mental intimidation, controlling activities, or using demeaning language;
 - (d) Economic abuse of an intimate partner;
 - (e) Causing an intimate partner to engage involuntarily in sexual activity; or
 - (f) Preventing the victim from accessing services.
-

Fort Peck Tribes Comprehensive Code of Justice

Title 2 - Courts

Chapter 1. The Fort Peck Tribal Court

[Sec. 106. Criminal Jurisdiction of the Court.](#)

- (a) **Generally.** The Fort Peck Tribal Court is vested with jurisdiction to enforce all provisions of this Code, as amended from time to time, against any person violating the Code within the boundaries of the Fort Peck Tribes' Indian country. The Court is also vested with the power to impose protection orders against non-Indians in accordance with the provisions of this Code.
- (b) **Criminal jurisdiction over non-Indian domestic or dating violence.** The Fort Peck Tribal Court is vested with jurisdiction to enforce all provisions of this Code against a non-Indian who has committed an act of dating violence or domestic violence against an Indian victim within the Fort Peck Tribes' Indian country provided the non-Indian has sufficient ties to the Fort Peck Tribes.
 - (1) A non-Indian has sufficient ties to the Fort Peck Tribes for purposes of jurisdiction if they:
 - (A) Reside in the Fort Peck Tribes' Indian country;
 - (B) Are employed in the Fort Peck Tribes' Indian country; or
 - (C) Are a spouse, intimate partner, or dating partner of either:
 - (i) A member of the Fort Peck Tribes, or
 - (ii) A non-member Indian who resides in the Fort Peck Tribes' Indian country.
- (c) **Criminal jurisdiction over non-Indian protection order violations.** The Fort Peck Tribal Court is vested with criminal jurisdiction to enforce all provisions of this Code related to violations of protection orders against a non-Indian who has sufficient ties to the Tribes as identified in Section 106(b)(1) and who has violated a protection order within the Fort Peck Tribes' Indian country provided the

protected person is an Indian, and the following conditions are met:

- (1) The protection order was issued against the non-Indian,
- (2) The protection order is consistent with 18 U.S.C. 2265(b), and
- (3) The violation relates to that portion of the protection order that provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, the protected person.

Title 7 – Criminal Offenses

Chapter 2. Crimes Against Persons

Subchapter E. Crimes Against the Family

Sec. 249. Special domestic violence criminal offense.

(a) Jurisdiction. The Fort Peck Tribal Court is vested with jurisdiction to enforce this section against any person who has committed an act of Dating Violence, Domestic Violence or Violation of a Protection Order against an Indian victim within the Indian country of the Assiniboine and Sioux Tribes provided the defendant has sufficient ties to the Fort Peck Tribes. A defendant has sufficient ties if the defendant resides or is employed in the Indian country of the Assiniboine and Sioux Tribes; or if the defendant is a spouse, intimate partner, or dating partner of any Indian who resides in the Indian country of the Assiniboine and Sioux Tribes.

(b) Definitions.

- (1) Dating Violence** - The term dating violence means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.
- (2) Domestic Violence** - The term domestic violence means violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim.
- (3) Indian Country** - The term Indian country has the meaning given the term in section 1151 of title 18, United States Code.
- (4) Protection Order** - The term protection order means any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; and includes any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a pendent lite order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.
- (5) Spouse or Intimate Partner** - The terms spouse or intimate partner has the

meaning given the term in section 2266 of title 18, United States Code.

(c) **Offenses; Domestic and Dating Violence, Violations of Protection Orders.**

Every person who commits an act of domestic violence, dating violence or violation of a protective order is guilty of an offense punishable as a felony as per 7 CCOJ 501(1), and subject to the requirements of 7 CCOJ 244(4), except that an act that constitutes domestic abuse under 7 CCOJ 245, is punishable as a Class A misdemeanor, as per 7 CCOJ 501(2) and subject to the requirements of 7 CCOJ 245(1).

Domestic and dating violence include the offenses as stated in 7 CCOJ 244 and 245.

Violation of a Protection Order includes any act where the protection order was issued against the defendant, the protection order is consistent with 18 U.S.C. 2265(b), and the violation relates to that portion of the protection order that provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, the protected person.

Tribal Code Commentary

This commentary focuses on utilizing SDVCJ to prosecute some sexual assaults by non-Indians. Neither the commentary or this resource provides a comprehensive discussion of the requirements of VAWA 2013 to implement SDVCJ. Consult the TLPI publication [Tribal Legal Code Resource: Tribal Laws Implementing TLOA Enhanced Sentencing and VAWA Enhanced Jurisdiction](#) for assistance in developing code for implementation of SDVCJ.

The Tulalip statute is specifically designed to implement SDVCJ. The statute allows for prosecution of a non-Indian, who has committed a sexual assault within the Tulalip Nation, if the perpetrator resides within the Nation's jurisdiction; is employed with the Nation; is a spouse, intimate partner, or dating partner of a member of the Tulalip Nation; or is a member of another Indian Nation who resides within the Tulalip jurisdiction. Assuming also that the sexual assault also satisfies the definition of dating violence, domestic violence, or violation of a protection order in the Tulalip's statute.

Dating violence means a crime committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the type of relationship and the frequency of interaction. Clearly a sexual assault is such a crime, provided the accused satisfies the relationship requirements in the definition.

Domestic violence means a crime committed by a current or former spouse or intimate partner of the victim; by a person with whom the victim shares a child in common; by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner; or by a person similarly situated as a spouse of the victim under the domestic violence laws of the Tulalip Nation. A non-Indian accused of the crime of sexual assault could be charged by the Nation with domestic violence, if the accused meets the domestic violence definition. Indeed, causing an intimate partner to engage involuntarily in sexual activity is provided as one of the examples in the code.

The Tulalip Code includes legislative history and findings, which may be helpful in interpreting the law. Tulalip applies the domestic violence statute to all people (not just non-Indians) and provides equal rights and punishments to all that are accused and convicted of violating the law. The statute closely follows the definitions set out in VAWA 2013.

The Assiniboine and Sioux Tribes of the Fort Peck Nation implements SDVCJ in the Nation's Code of Justice as a provision under the general criminal jurisdiction of the court. Fort Peck provides the same description of a non-Indian with sufficient ties that is included in VAWA 2013 and the Tulalip Code. Fort Peck uses VAWA's statutory definitions for dating violence and domestic violence. Both of the definitions cover a sexual assault, if the accused fits the

description of the non-Indian with sufficient ties in the definition. A sexual assault by a non-Indian with sufficient ties could also be charged as a violation of a protection order, provided the protection order was issued against the accused and provides protection against violent or threatening acts, sexual violence, or contact against the Indian victim (meets the definition of protection order). This broadens the non-Indian perpetrator the Nation can prosecute, beyond intimate partners, dating partners, spouses, and former spouses.

Exercises

Step 1: Examine the Current Situation

- Review the current sexual assault statute to ensure any provision for marital immunity is highlighted for removal.
- Review the information and statistics you have access to on sexual assaults within your Nation committed by non-Indians. Has the federal or state government adequately held the perpetrator accountable?
- Do you currently incorporate SDVCJ into your statutes?
- Review the facts of any unpunished sexual assault cases involving a non-Indian offender and discuss whether the offender could be held accountable under SDVCJ, if established.
- Determining the value of SDVCJ requires an evaluation of domestic violence cases involving non-Indians and many other factors. The resource [Tribal Laws Implementing TLOA Enhanced Sentencing and VAWA Enhanced Jurisdiction](#) (Chapter 3: “Does Your Tribe Want to Exercise Enhanced Powers”) provides numerous questions that may help a Native Nation carefully analyze the value of implementing SDVCJ.

Step 2: Establish a Vision for the Future

- If you desire to eliminate any marital immunity, what changes are necessary?
- Is there significant value in holding non-Indian offenders accountable for sexual assault under SDVCJ?
- Will you set up a team to review domestic violence committed by non-Indians within your jurisdiction and conduct an examination of the value of implementing SDVCJ in your Nation?
- If you have implemented SDVCJ, are non-Indian sexual assault offenders being prosecuted? If not, why not?

Step 3: Drafting Law

Use your answers to Step 1 and Step 2 to draft the key points for this section of your code.

CHAPTER 6

SANCTIONS

After a defendant is convicted of sexual assault, the tribal court imposes sanctions (penalties) on the defendant. Sanctions are used to provide an incentive for obedience to the law, as well as punishment for disobeying the law. The tribal code provides the legal expectations and possible penalties to be imposed. These penalties reflect the community's antiviolence sentiment.

Different governments operate from different philosophical perspectives.

The tribal code-writing committee may choose to discuss the primary purposes of punishment from the tribal perspective. For example, discussing the following questions will help to illuminate the tribal "philosophy."

Point of Discussion: Holding perpetrators accountable

- What is/are the primary goal/s of sanctions? Punishment, safety, and/or rehabilitation?
- How can sanctions ensure the safety of victims?
- How can sanctions serve to rehabilitate the perpetrator?
- Do you want to increase sanctions for sexual assaults that involve firearms or other weapons?
- What sanctions fit our traditions?

[ICRA](#) limits the sanctions imposed by a tribal court to sentences not exceeding one year in jail and/or a fine of up to \$5,000, or both unless certain conditions are met. If a person is convicted of more than one crime (e.g., domestic violence and kidnapping), up to one year for each offense is allowed.⁵⁶ TLOA amended ICRA, increasing tribal court authority to incarcerate for up to three years and/or fine up to \$15,000 for one offense.⁵⁷ However, if a tribal court orders incarceration for more than one year for one offense, it must

- Provide the right to effective counsel for an indigent defendant at least equal to the U.S. Constitution at the tribe's expense. (The defense attorney must be licensed to practice law by a tribe, state, or federal government in a manner that ensures professional

⁵⁶ [25 U.S.C. § 1302\(7\)\(B\).](#)

⁵⁷ [25 U.S.C. § 1302\(7\)\(C\).](#)

competence and responsibility.);

- Ensure that the tribal court judge presiding over the case has sufficient legal training to preside over criminal proceedings, and is licensed to practice law in any jurisdiction;
- Publish criminal laws, rules of evidence, and procedure, including procedure on recusal of judge; and
- Maintain an audio or other record of the criminal trial.⁵⁸

Incarceration for more than a year also requires that the defendant either was previously convicted of the crime or that the crime is one that would carry a penalty of more than a year if prosecuted in a state or federal court. ICRA also allows for the defendant to be convicted of more than one offense at a time, allowing incarceration for up to nine years.⁵⁹ For a more detailed discussion on TLOA implementation to increase tribal court sentencing power, consult the resource [Tribal Laws Implementing TLOA Enhanced Sentencing and VAWA Enhanced Jurisdiction](#).

ICRA imposes **no limitations** on:

- Probation,
- Restitution,
- Public apology/personal apology,
- Banishment,
- Shaming,
- Restriction on firearms, and
- Other remedies not related to incarceration or fines.

⁵⁸ [25 U.S.C. § 1302\(b\),\(c\)](#).

⁵⁹ [25 U.S.C. § 1302 \(7\)\(D\)](#).

Varying “Degrees” of Sexual Assault

All states and the federal government have different degrees or categories of sexual assault. Making “degrees” might send the message that some sexual assaults are more serious or dangerous than other sexual assaults. Frequently sexual assaults involving force or guns or where the victims are particularly vulnerable, such as children or the disabled, carry the more severe penalties. Because Native Nations’ sanctions for incarceration and fines are limited, particularly when TLOA-enhanced sentencing has not been implemented, this may seem insignificant. However, many Nations continue to use categories of sexual assault with varying sentencing options.

Tribal Code Examples

The following tribal sexual assault laws are provided as illustrative examples.

Cherokee Indians Eastern Band, NC

[The Cherokee Code](#)

Part II Code of Ordinances

Chapter 14 Criminal Law

ARTICLE V. - SEXUAL ASSAULT (March 3, 2000)

Sec. 14-20.1 Reserved

Sec. 14-20.2. - Aggravated sexual abuse.

A person shall be guilty of aggravated sexual abuse if he or she:

- (1) Knowingly causes another person to engage in a sexual act by using force against that other person; or
- (2) Knowingly causes another person to engage in a sexual act by threatening or placing that other person in fear that any person will be subject to death, serious bodily injury, or kidnapping; or
- (3) Knowingly renders another person unconscious and thereby engages in a sexual act with that other person; or
- (4) Knowingly administers to another person by force or threat of force or without the knowledge or permission of that person a drug, intoxicant or other similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct and engages in a sexual act with that other person; or
- (5) Engages in a sexual act with another person who has not attained the age of 13 years.

Sec. 14-20.3. - Sexual abuse. (March 3, 2000)

A person shall be guilty of sexual abuse if he or she:

- (1) Knowingly causes another person to engage in a sexual act by threatening or placing that other person in fear; or
- (2) Knowingly engages in a sexual act with another person and that other person is:
 - a. Incapable of appraising the nature of the conduct; or
 - b. Physically incapable of declining participation in or communicating unwillingness to engage in the sexual act.

Sec. 14-20.4. - Sexual abuse of minor or a ward. (June 3, 2011)

A person shall be guilty of sexual abuse of a minor or a ward if he or she:

- (1) Engages in a sexual act with another person who has attained the age of 13 years but has not attained the age of 16 and who is at least four years younger than the person so engaging; or
- (2) Knowingly engages in a sexual act with another person who is in official detention and under the custodial, supervisory or disciplinary authority of the person so engaging.

Secs. 14-20.5—14-20.7. - Reserved.

Sec. 14-20.8. - Abusive sexual contact. (June 3, 2011)

A person shall be guilty of abusive sexual contact if he or she:

- (1) Engages in or causes sexual contact with or by another person, if to do so would violate section 14-20.2, 14-20.3 or 14-20.4, above, had the sexual contact been a sexual act; or
- (2) Knowingly engages in sexual contact with another person without that other person's permission.

Sec. 14-20.9. - Definitions. (June 3, 2011)

The following definitions apply to this article:

- (1) The term "sexual act" means:
 - a. Contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
 - b. Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
 - c. The penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
 - d. The intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.
- (2) The term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.
- (3) The term "serious bodily injury" means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.
- (4) The term "official detention" means:
 - a. Detention by a Tribal, Federal or State officer or employee, or under the direction of a Tribal, Federal or State officer or employee, following arrest for an offense; following surrender in lieu of arrest for an offense; following a charge or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following civil commitment in lieu of criminal proceedings or pending resumption of criminal proceedings that are being held in abeyance, or pending extradition, deportation, or exclusion; or
 - b. Custody by a Tribal, Federal or State officer or employee, or under the direction of a Tribal, Federal or State officer or employee, for purposes incident to any detention described in subparagraph a. of this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation; but does not include supervision or other control

(other than custody during specified hours or days) after release on bail, probation, or parole, or after release following a finding of juvenile delinquency; and

(5) The term "State" means a State of the United States, the District of Columbia, and any commonwealth, possession, or territory of the United States.

Sec. 14-20.10. - Punishment. (June 3, 2011)

Any person subject to the criminal jurisdiction of the Eastern Cherokee Court of Indian Offenses or any successor Cherokee Tribal Court who shall be convicted of any offense defined by this Article shall be punished as follows:

(1) For a violation of section 14-20.2, by imprisonment for not less than three years, which term shall not be suspended, staved or otherwise delayed or reduced, and a fine of \$15,000.00;

(2) For a violation of section 14-20.3 or 14-20.4, by imprisonment for not less than three years, all or any part of which may, in the Court's discretion, be suspended, and a fine of up to \$15,000.00.

(3) For a violation of section 14-20.8, by imprisonment for not less than one year nor more than three years, all or any part of which may be suspended in the Court's discretion, and a fine of up to \$15,000.00.

Hopi Code (August 28, 2012)

[Title III: Criminal Code](#)

Chapter 10. SEXUAL OFFENSES AND RELATED OFFENSES

3.10.1 ENTICEMENT OF A MINOR. A person who forces, entices, or persuades a child under the age of sixteen to enter any building, vehicle, or secluded place with intent to engage in sexual acts, sexual contact or oral sexual acts with the minor, is guilty of a dangerous offense.

3.10.2 SEXUAL ASSAULT.

A. A person who engages in sexual contact with another person, without his or her consent, is guilty of a sexual assault, a serious offense. "Without consent" includes any of the following:

1. The victim is coerced by the immediate use or threatened use of force against a person or property.

2. The victim is incapable of consent by reason of mental disorder, mental defect, drugs, alcohol, sleep or any other similar impairment of cognition and such condition is known or should have reasonably been known to the defendant. For purposes of this subsection, "mental defect" means the victim is unable to comprehend the distinctively sexual nature of the conduct or is incapable of understanding or exercising the right to refuse to engage in the conduct with another.

3. The victim is intentionally deceived as to the nature of the act.

4. The victim is intentionally deceived to erroneously believe that the person is the victim's spouse.

B. A person who engages in sexual acts or oral sexual acts with another person, without his or her consent, is guilty of aggravated sexual assault, a dangerous

offense.

3.10.3 SEXUAL CONDUCT WITH A MINOR. Any person who engages in sexual acts, sexual contact or oral sexual acts with a minor who is not his or her spouse is guilty of a dangerous offense.

Chapter 4. PENALTIES

3.4.1 IMPRISONMENT AND FINES.

The Court may impose the following criminal penalties against a person who is convicted for violating this Code:

1. A maximum of three years in custody and/or a fine of up to \$15,000.00 upon conviction for an offense which is defined in this Code as a “dangerous offense;”
2. A maximum of two years in custody and/or a fine of up to \$10,000.00 upon conviction for an offense which is defined in this code as a “serious offense;”
3. A maximum of one year in custody and/or a fine of up to \$5,000.00 upon conviction for an offense which is defined in this Code as an “offense;”
4. A maximum of six months in custody and/or a fine of up to \$2,500.00 upon conviction for an offense which is defined in this Code as a “minor offense;”
5. A maximum of three months in custody and/or a fine of up to \$1,250.00 upon conviction for an offense which is defined in this Code as a “petty offense.”

3.4.2 REPETITIVE OFFENDERS.

The Court may, at its discretion, sentence a person who has been previously convicted of the same offense, or a comparable offense by any jurisdiction in the United States, to one class higher than the sentence imposed in the previous conviction. Convictions for two or more offenses committed for the same act may be counted as one conviction for the purposes of this section.

3.4.3 CONSECUTIVE TERMS OF IMPRISONMENT.

If multiple crimes are committed, and multiple sentences of imprisonment are imposed on a person at the same time, the Court may, at its discretion, direct the sentences to run consecutively.

3.4.4 OTHER CRIMINAL PENALTIES.

In addition to, or in lieu of, the penalties set forth in Section 3.4.1, the Court may order restitution, diversion from criminal prosecution, community service, treatment, probation, parole, or suspension of sentence, unless a provision of this Code provides otherwise with respect to a certain type of offense.

Sault Sainte Marie Tribe of Chippewa Indians (10/28/2013)

[Tribal Code, Chapter 71](#)

SUBCHAPTER XVIII: SEX CRIMES

71.1801 Criminal Sexual Conduct – First Degree.

- (1) Offense. A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

- (a) That other person is under 13 years of age.
- (b) That other person is at least 13 but less than 16 years of age and any of the following:
 - (i) The actor is a member of the same household as the victim.
 - (ii) The actor is related to the victim by blood or affinity to the fourth degree.
 - (iii) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.
 - (iv) The actor is a teacher, substitute teacher, or administrator of the public or nonpublic school in which that other person is enrolled.
- (c) Sexual penetration occurs under circumstances involving the commission of any other crime which would be a felony if committed in the state of Michigan.
- (d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:
 - (i) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.
 - (ii) The actor uses force or coercion to accomplish the sexual penetration. Force or coercion includes, but is not limited to, any of the circumstances listed in subdivision (vi).
- (e) The actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.
- (f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes, but is not limited to, any of the following circumstances:
 - (i) When the actor overcomes the victim through the actual application of physical force or physical violence.
 - (ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.
 - (iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.
 - (iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable.
 - (v) When the actor, through concealment or by the element of surprise, is able to overcome the victim.
- (g) The actor causes personal injury to the victim, and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.
- (h) That other person is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless, and any of the following:
 - (i) The actor is related to the victim by blood or affinity to the fourth degree.
 - (ii) The actor is in a position of authority over the victim and used this

authority to coerce the victim to submit.

(2) Sentence. A person convicted of Criminal Sexual Conduct in the First Degree may be sentenced to imprisonment for a period not to exceed one (1) year, or a fine not to exceed Five Thousand Dollars (\$5,000.00), or both.

71.1802 Criminal Sexual Conduct – Second Degree.

(1) Offense. A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:

- (a) That other person is under 13 years of age.
- (b) That other person is at least 13 but less than 16 years of age and any of the following:
 - (i) The actor is a member of the same household as the victim.
 - (ii) The actor is related by blood or affinity to the fourth degree to the victim.
 - (iii) The actor is in a position of authority over the victim and the actor used this authority to coerce the victim to submit.
 - (iv) The actor is a teacher, substitute teacher, or administrator of the public or nonpublic school in which that other person is enrolled.
- (c) Sexual contact occurs under circumstances involving the commission of any other crime which would be a felony if committed in the state of Michigan.
- (d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:
 - (i) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.
 - (ii) The actor uses force or coercion to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the circumstances listed in section (1)(a)(vi) above.
- (e) The actor is armed with a weapon, or any article used or fashioned in a manner to lead a person to reasonably believe it to be a weapon.
- (f) The actor causes personal injury to the victim and force or coercion is used to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the circumstances listed in section (1)(a)(vi) above.
- (g) The actor causes personal injury to the victim and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.
- (h) That other person is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless, and any of the following:
 - (i) The actor is related to the victim by blood or affinity to the fourth degree.
 - (ii) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

(2) Sentence. A person convicted of Criminal Sexual Conduct in the Second Degree may be sentenced to imprisonment for a period not to exceed one (1) year, or a fine not to exceed Five Thousand Dollars (\$5,000.00), or both.

71.1803 Criminal Sexual Conduct – Third Degree.

(1) Offense. A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist:

- (a) That other person is at least 13 years of age and under 16 years of age.
- (b) Force or coercion is used to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in section (1)(a)(vi) above.
- (c) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.
- (d) That other person is related to the actor by blood or affinity to the third degree and the sexual penetration occurs under circumstances not otherwise prohibited by this chapter. It is an affirmative defense to a prosecution under this subdivision that the other person was in a position of authority over the defendant and used this authority to coerce the defendant to violate this subdivision. The defendant has the burden of proving this defense by a preponderance of the evidence. This subdivision does not apply if both persons are lawfully married to each other at the time of the alleged violation.
- (e) That other person is at least 16 years of age but less than 18 years of age and a student at a public or nonpublic school, and the actor is a teacher, substitute teacher, or administrator of that public or nonpublic school. This subdivision does not apply if the other person is emancipated or if both persons are lawfully married to each other at the time of the alleged violation.

(2) Sentence. A person convicted of Criminal Sexual Conduct in the Third Degree may be sentenced to imprisonment for a period not to exceed one (1) year, or a fine not to exceed Five Thousand Dollars (\$5,000.00), or both.

71.1804 Criminal Sexual Conduct – Fourth Degree.

(1) Offense. A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if any of the following circumstances exist:

- (a) That other person is at least 13 years of age but less than 16 years of age, and the actor is 5 or more years older than that other person.
- (b) Force or coercion is used to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the following circumstances:
 - (i) When the actor overcomes the victim through the actual application of physical force or physical violence.
 - (ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute that threat.
 - (iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute that threat. As used in this subparagraph, “to retaliate” includes threats of physical punishment, kidnapping, or extortion.
 - (iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.

(v) When the actor achieves the sexual contact through concealment or by the element of surprise.

(c) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

(d) That other person is related to the actor by blood or affinity to the third degree and the sexual contact occurs under circumstances not otherwise prohibited by this chapter. It is an affirmative defense to a prosecution under this subdivision that the other person was in a position of authority over the defendant and used this authority to coerce the defendant to violate this subdivision. The defendant has the burden of proving this defense by a preponderance of the evidence. This subdivision does not apply if both persons are lawfully married to each other at the time of the alleged violation.

(e) The actor is a mental health professional and the sexual contact occurs during or within 2 years after the period in which the victim is his or her client or patient and not his or her spouse. The consent of the victim is not a defense to a prosecution under this subdivision. A prosecution under this subsection shall not be used as evidence that the victim is mentally incompetent.

(f) That other person is at least 16 years of age but less than 18 years of age and a student at a public or nonpublic school, and the actor is a teacher, substitute teacher, or administrator of that public or nonpublic school. This are lawfully married to each other at the time of the alleged violation.

(2) Sentence. A person convicted of Criminal Sexual Conduct in the Fourth Degree may be sentenced to imprisonment for a period not to exceed one (1) year, or a fine not to exceed Five Thousand Dollars (\$5,000.00), or both.

71.1805 Indecent Exposure.

(1) Offense. A person commits the offense of indecent exposure, or he deliberately exposes the genital organs of a person to the view of another person or persons or exposes them under circumstances that the exposing person has reasonable cause to know that such exposure may be viewed by another person or persons, if in either event the exposing person knows or has reasonable cause to know the conduct may offend some person or persons viewing the same.

(2) Sentence. A person convicted of indecent exposure may be sentence to imprisonment for a period not to exceed three (3) months, or a fine not to exceed Two Thousand Dollars (\$2,000.00), or both.

Tribal Code Commentary

The Eastern Cherokee divided their sexual assault code into varying degrees of sexual assault: aggravated sexual abuse, sexual abuse, sexual abuse of a minor or ward, and abusive sexual contact. *Aggravated sexual abuse* required imprisonment for not less than three years, which cannot be suspended, stayed, or otherwise delayed and a fine of \$15,000. *Sexual abuse* and *sexual abuse of a minor or ward* requires imprisonment for not less than three years, and all or a part may be suspended and a fine of up to \$15,000. *Abusive sexual contact* requires imprisonment for not less than one year, nor more than three years, all or part may be suspended, and a fine of up to \$15,000.

The following paragraphs describe the major requirements or differences between each sexual assault crime of the Eastern Cherokee Sexual Assault Code. The definitions section contains important definitions including such words as *sexual act*, *sexual contact*, and *serious bodily injury*.

Aggravated sexual abuse requires that the actor causes another to engage in a sexual action:

- By using force;
- By placing another in fear of death or serious bodily injury or kidnapping;
- By causing another to be unconscious;
- By administering a drug or intoxicant substantially impairing another without the other's permission, or with threat or force; or
- When the other is a person under thirteen years of age.

Sexual abuse differs in that it only requires placing another person in fear (not fear of death or serious injury) or it requires engaging in a sexual act with the other person, who is incapable of apprising the nature of the conduct or is physically incapable of declining.

Sexual abuse with a minor or ward includes engaging in a sexual act with a person at least thirteen, but under sixteen. The victim must be at least four years younger than the actor or the person must be under custodial or supervision of the actor.

Abusive sexual contact requires intentional touching either directly or through clothing without the other person's permission or meets the requirements of any of the other three sexual abuse crimes except there is sexual contact rather than a sexual act.

The Hopi Code has three sexual assault offences: *Enticement of a minor*, *sexual assault*, and *sexual contact with a minor*. All three offenses are considered *dangerous offenses* and carry the potential of up to three years and up to a \$15,000 fine. The Hopi Code categorizes all criminal

offenses as a *dangerous offense*, *serious offense*, *offense*, or a *petty offense*. Each category carries a specific maximum penalty with the *dangerous offense* carrying the most serious penalty. The tribal judge is not compelled to deliver a required period of incarceration or fine, as in the case of Eastern Cherokee, but rather must evaluate each case and has discretion to determine the appropriate sanctions. A judge has discretion to sentence a repetitive offender of the same or comparable offense to one degree higher than the sentence imposed. Other penalties may be ordered as well, such as restitution, diversion from criminal prosecution, community service, treatment, probation, parole, or suspension of a sentence, unless a provision of the criminal code prohibits such a penalty for the specified crime.

The Sault Sainte Marie Tribe of Chippewa Indians have incorporated Michigan's Sexual Assault Code with minor modifications. A Native Nation should not incorporate a state or federal code without serious discussions to ensure that the code is consistent with their customs and beliefs. This code is very detailed and specific about possible crimes of sexual assault and divides the crimes into first, second, third, and fourth degree criminal sexual conduct. In the state court this would vary from serious felonies to misdemeanors with different sanctions, but in the Sault Sainte Marie Nation incarceration is limited to one year and a fine may not exceed \$5,000. Although incorporating state codes is not generally recommended, at times due to the particular relationship between the Native Nation and the state it may be reasonable to consider. It may lead to greater cooperation of law enforcement agencies and handling of sex offender registration. Each Nation's situation is different.

Exercises

Step 1: Examine the Current Situation

- Has the tribe expanded sentencing authority to three years and \$15,000 by implementing the requirements of TLOA?
- What are current “degrees” or “categories” of sexual assault?
- What are the current sanctions for each category?
- What other sanctions are available for use in addition to incarceration and fines?

Step 2: Establish a Vision for the Future

It is important to have a set of “tools” that can be used by tribal judges in sentencing victims. When drafting the punishments, you may want to discuss the following issues and the resources necessary to implement them:

- Mandatory incarceration (jail time) for a sexual assault conviction
- Fines to be paid to the tribal government (not to exceed \$5,000 per offense or \$15,000 if tribe meets TLOA requirements)
- Restitution (money or other forms) to the victim and/or the victim’s family
- Mandatory counseling (reeducation, drug/substance abuse treatment, parenting classes, etc.) for sexual assault convictions
- Banishment (requiring an offender to leave the reservation for a period of time)
- Seizure of weapons
- Other _____

Discuss whether enhanced punishments should be imposed for the following acts:

- Repeat sexual assault offenders;
- Use of weapons during an act of sexual assault;
- Sexual assault in the presence of a child or elder;
- Sexual assault of a pregnant woman; and/or
- Sexual assault of a child or elder.

Determine the categories or degrees of sexual assault you want in your code and the sanctions or punishments for each.

Point of Discussion:

Would any of these examples be excluded from your definitions of sexual assault?

1. *Mrs. Randall is an older woman with health problems and she uses a wheelchair. A man comes to her house to deliver some groceries. While he is there, he touches her breast and bottom. He doesn't threaten to hurt Mrs. Randall, but she can't physically resist him.*
2. *Rebecca is a single mom, late on her rent. When she goes to her landlord's office, he locks the door and says that if she doesn't have sex with him, he will evict her and the children. Because she is afraid of losing her kids, she has sex with him.*
3. *Patty is a twenty-year-old who drank a great deal while partying and passed out. While she was passed out, Victor pulled down her pants and had sex with her.*

If you determine that you desire to implement enhanced sentencing under TLOA and have not already done so, select a group to work with the tribal legal code resource: [Tribal Laws Implementing TLOA Enhanced Sentencing and VAWA Enhanced Jurisdiction](#).

Step 3: Drafting Law

Use your answers to Step 1 and Step 2 to draft the key points for this section of your code.

Additional Resources

Books

Sarah Deer, *The Beginning and End of Rape: Confronting Sexual Violence in Native America* (University of Minnesota Press, 2015).

Sarah Deer, Bonnie Clairmont, Carrie A. Martell, and Maureen L. White Eagle, *Sharing Our Stories of Survival: Native Women Surviving Violence* (AltaMira Press, 2008).

Jacqueline Agtuca, *Safety for Native Women: VAWA and American Indian Tribes* (National Indigenous Women's Resource Center, 2014).

Reports and Resources

[Special Domestic Violence Criminal Jurisdiction Pilot Project Report](#), National Congress of American Indians (June 2016).

Indian Law and Order Commission, [A Roadmap for Making Native America Safer](#), Report to the President and Congress (May 2015).

Andre Rosay, [Violence Against American Indian and Alaska Native Women and Men](#), National Institute of Justice Research Report (May 2016).

[Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA](#), Amnesty International (2007).

[Indian Country Prosecution and Investigations](#), U.S. Department of Justice (2014).

Maureen L. White Eagle, Melissa L. Tatum, and Chia Halpern Beetso, [Tribal Legal Code Resource: Tribal Laws Implementing TLOA Enhanced Sentencing and VAWA Enhanced Jurisdiction](#), Tribal Law and Policy Institute (updated February 2016).

Sarah Deer, Carole Goldberg, Heather Valdez Singleton, and Maureen White Eagle, [Focus Group on Public Law 280 and the Sexual Assault of Native Women](#), Tribal Law and Policy Institute (2007).

Sarah Deer, Maureen White Eagle, Kelly Stoner, Carrie Martell, and Hallie Bongar White, [Tribal Legal Code Resource: Domestic Violence Laws](#), Tribal Law and Policy Institute (updated February 2015).

Maureen White Eagle, [Tribal Legal Code Resource: Tribal Judge's Sexual Assault Bench Book and Bench Card](#), Tribal Law and Policy Institute (June 2011).

Hallie Bongar White, James White, Sarah Deer, and Maureen White Eagle, [Law Enforcement Protocol Guide: Sexual Assault](#), Tribal Law and Policy Institute (July 2008).

Hallie Bongar White, James White, Sarah Deer, and Maureen White Eagle, [Prosecutor Protocol Guide: Sexual Assault](#), Tribal Law and Policy Institute (September 2008).

Bonnie Clairmont and Maureen White Eagle, [Sexual Assault Response Team \(SART\) Resource](#), Tribal Law and Policy Institute (September 2008).

[Indian Country Jurisdictional Chart](#), Department of Justice (2014).

Articles and Pamphlets

Amy Radon, "[Tribal Jurisdiction and Domestic Violence: The Need for Non-Indian Accountability on the Reservation](#)," 37 Michigan Journal of Law Reform 1275 (2004).

Kathleen Cairney, "[Addressing Acquaintance Rape: The New Direction of the Rape Law Reform Movement](#)," 69 St. John L. Rev. 291 (1995).

Sarah Deer, "[Expanding the Network of Safety: Tribal Protection Orders for Survivors of Sexual Assault](#)," 2003/2004 Tribal Law Journal, University of New Mexico.

Sarah Deer, "[Toward an Indigenous Jurisprudence of Rape](#)," 14 Kan. J. L. & Pub. Pol'y 121 (2004a).

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SECTION III

EVIDENCE IN SEXUAL ASSAULT CASES

Evidence laws can be extremely important in cases of sexual assault. Evidence laws are rules that describe what and how evidence (testimony or exhibits) can be considered in court. They are designed to make sure the case is fair; help the judge or jury determine the truth; and prevent wasted time and cost.

This section focuses on three common rules of evidence in sexual assault cases. Chapter 7 focuses on what are called “rape shield” laws. It discusses rules or laws designed to protect the victim from discussion of sexual activity that is not relevant to the crime. Chapter 8 further discusses privacy of the victim in its focus on laws that provide a “privilege” to the victim’s advocate. This prevents the advocate from testifying about matters relayed to the advocate by the victim unless the victim waives the privilege. Chapter 9 discusses laws and rules related to the admissibility of prior bad acts of the defendant.

CHAPTER 7

RAPE SHIELD LAWS

A common issue in a sexual assault case is whether a defendant should be allowed to submit evidence of the previous sexual activity of the victim.

In historical Anglo-American rape trials, the defendant may have been allowed to say, “This woman who claims to be a victim is an unmarried mother. She has a bad reputation sexually. She is promiscuous.” This kind of testimony was extremely damaging to victims. Women did not come forward and report sexual assault because they feared being humiliated in public.

The question of admissibility is one of “relevance.” Is a victim’s past sexual activity relevant to the specific incident of the alleged sexual assault? Rape shield laws are designed to provide some protection for victims against character attacks, invasions of privacy, sexual stereotyping, and embarrassment. At times, evidence of past sexual history is still admissible if it is relevant to the issue of consent or credibility of the victim. The following are common situations in which past sexual activity may be admissible, even with a rape shield law.

- Prior or subsequent sexual conduct with the defendant that tends to show consent by the victim.
- Evidence of specific instances of sexual activity with another party that would show that the rape was not committed by the defendant.
- Evidence that semen, sexually transmitted diseases, pregnancies, and/or injuries were not caused by the defendant.
- Evidence that the victim did engage in sexual activity if the victim testifies that he or she did not engage in any sexual activity during a time period.

The theory is that it is necessary to admit evidence of sexual activity in these limited situations, in order to support the defendant’s right to due process. The judge may use a balancing test, balancing the defendant’s due process rights with the victim’s rights. The rule should contain a procedure for the judge to review the evidence before it is submitted at trial.

Tribal Code Examples

The following tribal sexual assault laws are provided as illustrative examples.

Hopi Code (Enacted August 28, 2012)

Title I. Establishment of Courts and Appointment of Judges

Chapter 5. Powers and Duties of the Tribal Court

(sections omitted)

1.5.6 Rules of Evidence. The Federal Rules of Evidence shall constitute the rules of evidence, to the extent that they do not conflict with Hopi law and tradition, in all proceedings before the Trial Courts.

Federal Rules of Evidence

Rule 412: Sex-Offense Cases: Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition (Amended 2011)

(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

- (1)** evidence offered to prove that a victim engaged in other sexual behavior; or
- (2)** evidence offered to prove a victim's sexual predisposition.

(b) Exceptions.

(1) Criminal Cases. The court may admit the following evidence in a criminal case:

- (A)** evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
- (B)** evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and
- (C)** evidence whose exclusion would violate the defendant's constitutional rights.

(2) Civil Cases. In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

(c) Procedure to Determine Admissibility.

(1) Motion. If a party intends to offer evidence under [Rule 412\(b\)](#), the party must:

- (A)** file a motion that specifically describes the evidence and states the purpose for which it is to be offered;
- (B)** do so at least 14 days before trial unless the court, for good cause, sets a different time;
- (C)** serve the motion on all parties; and
- (D)** notify the victim or, when appropriate, the victim's guardian or representative.

(2) Hearing. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

(d) Definition of “Victim.” In this rule, “victim” includes an alleged victim.

Skokomish Tribal Code

Title IX. Criminal Code (Amended September 8, 2004)

9.02A Sex Crimes

9.02A.020 Testimony – Evidence – Written Motion – Admissibility

(a) In order to convict a person of any crime defined in S.T.C. 9.02A it shall not be necessary that the testimony of the alleged victim be corroborated.

(b) Evidence of the victim’s past sexual behavior including but not limited to the victim’s marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to tribal community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim’s consent except as provided in subsection (c) of this section, but when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense.

(c) In any prosecution for the crime of rape or for an attempt to commit or an assault with an intent to commit any such crime, evidence of the victim’s past sexual behavior including but not limited to the victim’s marital behavior, divorce history, or general reputation for promiscuity, nonchastity or sexual mores contrary to tribal community standards is not admissible if offered to attack the credibility of the victim and is admissible on the issue of consent only pursuant to the following procedure:

- (1) A written pretrial motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the past sexual behavior of the victim proposed to be presented and its relevancy on the issue of the consent of the victim.
- (2) The written motion shall be accompanied by an affidavit or affidavits in which the offer of proof shall be stated.
- (3) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and the hearing shall be closed except to the necessary witnesses, the defendant, counsel, and those who have a direct interest in the case or in the work of the court.
- (4) At the conclusion of the hearing, if the court finds that the evidence proposed to be offered by the defendant regarding the past sexual behavior of the victim is relevant to the issue of the victim’s consent, and the evidence is not inadmissible because its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice and that the exclusion of the evidence would result in denial of substantial justice to the

defendant, then the court shall make an order stating what evidence may be introduced by the defendant, which order may include the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

(d) Nothing in this section shall be construed to prohibit cross-examination of the victim on the issue of past sexual behavior when the prosecution presents evidence in its case in chief tending to prove the nature of victim's past sexual behavior, but the court may require a hearing pursuant to subsection (c) of this section concerning such evidence.

The Confederate Salish and Kootenai Tribes of the Flathead Reservation

[Laws of the Confederate Salish and Kootenai Tribes Codified](#)

Title II, Chapter 1. Tribal Offenses

Part 6. Sex Crimes

2-1-606. Provisions generally applicable to sexual crimes.

(1) When criminality depends on the victim being less than 16 years old, it is a defense for the offender to prove that he or she reasonably believed the child to be above that age. Such belief shall not be deemed reasonable if the child is less than 14 years old.

(2) No evidence concerning the sexual conduct of the victim is admissible in prosecutions under this part except evidence of the victim's past sexual conduct with the offender or evidence of specific instances of the victim's sexual activity to show the origin of semen, pregnancy or disease which is at issue in the prosecution.

(3) If the defendant proposes for any purpose to offer evidence described in subsection (2), the trial judge shall order a hearing out of the presence of the jury to determine whether the proposed evidence is admissible under subsection (2).

(4) Evidence of failure to make a timely complaint or immediate outcry does not raise any presumption as to the credibility of the victim.

(5) Resistance by the victim is not required to show lack of consent. Force, fear, or threat is sufficient alone to show lack of consent.

Tribal Code Commentary

The Hopi Nation has adopted the Federal Rules of Evidence by reference through the Hopi code. Many Nations have adopted the Federal Rules of Evidence, and for that reason Rule 412 is discussed in detail. [Rule 412, Federal Rules of Evidence](#) aims to protect the victim in criminal and civil cases involving sexual assault against:

- The invasion of privacy,
- Potential embarrassment, and
- Sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process.

Rule 412 bars evidence offered as substantive evidence or for impeachment, except in designated circumstances in which the probative value of the evidence significantly outweighs possible harm to the complainant. Past sexual behavior that is excluded includes all activities:

- That involve or imply actual physical conduct, that is, sexual intercourse and sexual contact;⁶⁰
- Of the mind, such as fantasies or dreams;⁶¹ and
- Relating to a complainant's sexual misconduct that is offered to prove a sexual predisposition, such as complainant's mode of dress, speech, or lifestyle.

The following past sexual behavior is not barred by Rule 412:

- Evidence offered to prove allegedly false prior claims by the complainant;
- Specific instances of sexual behavior with persons other than the defendant may be admissible if offered to prove that another person was the source of semen, injury, or other physical evidence;⁶²
- Evidence of past sexual behavior with the accused to prove consent or presented by the prosecution;⁶³ and
- Evidence that, if excluded, would violate the constitutional rights of the defendant.⁶⁴

⁶⁰ See, e.g., *United States v. Galloway*, 937 F.2d 542 (10th Cir. 1991), *cert. denied*, 113 S.Ct. 418 (19) (use of contraceptives inadmissible because use implies sexual activity); *United States v. One Feather*, 702 F.2d 736 (8th Cir. 1983) (birth of an illegitimate child inadmissible); and *State v. Carmichael*, 727 P.2d 918, 925 (Kan. 1986) (evidence of venereal disease inadmissible).

⁶¹ See C. Wright and K. Graham Jr., *Federal Practice and Procedure*, § 5384 at 548 (1980) ("While there may be some doubt under statutes that require 'conduct,' it would seem that the language of Rule 412 is broad enough to encompass the behavior of the mind.").

⁶² See Federal Rule of Evidence 412(b)(1)(A).

⁶³ See Federal Rule of Evidence 412(b)(1)(B).

⁶⁴ See Federal Rule of Evidence 412(b)(1)(C).

Rule 412 requires the following procedure to determine admissibility. A party intending to offer evidence under Rule 412 must:

- File a written motion at least fourteen days before trial (for good cause the judge can require a different deadline);
- Specifically describe the evidence;
- State the purpose for which it is offered;
- Serve the motion on all parties; and
- Notify the complainant.

Procedure required of the court under Rule 412:

- Must conduct a hearing in camera;
- Must afford the complainant and the defendant a right to attend and be heard; and
- Motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

The Skokomish Nation's statute prohibits the admission of the victim's past sexual activity into evidence to prove the character of the victim. The victim's sexual behavior including marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to the tribal community standards is inadmissible. It allows the admission of past sexual activity for the purposes of proving consent provided the procedure for a pretrial motion is followed and the judge determines that the evidence is strong evidence that substantially outweighs the prejudice that may result to the victim. The judge must also find that if the evidence were excluded it would result in a substantial injustice to the defendant. The judge is required to issue an order that specifically describes the evidence that is admissible.

The Skokomish statute also instructs that a victim's testimony does not need to be corroborated. The judge or jury hearing the case must then simply judge the creditability of the victim witness, and not reject the victim's testimony simply because there may not be corroborating evidence.

The Salish and Kootenai statute provides for the exclusion of evidence of the victim's sexual activity except for the victim's past sexual activity with the defendant or to show evidence of semen, disease, or pregnancy that is at issue in the case. It allows admission of the evidence of the victim's sexual activity in only a few situations. If the defendant seeks admission of such testimony, it does require a separate hearing before the judge.

Exercises

Step 1: Examine the Current Situation

- What current rule or law does your Nation have in place to protect the privacy of the victim's past sexual behavior?
- Does your Nation incorporate the Federal Rules of Evidence?
- Are you aware of people who have failed to report a sexual assault due to fear of their sexual behavior being revealed?
- Have there been any cases in which a victim's sexual behavior or reputation has been revealed in a sexual assault? Describe the situation and discuss whether you believe it was justified.

Step 2: Establish a Vision for the Future

- What changes if any in your current law relative to shielding the victim are necessary?
- How is your current law different than Rule 412 of the Rules of Federal Evidence? Why?
- What procedure will be required to ensure the evidence is admissible?

Step 3: Drafting Law

Use your answers to Step 1 and Step 2 to draft the key points for this section of your code.

CHAPTER 8

VICTIM-ADVOCATE PRIVILEGE

Over the past twenty years, many jurisdictions have passed laws that protect private conversations between sexual assault and/or domestic violence victims and their advocates. Some of these jurisdictions have determined that these communications should always be strictly confidential. Other jurisdictions have decided that they should be made available to the defense in a criminal case under special circumstances.

When certain conversations and information are considered confidential and not subject to disclosure, it is called “privileged.” If the information can be disclosed in some situations it may be a qualified privilege, and in other situations in which the information can never be disclosed without consent, it is an absolute privilege.

Sexual assault advocates or domestic violence advocates perform many services to victims similar to the services provided by attorneys, social workers, psychologists, or clergy. Most jurisdictions recognize the need for confidentiality in these relationships and have developed a victim-advocate privilege in their laws.

Confidentiality promotes trust between the victim and advocate, which allows a victim to feel comfortable sharing information. Information can help the advocate promote healing and safety. A victim who is concerned that the advocate may have to tell the defendant what was said may be too afraid to seek help.

Four elements are generally considered necessary to justify establishing a testimonial privilege:

- (1) The communications must originate in confidence,
- (2) Confidentiality must be essential to the proper maintenance of the relationship,
- (3) The relationship must be one that society deems worthy of protecting, and
- (4) Disclosure must injure the relationship more than it benefits the litigation.⁶⁵

⁶⁵ John H. Wigmore, *Evidence in Trials at Common Law*, §2285 (John T. McNaughton, rev. ed., 1961).

Tribal Code Examples

The following tribal sexual assault laws are provided as illustrative examples.

Oglala Sioux Tribe Law and Order Code⁶⁶

Domestic Violence Code Sec. 224

Victim-advocate privilege applicable in cases involving domestic violence.

- 1) Except as otherwise provided in subsection 2, and in compliance with the Victim-Advocate Privilege Act, a victim of domestic violence may refuse to disclose, and may prevent an advocate, elder, or medicine person from disclosing, confidential oral communications between the victim and the advocate and written records and reports concerning the victim unless the privilege is waived by:
 - a) The victim; or
 - b) The death of the victim.
- 2) The privilege does not relieve a person from any duty imposed in the mandatory reporting of child abuse or neglect. A person may not claim the privilege when providing evidence in proceedings concerning child abuse and neglect.
- 3) As used in this subsection, “advocate” means an employee of or volunteer for a program for victims of domestic violence who:
 - a) Has a primary function of rendering advice, counseling, or assistance to victims of domestic violence; supervising the employees or volunteers of the program; or administering the program;
 - b) Has undergone a minimum of 40 hours of specialized domestic violence advocacy training; and
 - c) Works under the direction of a supervisor of the program, supervises employees or volunteers, or administers the programs.

Ely Shoshone Tribal Code (Adopted 6/30/2008)

XV. Witness and Evidence

[Chapter 49. Privileges](#)

VICTIM’S ADVOCATE AND VICTIM

SECTION 49.2541 Definitions. As used in SECTION 49.2541 to 49.2549, inclusive, the words and terms defined in SECTION 49.2542 to 49.2545, inclusive, have the meanings ascribed to them in those sections.

SECTION 49.2542 “Domestic violence” defined. “Domestic violence” means an act described in SECTION 33.018.

SECTION 49.2543 “Sexual assault” defined. “Sexual assault” means a violation of SECTION 200.366 or an attempt to violate or conspiracy to violate SECTION 200.366.

SECTION 49.2544 “Victim” defined. “Victim” means a person who alleges that an act of domestic violence or sexual assault has been committed against the person.

SECTION 49.2545 “Victim’s advocate” defined. “Victim’s advocate” means a person who works for a nonprofit program that provides assistance to victims with or

⁶⁶ The Oglala Sioux Tribal Code is not available online at the time of this printing, but is available at TLPI by e-mailing maureen@TLPI.org.

without compensation and who has received at least 20 hours of relevant training.

SECTION 49.2546 When communication deemed to be confidential;

“communication” defined.

1. A communication shall be deemed to be confidential if the communication is between a victim and a victim’s advocate and is not intended to be disclosed to third persons other than:
 - (a) A person who is present to further the interest of the victim;
 - (b) A person reasonably necessary for the transmission of the communication; or
 - (c) A person who is participating in the advice, counseling or assistance of the victim, including, without limitation, a member of the victim’s family.
2. As used in this section, “communication” includes, without limitation, all records concerning the victim and the services provided to the victim which are within the possession of:
 - (a) The victim’s advocate; or
 - (b) The nonprofit program for whom the victim’s advocate works.

SECTION 49.2547 General rule of privilege. Except as otherwise provided in SECTION 49.2549, a victim who seeks advice, counseling or assistance from a victim’s advocate has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications set forth in SECTION 49.2546.

SECTION 49.2548 Who may claim privilege.

1. The privilege provided pursuant to SECTION 49.2547 may be claimed by:
 - (a) The victim;
 - (b) The guardian or conservator of the victim;
 - (c) The personal representative of a deceased victim; and
 - (d) The victim’s advocate, but only on behalf of the victim.
2. The authority of a victim’s advocate to claim the privilege is presumed in the absence of evidence to the contrary.

SECTION 49.2549 Exceptions. There is no privilege pursuant to SECTION 49.2547 if:

1. The purpose of the victim in seeking services from a victim’s advocate is to enable or aid any person to commit or plan to commit what the victim knows or reasonably should have known is a crime or fraud;
 2. The communication concerns a report of abuse or neglect of a child, older person or vulnerable person in violation of SECTION 200.508, 200.5093 or 200.50935, but only as to that portion of the communication;
 3. The communication is relevant to an issue of breach of duty by the victim’s advocate to the victim or by the victim to the victim’s advocate; or
 4. Disclosure of the communication is otherwise required by law.
-

[Turtle Mountain Band of Chippewa Indians Tribal Code](#)

Title 37. Domestic Violence (updated 2012)

Chapter 37.03. Criminal and Civil Penalties; Other Sanctions

Section 37.0305 Special Court Rules

(sections omitted)

f. Except as otherwise provided in Section 37.30, a victim of domestic violence may refuse to disclose and may prevent an advocate, elder, or medicine person from disclosing confidential oral communication between the victim and the advocate and written records and reports concerning the victim unless the privilege is waived by the victim.

1. The privilege does not relieve a person from any duty imposed in the mandatory reporting of child abuse or neglect. A person may not claim the privilege when providing evidence in proceedings concerning child abuse or neglect.
 2. A person may not claim the privilege when providing evidence in proceedings concerning child abuse or neglect.
-

Tribal Code Commentary

The Oglala Sioux's victim advocate privilege extends to conversations a victim has with an advocate, elder, or medicine person and to records and reports. The victim may refuse to disclose and prevent an advocate, elder, or medicine person from disclosing confidential information. The privilege may be waived by the victim or is waived by the death of the victim. Oglala law defines *advocate* to clarify that it can include an employee or volunteer whose primary function is to provide advice, counseling, or assistance to victims and who has received the forty-hour advocacy training. The privilege does not apply to child abuse and neglect cases. Although the law applies to domestic violence and sexual assault is not included within the provisions, the principle and the laws would be similar. Many tribes have not yet focused on updating and revising their sexual assault laws.

The Ely Shoshone Code's victim's advocate privilege extends to advocates for domestic violence and sexual assault. It defines *victim advocate* as a person who works for a nonprofit that provides assistance to victims with or without compensation and who has received twenty hours in training. A communication is deemed confidential if it is between a victim and a victim's advocate and is not intended to be disclosed to a third person other than a person who is present to further the interest of the victims, a person reasonably necessary for the transmission of the communication, or a person who is participating in the advice, counseling, or assistance of the victims, including without limitation, a member of the victim's family. This provision extends the privilege to include situations in which others may be present to assist the victim. The records of the nonprofit and advocate are confidential. The privilege may be claimed by the victim, the guardian, or conservator of the victim and the victim advocate on behalf of the victim. There are certain exceptions to the privilege, including a plan to commit a crime or fraud, child abuse or neglect, relevance to an issue of breach of duty of the victim's advocate to the victim, or disclosure is otherwise provided by law.

The Turtle Mountain Code extends the advocate privilege to domestic violence victims. It covers disclosing confidential information provided to an advocate, elder, or a medicine person in conversation or records. Child abuse or neglect is an exception.

Exercises

Step 1: Examine the Current Situation

- What is the role of advocate (domestic violence and sexual assault) in your community?
- Should discussion between advocates and victims be kept private?
- Are there others in your community who may be consulted by a sexual assault victim and confidentiality would be expected (e.g., elder, medicine person)?
- Does your tribal code currently protect victim/advocate conversations and records? What forms of communication are currently considered privileged: attorney/client, doctor/patient, and psychologist/patient?

Step 2: Establish a Vision for the Future

- Who should be covered by this privilege? Are there certain people who would traditionally aid a sexual assault victim, where there should be an expectation of privacy?
- How will you define an *advocate*, *medicine person*, or *elder*? Are these terms defined elsewhere in your code?
- Generally, a privilege may be revoked if a third party is present. Are there certain people who may be present without abrogating the privilege (see the Ely Shoshone Code)?
- What exceptions should there be to the privilege?

Step 3: Drafting Law

Use your answers to Step 1 and Step 2 to draft the key points for this section of your code.

CHAPTER 9

ADMISSIBILITY OF PRIOR BAD ACTS INTO EVIDENCE

Another evidence issue relating to sexual assault is whether the defendant's prior convictions or "bad acts" should be admissible at trial. Generally, evidence of other crimes and bad acts are not admissible to prove the character of the defendant. However, the evidence of bad acts or prior convictions is admissible for other purposes, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake.

Many rape convictions have been overturned by appellate courts because the courts disagreed on the purpose served by the admission of evidence of the prior bad acts. As a result, some jurisdictions changed their rules of evidence or statute to allow greater use of prior bad acts in sexual assault cases. Prior sexual assaults may be admissible if allowed under the rules.

Tribal Code Examples

Hopi Code (Enacted August 28, 2012)

Title I. Establishment of Courts and Appointment of Judges

[Chapter 5. Powers and Duties of the Tribal Court](#)

(section omitted)

1.5.6 RULES OF EVIDENCE. The Federal Rules of Evidence shall constitute the rules of evidence, to the extent that they do not conflict with Hopi law and tradition, in all proceedings before the Trial Courts.

Federal Rule of Evidence (Amended 2011)

Rule 413. Similar Crimes in Sexual-Assault Cases

(a) Permitted Uses. In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.

(b) Disclosure to the Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

(d) Definition of "Sexual Assault." In this rule and Rule 415, "sexual assault" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:

- (1) any conduct prohibited by 18 U.S.C. chapter 109A;
- (2) contact, without consent, between any part of the defendant's body — or an object — and another person's genitals or anus;
- (3) contact, without consent, between the defendant's genitals or anus and any part of another person's body;
- (4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or
- (5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)–(4).

Rule 415. Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation

(a) Permitted Uses. In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation. The evidence may be considered as provided in Rules 413 and 414.

(b) Disclosure to the Opponent. If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

Rules of Evidence in the Court of the Confederated Tribes of the Umatilla Reservation

Rule 413. Similar Crimes in Sexual-Assault Cases

(a) Permitted Uses. In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.

(b) Disclosure to the Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

(d) Definition of "Sexual Assault." In this rule and Rule 415, "sexual assault" means crime under tribal, federal, or state law, involving:

- (1) any conduct considered a sex related crime or sexual abuse under tribal law and any conduct prohibited by 18 U.S.C. chapter 109A;
- (2) contact, without consent, between any part of the defendant's body — or an object — and another person's genitals or anus;
- (3) contact, without consent, between the defendant's genitals or anus and any part of another person's body;
- (4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or
- (5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)-(4).

Rule 415. Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation

(a) Permitted Uses. (a) In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation. The evidence may be considered as provided in Rules 413 and 414.

(b) Disclosure to the Opponent. If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

Tribal Code Commentary

The Hopi statute like many tribal codes incorporate the Federal Rules of Evidence. Federal Rule of Evidence 413 is particularly important in sexual assault cases. Rule 413 provides that in a sexual assault case evidence of other sexual assaults is admissible, and the rule allows admission of other sexual assaults including those that are subject of uncharged conduct.⁶⁷

If the prosecutor intends to offer evidence under Rule 413, the prosecutor is required

- To tell the defendant in advance;
- To include in the disclosure statements of witnesses or a summary of the substance of any testimony that is to be offered; and
- To disclose at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

Rule 413 allows the admission of other sexual assaults in a civil case for damages. The party intending to provide evidence of past sexual assault must disclose the information and witnesses fifteen days before trial.

Rules 413 and 415 of the Umatilla Rules of Evidence are identical to the Federal Rules of Evidence. Unlike Hopi, Umatilla has incorporated the rules into their Nation's rules of evidence. Hopi references them. The benefit of the manner used by Umatilla is that any changes that are made to the Federal Rules will not automatically be incorporated, but rather be reviewed and approved by the Nation. This is an exercise of their sovereignty. The advantage of the way Hopi has referenced the Federal Rules of Evidence allows for the automatic incorporation of any changes to the evidence rules. It is evidently their desire to always use the Federal Rules of Evidence.

⁶⁷ United States v. Guidry, 456 F3d 493 (5th Cir., 2006), *cert. denied* 127 S.Ct. 996 (2007).

Exercises

Step 1: Examine the Current Situation

- Has your Nation incorporated the Federal Rules of Evidence? If so, does Federal Rule 413 describe how your Nation wants to handle the admission of bad acts of the defendant into evidence?
- Does your Nation have other rules of evidence that specifically deal with admission of bad acts of the defendant? Do they adequately describe how your Nation wants to deal with this type of evidence?
- What is the current procedure, if any, that must be followed to admit defendant's bad acts into evidence?

Step 2: Establish a Vision for the Future

- What changes if any should be made in the current rules of evidence?
- What procedure must be followed to admit defendant's bad acts into evidence?
- Are there any additional issues that should be dealt with relating to the admission of defendant's bad acts into evidence?

Step 3: Drafting Law

Use your answers to Step 1 and Step 2 to draft the key points for this section of your code.

Additional Resources

Books

Sarah Deer, Bonnie Clairmont, Carrie Martell, and Maureen White Eagle, *Sharing Our Stories of Survival: Native Women Surviving Violence* (AltaMira Press, 2007).

Carrie E. Garrow and Sarah Deer, *Tribal Criminal Law and Procedure*, 2nd ed. (AltaMira Press, 2015).

Resources and Reports

Maureen White Eagle, [*Tribal Court Judges Bench Book and Bench Card*](#), Tribal Law and Policy Institute (2011).

Sarah Deer, Carole Goldberg, Heather Valdez Singleton, and Maureen White Eagle, [*Focus Group on Public Law 280 and the Sexual Assault of Native Women*](#), Tribal Law and Policy Institute (2007).

Articles

Jennifer Bruno, "[Pitfalls for the Unwary: How Sexual Assault Counselor-Victim Privileges May Fall Short of Their Intended Protections](#)," University of Illinois Law Review, 1373 (2002).

Kathleen Cairney, "[Addressing Acquaintance Rape: The New Direction of the Rape Law Reform Movement](#)," 69 St. John L. Rev. 291 (1995).

Sarah Deer, "Toward an Indigenous Jurisprudence of Rape," 14 Kan. J. L. & Pub. Pol'y 121 (2004a).

Sarah Deer, "[Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law](#)," 38 Suffolk University Law Review 455 (2005).

Sarah Deer, "[Federal Indian Law and Violent Crime: Native Women and Children at the Mercy of the State](#)," 31 Social Justice 17 (2004b) (reprinted in *Color of Violence*, Southend Press, 2006).

Melissa Farley et al., [*Garden of Truth: The Prostitution and Trafficking of Native Women in Minnesota*](#), Minnesota Indian Women's Sexual Assault Coalition, (2011).

Judith D. Lincoln, "[Abolishing the Marital Rape Exemption: The First Step in Protecting Married Women from Spousal Rape](#)," 35 Wayne L. Rev. 1219 (1989).

Cheryl A. Whitney, "[Non-Stranger, Non-Consensual Sexual Assaults: Changing Legislation to Ensure That Acts Are Criminally Punished](#)," 27 Rut. L. J. 417 (1996).

[*Report to the U.S. Attorney General on Improving Federal Agency Response to Sexual Violence in Tribal Nations: Issues and Recommendations*](#), National Coordination Committee on the American Indian/Alaskan Native Sexual Assault Nurse Examiner-Sexual Assault Response Team Initiative (June 2014).

SECTION IV

CRIMINAL STALKING LAWS

Stalking, sexual assault, and murder are closely related. In the United States, one in every twelve women has been stalked. Three out of four stalking victims are stalked by someone they know. Eighty-one percent of women stalked by a current or former intimate partner are also physically assaulted by that partner; 31 percent are sexually assaulted by that partner.⁶⁸ In addition, 76 percent of female intimate partner murder victims and 85 percent of female attempted-homicide victims had been stalked by their intimate partner the year before their murder or attempted murder.

*A statistically significant association existed between intimate partner physical assault and stalking for femicide victims as well as attempted femicide victims. Stalking is revealed to be a correlate of lethal and near lethal violence against women and, coupled with physical assault, is significantly associated with murder and attempted murder. Stalking must be considered a risk factor for both femicide and attempted femicide, and abused women should be so advised.*⁶⁹

This section is divided into three chapters, [Chapter 10: “Summary of Stalking in Native Nations,”](#) [Chapter 11: “Criminal Stalking Statute,”](#) and [Chapter 12: “Sanctions in Stalking Cases.”](#)

[Chapter 10](#) provides statistical information on stalking in Indian country, information on common stalking behavior, including the use of technology, and federal statutes on stalking that impact Indian country.

[Chapter 11](#) discusses the core elements of a stalking criminal statute. It provides examples of tribal statutes as well as exercises to aid in development of a tribal statute.

[Chapter 12](#) provides an overview of sanctions and includes tribal code examples as well as exercises. It raises certain situations in which it may be appropriate to enhance the penalties.

The January 2007 report [The Model Stalking Code Revisited: Responding to the New Realities of Stalking](#) was used extensively in this section in framing the issues, describing the problems, and providing a model code. For more information on these issues, you can access the report and other useful materials on [the Stalking Resource Center website](#).

⁶⁸ Patricia Tjaden and Nancy Thoennes, *Stalking in America: Finding from the National Violence Against Women Survey*, U.S. Department of Justice, National Institute of Justice and the Centers for Disease Control and Prevention (1998).

⁶⁹ Judith M. McFarlane et al., “Partner and Intimate Partner Femicide,” *Homicide Studies* 3, no. 4 (November 1999), 300.

CHAPTER 10

SUMMARY OF STALKING IN NATIVE NATIONS

Among AI/AN women, 48.8 percent have experienced stalking in their lifetime and 11.6 percent have experienced it in the past year. Among AI/AN men, 18.6 percent have experienced stalking in their lifetime and 3.8 percent have experienced it in the past year. Among AI/AN victims, 89 percent of women and 91 percent of men have experienced stalking by an interracial perpetrator.⁷⁰

Because there is a strong relationship between stalking and sexual assault and murder, strong stalking laws may result in a decrease in other serious crimes.

The definition of *stalking* varies depending upon the jurisdiction. The Stalking Resource Center defines *stalking* as “a course of conduct directed at a specific person that would cause a reasonable person fear.”⁷¹

Research shows that surveillance (e.g., watching and following) is the most common type of stalking behavior. Stalkers can cause serious emotional trauma and terror without ever communicating direct threats. Many victims experience loss of sleep, nightmares, weight loss or gain, depression, anxiety, and difficulty in concentrating. Some are forced to change jobs and homes to avoid a stalker.

Many tribes do not have stalking laws, although many have developed and updated their statute in recent years. The methods that a stalker can use to track victims has substantially changed in the past ten years, so it is important to consider this in developing or revising stalking laws. Today stalking by using the Internet is common, installation of surveillance software on a computer is possible, global positioning systems (GPS) have become available, and secret video cameras are an economic possibility.

⁷⁰ Andre Rosay, [Violence Against American Indian and Alaska Native Women and Men](#), National Institute of Justice Research Report (May 2016), 29.

⁷¹[Definition of Stalking](#), National Stalking Resource Center.

Technology and Stalking

Generally, laws have not kept up with the technology. A review of some common uses of technology to stalk should be helpful in determining whether your proposed or current statute is comprehensive and covers cyberstalking, or the use of electronic communications to harass or frighten someone.

Cell Phones: Cell phones can be used by stalkers to send text messages, call, send photos and video, track using GPS, monitor a victim's usage through spyware, access a victim's personal information stored on that cell phone, and can also be used as a listening device. Caller ID can be circumvented by a stalker by spoofing technology that allows the stalker to mask identity. A stalker can use a victim's phone GPS system to track a victim. If a stalker has access to the victim's phone, the stalker can activate one of the applications that allows tracking of the cell phone without the victim's knowledge. Alternatively, the stalker may purchase a different phone, activate one of the tracking services, and plant the phone in the victim's car. Spyware is software that can be installed on a victim's phone. The spyware enables the stalker to listen to calls, read text messages, access the victim's contact list, or use the phone as a listening device. Spyware can be installed remotely without the stalker actually having possession of the phone.

GPS Devices: In addition to using cell phones for tracking victims, stalkers can also purchase a GPS in order to track victims. Trackers and loggers are devices that can be put in a bag or attached to a car to track a victim.

Computers: Spyware can be attached or imbedded in a computer to track the use of the victim's computer. Spyware is a computer software program or hardware device that enables an unauthorized person to secretly monitor and gather information about computer use. If these applications are run on stealth mode, they can be very difficult to detect. A person does not even need physical access to the computer in order to install some spyware. Some spyware can track every keystroke, allowing an abuser to access passwords and gain access to accounts. Some can track every chat, instant message, or e-mail message. Other spyware allows the stalker to freeze or shut down the victim's computer or remotely turn on the webcam.

Social Networking Sites: The stalker may use social networking sites and the information contained in them to harass and track the victim. They may post information about the victim on their own site, impersonate the victim by creating a fake site; "friend" family and friends of the victim; upload or tag photos of the victim; or use the sites of the victim's children to gather information on the victim.

Federal Stalking Laws

Knowledge of federal laws and state laws impacting people in your community is important when developing a stalking statute, as stalkers may enter and leave Indian country or stalk a person through technology within Indian country without ever physically entering your jurisdiction. Cooperation between jurisdictions is important in holding stalkers accountable.

The federal stalking law, [18 USCS § 2261A](#) (2013), is a law of general applicability, applying to anyone who meets the elements of the statute. The federal stalking statute uses the power of the federal government to regulate interstate commerce in establishing this crime. The law requires three key elements:

1. The person must have “intent”
 - a. To kill, injure, harass, intimidate, cause severe emotional distress to someone in another state or in another tribal jurisdiction, or
 - b. To place that person in another state or tribal jurisdiction in reasonable fear of death or serious bodily injury to that person or the immediate family, spouse, or intimate partner of that person.
2. Must pursue that “intent” through a course of conduct, defined as a pattern of conduct composed of two or more acts, evidencing a continuity of purpose that makes use of a facility of interstate commerce (e.g., mail, Internet, telephone, and actual travel).
3. The conduct must cause substantial emotional distress to the person or place that person in reasonable fear of the death or serious bodily injury to the persons described above in 1(b).⁷²

Realizing that a tribe generally cannot hold non-Native stalkers criminally accountable⁷³ and may have difficulty holding Native stalkers who are not physically within their boundaries criminally accountable, the importance of cooperation between federal and state law enforcement and prosecution is extremely important to stop stalkers, before the stalking ends in more serious criminal violations.

For a tribe to have jurisdiction, it is necessary that the crime took place within the boundaries of Indian country. In stalking cases, courts have ruled that the crime of stalking can take place in either or both the location where the communication originated (e.g., text messages or e-mail messages sent from a town outside of Indian country) and the place where the message was

⁷² See the appendix for pertinent provisions of the federal laws on stalking.

⁷³ In some situations, a non-Native stalker violating a protection order may be held accountable by a Native Nation. This is discussed in Section V: Protection Orders for Sexual Assault and Stalking Survivors.

received and responded to (e.g., in the victim's home in Indian country).

Point of Discussion: Federal law

The federal stalking law applies to both PL 280 and non-PL 280 affected reservations, so consider:

What are the important parts of the federal law?

What kind of stalking cases does the federal law cover? Can you think of examples from your community that might be covered?

What stalking cases are not covered by the federal stalking law? Can you think of examples from your community that might not be covered?

What is effective or positive about the federal law?

What is ineffective or negative about the federal law?

What are the ways that the tribe could support prosecution under federal law?

Are there parts of the federal law you think would be effective in tribal court?

Because a stalking victim may have a protection order for stalking, domestic violence, or sexual assault through tribal or state court, knowledge of the federal law on interstate violation of a protection order is helpful to ensure the tribal laws you develop intersect or make the most of federal protection for victims. The federal law, [18 USCS § 2262](#) (2006), describes the crime of interstate violation of a protection order. Protection orders for stalking and sexual assault are further discussed in Section V of this resource.

The federal firearms laws described in Chapter 3 of this resource, "Criminal Jurisdiction: Important Federal Laws and Crimes to Consider," are also significant in many stalking cases. Firearms prohibitions are contained in [18 USC § 922](#) (2005). It may be helpful to review the section before drafting your own law.

CHAPTER 11

CRIMINAL STALKING STATUTE

There are a number of key issues that should be discussed, understood, and resolved in developing or revising a criminal stalking statute. A quick review of these points may be helpful before examining your current statute or developing a new one.

Intent

Every criminal code requires that the offender intends to commit the crime. Intent is generally described either as “specific intent” or “general intent.”

Specific intent means a stalker must intend to cause the reaction in the victim, such as fear for the victim’s safety. This can be difficult to prove. A prosecutor needs to prove what was on the perpetrator’s mind when the acts were performed.

General intent means a stalker must intend the actions in which the stalker is engaging (e.g., following, calling, or e-mailing) but not necessarily the consequences of those actions. If a tribe desires to hold more stalkers accountable, it is suggested that the statute require general intent.

Fear and Emotional Distress

The main goal of a stalking law is to be able to take action to prevent violence. When has a person “crossed the line”? Many stalking laws look at the issue of fear. Is the stalker doing things that cause fear?

Many jurisdictions require that the victim personally experience fear, rather than using a “reasonable person standard.” If a prosecutor must prove the victim experienced fear, the prosecutor must call the victim as a witness. This means that the victim must sit in front of the person the victim fears and, in a public setting, describe the fear and the effect of that fear (anxiety or psychiatric problems). This can be re-traumatizing.

If a reasonable person standard is used, it may not always be necessary for the victim to testify. The prosecutor must show that a reasonable person (not necessarily the victim) would feel fear when exposed to the stalker’s actions.

Some laws require that the victim fear serious bodily injury or death. However, there are some milder forms of stalking that can also cause immense fear.

Point of Discussion: What stalking behaviors should we criminalize?

Some stalking laws are limited to actions that threaten death or injury. However, there are other forms of stalking that can be terrifying. Stalkers might threaten some of the following:

- * I will kidnap you/hold you hostage.
- * I will kidnap your children/family members.
- * I will destroy your credit rating/get you evicted.
- * I will destroy your reputation/end your career.
- * I am watching your every move.

These kinds of threats do not necessarily rise to the level of death or injury, but are quite frightening to the victim.

Some jurisdictions require that the victim **fear for safety** or **suffer other emotional distress**. The term *emotional distress* is meant to cover a reasonable person's response to being followed, watched, or threatened.

Fear in many statutes not only includes fear of harm to oneself but also includes fear of harm to others. Sometimes "others" is limited to family members, or it could be extended to a broader group of people, such as a current social companion or someone with whom the victim has or has had a continued relationship; the victim's professional counselor or attorney; or any person with whom the victim is acquainted.

Most stalkers are not strangers and may have had some kind of relationship with the victim, so the stalker may know the important people in the victim's life.

Point of Discussion: Who might the stalker threaten?

A victim of stalking might fear for more than her own safety. A stalker might threaten a variety of different people in her life. Examples:

- * Spouse, boyfriend
- * Children
- * Parents
- * Boss
- * Lawyer
- * Friends

Acts and Course of Conduct

Stalking laws should also include an understanding of context (the entire situation). Some behavior might look harmless unless you understand the background.

Example: Joe sends his ex-girlfriend, Nancy, a dozen red roses.

One possible interpretation: Joe is romantic. Joe wants to get back together.

Reality: Joe once told Nancy that the next time she receives roses, she will die.

The use of phrase “reasonable person in the victim’s circumstances” allows for the consideration of context in a law.

The following is a list of behavior (acts) that could be considered stalking under certain circumstances. By itself, an act may not be stalking. However, if you look at the background situation, it might meet the legal definition of stalking.

- Following;
- Telephoning/texting;
- Sending letters or packages;
- Photographing a person from a distance or with a hidden camera;
- Tracking or intimidating a person in any manner;
- Violating protection orders;
- Using the legal system to harass a victim (“litigation abuse”) by continuously filing motions or other civil process against victims;
- Harassing a victim through visitation or custody arrangements;
- Using surveillance in person, through technology, or through third parties;
- Using the Internet or a computer to steal a victim’s identity or to interfere with a victim’s credit;
- Engaging in obsessive or controlling behaviors;
- Targeting third parties (e.g., a victim’s family member, friend, or child) to scare a victim;
- Committing burglary in a victim’s home;
- Trespassing or moving items in a victim’s home;
- Killing animals;
- Attempting to harm oneself in a victim’s presence;
- Sending flowers, cards, or e-mail messages to a victim’s home or workplace;
- Contacting a victim’s employer or forcing a victim to take time off from work;
- Using humiliating or degrading tactics, such as posting pictures of a victim on the Internet or disseminating embarrassing or inaccurate information about a victim;

- Assaulting a victim;
- Using children to harass or monitor a victim; and
- Impersonating a victim through technology or other means.

Most jurisdictions have a requirement that the behavior be repeated on two or more occasions. The words “course of conduct” can be used to describe the action. Some places require that the action take place within a certain time period. Minnesota defines a **pattern of harassing conduct** as “two or more acts within a five-year period.”

Some stalking statutes contain a list of specific acts, sometimes called a “laundry list.” The best way to use a laundry list is to add language such as “includes but is not limited to” so that new technology or new tactics can be applied.

Tribal Code Examples

The following laws are provided as illustrative examples.

Fort Peck Comprehensive Code of Justice

Title 7: Criminal Offenses

Chapter 2. Crimes Against Persons

Subchapter D. Sexual Offenses

Sec. 224. Stalking. (amended 2011)

- (a) A person commits the offense of stalking if the person purposely or knowingly causes another person substantial emotional distress or reasonable apprehension of bodily injury or death by repeatedly:
1. following the stalked person; or
 2. harassing, threatening, or intimidating the stalked person, in person or by phone, by mail, or by other action, devise or method.
- (b) Stalking is a Class A misdemeanor. A person convicted of stalking may be sentenced to pay all medical, counseling, and other costs incurred by or on behalf of the victim as a result of the offense.
- (c) Upon presentation of credible evidence of a violation of this section, an order may be granted restraining a person from engaging in the activity described in subsection (a).
- (d) Attempts by the accused person to contact or follow the stalked person after the accused person has been given actual notice that the stalked person does not want to be contacted or followed constitutes prima facie evidence that the accused person intentionally followed, harassed, threatened, or intimidated the stalked person.
-

Colville Tribal Code

Title 3. Offenses

Chapter 3.1 Criminal Code (Current as of April 2016)

3-1-18 Stalking

- (a) A person commits the offense of stalking if the person:
- (1) purposefully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury, indecent liberties, rape, death of himself or herself or a family or household member or uninvited intrusion into a residence or place of employment; and
 - (2) has knowledge or should have knowledge that the specific person will be placed in reasonable fear of bodily injury, indecent liberties, rape, death of himself or herself or a family or household member, or uninvited intrusion into a residence or place of employment; and
 - (3) whose acts induce fear in the specific person of bodily injury, indecent liberties, rape, death of himself or herself or a family or household member or uninvited intrusion into a residence or place of employment.
- (b) For purposes of this section:
- (1) "Course of conduct" means repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats, or threats implied by conduct or a combination thereof directed at or toward a person.

(2) “Repeatedly” means on two or more occasions.

(3) “Has knowledge” means a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when the person is aware of the person’s own conduct or that the circumstances exist. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when the person is aware that it is highly probable that the result will be caused by the person’s conduct. When knowledge of the existence of a particular fact is an element of an offense, knowledge is established if a person is aware of a high probability of its existence. Equivalent terms, such as “knowing” or “with knowledge”, have that same meaning.

(c) Attempts to engage in this course of conduct after being given actual notice that the person does not want the course of conduct to continue constitutes prima facie evidence that the stalker’s actions are purposeful, as required in (a)(1) of this section, and that the stalker has knowledge, as required in (a)(2) of this section.

(d) A conviction for the offense of stalking is a Class C offense, except that a conviction is a Class B offense if any of the following apply:

(1) the stalker has previously been convicted of the offense of stalking under this section;

(2) the stalker has previously been convicted in Tribal Court or another court of domestic violence, or harassment of the same victim or any person specifically named in a protective order;

(3) the stalking violates any protective order protecting the person being stalked;

(4) the stalker was armed with a deadly weapon while stalking the person;

(5) the stalker’s victim is or was a law enforcement officer, judge, juror, attorney, victim advocate, spokesperson, legislator, or community correction’s officer, and the stalker stalked the victim to retaliate against the victim for an act the victim performed during the course of official duties or to influence the victim’s performance of official duties; or

(6) the stalker’s victim is a current, former, or prospective witness in an adjudicative proceeding, and the stalker stalked the victim to retaliate against the victim as a result of the victim’s testimony or potential testimony.

STATUTES of the CONFEDERATED TRIBES of the UMATILLA INDIAN RESERVATION

Criminal Code

SECTION 4.84. STALKING (Last amended 3/24/2014)

A. Definitions.

1. “Alarm” means to cause apprehension or fear resulting from the perception of danger.

2. “Coerce” means to restrain, compel or dominate by force or threat.

3. “Contact” includes but is not limited to:

a. Following the other person,

b. Waiting outside the home, property, place of work or school of the other person’s family or household,

c. Sending or making written communications in any form to the other person,

d. Speaking with the other person by any means,

- e. Communicating with the other person through a third person,
- f. Committing a crime against the other person,
- g. Communicating with a third person who has some relationship to the other person with the intent of effecting the third person's relationship with the other person, or with the intent of gaining knowledge about the other person,
- h. Communicating with business entities with the intent of effecting some right or interest of the other person, or gaining knowledge of the other person,
- i. Damaging the other person's home, property, place of work or school, or
- j. Delivering directly or through a third person any object to the other person at any time or place,
- k. Using technology to track, monitor or otherwise gain knowledge of the other person's activity, including but not limited to the use of computer spy ware, surveillance equipment, tracking devices or long-distance magnification devices.

4. "Repeated" means two or more times.

B. A person commits the crime of stalking when:

- 1. The person knowingly alarms or coerces another person or a member of that person's immediate family or household by engaging in repeated and unwanted contact with the other person;
- 2. It is objectively reasonable for a person in the victim's situation to have been alarmed or coerced by the contact; and
- 3. The repeated and unwanted contact causes the victim reasonable apprehension regarding the personal safety of the victim or the victim's immediate family or household. Stalking is a felony.

National Center for Victims of Crime (NCVC) [Model Stalking Code \(1/2007\)](#)

SECTION TWO: OFFENSE

Any person who purposefully engages in a course of conduct directed at a specific person and knows or should know that the course of conduct would cause a reasonable person to:

- (a) fear for his or her safety or the safety of a third person; or
- (b) suffer other emotional distress is guilty of stalking.

SECTION THREE: DEFINITIONS

As used in this Model Statute:

- (a) "Course of conduct" means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about, a person, or interferes with a person's property.
- (b) "Emotional distress" means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.
- (c) "Reasonable person" means a reasonable person in the victim's circumstances.

SECTION FOUR: DEFENSES

In any prosecution under this law, it shall not be a defense that:

- (a) the actor was not given actual notice that the course of conduct was unwanted; or
 - (b) the actor did not intend to cause the victim fear or other emotional distress.
-

Tribal Code Commentary

The Fort Peck law defines *stalking* narrowly. It requires specific intent. The prosecutor must show the perpetrator intended to cause the victim substantial emotional distress or reasonable apprehension of bodily injury or death. It also requires the victim to have substantial emotional distress or reasonable apprehension of bodily injury or death. At a trial, evidence of the victim's emotional distress would be a required part of the case, if the victim was alleging severe emotional distress. The activity used by the stalker could be repeated following or harassing, threatening, or intimidating the stalked person by phone, mail, or by other device or method. This broadly defines the method the stalked might use to cause the emotional distress or apprehension of bodily injury. Stalking is a Class A misdemeanor. Once the statute is violated the victim may obtain a restraining order against the stalker.

The Colville stalking code requires that:

- The stalker must intend the actions that would cause a reasonable person to fear bodily injury, indecent liberties, rape, or death to the person or to a family or household member or fear uninvited intrusion into a residence or place of employment.
- The stalker must have knowledge or should have knowledge that the stalked person will be placed in a reasonable fear of bodily injury, and so forth.
- The acts of the stalker must actually induce fear in the victim of bodily injury, indecent liberties, rape, or death of himself or herself or a family member or an uninvited intrusion into a residence or place of employment.

If notice is given to the stalker that the person does not want the course of conduct to continue, this constitutes prima facie evidence that the stalker's actions are purposeful, and that the stalker has knowledge of the effect.

The Umatilla stalking code requires conviction for stalking when:

- A person knowingly alarms or coerces another or a member of that person's immediate family or household by engaging in repeated and unwanted contact;
- It is reasonable for a person in the victim's situation to have been alarmed or coerced by the contact; and or
- The contact causes the victim reasonable apprehension regarding the personal safety of the victim or the victim's immediate family or household.

Alarm is defined by the statute as apprehension or fear resulting from the perception of danger. The definition of *contact* covers a wide variety of actions including but not limited to the following: sending or making communication in any form; speaking or communicating

through a third person; communicating with a business entity for the purpose of effecting some right or interest of the other or to gain knowledge of the other; damaging the person's home or property; delivering any object to the other; and using technology to track, monitor, or otherwise gain knowledge of the other person's activity, including but not limited to the use of computer spyware, surveillance equipment, tracking devices, or long-distance magnification devices.

Stalking under the Umatilla Code is a felony. Umatilla is a Nation that has implemented TLOA, so it has the ability to incarcerate for up to three years for conviction of one crime.

The Model Stalking Code incorporates general intent into the statute, instead of specific intent. The stalker must intend the actions but not necessarily intend the consequences. The **course of conduct** means two or more acts. The acts can be committed by the stalker or through others and include:

- Monitoring,
- Surveilling,
- Threatening, or
- Communicating.

The stalker does not need to be physically close to the victim. The code has not been specific in naming all the possible acts, but provides some direction to the court on the type of acts.

Under the Model Stalking Code, these acts need to be "sufficiently disturbing" that a reasonable person would be fearful of their safety or the safety of a third person. The acts could also be the type that causes a reasonable person to suffer emotional distress.

Under this law, a prosecutor would not need to show that the victim suffered emotional distress or feared for their safety, but rather that a reasonable person would suffer emotional distress or fear for their safety. It defines "a reasonable person" as a person in the victim's circumstance. This is a broad statute that is intended to punish a wide variety of stalkers, including stalkers using new technology.

The Model Stalking Code recommends that stalking laws specifically exempt two typical defenses claimed by stalkers: (1) that the perpetrator was not given actual notice by the victim that the conduct was not wanted; or (2) that the stalker did not intend to cause the victim fear or other emotional distress.

Exercises

Step 1: Examine the Current Situation

- Do you currently have a criminal stalking law?
- Does your current law require general or specific intent?
- What is the fear requirement in your statute? (Reasonable person? Actual fear to the victim? Fear of what? Bodily injury? Death? Safety?)
- Does the current law cover the current technological methods used to stalk as described in Chapter 10?
- What type of conduct is considered stalking in the current law? How many acts are required?
- If your reservation is affected by PL 280, what is the citation for the state's criminal stalking statute? _____
- Even if you are not affected by PL 280, consider reviewing the state(s) statutes on stalking in states bordering your reservation, as stalking could be a crime in both jurisdictions, and knowledge and cooperation could lead to an increased number of stalkers held accountable for their actions.
- What is the citation from the bordering state(s)? _____

Step 2: Establish a Vision for the Future

- **What is the intent requirement you want in your stalking statute?**
 - General intent
 - Specific intent
- **What standard of fear do you want in your statute?**
 - Actual fear to the victim (which requires the victim to testify)
 - Reasonable person to feel fear
 - A reasonable person in the same context as the victim (Model Stalking Code)
 - Other _____
- **What must the victim fear?**
 - Fear for her safety or the safety of a third person (Model Stalking Code)
 - Reasonable apprehension of bodily injury or death
 - Fear for own safety or the safety of immediate family
 - Fear for imminent physical injury or death to their person or immediate family
 - Other _____

- **Should emotional distress be included as an element of the crime as an alternative to the requirement of fear?**

- Purposely or knowingly causes another person substantial emotional distress.
- Knows or should know that the course of conduct would cause a reasonable person to suffer emotional distress. (Model Stalking Code)
- Other _____

- **What type of conduct is considered stalking?**

- How many separate acts are required?
- Do you want to use a laundry list of possible acts?
- Do you want a narrow or broad context describing stalking behavior?
 - Narrow context: Stalking conduct can mean maintaining visual contact or physical proximity to a specific person or directing verbal or written threats, whether express or implied, to a specific person on two or more occasions over a period of time, however short, not including constitutionally protected activity.
 - Broad context: Course of conduct means two or more acts, including, but not limited to acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about, a person, or interferes with a person's property. (Model Stalking Code)

- **Consider whether you want your stalking law to clearly eliminate the following common defenses.**

- Lack of actual notice that the behavior was unwanted
- Lack of intent to cause the fear or emotional distress

Step 3: Drafting Law

Use your answers to Step 1 and Step 2 to draft the key points for this section of your code.

CHAPTER 12

SANCTIONS IN STALKING CASES

Tribal court sentencing limitations are discussed in Chapter 3: “Criminal Jurisdiction” of this resource. These same limitations apply to criminal stalking cases.

Some governments have developed statutes that allow intervention at the early stages of stalking so that the behavior can be monitored and stopped. Many have used a graduated punishment system with the punishment increasing when there is a previous conviction of stalking or of another serious crime or when weapons are involved.

Although a Native Nation generally cannot hold a non-Indian criminally responsible in tribal court for criminal stalking, it could in some situations hold certain non-Indians criminally responsible for stalking behavior if the Nation has implemented VAWA 2013 and a valid protection order is in place. See Chapter 13: “Protection Orders for Sexual Assault and Stalking Survivors.”

Point of Discussion: Are some stalkers more dangerous than others?

Some experts believe that certain kinds of behavior indicate a more dangerous kind of stalker. Should the penalty/punishment be greater if the stalker is:

- Violating an existing protection order?
- Using weapons or threatening to use weapons?
- Stalking a child and/or teenager?
- Continuing the behavior even after being convicted?

Additionally, non-Indians could be held civilly responsible. A victim of stalking may feel safer and more secure if the stalker is excluded from tribal lands. Although stalkers can cause fear and stalk even if not physically close to the victim, there are many cases in which a stalker is physically following his victim.

Some Nations have developed laws that permit the exclusion of both Indians and non-Indians from reservations. A few Native Nations have also expanded their protection order statutes to cover stalkers.

Many Native Nations also may enhance punishment for repeat stalking offenders. Some may enhance punishment for certain types of stalking behavior.

Tribal Code Examples

Fort Peck Comprehensive Code of Justice (5/23/2011)

Chapter 2. Crimes Against Persons

Subchapter C. Sexual Offenses

Sec. 224. Stalking.

(section omitted)

B. Stalking is a Class A misdemeanor. For a second or subsequent offense or for a first offense against a victim who was under the protection of a restraining order directed at the offender, the offender shall be imprisoned for a term of not less than three months, or fined an amount not to exceed \$500, or both. A person convicted of stalking may be sentenced to pay all medical, counseling, and other costs incurred by or on behalf of the victim as a result of the offense.

(section omitted)

Colville Tribal Code

Title 3. Offenses

Chapter 3.1 Criminal Code (Current as of April 2016)

3-1-18 Stalking

(sections omitted)

(d) A conviction for the offense of stalking is a Class C offense, except that a conviction is a Class B offense if any of the following apply:

- (1) the stalker has previously been convicted of the offense of stalking under this section;
 - (2) the stalker has previously been convicted in Tribal Court or another court of domestic violence, or harassment of the same victim or any person specifically named in a protective order;
 - (3) the stalking violates any protective order protecting the person being stalked;
 - (4) the stalker was armed with a deadly weapon while stalking the person;
 - (5) the stalker's victim is or was a law enforcement officer, judge, juror, attorney, victim advocate, spokesperson, legislator, or community correction's officer, and the stalker stalked the victim to retaliate against the victim for an act the victim performed during the course of official duties or to influence the victim's performance of official duties; or
 - (6) the stalker's victim is a current, former, or prospective witness in an adjudicative proceeding, and the stalker stalked the victim to retaliate against the victim as a result of the victim's testimony or potential testimony.
-

Tribal Code Commentary

The Fort Peck statute increases the penalty for those with prior convictions. It also increases the penalty on a first offense, if there is a violation of a restraining order.

Under the Colville Code stalking is generally a Class C offense, punishable for up to ninety days in jail, except that it is enhanced to a Class B offense, punishable for up to 180 days in jail if:

- There has been a previous conviction of stalking, domestic violence, or harassment.
- The stalking violates a protection order.
- The stalker is armed with a deadly weapon while stalking.
- The victim is or was a law enforcement officer, judge, juror, attorney, victim advocate, spokesperson, legislator, or community correction officer, and the stalker is retaliating against the victim for an act the victim performed during the course of official duties or to influence the victim's performance of duties.
- The stalker's victim is a current, former, or prospective witness in an adjudicative proceeding, and the stalking is to retaliate against the victims as a result of the victim's testimony or potential testimony.

Exercises

These exercises are designed to guide you in drafting or revising your tribal stalking laws.

Step 1: Examine the Current Situation

- What are the current penalties for stalking?
- Do you have enhanced sanctions for certain types of stalking or repeat offenders?
- Do you have any civil penalties, such as banishment and restitution?
- Have you opted in to expanded criminal penalties under TLOA?
- What kind of limitations does your tribe have in considering sanctions?

Step 2: Establish a Vision for the Future

- What traditional tribal sanctions might be appropriate for this crime, if any?
- Are there certain actions or conditions that should increase the penalties, such as violation of a protection order, a minor victim, a previous stalking conviction or other criminal offense, or the use or force or a weapon?
- Should possession or purchase of firearms be considered in sanctions?
- Do you have a statute regarding exclusion of members/nonmembers that might be useful to consider?
- If you have incorporated the enhance criminal penalties under TLOA, do you have the appropriate penalty for stalking?

Step 3: Drafting Law

Use your answers to Step 1 and Step 2 to draft the key points for this section of your code.

Additional Resources

Resources

Model Stalking Code Advisory Board, [The Model Stalking Code Revisited](#), National Center for the Victims of Crime (January 2007).

[The Stalking Resource Center](#), National Center for the Victims of Crime, accessed October 7, 2016.

Articles

Hallie Bongar White, "[Stalking in Indian Country](#)," Southwest Center for Law and Policy (2004).

Jo Hally, "[Addressing Stalking in Native Communities](#)," *The Source* 2, no. 2 (2002).

Melissa A. Knight, "[Stalking and Cyberstalking in the United States and Rural South Dakota: Twenty-Four Years after the First Legislation](#)," 59:2 South Dakota Law Review (Summer 2014), 392.

Rebecca St. George, [Addressing Stalking in Indian Country](#), Mending the Sacred Hoop (2001).

Patricia Tjaden and Nancy Thoennes, [Stalking in America: Findings from the National Violence Against Women Survey](#), National Institute of Justice Centers for Disease Control and Prevention (April 1998).

Michelle Garcia, [Working with Stalking Victims](#), Stalking Resource Center (September 2014).

Michelle Garcia, [The Use of Technology to Stalk](#), Stalking Resource Center (August 2014).

Michelle Garcia, [Stalking and the Intersection with Domestic Violence](#), Stalking Resource Center (August 2014).

SECTION V

PROTECTION ORDERS FOR SEXUAL ASSAULT AND STALKING SURVIVORS

AI/AN women are victims of sexual assault at a higher rate than any other population. One in two AI/AN women experience sexual violence during their lifetime.⁷⁴ In the last year 14.4 percent of AI/AN women have experienced sexual violence.⁷⁵ One in four AI/AN men experience sexual violence during their lifetime.⁷⁶ Only 16 to 32 percent of rape victims report the crime to law enforcement authorities.⁷⁷

Among AI/AN women, 48.8 percent have experienced stalking in their lifetime and 11.6 percent have experienced it in the past year. Among AI/AN men, 18.6 percent have experienced stalking in their lifetime and 3.8 percent have experienced it in the past year. Among AI/AN victims, 89 percent of women and 91 percent of men have experienced stalking by an interracial perpetrator.⁷⁸

Native Nations are limited in methods to hold perpetrators accountable. Criminally they are restricted in who can be punished by the Nation and what punishment can be used. It is imperative that a Nation use all of the methods possible to reduce the high sexual assault and stalking rates and protect Native victims from further violence. A tool that has not been frequently used by Native Nations is the sexual assault and stalking protection order. The sexual assault or stalking protection order can be effective in protecting victims not covered by domestic violence protection orders.

This section provides information on sexual assault and stalking protection orders. Sexual assault and stalking protection orders not only to expand safety for Native victims, but also to expand the Nation's sovereignty.

⁷⁴ 56.1 percent experience sexual violence. Andre Rosay, [Violence Against American Indian Women and Men, National Institute of Justice Research Report](#), May 2016.

⁷⁵ Ibid.

⁷⁶ 27.5 percent have experienced sexual violence. Ibid.

⁷⁷ National Institute of Justice, *The Sexual Victimization of College Women*, U.S. Department of Justice (2000).

⁷⁸ Andre Rosay, [Violence Against American Indian and Alaska Native Women and Men](#), National Institute of Justice Research Report (May 2016), 29.

CHAPTER 13

TRIBAL PROTECTION ORDERS

Native Nations are severely limited in how they hold perpetrators of sexual assault or stalking accountable. Even if a Native Nation has opted in to TLOA, the possible maximum jail term for sexual assaulting or stalking a Native woman in Indian country through the tribal court system is three years of incarceration and a \$15,000 fine or up to nine years if multiple crimes were committed and could be charged.⁷⁹ If the Nation has not opted into TLOA, the maximum jail sentence per crime is one year of incarceration and a fine of \$5,000.⁸⁰ Finding and providing other options to protect Native victims and hold perpetrators accountable in Indian country is an important consideration for Native Nations. Protection orders are a tool that may be used in this quest for safety and accountability.

Sexual assault survivors who do not have a history of intimacy with their rapist may not meet the requirements of a tribal protection order statute, which are generally designed for domestic violence situations. The stalking survivor who is stalked by a non-intimate partner (a co-worker, an acquaintance, a fellow student, a neighbor) generally cannot meet the requirements of a domestic violence protection order. Consider the casino employee raped by a co-worker, a grandmother raped by a neighbor, a young woman gang raped, a high school student stalked by a fellow student, or a child sexual abused by a priest. There are numerous victims of rape and stalking, who are not allowed the shield of a protection order under tribal law.

Many Native Nations have restraining order or harassment orders, but these orders are totally inadequate to deal with stalking and sexual assault. Generally, harassment or restraining orders lack the same safety considerations of a protection order: There is no opportunity for an ex parte order in emergency circumstances; no mandatory arrest for a violation by law enforcement; and generally filing fees are charged the victim. The statutes generally are not focused on the victims' safety, but are more amenable to a trespass dispute. Protection orders serve a different purpose as they are focused on the safety of the victim. Keep in mind that only protection orders that meet the full faith and credit of VAWA may be enforced through SDVCJ against non-Indians or may be enforced by states when violations occur outside of Indian country.

Protection orders can provide survivors of nonconsensual sexual contact or stalking with a sense of security and safety and they are designed to prevent further harm. Protection orders provide the survivor with some control. For survivors who believe that the perpetrator will

⁷⁹ Although it is possible that these crimes could be enforced by the federal or a state government.

⁸⁰ Indian Civil Right Act, 25 U.S.C. §§ 1302 (b) (2010).

continue to present a danger, it can provide some peace of mind in knowing that law enforcement will respond to a violation and that others know of the potential harm. And proving a violation of a protection order can be far easier than proving sexual assault or stalking. A sexual assault/stalking protection order should, at a minimum, require the perpetrator to stay away from the survivor's person, place of residence, school, employment, and to refrain from contacting the victim through any method.

An important question to consider in developing code is how the protection order statutes should define *stalking* or *sexual assault*. Some states make reference to their criminal statutes, but it is recommended that you consider defining sexual assault and stalking in your sexual assault and stalking protection order code more broadly than your criminal statutes. This would enable easier access to protection orders and help in preventing criminal sexual assault and stalking from occurring.

Civil protection orders can be issued against Indians and non-Indians in tribal court provided the court has jurisdiction provided they are authorized in the Nation's code. VAWA 2013 Reauthorization ([18 U.S.C. § 2265](#)) clearly states:

For purposes of this section, a court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.

A violation of a protection order is generally considered a crime, but a violation may also have civil penalties. Nations use many methods to enforce protection orders, including incarceration, fines, community service, exclusion from tribal lands, restitution, forfeiture, posting a peace bond, and other methods. All penalty options are enforceable against Indians.

All non-Indians (over which there is personal jurisdiction) are subject to civil penalties for a violation of a valid sexual assault/stalking protection order in Indian country, if provided for in the tribal code. Full faith and credit would apply to a qualified tribal sexual assault/stalking protection order so the order would also be enforceable outside tribal court. If enforced in a state court, state criminal law and state penalties would apply against an Indian or non-Indian.

This resource does not provide you all the information that you may need to develop a statute that ensures a protection order's full faith and credit in state courts. We are presuming that you have a domestic violence protection order statute and form that meet these requirements. If

you do not, please consult the resources on the website [Tribal Protection Order Resources](#). This website contains valuable resources including sample forms that meet the full faith and credit requirements. It should be remembered, however, that the court must have jurisdiction over the parties and the matter under the law of the Nation and reasonable notice and opportunity to be heard must be given to the person against whom the order is sought. The TLPI resource entitled [Tribal Legal Code Resource: Domestic Violence Laws](#) also has a section on drafting laws on civil protection orders with a section on full faith and credit.

Additionally, if the rapist or stalker is non-Indian, the non-Indian cannot be held criminally accountable in a tribal court unless the Native Nation has adopted SDVCJ under VAWA 2013 and the crime and situation fits the definition of domestic violence or dating violence and other requirements, **unless** there is a protection order in place. Violation of a protection order can be enforced against a non-Indian in tribal court under SDVCJ even against a non-intimate partner, provided the non-Indian has “sufficient connections” to the Indian country of that Nation, the violation occurs in Indian country of the participating tribe, and the Nation has jurisdiction pursuant to its tribal codes. The offense must be a violation of the section of the protection order that prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to another person. It, of course, must have been issued against the defendant, be enforceable by the participating tribe, and be consistent with [18 U.S.C. 2265 \(b\)](#) relating to full faith and credit of protection orders.

The definition of the term *protection order* under SDVCJ:

- A. Means any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to another person and
- B. Includes any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a pendent lite order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition or motion filed by or on behalf of a person seeking protection.⁸¹

If the Native Nation has opted in to SDVCJ⁸² under VAWA 2013, a violation of a sexual assault or stalking protection order violation in Indian country where the victim is Indian (not necessarily a citizen of the Nation where the violation occurs) should also be criminally enforceable in tribal court against certain non-Indians with “sufficient contacts” meaning one that:

⁸¹ Indian Civil Rights Act, 25 U.S.C. § 1304 (a)(5) (2013).

⁸² See Indian Civil Rights Act, 25 U.S.C. §1304 (amended 2013).

- Resides in the Indian country of the participating tribe;
- Works in the Indian country of the participating tribe; and/or
- Is a spouse or intimate partner or dating partner of a member of a participating tribe or an Indian who resides in Indian country of the participating tribe.

This resource does not provide sufficient information for a tribe to develop the laws and practices to opt in to SDVCJ, but does consider how sexual assault and stalking protection orders may expand the tribal jurisdiction over non-Indians and increase protection for Natives residing in Indian country. If you are interested in instituting SDVCJ, refer to the TLPI resource [*Tribal Laws Implementing TLOA Enhanced Sentencing and VAWA Enhanced Jurisdiction*](#). It should be noted that violations of a state or other tribe’s protection orders that occur in Indian country of a Nation participating in SDVCJ by a non-Indian with “sufficient contacts” may be enforced criminally in tribal court as well, if the victim is an Indian and the other mandates of VAWA 2013 are met.

Tribal Code Examples

Tulalip Tribal Code

Title IV. Youth, Elders and Family

Chapter 4.25 Domestic Violence

Article V. Civil Remedies and Actions (Amended 2015)

4.25.470 Civil protection order.

Purpose. A person may seek a protection order whether or not the person has contacted law enforcement officers to report a crime, but such persons should be referred to law enforcement officers in the event that crime has been committed. It is the policy of the Tribes that temporary protection orders may be issued without prior notice to the respondent to ensure the immediate protection of the victim and any family or household member, and to prevent further violence. Orders may be modified or extended, with or without prior notice to the respondent or a hearing, consistent with this purpose. Relief under this chapter may not be denied or delayed on the grounds that the relief is available in another action.

4.25.480 Persons authorized to file.

- (1) A petition to obtain a protection order under this section may be filed by:
 - (a) Any person claiming to be the victim of domestic violence, family violence, dating violence or stalking; or
 - (b) Any family member or household member of a minor or vulnerable adult alleged to be the victim of domestic violence, family violence, dating violence or stalking on behalf of the minor or vulnerable adult; or
 - (c) The Tribal Prosecutor; or
 - (d) Any person acting in an official capacity in the protection of domestic violence, family violence, dating violence or stalking survivors including but not limited to Legacy of Healing staff, elder abuse case managers or advocates, Child Advocacy Center, therapists, behavioral health case managers on behalf of a child, or other advocate acting in a professional capacity.

4.25.490 Petition for protection order or modification.

- (1) A petition shall allege the existence of domestic violence, family violence, dating violence, or stalking, and shall be supported by an affidavit made under oath stating the specific facts and circumstances justifying the requested order.
- (2) A petition may be filed regardless of the pendency of any other civil or criminal proceeding related to the allegations in the petition.
- (3) No filing fee shall be required for the filing of a petition under this section. If an alleged perpetrator has been arrested for the offense of domestic violence, family violence, dating violence or stalking, the Court or the arresting Police Officer shall advise the alleged victim of the right to file a petition under this section without cost.
- (4) The petitioner, or the victim on whose behalf a petition has been filed, is not required to file for annulment, separation, or divorce as a prerequisite to obtaining a protection order. However, the petition shall state whether any other action is pending between the petitioner or victim and the respondent.
- (5) The Court shall make available standard, simplified petition forms and instructional brochures with instructions for completion. The Tulalip Police

Department and the Tribal Court shall make such forms available upon request to victims of domestic violence, family violence, dating violence, or stalking.

(6) Once a petition has been filed, the Court Clerk shall conduct a criminal background check according to Court policy and attach the report(s) to the petition.

4.25.500 Procedure for issuance of a protection order.

Upon the filing of a petition for a protection order, the Court shall evaluate the petition for protection and, when deciding whether or not to grant an ex parte temporary protection order, err on protecting the petitioner and any other family members during this initial process, and:

(1) Immediately grant an ex parte protection order without bond if, based on the specific facts stated in the affidavit, the Court has probable cause to believe that the petitioner or the person on whose behalf the petition has been filed is the victim of an act of domestic violence, family violence, dating violence, or stalking committed by the respondent, and issuance of the ex parte order is necessary to protect the victim from further abuse.

(2) Cause an ex parte protection order, together with notice of hearing, to be made immediately available to the petitioner for service by a Police Officer, Court Officer, or other authorized person.

(3) The Court may hold the record open and request additional information if the submitted information is insufficient at the time of filing. The record must be completed within 72 hours and at that time the order granted or denied.

(4) Hold a hearing within 14 days after the granting of the ex parte temporary protection order to determine whether the temporary order should be vacated, extended, or modified in any respect, or made a permanent order of protection with or without an expiration date.

(a) At the hearing, both parties may testify, and the Court will review the record and may consider other relevant evidence. Copies of any writings, declarations, affidavits or other documentary evidence entered as exhibits must be provided to the other party. Rules of evidence may be relaxed in these proceedings and testimony is not required.

(5) Once granted, the protection order may not be dismissed without a Court hearing.

(6) If an ex parte order is not granted, serve notice upon both parties to appear in Tribal Court and hold a hearing on the petition for protection order within 72 hours after the filing of the petition; if notice of hearing cannot be personally served, notice shall be provided consistent with [TTC Title 2](#).

Statutes of the Confederated Tribes of the Umatilla Reservation
Criminal Code (March 24, 2014)

Section 1.02. Jurisdiction

A. Generally. The Umatilla Tribal Court is vested with jurisdiction to enforce all provisions of this Code, as amended from time to time, against any person violating the same within the boundaries of the Confederated Tribes' Indian country, including any person at any In Lieu Fishing Site or Treaty Fishing Access Site, and against any tribal member exercising treaty hunting and fishing rights beyond the boundaries of the Umatilla Indian Reservation. In the cases where the person in violation of this Code is not an Indian and is not covered by subsection 1.02(B) or (C), the Court's exercise of power shall be civil rather than criminal and punishment subject only to the applicable fine. The Court is also vested with the power to impose protection orders against non-Indians in accordance with the provisions of this Code.

B. Criminal Jurisdiction Over Non-Indian Domestic or Dating Violence. The Umatilla Tribal Court is vested with jurisdiction to enforce all provisions of this Code against a non-Indian who has committed an act of Dating Violence or Domestic Violence against an Indian victim within the Confederated Tribes' Indian country provided the non-Indian has sufficient ties to the Confederated Tribes.

1. A non-Indian has sufficient ties to the Confederated Tribes for purposes of jurisdiction if they:

- a. reside in the Confederated Tribes' Indian country;
- b. are employed in the Confederated Tribes' Indian country; or
- c. are a spouse, intimate partner, or dating partner of either:
 - i. a member of the Confederated Tribes, or
 - ii. a non-member Indian who resides in the Confederated Tribes' Indian country.

C. Criminal Jurisdiction Over Non-Indian Protection Order Violations. The Umatilla Tribal Court is vested with criminal jurisdiction to enforce all provisions of this Code related to violations of protection orders against a non-Indian that has sufficient ties to the Confederated Tribes as identified in Section 1.02(B)(1), and who has violated a protection order within the Confederated Tribes' Indian country provided the protected person is an Indian, and following conditions are met:

1. The protection order was issued against the non-Indian,
2. The protection order is consistent with 18 U.S.C. 2265(b), and
3. The violation relates to that portion of the protection order that provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, the protected person.

Statutes of the Confederated Tribes of the Umatilla Reservation
Criminal Code (March 24, 2014)

PART II. PRELIMINARY PROCEEDINGS

SECTION 3.03. THE COMPLAINT

(sections omitted)

8. For purposes of crimes involving non-Indian protection order violations, the complaint shall also allege, and the prosecution must prove beyond a reasonable doubt:

- a. That the defendant is a non-Indian,
 - b. That the protection order was issued against the defendant,
 - c. That the protected person is an Indian,
 - d. That the violation occurred within the Confederated Tribes' Indian country,
 - e. That the protection order is consistent with 18 U.S.C. 2265(b),
 - f. That the violation relates to that portion of the protection order that provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, the protected person, and
 - g. That the defendant has sufficient ties to the Confederated Tribes as outlined in Section 3.03(B)(7).
-

Alaska Statutes (2015)

Title 18. Health, Safety, and Housing

Chapter 65. Police Protection

Section 18.65.850 Protective Orders for Stalking and Sexual Assault

(a) A person who reasonably believes that the person is a victim of stalking or sexual assault that is not a crime involving domestic violence may file a petition in the district or superior court for a protective order against a respondent who is alleged to have committed the stalking or sexual assault. A parent or guardian may file a petition on behalf of a minor.

(b) When a petition for a protective order is filed, the court shall schedule a hearing and provide at least 10 days' notice to the respondent of the hearing and of the respondent's right to appear and be heard, either in person or through an attorney. If the court finds by a preponderance of evidence that the respondent has committed stalking or sexual assault against the petitioner, regardless of whether the respondent appears at the hearing, the court may order any relief available under (c) of this section. The provisions of a protective order issued under this section are effective for six months unless earlier dissolved by the court.

(c) A protective order issued under this section may

- (1) prohibit the respondent from threatening to commit or committing stalking or sexual assault;
- (2) prohibit the respondent from telephoning, contacting, or otherwise communicating directly or indirectly with the petitioner or a designated household member of the petitioner specifically named by the court;
- (3) direct the respondent to stay away from the residence, school, or place of employment of the petitioner, or any specified place frequented by the petitioner; however, the court may order the respondent to stay away from the respondent's own residence, school, or place of employment only if the respondent has been provided actual notice of the opportunity to appear and be heard on the petition;
- (4) order other relief the court determines to be necessary to protect the petitioner or the designated household member.

(d) If the court issues a protective order under this section, the court shall

- (1) make reasonable efforts to ensure that the order is understood by the petitioner and by the respondent, if present; and

(2) have the order delivered to the appropriate local law enforcement agency for expedited service.

(e) A court may not deny a petition for a protective order solely because of a lapse of time between an act of sexual assault and the filing of the petition.

§18.65.865. Service of Process; Forms for Petitions and Orders; Fees; Warnings; Notification; and Pending Civil or Criminal Actions

(a) Service of process of an order issued by the court under AS 18.65.850 -- 18.65.860 shall be as provided in AS 18.66.160 for service of process of domestic violence protective orders.

(b) The Alaska Court System shall prepare forms for petitions and protective orders and instructions for their use by a person seeking a protective order under AS 18.65.850 -- 18.65.860. The forms must conform to the Alaska Rules of Civil Procedure, except that information on the forms may be filled in by legible handwriting. Filing fees may not be charged in any action seeking only the relief provided in AS 18.65.850 -- 18.65.870. Each protective order form must contain the following warning in boldface type: "Violation of this order may be a misdemeanor, punishable by up to one year of incarceration and a fine of up to \$ 5,000."

(c) The Department of Public Safety shall develop and make available to law enforcement agencies in the state a notice that details the rights of victims of stalking and sexual assault and the services available to them. The form must be similar to that provided to victims of domestic violence under AS 18.65.520. A peace officer investigating a stalking or sexual assault offense shall provide the form to the victim.

(d) In addition to other information required, a petition for a protective order must include a statement of pending civil and criminal actions involving either the petitioner or the respondent, if known. While a protective order is in effect or a petition for a protective order is pending, both the petitioner and respondent have a continuing duty to inform the court of pending civil and criminal actions involving either the petitioner or the respondent, if known.

§18.65.860 Modification of Protective Orders for Stalking and Sexual Assault

(a) Either the petitioner or the respondent may request modification of a protective order issued under AS 18.65.850 or 18.65.855(a). If a request is made for modification of

(1) a protective order, after notice and hearing under AS 18.65.850, the court shall schedule a hearing within 20 days after the date the request is made, except that, if the court finds that the request is meritless on its face, the court may deny the request without a hearing; or

(2) an ex parte protective order under AS 18.65.855(a), the court shall schedule a hearing on three days' notice or on shorter notice as the court may prescribe.

(b) If the court modifies a protective order under this section, the court shall issue a modified order and shall

(1) make reasonable efforts to ensure that the order is understood by the petitioner and by the respondent, if present at the hearing; and

(2) have the order delivered to the appropriate local law enforcement agency for expedited service.

§18.65.870 Definitions

In AS 18.65.850 -- 18.65.870,

- (1) “crime involving domestic violence” has the meaning given in AS 18.66.990;
- (2) “household member” has the meaning given in AS 18.66.990;
- (3) “sexual assault” has the meaning given in AS 18.66.990;
- (4) “stalking” means a violation of AS 11.41.260 or 11.41.270.

Alaska R. Civ. Proc. 65.1 Domestic Violence, Stalking, and Sexual Assault Protective Orders – Access to Information

A petitioner who is appearing pro se in a proceeding to obtain a domestic violence protective order under AS 18.66.100 or 18.66.110 or a stalking or sexual assault protective order under AS 18.65.850 or 18.65.855 may submit the petitioner's mailing address and telephone number on a separate form and omit this information from other pleadings and papers filed with the court. Access to the form containing the petitioner's mailing address and telephone number is limited to the court, authorized court system personnel, and the petitioner. If a child support order is entered in a domestic violence proceeding, court system personnel may also provide a copy of the address information form to the Child Support Services Division. Further disclosure of this form by the Child Support Services Division is prohibited. If the petitioner submits an information sheet containing the petitioner's address and telephone number for use by law enforcement agencies, the court may retain a copy of this document. Access to the copy is limited to the court, authorized court system personnel, and the petitioner.

Revised Code of Washington

Title 7 Special Proceedings and Actions

[Chapter 7.90 Sexual Assault Protection Order Act](#)

[RCW 7.90.030](#)

(Note only one section of the Sexual Assault Protection Act is included, follow the link for the full act)

Petition—Who may file.

- (1) A petition for a sexual assault protection order may be filed by a person:
 - (a) Who does not qualify for a protection order under chapter [26.50](#) RCW and who is a victim of nonconsensual sexual conduct or nonconsensual sexual penetration, including a single incident of nonconsensual sexual conduct or nonconsensual sexual penetration; or
 - (b) On behalf of any of the following persons who is a victim of nonconsensual sexual conduct or nonconsensual sexual penetration and who does not qualify for a protection order under chapter [26.50](#) RCW:
 - (i) A minor child;
 - (ii) A vulnerable adult as defined in RCW [74.34.020](#) or [74.34.021](#); or
 - (iii) Any other adult who, because of age, disability, health, or inaccessibility, cannot file the petition.

Revised Code of Washington

Title 7 Special Proceedings and Actions

[Jennifer Paulson Stalking Protection Order Act](#)

[RCW 7.92.040](#) **Petition—Who may file.**

A petition for a stalking protection order may be filed by a person:

- (1) Who does not qualify for a protection order under chapter [26.50](#) RCW and who is a victim of stalking conduct; or
- (2) On behalf of any of the following persons who is a victim of stalking conduct and who does not qualify for a protection order under chapter [26.50](#) RCW:
 - (a) A minor child, where the petitioner is a parent, a legal custodian, or, where the respondent is not a parent, an adult with whom the child is currently residing; or
 - (b) A vulnerable adult as defined in RCW [74.34.020](#) and where the petitioner is an interested person as defined in RCW [74.34.020](#)(10).

[\[2013 c 84 § 4.\]](#)

Tribal Code Commentary

There are very few Native Nations, if any, that have expanded their protection order statutes to cover victims of nonconsensual sex or stalking. States have been adopting this practice for the last twelve years. Illinois was the first state to develop a civil sexual assault protection order statute in 2004, and since then twenty-two other states have followed. Because there are no examples of tribes that could be found that have both sexual assault and stalking protective order statutes, some state statutes are provided as examples.

The Tulalip Tribal Code has expanded its domestic violence protection order statute to include stalking. The statute specifically allows any person claiming to be a victim of domestic violence, family violence, dating violence, or stalking to file a petition for a protection order. It also allows any family member or household member of a minor or vulnerable adult to file on behalf of a minor who is a victim of stalking. Their statute does not cover sexual assault unless it is in the context of domestic violence, family violence, or dating violence. Including stalking as a part of the domestic violence protection order statute is one option, but it may cause confusion, as nonintimate partner stalking really doesn't fit the chapter title of "Domestic Violence." The Tulalip Nation has implemented SDVCJ so it could hold those non-Indians with "substantial contacts" criminally responsible for violation of a stalking protection order. Needless to say, the statute also protects Native victims stalked by Native perpetrators.

The Confederated Tribe's code provides an example of a section implementing SDVCJ. The Umatilla Nation that has implemented SDVCJ has not adopted statutes that would permit stalking and sexual assault protection orders in their tribal court, but the language of their jurisdiction section and the complaint section demonstrate that with the enactment of a sexual assault and stalking protection order code, the Nation would have the power to enforce against non-Indians, as well as Indians. The requirements of a complaint for violation of a protection order by a non-Indian include the following:

- That the protection order was issued against the defendant;
- That the protected person is an Indian;
- That the violation occurred within the Confederated Tribes Indian country;
- That the protection order is consistent with 18 U.S.C. 2265(b); and
- That the violation relates to that portion of the protection order that provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to the protected person and the defendant has sufficient ties to the Confederated Tribes.

The statute would allow the Confederated Tribe to enforce sexual assault or stalking protection orders issued by a state or another tribe against non-Indians.

The Alaska code for Protective Orders for Stalking and Sexual Assault was recently adopted and provides an option for developing a stalking and sexual assault protective order code specifically for those victims who do not meet the requirements of a domestic violence protection order but are stalking or sexual assault victims. A parent could also file for a protective order on behalf of his or her child. The statute allows for ex parte protection orders, if it is necessary to prevent abuse. It provides for prompt service and a hearing. The statute requires that forms be developed and made available with explanations. No filing fee is required.

Washington State has separate codes for stalking protection orders and sexual assault protection orders. To file a petition for a sexual assault protection order, the person cannot qualify for a protection order under the domestic violence protection order statute and must be a victim of nonconsensual sexual conduct or nonconsensual sexual penetration, including a single incident of nonconsensual sexual conduct or nonconsensual sexual penetration or on behalf of a victim who is a minor, vulnerable adult, or other adult who cannot file a petition and meets the requirements.

Washington State's stalking protection order statute requires that the person filing cannot qualify for a protection order under the domestic violence protection order statute and must be a victim of stalking or file on behalf of a victim of stalking who is a minor or unable to file a petition. Only the qualifications section of the code was included in the example, and the full code should be examined for further sections, but it is similar to a domestic violence protection order statute with adjustment for a nonintimate relationship and the stalking situation.

Exercises

These exercises are designed to guide you in drafting or revising your tribal laws.

Step 1: Examine the Current Situation

- What current statutes do you have that protect Native women from sexual assault or stalking by a nonintimate partner? Check any law relating to restraining order, harassment order, or stay away order, including an order a judge might issue in a criminal sexual assault or stalking case to protect the victim.
- Review your current domestic violence protection law to understand the victims that might not be protected. Do you currently have civil penalties as well as criminal?
- Does your Nation currently have SDVCJ over non-Indians? Is there a desire to expand jurisdiction?
- Does your Nation currently issue protection orders over non-Indians? What prevents you from doing so?
- Do your current laws require the victim to report the assault or stalking to law enforcement? What requirements are there?
- Does your current law allow a protection order to issue when there has only been sexual harassment or inappropriate sexual touching and not sexual penetration?

Step 2: Establish a Vision for the Future

- Decide whether you want to expand your protection order statutes to protect nonintimate partners from sexual assault. From stalking? From non-Indians? (Each category is important, but many Nations may not be ready to criminally prosecute non-Indian violators. If your Nation has not already adopted SDVCJ, you could still hold non-Indian violators of protection orders responsible through civil penalties.)
- Do you want to have separate statutes for sexual assault and stalking protection orders or combine the two? (It is recommended that the sexual assault and stalking protection order law be separate from your domestic violence protection order statute.)
- Who may qualify for a sexual assault protection order? For a stalking protection order? Do you want to exclude people who would be eligible for a domestic violence protection order? Who may file on behalf of a minor or vulnerable individual?
- How will you define sexual assault or sexual contact? Consider defining it more broadly than your criminal law, recognizing that the order is meant to prevent the crime.
- How will you define *stalking*? Consider defining it more broadly than your criminal law (if your criminal law does not have a broad definition), recognizing the order is meant to prevent the crime.

- In your sexual assault and stalking protection order statute, will you provide some of the same considerations and protections that are provided victims of domestic violence, such as these common practices?
 - No fee for filing a petition.
 - Mandatory arrest for a violation.
 - Opportunity for an ex parte order under emergency circumstances.
- Does the statute require that the respondent be given reasonable notice and an opportunity to be heard? Will it meet all full faith and credit requirements? (Consult the resources on the website [Tribal Protection Order Resources](#).) Will you provide forms to ensure full faith and credit requirements are met?
- Will you have both civil and criminal penalties?
- Refer to the TLPI resource [Tribal Laws Implementing TLOA Enhanced Sentencing and VAWA Enhanced Jurisdiction](#) if you have not already implemented SDVCJ and your Nation desires to do so.

Step 3: Drafting Law

Use your answers to Step 1 and Step 2 to draft the key points for this section of your code.

Additional Resources

Books

Sarah Deer, *The Beginning and End of Rape: Confronting Sexual Violence in Native America* (University of Minnesota Press, 2015).

Reports and Resources

National Council of Juvenile and Family Court Judges, [Civil Protection Orders: A Guide to Improving Practice](#) (2010).

[Special Domestic Violence Criminal Jurisdiction Pilot Project Report](#), National Congress of American Indians (June 2016).

[Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA](#), Amnesty International, 2007.

Andre B. Rosay, [Violence Against American Indian and Alaska Native Women and Men](#), National Institute of Justice (2016).

Articles

Sarah Deer, "[Expanding the Network of Safety: Tribal Protection Orders for Survivors of Sexual Assault](#)," 4 Tribal Law Journal (2004).

Sarah Deer, "[Violence Against Women and Tribal Law](#)," Indian Country Today (July 16, 2012).

Sarah Deer, "[Decolonizing Rape Law: A Native Feminist Synthesis of Safety and Sovereignty](#)," 24:2 Wicazo Sa Review 149 (2009).

[Report to the U.S. Attorney General on Improving Federal Agency Response to Sexual Violence in Tribal Nations: Issues and Recommendations](#), National Coordination Committee on the American Indian/Alaskan Native Sexual Assault Nurse Examiner-Sexual Assault Response Team Initiative (June 2014).

Jo Hally, "[Addressing Stalking in Native American Communities](#)," 2:2 The Source (Summer 2002).

GLOSSARY

The definitions in this glossary are meant to provide a general definition in common language to legal terms. Legal definitions may vary from one jurisdiction to another.

Action: Term in usual legal sense means lawsuit.

Assault: An intentional attempt or threat to inflict injury upon another, when coupled with an apparent ability and any intentional display of force that could reasonably make a person feel in danger of harmful physical contact.

Banishment: Requiring a convicted offender to leave a reservation or country.

Burglary: A person enters a building or dwelling for the purpose of committing a crime.

Civil Action: A lawsuit brought to enforce, compensate a party for a loss, or protect private rights. All types of legal actions are not considered criminal. Actions for divorce, actions to recover damages for injury, or actions for a protection order are a few examples of civil actions.

Civil Contempt: A civil contempt action is generally brought when a person fails to obey a court order, such as a violation of a protection order or injunction. Contempt of the court is the deliberate failure to comply with an order of the court. Punishment for civil contempt may be a fine or imprisonment. The purpose of such punishment is to compel compliance with the order of the court.

Civil Jurisdiction: The power of a court to hear and decide civil actions.

Civil Process: May include all acts of the court from the beginning to the end of civil proceedings.

Code: A collection of laws, rules, or regulations organized in a particular manner, usually by subject.

Concurrent Jurisdiction: When two or more courts, legislative officers, or administrative officers have the same authority to deal with a particular subject matter within the same territory.

Conspiracy: When two or more persons join to perform an illegal act.

Conviction: In a criminal action, the finding that the offender is guilty of the crime.

Correctional Personnel: A general term used to describe people working in jails, prisons, reformatories, and other places of detention.

Crime: An act committed in violation of a law that recommends a particular punishment; considered an offense against the state, tribe, or United States. Crimes are generally divided into misdemeanors and felonies.

Criminal Action: A proceeding by which a person charged with a crime is brought to trial and either found guilty or not guilty.

Criminal Contempt: A crime that obstructs a judicial duty generally resulting in an act done in the presence of the court, for example, insulting a judge, disrupting a court proceeding, or refusing to answer questions.

Criminal Jurisdiction: Power of a court to hear and dispose of criminal cases.

Divest: Deprive or take away a right.

Elements: The basic parts of a crime or civil action that must be proven. For example, some elements of a cause of action for battery are intentional, unwanted, physical contact. Each part, “intentional,” “unwanted,” and so forth, is one element.

Enhanced Penalties: Greater or increased penalties as a result of aggravating factors.

Exemption: Freedom from a general duty, a privilege allowed by law, immunity from certain legal obligations, or certain information required to be left out of public website.

Felony: A crime of a more serious nature than a misdemeanor. Under many state statutes, it is punishable by more than a year in prison or even death.

Forfeiture: Loss of some right or property as a penalty for some illegal act.

General Intent: In criminal law, the offender intends the actions in which he or she is engaging, not necessarily the consequences.

Harassment: Words, gestures, and actions that tend to annoy, alarm, or abuse another person. Civil and criminal definitions of harassment vary. Criminal laws prohibiting harassment may list specific acts of harassment and increase the penalties based on the level of harassment.

Inchoate: Partial; unfinished; begun, but not completed.

Injunction: A court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury.

Jurisdiction: The geographical area within which a court has the right and power to operate. The persons about whom and the types of cases a court has the right and power to make binding decisions.

Jurisprudence: The philosophy of law and the study of legal principles on which legal rules are based.

Juvenile Delinquency: Illegal behavior by a minor child (age defined by laws).

Legislative Body: The branch of government whose appropriate function is the making of laws.

Litigation Abuse: The use of multiple legal actions to harass another, rather than for its proper purpose.

Misdemeanors: Any offense lower than a felony and generally punishable by fine, penalty, forfeiture, or imprisonment otherwise than in penitentiary. Oftentimes misdemeanors are punishable by less than one year of imprisonment. There may be various classes of misdemeanors.

Noncompliant: Failing to conform or obey the requirements.

Notice: Information or written warning, in a more or less formal shape, intended to tell a person of some proceeding in which his interests are involved, or inform him of some fact that it is his right to know and the duty of the notifying person to communicate.

Offender: A person who commits a crime.

Offense: Violation of a criminal statute.

Perpetrator: A person who commits a crime.

Petition: A written request or application to a court that it takes a particular action, for example, a petition for a protection order.

Petitioner: One who presents a petition to a court and starts a legal action.

Plea Agreement: The agreement between the offender and the prosecutor in a criminal case about the punishment.

Prejudice: Bias or preconceived opinion. Leaning toward one side of a cause for some reason other than justice.

Privileged Communications: Those statements made by certain persons within a protected relationship, such as husband-wife or attorney-client, that the law protects from forced

disclosure on the witness stand.

Probation: A sentence of a convicted offender, whereby he is released into the community under the supervision of a probation officer.

Prosecution: A criminal action; a proceeding instituted and carried on according to the law before a court, for the purpose of determining the guilt or innocence of a person charged with a crime.

Protocol: The rules of correct or appropriate behavior for a particular group of people in a particular situation. For example, the hospital or police have a protocol for the handling of sexual assault cases.

Regulations: Rules issued by agencies of a government to guide the activity of those meant to be regulated by the agency and their employees to ensure uniform application of laws.

Relevancy: Evidence that relates to and has a tendency to prove a particular issue.

Restitution: The act of restoring something to its rightful owner or giving an equivalent for any loss, damage, or injury.

Retroactive Law: Creates new obligations or duties for offenders convicted before the passage of the law (referring to the Adam Walsh Act).

Retrocession: Refers to the act of a PL 280 state conveying some or all rights acquired by PL 280 back to the U.S. government.

Sanction: A penalty or punishment attached to a law so that it is obeyed.

Sentencing: The phase of a criminal proceeding after the offender has been found guilty, when the punishment is imposed.

Solicitation: Asking, enticing, requesting, or encouraging someone to engage in an illegal act.

Sovereignty: The supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority.

Specific Intent: In criminal law, the offender intends the precise action the law prohibits, for example, assault with intent to rape, stalking with intent to cause emotional distress.

Stalking: Stalking is a pattern of repeated, unwanted attention, harassment, and contact. It is a course of conduct that can include a wide variety of activities that are usually specified in criminal law, including such things as following someone, threatening to harm the victim or her relatives, harassment through the Internet, and many other activities.

Statutes: A law; it can mean a single act of a legislature or a body of acts that are collected and arranged according to a scheme or legislative session.

Surveillance: Continual observation of a person, involving visual or electronic methods.

Trespass: An unauthorized entry or intrusion on private property or land of another.

Waive: To voluntarily give up a right.

Ward: A person, especially a child, placed by the court under the care of a guardian.

APPENDIX

Part I – Crimes Chapter 109A – Sexual Abuse

2241. Aggravated sexual abuse

(a) By force or threat.—Whoever, . . . , knowingly causes another person to engage in a sexual act—
(1) by using force against that other person; or
(2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;
or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(b) By other means.—Whoever, . . . , knowingly—
(1) renders another person unconscious and thereby engages in a sexual act with that other person;
or
(2) administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby—
(A) substantially impairs the ability of that other person to appraise or control conduct; and
(B) engages in a sexual act with that other person;
or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(c) With children.—Whoever . . . , knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging),
or attempts to do so, shall be fined under this title and imprisoned for not less than 30 years or for life. If the defendant has previously been convicted of another Federal offense under this subsection, or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.

(d) State of mind proof requirement.—In a prosecution under subsection (c) of this section, the Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years.

2242. Sexual abuse

Whoever, . . . , knowingly—

- (1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or
- (2) engages in a sexual act with another person if that other person is—
 - (A) incapable of appraising the nature of the conduct; or
 - (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;

or attempts to do so, shall be fined under this title and imprisoned for any term of years or for life.

2243. Sexual abuse of a minor or ward

(a) Of a minor.—Whoever, . . . , knowingly engages in a sexual act with another person who—

(1) has attained the age of 12 years but has not attained the age of 16 years; and

(2) is at least four years younger than the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(b) Of a ward.—Whoever, . . . , knowingly engages in a sexual act with another person who is—

(1) in official detention; and

(2) under the custodial, supervisory, or disciplinary authority of the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(c) Defenses.—

(1) In a prosecution under subsection (a) of this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years.

(2) In a prosecution under this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the persons engaging in the sexual act were at that time married to each other.

(d) State of mind proof requirement.—In a prosecution under subsection (a) of this section, the Government need not prove that the defendant knew—

(1) the age of the other person engaging in the sexual act; or

(2) that the requisite age difference existed between the persons so engaging.

2244. Abusive sexual contact

(a) Sexual conduct in circumstances where sexual acts are punished by this chapter.—Whoever . . . knowingly engages in or causes sexual contact with or by another person, if so to do would violate—

(1) subsection (a) or (b) of section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than ten years, or both;

(2) section 2242 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than three years, or both;

(3) subsection (a) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both;

(4) subsection (b) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both; or

(5) subsection (c) of section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title and imprisoned for any term of years or for life.

(b) In other circumstances.—Whoever, . . . knowingly engages in sexual contact with another person without that other person's permission shall be fined under this title, imprisoned not more than two years, or both.

(c) Offenses involving young children.—If the sexual contact that violates this section (other than subsection (a)(5)) is with an individual who has not attained the age of 12 years, the maximum term of imprisonment that may be imposed for the offense shall be twice that otherwise provided in this section.

2245. Offenses resulting in death

(a) In general.—A person who, in the course of an offense under this chapter, or section 1591, 2251, 2251A, 2260, 2421, 2422, 2423, or 2425, murders an individual, shall be punished by death or imprisoned for any term of years or for life.

2246. Definitions for chapter

As used in this chapter—

(1) the term “prison” means a correctional, detention, or penal facility;

(2) the term “sexual act” means—

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however, slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(3) the term “sexual contact” means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(4) the term “serious bodily injury” means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty;

(5) the term “official detention” means— . . .

2247. Repeat offenders

(a) Maximum Term of Imprisonment.—The maximum term of imprisonment for a violation of this chapter after a prior sex offense conviction shall be twice the term otherwise provided by this chapter, unless section 3559(e) applies.

(b) Prior Sex Offense Conviction Defined.—In this section, the term “prior sex offense conviction” has the meaning given that term in section 2426(b).

U.S.C. Title 18 – Crimes and Criminal Procedure
Part 1 – Crimes
Chapter 110A – Domestic Violence and Stalking

2261. Interstate Domestic Violence

(a) OFFENSES. —

(1) TRAVEL OR CONDUCT OF OFFENDER. —

A person who travels in interstate or foreign commerce or enters or leaves Indian country or is present within the special maritime and territorial jurisdiction of the United States with the intent to kill, injure, harass, or intimidate a spouse, intimate partner, or dating partner, and who, in the course of or as a result of such travel or presence, commits or attempts to commit a crime of violence against that spouse, intimate partner, or dating partner, shall be punished as provided in subsection (b).

(2) CAUSING TRAVEL OF VICTIM. —

A person who causes a spouse, intimate partner, or dating partner to travel in interstate or foreign commerce or to enter or leave Indian country by force, coercion, duress, or fraud, and who, in the course of, as a result of, or to facilitate such conduct or travel, commits or attempts to commit a crime of violence against that spouse, intimate partner, or dating partner, shall be punished as provided in subsection (b).

(b) PENALTIES. —A person who violates this section or section 2261A shall be fined under this title, imprisoned—

(1) for life or any term of years, if death of the victim results;

(2) for not more than 20 years if permanent disfigurement or life threatening bodily injury to the victim results;

(3) for not more than 10 years, if serious bodily injury to the victim results or if the offender uses a dangerous weapon during the offense;

(4) as provided for the applicable conduct under chapter 109A if the offense would constitute an offense under chapter 109A (without regard to whether the offense was committed in the special maritime and territorial jurisdiction of the United States or in a Federal prison); and

(5) for not more than 5 years, in any other case, or both fined and imprisoned.

(6) Whoever commits the crime of stalking in violation of a temporary or permanent civil or criminal injunction, restraining order, no-contact order, or other order described in section 2266 of title 18, United States Code, shall be punished by imprisonment for not less than 1 year.

2261A. Stalking (Amended 2013)

Whoever—

(1) travels in interstate or foreign commerce or is present within the special maritime and territorial jurisdiction of the United States, or enters or leaves Indian country, with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, and in the course of, or as a result of, such travel or presence engages in conduct that—

(A) places that person in reasonable fear of the death of, or serious bodily injury to—

(i) that person;

- (ii) an immediate family member (as defined in section 115) of that person; or
 - (iii) a spouse or intimate partner of that person; or
 - (B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of subparagraph (A); or
- or
- (2) with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to engage in a course of conduct that—
- (A) places that person in reasonable fear of the death of or serious bodily injury to a person described in clause (i), (ii), or (iii) of paragraph (1)(A); or
 - (B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of paragraph (1)(A), shall be punished as provided in section 2261(b) of this title.

2262 Interstate Violation of a Protection Order (amended 2013)

(a) OFFENSES. —

(1) TRAVEL OR CONDUCT OF OFFENDER. —

A person who travels in interstate or foreign commerce, or enters or leaves Indian country or is present within the special maritime and territorial jurisdiction of the United States, with the intent to engage in conduct that violates the portion of a protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person, or that would violate such a portion of a protection order in the jurisdiction in which the order was issued, and subsequently engages in such conduct, shall be punished as provided in subsection (b).

(2) CAUSING TRAVEL OF VICTIM. —

A person who causes another person to travel in interstate or foreign commerce or to enter or leave Indian country by force, coercion, duress, or fraud, and in the course of, as a result of, or to facilitate such conduct or travel engages in conduct that violates the portion of a protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person, or that would violate such a portion of a protection order in the jurisdiction in which the order was issued, shall be punished as provided in subsection (b).

(b) PENALTIES. —A person who violates this section shall be fined under this title, imprisoned—

- (1) for life or any term of years, if death of the victim results;
- (2) for not more than 20 years if permanent disfigurement or life threatening bodily injury to the victim results;
- (3) for not more than 10 years, if serious bodily injury to the victim results or if the offender uses a dangerous weapon during the offense;
- (4) as provided for the applicable conduct under chapter 109A if the offense would constitute an offense under chapter 109A (without regard to whether the offense was committed in the special maritime and territorial jurisdiction of the United States or in a Federal prison); and
- (5) for not more than 5 years, in any other case, or both fined and imprisoned.

2263. Pretrial release of defendant (1994)

In any proceeding pursuant to section 3142 for the purpose of determining whether a defendant charged under this chapter shall be released pending trial, or for the purpose of determining conditions of such release, the alleged victim shall be given an opportunity to be heard regarding the danger posed by the defendant.

2264. Restitution (Amended 1996)

(a) IN GENERAL. —

Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

(b) SCOPE AND NATURE OF ORDER. —

(1) DIRECTIONS. —

The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).

(2) ENFORCEMENT. —

An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) DEFINITION. —For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for—

- (A)** medical services relating to physical, psychiatric, or psychological care;
- (B)** physical and occupational therapy or rehabilitation;
- (C)** necessary transportation, temporary housing, and child care expenses;
- (D)** lost income;
- (E)** attorneys' fees, plus any costs incurred in obtaining a civil protection order;
- and
- (F)** any other losses suffered by the victim as a proximate result of the offense.

(4) ORDER MANDATORY. —

(A) The issuance of a restitution order under this section is mandatory. the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

(c) VICTIM DEFINED. —

For purposes of this section, the term "victim" means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.

2265. Full faith and credit given to protection orders (amended 2013)

(a) FULL FAITH AND CREDIT. —

Any protection order issued that is consistent with subsection (b) of this section by the court of one State, Indian tribe, or territory (the issuing State, Indian tribe, or territory) shall be accorded full faith and credit by the court of another State, Indian tribe, or

territory (the enforcing State, Indian tribe, or territory) and enforced by the court and law enforcement personnel of the other State, Indian tribal government or Territory [1] as if it were the order of the enforcing State or tribe.

(b) PROTECTION ORDER. —A protection order issued by a State, tribal, or territorial court is consistent with this subsection if—

(1) such court has jurisdiction over the parties and matter under the law of such State, Indian tribe, or territory; and

(2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person’s right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent’s due process rights.

(c) CROSS OR COUNTER PETITION.—A protection order issued by a State, tribal, or territorial court against one who has petitioned, filed a complaint, or otherwise filed a written pleading for protection against abuse by a spouse or intimate partner is not entitled to full faith and credit if—

(1) no cross or counter petition, complaint, or other written pleading was filed seeking such a protection order; or

(2) a cross or counter petition has been filed and the court did not make specific findings that each party was entitled to such an order.

(d) NOTIFICATION AND REGISTRATION. —

(1) NOTIFICATION. —A State, Indian tribe, or territory according full faith and credit to an order by a court of another State, Indian tribe, or territory shall not notify or require notification of the party against whom a protection order has been issued that the protection order has been registered or filed in that enforcing State, tribal, or territorial jurisdiction unless requested to do so by the party protected under such order.

(2) NO PRIOR REGISTRATION OR FILING AS PREREQUISITE FOR ENFORCEMENT. —Any protection order that is otherwise consistent with this section shall be accorded full faith and credit, notwithstanding failure to comply with any requirement that the order be registered or filed in the enforcing State, tribal, or territorial jurisdiction.

(3) LIMITS ON INTERNET PUBLICATION OF REGISTRATION INFORMATION. — A State, Indian tribe, or territory shall not make available publicly on the Internet any information regarding the registration, filing of a petition for, or issuance of a protection order, restraining order or injunction, restraining order, or injunction in either the issuing or enforcing State, tribal or territorial jurisdiction, if such publication would be likely to publicly reveal the identity or location of the party protected under such order. A State, Indian tribe, or territory may share court-generated and law enforcement-generated information contained in secure, governmental registries for protection order enforcement purposes.

(e) TRIBAL COURT JURISDICTION. —

For purposes of this section, a court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.

2265A. Repeat Offenders. (2013)

(a) MAXIMUM TERM OF IMPRISONMENT. —

The maximum term of imprisonment for a violation of this chapter after a prior domestic violence or stalking offense shall be twice the term otherwise provided under this chapter.

(b) DEFINITION. —For purposes of this section—

(1) the term “prior domestic violence or stalking offense” means a conviction for an offense—

(A) under section 2261, 2261A, or 2262 of this chapter; or

(B) under State or tribal law for an offense consisting of conduct that would have been an offense under a section referred to in subparagraph (A) if the conduct had occurred within the special maritime and territorial jurisdiction of the United States, or in interstate or foreign commerce; and

(2) the term “State” means a State of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.

2266. Definitions. (2006)

In this chapter [18 USCS §§ 2261 et seq.]:

(1) Bodily injury. The term “bodily injury” means any act, except one done in self-defense, that results in physical injury or sexual abuse.

(2) Course of conduct. The term “course of conduct” means a pattern of conduct composed of 2 or more acts, evidencing a continuity of purpose.

(3) Enter or leave Indian country. The term “enter or leave Indian country” includes leaving the jurisdiction of 1 tribal government and entering the jurisdiction of another tribal government.

(4) Indian country. The term “Indian country” has the meaning stated in section 1151 of this title [18 USCS § 1151].

(5) Protection order. The term “protection order” includes—

(A) any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil or criminal court whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection; and

(B) any support, child custody or visitation provisions, orders, remedies or relief issued as part of a protection order, restraining order, or injunction pursuant to State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, sexual assault, dating violence, or stalking.

(6) Serious bodily injury. The term “serious bodily injury” has the meaning stated in section 2119(2) [18 USCS § 2119(2)].

(7) Spouse or intimate partner. —The term “spouse or intimate partner” includes—

(A) for purposes of—

(i) sections other than 2261A—

(I) a spouse or former spouse of the abuser, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited as a

spouse with the abuser; or

(II) a person who is or has been in a social relationship of a romantic or intimate nature with the abuser, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship; and

(ii) section 2261A—

(I) a spouse or former spouse of the target of the stalking, a person who shares a child in common with the target of the stalking, and a person who cohabits or has cohabited as a spouse with the target of the stalking; or

(II) a person who is or has been in a social relationship of a romantic or intimate nature with the target of the stalking, as determined by the length of the relationship, the type of the relationship, and the frequency of interaction between the persons involved in the relationship.

(B) any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State or tribal jurisdiction in which the injury occurred or where the victim resides

(8) State. — The term “State” includes a State of the United States, the District of Columbia, and a commonwealth, territory, or possession of the United States.

(9) Travel in interstate or foreign commerce. The term “travel in interstate or foreign commerce” does not include travel from one State to another by an individual who is a member of an Indian tribe and who remains at all times in the territory of the Indian tribe of which the individual is a member. . . .

18 U.S.C § 922. Unlawful acts.

[Domestic Violence and Stalking Firearm Prohibitions Only]

Sections omitted

(g) It shall be unlawful for any person—

(1) – (7) (Omitted)

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(h)–(z) (Omitted)