



SEX TRAFFICKING IN INDIAN COUNTRY: ADVOCACY CURRICULUM

UNITS 1- 4 | JANUARY 2020

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PARTICIPANT WORKBOOK

**Sex Trafficking in Indian Country:
Advocacy Curriculum
Units 1 - 4**

PARTICIPANT WORKBOOK



**Tribal Law and Policy Institute
January 2020**

Preface

This curriculum is dedicated to Tribal Coalitions in honor of their dedication and tireless efforts advancing systemic change for victims and training tribal victim advocates and others seeking to promote safety for all victims of domestic violence, sexual assault, dating violence, stalking, and sex trafficking.

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About This Resource

The *Sex Trafficking in Indian Country: Advocacy Curriculum (Curriculum)* is designed to provide tools for Tribal Coalitions and tribal advocates interested in training their staff on introductory information on sex trafficking of Native people. While the *Curriculum* was designed specifically for Tribal Coalitions to utilize in training tribal victim advocates, it may be useful for tribal victim advocates and victim service providers to train others from any number of disciplines and professional backgrounds such as social work, nursing, tribal court, probation, tribal government, psychology, and victim services.

This *Curriculum* was also designed to be taught in full, during a multiday training. However, it can be used for individual learning. The exercises and activities mentioned in this resource can be adapted for individual learning.

This *Curriculum* consists of three components: **Instructor Guide**, **Participant Workbook**, and **PowerPoints**. Each *Curriculum* component will be available for free download at www.TribalTrafficking.org and www.Home.TLPI.org.

About the Participant Workbook

The **Participant Workbook** corresponds with the *Curriculum Instructor Guide* and **PowerPoints**. The **Instructor Guide** and **PowerPoints** provide training resources and guidance to presenters of workshops, conference plenary sessions, staff trainings, and community trainings. This **Participant Workbook** component is a resource for participants attending the training or engaging in self-study. The **Participant Workbook** may serve as an individual or group learning resource, simply read through like any other publication.

The **Participant Workbook** includes seven units:

1. Introduction to Sex Trafficking in Indian Country
2. Identifying and Screening for Sex Trafficking
3. Advocacy for Victims of Sex Trafficking
4. Legal Advocacy
5. Sex Trafficking and Federal Law (pending approval)
6. Sex Trafficking and State Law (pending approval)
7. Sex Trafficking and Tribal Law (pending approval)

Reader Support

CAUTION READER: Reading about sex trafficking, sexual assault, and other violence topics can be difficult. Some of the topics deal with very sensitive issues and may be disturbing or trigger memories and repressed feelings.

The StrongHearts Native Helpline can provide support to those in need of aid, simply call (844) 7Native (844-762-8483) or visit their website at www.StrongHeartsHelpline.org. Be sure to visit www.TribalTrafficking.org for more resources.

Unit 1:

Introduction to Sex Trafficking in Indian Country

Unit 1: Introduction to Sex Trafficking in Indian Country

Issues related to sex trafficking in Indian country have reached a heightened level of attention from tribal, federal, and state governments. While sex trafficking has been on the radar of tribal victim advocates and tribal scholars for a much longer period,¹ their efforts to address the issue have not resulted in widespread criminalization of sex trafficking through tribal law. This may be attributed to a variety of factors: complex criminal jurisdiction,² limited sentencing powers,³ limited resources,⁴ or special domestic violence criminal jurisdiction,⁵ to name a few.

This unit and corresponding training workshop will provide participants with a basic understanding of sex trafficking as it impacts Native people.

By the end of this unit, participants will be able to:

- Discuss sex trafficking generally;
- Discuss why sex trafficking occurs;
- Identify where sex trafficking can occur;
- Identify some sex trafficking risk factors; and
- Understand the importance of identifying sex trafficking myths and misconceptions.

Please note: Slide 1 is purposely omitted from your workbook.

¹ Lynn Armitage, "Human Trafficking Will Become One of the Top Three Crimes against Native Women," Indian Country Today Media Network (July 15, 2015), accessed September 1, 2016, <http://indiancountrytodaymedianetwork.com/2015/07/15/human-trafficking-will-become-one-top-three-crimes-against-native-women-161083>.

² Robert N. Clinton, "Criminal Jurisdictional Maze," 18 Ariz. L. Rev. 503 (1976) (discussing the jurisdictional maze that is criminal jurisdiction in Indian country). *See also* William V. Vetter, "A New Corridor for the Maze: Tribal Criminal Jurisdiction and Nonmember Indians," 17 Am. Indian L. Rev. 349 (1992) and Matthew L. M. Fletcher, Kathryn E. Fort, and Wenona T. Singel, "Indian Country Law Enforcement and Cooperative Public Safety Agreements," 89 Mich. B.J. 42 (2010).

³ The Indian Civil Rights Act, as codified Title 25, U.S.C. §1300 (1968) (modified in 1986 to allow for sentencing of up to one year and \$5,000 per offense). *See also*, Pub. L. No. 111-211, §202(a)(5)(A), 124 Stat. 2261 (codified as amended in scattered sections of 18 U.S.C., 21 U.S.C., 25 U.S.C., 28 U.S.C., and 42 U.S.C.).

⁴ Angela R. Riley, "Crime and Governance in Indian Country," 63 UCLA L. Rev. 1564, 1631 (2016) (citing lack of resources as a prominent reason for many Native Nations not implementing new laws such as the Violence Against Women Act (VAWA)). *See also* Elise Helgesen, "Allotment of Justice: How U.S. Policy in Indian Country Perpetuates the Victimization of American Indians," 22 U. Fla. J. L. & Pub. Pol'y 441, 454 (2011) (citing lack of resources as the reason for ineffective law enforcement in Indian country).

⁵ *See* Violence Against Women Act of 2013, Pub. L. No. 113-4, 25 U.S.C. §1304 (2013) (authorizing Special Domestic Violence Criminal Jurisdiction over non-Indians who commit acts of domestic violence or dating violence or violate protective order in the Indian country of the participating Native nation if the perpetrator has sufficient ties to the prosecuting Native nation).

Training Agenda

- Welcome, Invocation, Introduction, and Housekeeping
- Overview of Unit and Learning Objectives
- “Training Expectations”—Large Group Exercise
- What Is Sex Trafficking?
- Advocate’s Working Definition
- Common Misconceptions
- “Anything of Value”—Small Group Exercise
- “No Force, Fraud, or Coercion Required”—Large Group Exercise
- Where Does Sex Trafficking Occur?
- Why Does Sex Trafficking Occur?
- Question and Answer



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Learning Objectives

Objectives –As a result of participating in this workshop, you will be better able to:

- Discuss sex trafficking generally;
- Discuss why sex trafficking occurs;
- Identify where sex trafficking can occur;
- Identify some sex trafficking risk factors; and
- Understand the importance of identifying sex trafficking myths and misconceptions.



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Large Group Exercise: Training Expectations

Question: What are one to two expectations that you have for this training?

Use the following space and on the right to brainstorm your initial thoughts.

[illegible]

Large Group Exercise

Training Expectations



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Large Group Exercise

What are one to two expectations that you have for this training ?



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What Is Sex Trafficking?

While people may define *sex trafficking* differently, this curriculum is guided by the legal definition of *sex trafficking*. The definition is codified in 18 U.S.C. §1591 set forth below. Note that there are two separate criminal offenses of *sex trafficking*: sex trafficking of an adult and sex trafficking of a minor.

Sex trafficking is defined as:

(a) Whoever knowingly—
(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or
*(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that **means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act,** shall be punished as provided in subsection (b).*⁶
[Emphasis added]

One of the most important distinctions between the offenses is the proof of *force, fraud, or coercion*. Sex trafficking of an adult requires proof of force, fraud, or coercion, whereas sex trafficking of a minor does not require proof of force, fraud, or coercion.⁷

Please Note: *Force, fraud, and coercion* are legal terms that will vary depending on the jurisdiction.⁸

Historically, sex trafficking was a crime handled by the federal government, usually because it was perceived as an international or interstate crime. However, due to changing legal definitions and increased awareness of sex trafficking as a problem that can occur at the local level, every state has a law against sex trafficking.⁹ A few tribes also have laws against sex trafficking.¹⁰

⁶ 18 U.S.C. §1591(a).

⁷ *Ibid.*; See also Hilary Axam and Jennifer Toritto Leonardo, “Human Trafficking: The Fundamentals,” 65 U.S. Attorneys’ Bulletin, November 2017.

⁸ See 18 U.S.C. §1591(e) (providing definition for coercion and other terms used in 18 U.S.C. §1591(a)).

⁹ National Conference of State Legislatures, “Human Trafficking State Laws,” accessed January 7, 2020, <https://www.ncsl.org/research/civil-and-criminal-justice/human-trafficking-laws.aspx>.

¹⁰ A general discussion of sex trafficking and related laws is included in later units of this resource. (pending approval).

Legal Definition of Sex Trafficking

Federal Definition (18 U.S.C. §1591(a))

(a)Whoever knowingly—

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that **means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act**, shall be punished as provided in subsection (b).



Legal Definition of Sex Trafficking

Please Note: Force, fraud, and coercion are legal terms that will vary depending on the jurisdiction.

18 U.S.C. §1591(e) provides definitions for coercion and other terms used in 18 U.S.C. §1591(a)

(e)In this section: ...

(2)The term “coercion” means—

(A)threats of serious harm to or physical restraint against any person;

(B)any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(C)the abuse or threatened abuse of law or the legal process.



Advocate's Working Definition

While this unit does not focus on legal issues related to sex trafficking, it is important to begin with the same baseline understanding of sex trafficking. Similar to domestic violence, the legal definition may vary from the working definition used by tribal advocates. For instance, an advocate's working definition may include:

- Sex trafficking is a crime that involves the sexual exploitation of another person for personal/commercial gain.
- Sex trafficking usually includes the trafficker exercising power and control over a victim.
- The presence of force, fraud, or coercion is a useful check if an advocate is unsure. Remember, proof of force, fraud, or coercion needs to be proven if the victim is over 18.

Common Misconceptions

There are many misconceptions about sex trafficking. While there is limited informational and practical resources on sex trafficking in Indian Country, it is important to avoid operating under misconceptions. Identifying and correcting misconceptions is particularly important for tribal advocates educating others on sex trafficking and assisting victims in their communities.

One of the largest misconceptions is that sex trafficking is the same everywhere. Sex trafficking is a complex crime, and most sex trafficking laws are intentionally broad to allow for the prosecution of its many forms.

Other common **misconceptions** are that:

- Sex trafficking must involve kidnapping, confinement, or physical force;
- Sex trafficking must involve travel across state or international boundaries;
- Traffickers are always strangers to the victim;
- Sex trafficking victims are always female;¹¹
- Getting paid any amount means an individual cannot also be a victim;
- Victims are eager to receive help, self-identify, and discuss their victimization;
- Domestic violence is always different from sex trafficking; and
- Sex trafficking always involves the exchange of money.

¹¹ See Ashley Greve, "Human trafficking: What about the men and boys?," September 18, 2014, <https://humantraffickingcenter.org/men-boys/> (accessed November 25, 2019).

Advocate's Working Definition of Sex Trafficking

- Sex trafficking is the sexual exploitation of another person for personal/commercial gain.
- This crime usually includes the trafficker exercising power and control over the victim.
- Victims may not be free to come and go as they choose.
- Remember “force, fraud, or coercion” needs to be proven if the victim is over 18 years of age.



Common Misconceptions

- Sex trafficking must involve kidnapping, confinement, or physical force.
- Sex trafficking must involve travel across state or international boundaries.
- Traffickers are always strangers to the victim.
- Sex trafficking victims are always female.
- Getting paid any amount means an individual cannot also be a victim.
- Victims are eager to receive help, self-identify, and discuss their victimization.
- Domestic violence is always different from sex trafficking.
- Sex trafficking always involves the exchange of money.



Myths and Misconceptions

Though not specific to sex trafficking, the National Human Trafficking Resource Center (Center) lists some other myths and misconceptions related to human trafficking generally.¹² Below is a modified list of myths and misconceptions made available by the Center. While useful, this list is not tailored to tribal communities.

Myth: Trafficked persons can only be foreign nationals or are only immigrants from other countries.

Fact: The federal definition of *human trafficking* includes both U.S. citizens and foreign nationals.

Myth: *Human trafficking* is essentially a crime that must involve some form of travel, transportation, or movement across state or national borders.

Fact: Trafficking does not require transportation.

Myth: *Human trafficking* is another term for human smuggling.

Fact: Smuggling is a crime against a country's borders. *Human trafficking* is a crime against a person.

Myth: There must be elements of physical restraint, physical force, or physical bondage when identifying a human trafficking situation.

Fact: Trafficking does not require physical restraint, bodily harm, or physical force.

Myth: *Human trafficking* victims always come from situations of poverty or from small rural villages.

Fact: Although poverty can be a factor in human trafficking because poverty is an indicator of vulnerability, poverty alone is not a single causal factor or a universal indicator of a human trafficking victim.

Myth: Sex trafficking is the only form of *human trafficking*.

Fact: The federal definition includes both sex trafficking and labor trafficking.

Please Note: The following slides are blank to allow space for presenters to insert regionally based myths and misconceptions.

¹² "Myths and Misconceptions," National Human Trafficking Hotline, accessed September 12, 2016, <http://traffickingresourcecenter.org/what-human-trafficking/myths-misconceptions>; For further study of human trafficking, see Axam and Leonardo, *supra* note 7, at 3.

Myths and Misconceptions



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Myths and Misconceptions



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Small Group Exercise: Anything of Value

Question: Review and reflect on the federal definition of sex trafficking provided in this resource. What items may be of value to you? Identify an object other than money within your small group.

Use the following space to write your possible items:

[illegible]

Small Group Exercise

Anything of Value



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Small Group Exercise

What items may be of value to you?

Identify an object other than money with your small group.



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Large Group Exercise: No Force, Fraud, or Coercion Required

Question: Review and reflect on the federal definition of sex trafficking provided in this resource. Why do you think this law does not require a showing of force, fraud, or coercion if a person is under the age of eighteen years?

Take a minute to think of why the federal statute does not require proof of force, fraud, or coercion for cases involving children.

[illegible]

Large Group Exercise

No Force, Fraud, or Coercion Required



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Large Group Exercise

Review and reflect on the federal definition of sex trafficking provided in this resource. Why do you think this law does not require a showing of force, fraud, or coercion if a person is under the age of eighteen years?

Take a minute to think, then list possible answers in your workbook.



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Where Does Sex Trafficking Occur?

Unit 2 of this resource will provide an in-depth discussion of methods of trafficking, which will usually impact where sex trafficking is likely to occur. There are numerous situations (who, what, when, where) that can involve sex trafficking. However, when speaking broadly about all tribal communities, sex trafficking can occur in:

- Private homes;
- Hotels;
- Casinos;
- Truck stops;
- Bus terminals;
- Pow-wow grounds;
- Malls;
- Detention facilities;
- Shelters; and
- Bars.

Questions: Do you know if sex trafficking is occurring in your community? Do you know where sex trafficking occurs in your tribal community? Where do you think sex trafficking occurs?

Where Does Sex Trafficking Occur?

- Private homes
- Hotels
- Casinos
- Truck stops
- Bus terminals
- Pow-wow grounds
- Malls
- Detention facilities
- Shelters
- Bars



Where Does Sex Trafficking Occur?

- *Do you know if sex trafficking is occurring in your community?*
- *Do you know where sex trafficking occurs in your tribal community?*
- *Where do you think sex trafficking may occur?*



Why Does Sex Trafficking Occur?

There is an unfortunate lack of reliable data on the prevalence of sex trafficking in Indian country. This lack of reliable data is tied to the limited amount of research, articles, and reports on the topic. However, the limited Native-specific research that has been done and anecdotal evidence suggest that sex trafficking disproportionately impacts Native women and girls.¹³ Because much of the available research has focused on women and girls, it is difficult to make statements regarding other demographics. However, Native American sex trafficking risk factors that apply across age and gender include highest rates of physical and sexual violence, sexual assaults at an early age,¹⁴ drug and alcohol abuse,¹⁵ and intergenerational trauma. The U.S. Department of Justice has acknowledged the overrepresentation of Native American women among sex trafficking victims as a national problem.¹⁶

In 2011, a study of 105 Native women in Minnesota found that some trafficking survivors experienced extreme racial hatred and simultaneous, eroticization by traffickers and/or buyers.¹⁷ Some felt that they were targeted based on their experiences of oppression as Native women.¹⁸ Unit 2 of this resource will provide an in-depth discussion of risk factors.

Sex trafficking is not a new problem in tribal communities. Before the formation of the United States, colonists targeted Native women for rape, kidnapping, and trafficking. Colonial leaders argued that their men were simply yielding to temptation and assigned no moral or religious consequences to the perpetrators.¹⁹ Prior to colonization in some sovereign Native Nations,²⁰ violence against Native women was considered a most egregious crime and the response to acts of violence was swift. Women were not viewed as property of men; women were also sovereign as they controlled their bodies, property, and fertility.

¹³ Sarah Deer et al., *Garden of Truth: The Prostitution and Trafficking of Native Women in Minnesota* (St. Paul, MN: William Mitchell College of Law, October 27, 2011), accessed February 8, 2017, http://www.prostitutionresearch.com/pdfs/Garden_of_Truth_Final_Project_WEB.pdf.

¹⁴ Sarah Deer, "Relocation Revisited: Sex Trafficking of Native Women in the United States," 36 William Mitchell Law Review 821 (2010): 621-683, 678.

¹⁵ Ibid.

¹⁶ U.S. Department of Justice, *Attorney General's Annual Report to Congress and Assessment of U.S. Government Activities to Combat Trafficking in Persons Fiscal Year 2009* (Washington, DC: U.S. Department of Justice, 2010), accessed February 8, 2017, <https://www.justice.gov/archive/ag/annualreports/tr2009/agreporthumantrafficking2009.pdf>; See also U.S. Department of Justice, *Human Trafficking (including Sex Trafficking of American Indians and Alaska Natives)*, (2017), accessed January 7, 2020, <https://www.justice.gov/ovw/page/file/998081/download>.

¹⁷ Deer et al., *supra* note 13, at 32.

¹⁸ Ibid., 49.

¹⁹ Deer, *supra* note 14, at 640 – 665; See also National Congress of American Indians Policy Research Center, *Human and Sex Trafficking: Trends and Responses Across Indian Country*, (2016), accessed January 7, 2020, <http://www.ncai.org/policy-research-center/research-data/prc-publications/TraffickingBrief.pdf>.

²⁰ *Johnson v. McIntosh*, 21 U.S. 543 (1823), *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), *Worcester v. Georgia*, 31 U.S. 515 (1832), (Often referred to as the "Marshall Trilogy" referring to tribes as sovereigns.). See also *Talton v. Mayes*, 163 U.S. 376 (1896). (Tribal powers are inherent.); E.g., U.S. Department of Justice, *Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes* (June 1, 1995), accessed November 5, 2019, <https://www.justice.gov/archives/ag/attorney-general-june-1-1995-memorandum-indian-sovereignty>.

Why Does Sex Trafficking Occur?

- Limited research available.
- Social risk factors may make it more likely in tribal communities.
- Native nations stripped of jurisdictional authority to combat the problem.
- Substance use and abuse can contribute.
- Housing and family instability.
- Contemporary problem, but can be linked to colonization.



Why Does Sex Trafficking Occur?

- Precontact Native peoples had varied traditions and some considered violence against women taboo.
- Colonization disrupted Native lifeways and imposed a new social, political, and religious worldview.
- Postcontact, Native women's bodies were commoditized, exploited.
- Native women and girls viewed as hypersexual and sexually objectified.



Colonization and Sex Trafficking

While the roles of individuals varied greatly across tribal communities, colonization created a consistent disruption the values and lifeways of Native people.²¹ The post-contact colonization and genocide²² projects of non-Natives sought to wipe out or replace Native cultures with an Anglo social, political, and religious worldview, one in which men dominate. During this time, Native people were increasingly hypersexualized and sexually exploited by colonizers.

The colonizer values promoted inequality between men and women and the oppression of children and two-spirit individuals. These laws and attitudes provided men the permission to abuse women and children, viewing them as property and objects that are owned.

Systemic Change to a Systemic Problem

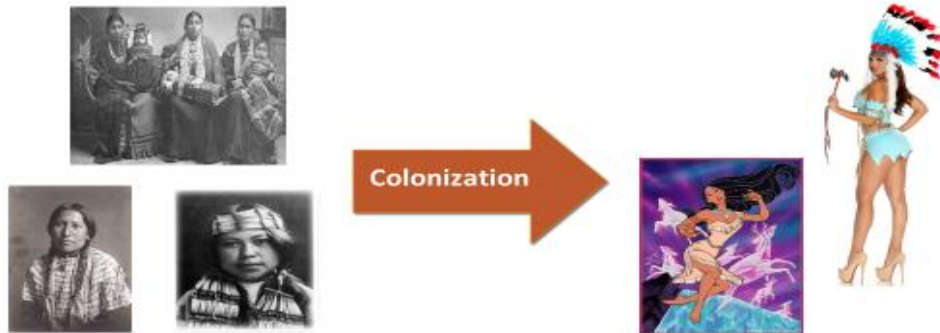
Understanding that modern sex trafficking is rooted in colonization as a system of oppression rather than simply looking at individual behavior is important when working with victims. By using this view, we can understand why an empowerment model of advocacy is necessary. It allows the advocate to examine a systemic problem and identify systemic solutions.

Advocates and other victim service providers may want to examine their current system to identify barriers of people escaping violence and to identify any systemic realities that may support the trafficker's power and control. Also, it is important to determine whether the system supports traditional values. If the values are restored, many tribal communities will not tolerate sex trafficking.

²¹ Oxford University Press, "Colonization," (2019), <https://www.lexico.com/en/definition/colonization> ("1. The action or process of settling among and establishing control over the indigenous people of an area."); Cf. Carole E. Goldberg et. al, *American Indian Law: Native Nations and the Federal System* (Carolina Academic Press, 2010), 11 ("Federal policymakers exercised the most extreme forms of colonial domination during the 19th and earlier 20th centuries in an effort to break down the structure of the traditional tribal governments and assimilate tribal members to Western norms.").

²² United Nations, General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, (December 1948), available from <https://www.un.org/en/genocideprevention/genocide.shtml> (defining the international crime of genocide as intentional destruction of national, ethnical, racial or religious groups by killing, causing serious bodily or mental harm, inflicting destructive life conditions, imposing birth prevention measures, or forcibly transferring children of the targeted group); See also Department of Defense Appropriations Act § 8113, Pub. L. No. 111-118, (2010), <https://www.congress.gov/111/plaws/publ118/PLAW-111publ118.pdf> (containing a Federal Government acknowledgment and apology for violence, maltreatment, and neglect inflicted on Native Americans and the breaking of political covenants) (accessed November 5, 2019); See also Angelique Townsend Eaglewoman, "Ongoing Traumatic Experience of Genocide for American Indians and Alaska Native in the United States: The Call to Recognize Full Human Rights As Set Forth in the U.N. Declaration on the Rights of Indigenous People," 3 American Indian Law Journal 424 (2015); E.g., "Remarks of Kevin Gover at the Ceremony Acknowledging the 175th Anniversary of the BIA September 8, 2000" Tribal Law and Policy Institute, www.tribal-institute.org/lists/kevin_gover.htm ("From the very beginning, the Office of Indian Affairs was an instrument by which the United States enforced its ambition against the Indian nations and Indian people...And so, the first mission of this institution was to execute the removal of the southeastern tribal nations ...After the devastation of tribal economies and the deliberate creation of tribal dependence on the services provided by this agency, this agency set out to destroy all things Indian.").

Colonization and Sex Trafficking



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Systemic Change to a Systemic Problem

- Contemporary sex trafficking is a symptom of colonization.
- Advocates and tribal communities must address societal norms and attitudes.
- Identify and dismantle systems that support traffickers.
- Look to traditional community values that can be used to support anti-trafficking efforts.



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Unit 1: Additional Resources

1. **Tribal Law and Policy Institute, “Tribal Sex Trafficking Resources,”**
www.TribalTrafficking.org.
 A website created by the Tribal Law and Policy Institute (TLPI) that contains the latest information on sex trafficking in Indian country. Including the [Sex Trafficking Victim Services Directory](#) and blog [Sex Trafficking in Indian Country Update](#).
2. **Tribal Law and Policy Institute, *Sex Trafficking in Indian Country: Victim/Survivor Resource Book* (2016),** <https://www.tribaltrafficking.org/victim-services>.
 This *Resource Book* is intended to provide Tribal Coalitions and tribal advocates with basic information on sex trafficking as it impacts Native people and to provide access to direct services that may assist victims of sex trafficking. This resource contains a 900+-page victim services directory that is organized by state. Only the states with a Tribal Coalition are represented in this directory.
3. **Alexandra (Sandi) Pierce, *Shattered Hearts: The Commercial Sex Exploitation of American Indian Women and Girls in Minnesota* (Minneapolis: Minnesota Indian Women’s Resource Center, 2009),**
http://www.sdcedsv.org/media/sdcedsvfactor360com/shattered_hearts_full_report-web_version.pdf.
 A report on the commercial sexual exploitation of American Indian/Alaska Native women and girls in Minnesota, including sex trafficking. In 2006, the state legislature passed Minnesota Statute section 299A.79 requiring the commissioner of public safety to develop a plan to address current human trafficking and prevent future sex trafficking in Minnesota.
4. **Sarah Deer et al., *Garden of Truth: The Prostitution and Trafficking of Native Women in Minnesota* (St. Paul, MN: William Mitchell College of Law, October 27, 2011),**
http://www.prostitutionresearch.com/pdfs/Garden_of_Truth_Final_Project_WEB.pdf.
 The study provides powerful personal accounts of violence, poverty, survival, and strength by Native women. The 105 women interviewed for the report describe extreme and frequent violence including child sexual abuse, rape beating, and traumatic brain injuries, with a majority experiencing symptoms of posttraumatic stress disorder. Ninety-eight percent of the women have been homeless, and 92 percent want to escape prostitution but believe they have no other options. The study authors stress that these women’s strengths as well as their vulnerabilities must be seen in the context of a history of systematic harm to Native people.

5. **Sarah Deer, “Relocation Revisited: Sex Trafficking of Native Women in the United States,”** *36 William Mitchell Law Review* 821 (2010), <http://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1157&context=facsch>.
This article details the historical and legal context of sex trafficking from its origin among the colonial predecessors of the United States and documents the commercial trafficking of Native women over several centuries.

6. **Kathleen Finn, Erica Gajda, Thomas Perrin, and Carla F. Fredericks, “Responsible Resource Development and Prevention of Sex Trafficking: Safeguarding Native Women and Children on the Fort Berthold Reservation” (2016),** <https://ssrn.com/abstract=2723517>.
This paper describes the intersection of sex trafficking and oil and gas development on the Fort Berthold Reservation. It also describes the jurisdictional regime within federal Indian law and other barriers to law enforcement that have created a situation ripe for trafficking and other crime on the Fort Berthold Reservation. The paper examines strategies to address this complex issue including corporate engagement of relevant companies; tribal capacity and coalition building; and remedies contained in the Violence Against Women Act (VAWA) of 2014.

7. **Sarah Deer, *The Beginning and End of Rape: Confronting Sexual Violence in Native America* (Minneapolis: University of Minnesota Press, 2015).**
The Beginning and End of Rape makes available the powerful writings in which Sarah Deer, who played a crucial role in the reauthorization of VAWA in 2013, has advocated for cultural and legal reforms to protect Native women from endemic sexual violence and abuse. These essays point to the possibility of actual and positive change in a world in which Native women are systematically undervalued, left unprotected, and hurt.

8. **American Bar Association, “Human Trafficking,”** www.americanbar.org/groups/human_rights/projects/task_force_human_trafficking.html.
This web portal provides very useful information on human trafficking. It includes an FAQ and list of resources for trafficking victims, and more information on federal trafficking legislation. The web portal also connects to the American Bar Association’s Human Trafficking Legal Access Center. The center’s main objective is to bring lawyers and law firms together with nonprofit or pro bono service providers working with survivors of human trafficking to provide low-cost or free legal aid.

9. **Office for Victims of Crime Training and Technical Assistance Center, *Human Trafficking Task Force e-Guide: Strengthening Collaborative Responses*,** <https://www.ovcttac.gov/taskforceguide/eguide/>.
Developed in partnership by the U.S. Department of Justice’s Office for Victims of Crime and Bureau of Justice Assistance, this Guide is a resource to support established task forces and provide guidance to agencies that are forming task forces. Its purpose is to assist in the development and day to day operations of an anti-human trafficking task force and to provide fundamental guidance for effective task force operations. Though not specific to sex trafficking, this resource contains a helpful review of human trafficking laws.

Unit 2:

Identifying and Screening for Sex Trafficking

Unit 2: Identifying and Screening for Sex Trafficking

This unit and corresponding training workshop will provide participants with a basic understanding of how to screen for sex trafficking of Native people.

By the end of this unit, participants will be able to:

- Identify “types” of trafficking;
- Identify methods used by traffickers against victims;
- Identify red flags that may indicate a person as a victim of sex trafficking; and
- Identify actions that an advocate can take to make the victim feel safer during an interview.

Please note: Slides 22 - 26 are purposely omitted from your workbook.

Training Agenda

- Introductions, Agenda, Overview of Unit, and Learning Objectives
- "Identifying Sex Trafficking"—Video and Large Group Discussion
- Who Are Sex Traffickers?
- What Do Traffickers Look For?
- Risk Factors
- Types of Sex Trafficking
- Tactics Used by Traffickers
- Correlations to Domestic Violence
- Sex Trafficking Red Flags
- "Fact Patterns"—Small Group Exercise
- Interviewing a Victim
- Initial Safety Assessment
- Screening Tools
- "Developing a Culturally Appropriate Screening Tool"—Small Group Exercise
- Question and Answer



Learning Objectives

As a result of participating in this workshop you will be better able to:

- Identify "types" of trafficking;
- Identify methods used by traffickers against victims;
- Identify red flags that may indicate a person as a victim of sex trafficking; and
- Identify actions that an advocate can take to make the victim feel safer during an interview.



Large Group Activity: Native American Trafficking

Before you view the upcoming video, keep the discussion questions in mind. Use this space to write your initial reactions or thoughts.

What is your initial reaction?

What were some key words/red flags?

Name some contributing factors that were highlighted.

Name some of the tactics traffickers used.

Were the types of traffickers in the video different than you expected them to be?

Was there anything you did not like about the video or thought the video got wrong?

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Large Group Activity

Video: *Native American Trafficking*

available at

<https://www.youtube.com/watch?v=VjeDTTw8tco>



Discussion Questions for Video

- What is your initial reaction?
- What were some key words/red flags?
- Name some contributing factors that were highlighted.
- Name some of the tactics traffickers used.
- Where are some locations that sex trafficking may be occurring in your community?
- Were the types of traffickers in the video different than you expected them to be?
- Was there anything you did not like about the video or thought the video got wrong?



Who Are Sex Traffickers?

Sex traffickers can be as varied as the circumstances where and when this crime occurs. Sex traffickers can be:

- Family members;
- Organized criminal networks;
- Gangs;
- Strangers
- New “friends”;
- Community members;
- Business owners;
- Intimate partners; and
- People in positions of actual or perceived authority.

Sex traffickers can be any age, gender, and personality type. Because so many different kinds of people are traffickers, it is useful to remember there are different types of sex trafficking (discussed later in this unit). Individual pimps, family operations, small businesses, loose-knit decentralized criminal networks, and international organized criminal operations can be traffickers.²³ It’s likely that the traffickers and their victims share the same national, ethnic, or cultural background, allowing the trafficker to better understand and exploit the vulnerabilities of their victims.

Question: Who do you think traffickers are? What made you think this person was a trafficker? What kinds of traffickers have you encountered in your work as an advocate? What do traffickers look like? Use the following space to write your ideas.

²³ “The Traffickers,” Polaris Project, accessed January 7, 2020, <https://humantraffickinghotline.org/what-human-trafficking/human-trafficking/traffickers>.

Who Are Sex Traffickers?

- Family members;
- Gangs;
- Strangers;
- New “friends”;
- Community members;
- Business owners;
- Intimate partners; and
- People in positions of actual or perceived authority.



Who Are Sex Traffickers?

Who do you think traffickers are?

What made you think the person was a trafficker?

What kinds of traffickers have you encountered in your work as an advocate?

What do traffickers look like?



What Do Traffickers Look For?

While there are currently no tribally specific studies on how people become sex traffickers or how they choose their victims, tribal experts and survivors have helped provide insight on some traits traffickers may be looking for in a victim. Often these traits are linked to the trafficker's ability to make money and maintain control over the victim. Possible victims include vulnerable individuals who experience child abuse (including child sexual abuse) and neglect, sexual assault, substance abuse, homelessness, extreme poverty, and those who are runaways or those with a cultural disconnect.²⁴ Additionally, sex traffickers often target vulnerable populations subject to social discrimination such as lesbian, gay, bisexual, transgender, questioning, and two-spirited (LGBTQ/2) individuals.²⁵

While some traits may overlap, it is useful to think of these traits in the context of the type of trafficking occurring. Family traffickers that victimizes a young child may be looking for different traits than gang members recruiting teenagers. While victims may have, or appear to have, traits that are attractive to a particular kind of trafficker, sex trafficking is *never* the fault of a victim. Some traits that a sex trafficker may be looking for are:

- People who can yield a greater profit;
- People who can “pass” as many races/ethnicities;
- People lacking a strong support system;
- Adolescents with little supervision;
- Runaway youth or Homeless youth;
- People from impoverished neighborhoods;
- People who are less assertive or mild tempered;
- People who are vulnerable to blackmail;
- People who have a strong interest in protecting others from the trafficker;
- People with alcohol or substance abuse issues; and
- People previously rape or molested.

Question: Which of the factors might make Native people more attractive to a trafficker?

²⁴ Alexandra (Sandi) Pierce and Suzanne Koeplinger, “New Language, Old Problem: Sex Trafficking of American Indian Women and Children,” National Online Resource Center on Violence Against Women, Applied Research (October 2011), accessed February 8, 2016, http://vawnet.org/sites/default/files/materials/files/2016-09/AR_NativeSexTrafficking.pdf.

²⁵ Alexandra (Sandi) Pierce, *Shattered Hearts: The Commercial Sex Exploitation of American Indian Women and Girls in Minnesota* (Minneapolis: Minnesota Indian Women's Resource Center 2009), 111-112, accessed February 8, 2017, http://www.sdcedsv.org/media/sdcedsvfactor360com/shattered_hearts_full_report-web_version.pdf (discussing how two-spirited, bisexual, and transgender “youth are much more likely than heterosexual-identifying youth to report having been kicked out of their homes or having run away, which makes them even more vulnerable to commercial sexual exploitation”).

What Do Traffickers Look For?

- People who can yield a greater profit;
- People who can “pass” as many races/ethnicities;
- People lacking a strong support system;
- Adolescents with little supervision;
- Runaway youth or Homeless youth;
- People from impoverished neighborhoods;
- People who are less assertive or mild tempered;
- People who are vulnerable to blackmail;
- People who have a strong interest in protecting others from the trafficker;
- People with alcohol or substance abuse issues; and
- People previously raped or molested.



What Do Traffickers Look For?

Which of the factors might make Native people more attractive to a trafficker?



- Age (minors may be more susceptible);
- Poverty and/or unemployment;
- Homelessness;
- Substance abuse/dependency;
- LGBTQ/2;
- Lack of support or support systems;
- Developmentally challenged, mental health challenges;
- Lack of educational opportunities;
- History of abuse and sexual abuse;
- Child welfare system and/or foster care involvement;
- Unsupervised youth; and
- Family history of violence and abuse.

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Risk Factors Related to Sex Trafficking Victimization

- Age (minors may be more susceptible);
- Poverty and/or unemployment;
- Homelessness;
- Substance abuse/dependency;
- LGBTQ/Two Spirit;
- Lack of support or support systems;
- Developmentally challenged, mental health challenges;
- Lack of educational opportunities;
- History of abuse and sexual abuse;
- Child welfare system and/or foster care involvement;
- Unsupervised youth; and
- Family history of violence and abuse.
- Others?



Risk Factors Related to Sex Trafficking Victimization

What risk factors are present in your tribal community?



Types of Sex Trafficking

Sex trafficking can appear in many forms. As technology changes, sex trafficking may shift along with it, but under the advocate's working definition, anything that involves the criminal sexual exploitation of another person for personal gain will likely be sex trafficking.

However broad sex trafficking may become, there are several "types" of sex trafficking that may occur in tribal communities. It is incredibly important for tribal advocates to understand the different ways sex trafficking can occur and how to respond in kind. Each "type" may be accompanied by different red flags, target people with different risk factors, occur in different settings, and may impact screening.

This list is not intended to be exhaustive and represents only a selection of possible types of sex trafficking. It is informed by anecdotal evidence and available tribal-specific research.²⁶ There are infinite ways to organize such a list, but this list is organized relative to the type of perpetrator and can be a useful framework for your advocacy efforts. Keep in mind that there can be overlap across trafficking "types," but use the following loose definitions to guide your learning throughout this curriculum.

- **Family Trafficking:** Trafficking a family member, guardian, foster parent, or person in a similar role. When thinking about family trafficking, for this training, there are two subcategories of family trafficking.
 - **Family trafficking of children**
 - **Family trafficking of a spouse or intimate partner:** This can resemble, or even be co-occurring with, domestic violence.
- **Gang Trafficking:** Trafficking linked to gang activity or membership in a gang.
- **Organized Criminal Trafficking:** Any type of organized crime that is not solely apart of gang activity, including those involving business owners.
- **Pimp Trafficking:** Trafficking that is mainly handled by an individual pimp, there can be different kinds of pimps, but for purposes of this training a defining characteristic is that a pimp will likely have more than one victim or a series of victims. Like family trafficking of a spouse or intimate partner, this kind of trafficker may use tactics to similar to, or co-occurring with, domestic violence.
- **"Officials" Trafficking:** Trafficking as an abuse of official power or authority such as a person/official (state actor, law enforcement, government leader, etc.) abusing their official power or authority to force or coerce individuals into performing commercial sex acts. For example, a police officer that uses force, fraud or coercion (including threats of arrest or jail time) to force victims into sexual acts with others for commercial gain. Recall however, force, fraud or coercion is not necessary of the victim is less than 18 years of age.

²⁶ "Articles and Reports," Tribal Law and Policy Institute, accessed December 4, 2019, <https://www.tribaltrafficking.org/articles-and-reports>.

“Types” of Sex Trafficking

- Family trafficking
- Organized criminal trafficking
- Gang trafficking
- Pimp trafficking
- “Officials” trafficking (trafficking as an abuse of power or authority)



“Types” of Sex Trafficking

Think back to the risk factors you identified in your community.

Is there a certain type (or types) of sex trafficking that can exploit these risk factors?



Trafficker Tactics

Once a potential victim is identified, sex traffickers must deploy some set of actions to start the victimization process. It is important for anyone working with victims to be aware of how sex traffickers target victims. Once victimization occurs, sex traffickers use other tactics to keep their victims trapped in a cycle of victimization. Sex traffickers exploit others for the profit gained from commercial sex and need to force, coerce, manipulate, and/or exploit their victim's vulnerabilities. The type of trafficking may impact the kinds of tactics used.²⁷

Gang traffickers may promise a high-paying job, a loving community, or new and exciting opportunities and then use physical and psychological violence to control their victims.²⁸ A victim may feel ashamed for their initial abuse and may feel responsible and unable to seek help. Gang members may also blackmail a victim into commercial sex by threatening to expose prior consensual sexual activities to the victim's family or tribal community.

Family traffickers who target children/youth may use a child's ignorance, drugs and alcohol, or physical confinement to exploit their victims. Family traffickers may be aware that another person is sexually abusing their child or young family member but continue to provide access to the child because the abuser provides the parent/family member with gifts or financial support.²⁹

For "officials" trafficking in the criminal justice context, the threat of arrest or criminal prosecution for participation (either forced or voluntary) in sex industries can keep victims within the control of sex traffickers abusing their authority.³⁰ These kinds of threats cause further trauma and leave victims with a profound distrust of law enforcement and authority figures in criminal justice systems. This can prevent victims from seeking future assistance from people they perceive as linked to a tribal government, including tribal advocates.

Pimp trafficking and trafficking involving domestic violence may also involve the same tactics used by batterers. However, in the context of this curriculum, pimp traffickers will likely have more than one victim at a time, or a series of victims.

Advocates can use their sexual assault and domestic violence training to help understand some tactics traffickers may use. For example, the primary goal of some pimps, like that of a batterer, is to focus the victim's complete attention upon them and what they want. Traffickers, like batterers, may use access to children as a means of controlling their victim.³¹

²⁷ "The Victims & the Traffickers," Polaris, accessed December 4, 2019, <https://polarisproject.org/victims-traffickers>.

²⁸ "Types of Sex Trafficking," Bakhita Foundation, last modified 2016, <http://thebakhitafoundation.com/sex-trafficking/types-of-sex-trafficking/>.

²⁹ Ibid.

³⁰ "What is Human Trafficking?," Polaris Project, accessed December 4, 2019, <https://humantraffickinghotline.org/what-human-trafficking>.

³¹ Ibid.

Trafficker Tactics

- Fraud; an “exciting business proposition”
- False promises
- Drugs and alcohol
- Domestic violence tactics
- Threats/blackmail
- Gifts, special treatment, luxury items



Trafficker Tactics

- | | |
|---|------------------------------------|
| • Inflicting sexual, emotional, or mental abuse | • Torture |
| • Inducing or enabling substance addiction | • Imprisonment |
| • Threatening to harm victim or victim's family | • Debt bondage |
| • Withholding money | • Psychological abuse/brainwashing |
| • Violent physical assaults | • Coercion |
| • Rape | • False affection/love |
| | • Isolation |
| | • Fear of arrest or prosecution |



Correlations to Domestic Violence

Victims/survivors may experience multiple sexual assaults by [the trafficker's] clients—victims/survivors often find these experiences difficult to talk about. Consider the sex trafficking victim who is forced by her perpetrator to have sex with his friends or gang members. The feelings of shame and stigma that are common in sexual assault cases are often compounded for those who are, or once were, part of the sex industry and fear moral condemnation by the justice system or society at large. . . . Although advocates are accustomed to working with legal and social service systems, working with sex trafficked persons challenges the way advocates typically interact with systems and collaborate with other agencies or providers.³²

Because advocates working at domestic violence programs may encounter victims of sex trafficking presenting as a victim of domestic violence, it is critical that advocates understand nuances of both (sometimes co-occurring) forms of victimization to better identify and appropriately respond to trafficking victims. *Domestic violence* is typically defined as a pattern of abusive behavior in any relationship that is used by one partner to gain, or maintain, power and control over another intimate partner. *Domestic violence* can be physical, sexual, emotional, economic, as well as psychological actions or threats of actions that influence another person.

Similar to sex trafficking cases, domestic violence cases are driven by the batterer's need to exercise power and control over the victim. A familiar and very useful tool that victim advocates utilize in screening a relationship for power and control markers is known as the Power and Control Wheel, which is reviewed further in this Unit.³³ Because of a batterer and trafficker's assertion of power over the victim, victim-centered advocacy, confidentiality, and safety must be the foremost priorities of advocates working with both domestic violence and sex trafficking victims.³⁴

Threats and physical abuse may also enforce silence when the victim encounters the justice system.³⁵ Emotional harm can be just as damaging to a victim as physical violence. For example, threatening to "out" an LBGQTQ2/ individual to their community or family may mean the loss of social and economic support.³⁶

³² Danielle Malangone and Katie Crank, "The Intersection of Domestic Violence, Sexual Assault and Human Trafficking," *Center for Court Innovation*, http://www.courtinnovation.org/sites/default/files/documents/UnderstandingHumanTrafficking_2.pdf (accessed February 8, 2017).

³³ Domestic Abuse Intervention Programs, Duluth Model, Wheels located at <https://www.theduluthmodel.org/wheels/>. (visited Jan. 7, 2020)

³⁴ National Resource Center on Domestic Violence, "What Are the Connections between Domestic Violence and Human Trafficking?," <https://dvawareness.org/sites/default/files/2019-06/HumanTrafficking%26DV-TalkingPointsForm.pdf> (accessed February 8, 2017).

³⁵ Ibid.

³⁶ Ibid.

Correlations to Domestic Violence

- Physical/psychological methods of power and control
- Victim has an overwhelming sense of fear
- Beatings or physical restraint not necessary
- Dependency
- Dictates or restricts movement/outside contact
- Isolation



Correlations to Domestic Violence

Threats and physical abuse may also enforce silence when the victim comes into contact with the justice system.

Emotional harm can be just as damaging to a victim as physical violence. For example, threatening to “out” an LGBTQ/2 individual to their community or family may mean the loss of social and economic support.



Sex trafficking and domestic violence can include isolation, economic abuse, and gaslighting so the victim feels responsible for the violence.

[illegible]

Correlations to Domestic Violence

For those encountering victims of trafficking through the justice system, remember that the dynamics of control and coercion may affect their ability to use legal system resources effectively.

Sex trafficking and domestic violence can include isolation, economic abuse, and gaslighting so the victim feels responsible for the violence.



Correlations to Domestic Violence

As you think about correlations to domestic violence, think about the trafficker's motives.

What are their motives?
Why are they doing this?





This wheel was adapted from the Domestic Abuse Intervention Project's Duluth Model Power and Control Wheel, available at www.theduluthmodel.org.

Polaris Project | P.O. Box 53315, Washington, DC 20009 | Tel: 202.745.1001 |

Info@PolarisProject.org | <https://humantraffickinghotline.org/resources/human-trafficking-power-and-control-wheel>

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Sex Trafficking Power & Control Wheel

COERCION and THREATS
Threatens to harm victim or family • Threatens to expose or shame victim • Threatens to report to police or immigration

INTIMIDATION
Harms other victims, children or pets • Displays or uses weapons • Destroys property • Lies about police involvement in trafficking situation

EMOTIONAL ABUSE
Humiliates in front of others • Calls names • Plays mind games • Makes victim feel guilt/blame for situation • Convinces victim they're the only one that cares about them

ISOLATION
Keeps confined • Accompanies to public places • Creates distrust of police/others • Moves victims to different locations • Doesn't allow victim to learn English or to go to school • Denies access to children, family and friends

DENYING, BLAMING, MINIMIZING
Makes light of abuse or exploitation • Denies that anything illegal or exploitative is occurring • Places blame on the victim for the trafficking situation

SEXUAL ABUSE
Uses sexual assault as punishment or means of control • Forces victim to have sex multiple times a day with strangers • Treats victim as an object for monetary gain • Normalizes sexual violence and selling sex

PHYSICAL ABUSE
Shoves, slaps, hits, punches, kicks, strangles • Burns, brands, tattoo • Denies food/water • Exposes to harmful chemicals • Forces pregnancy termination • Induces drug addiction as means of control

USING PRIVILEGE
Treats victim like a servant • Uses gender, age or nationality to suggest superiority • Uses certain victims to control others • Hides or destroys important documents

ECONOMIC ABUSE
Creates debt that can never be repaid • Takes money earned • Prohibits access to finances • Limits resources to a small allowance

domestic work, begging/peddling, stripping, street online prostitution, residential commercial sex work, truck stops, brothels

This wheel was adapted from the Domestic Abuse Intervention Project's Duluth Model Power and Control Wheel, available at www.theduluthmodel.org.

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Domestic Abuse Intervention Programs Power & Control Wheel

Using Coercion and Threats
Making and/or carrying out threats to do something to hurt her • threatening to leave her, to commit suicide, to report her to welfare • making her drop charges • making her do illegal things

Using Intimidation
Making her afraid by using looks, acting, gestures • smashing things • destroying her property • abusing pets • displaying weapons

Using Emotional Abuse
Putting her down • making her feel bad about herself • calling her names • making her think she's crazy • playing mind games • humiliating her • making her feel guilty

Using Isolation
Controlling what she does, who she sees and talks to, what she reads, where she goes • limiting her outside involvement • using jealousy to justify actions

Minimizing Denying and Blaming
Making light of the abuse and not taking her concerns about it seriously • saying the abuse didn't happen • shifting responsibility for abusive behavior • saying she caused it

Using Coercion and Threats
Making her feel guilty about the children • using the children to relay messages • using visitation to harass her • threatening to take the children away

Using Male Privilege
Threatening her like a servant • making all the big decisions • acting like the "master of the castle" • being the one to define men's and women's roles

Using Economic Abuse
Preventing her from getting or keeping a job • making her ask for money • giving her an allowance taking her money • not letting her know about or have access to family income

PHYSICAL VIOLENCE

SEXUAL VIOLENCE

DOMESTIC ABUSE INTERVENTION PROGRAMS
202 East Superior Street
Duluth, Minnesota 55802
218-722-2781
Available at www.theduluthmodel.org

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Sex Trafficking Red Flags

Anecdotal evidence suggests that trafficking victims may exhibit certain “red flags” that, compounded, may indicate sex trafficking. **Some signs may be more obvious than others and it is important to avoid assumptions based on the presence of one “red flag” on its own.**

It is very important to keep in mind that “red flags” will be different depending on the community, type of sex trafficking, and type of trafficker. Additionally, if there is more than one kind of trafficking happening in your community, the red flags may be different.

Keep in mind that the trauma caused by a sex trafficker(s) can be so great that people may not identify themselves as victims or seek help.³⁸ Other barriers to requesting help include language barriers, fear of the trafficker(s), fear of public scrutiny, and/or fear or distrust of law enforcement. On the other hand, you may encounter compliant victims who may have strong bonds with their trafficker.³⁹

Often, either advocates or law enforcement have first contact with the victim. This initial contact is critical for helping the victim find safety, receive support, access needed resources, and begin the process of criminal justice intervention if that is the choice of the victim.⁴⁰

Red flags include:

- Fearful, extremely intimidated speaking to others;
- Inability or unwillingness to make eye contact;
- Physically malnourished;
- Signs of abuse, torture, or injury;
- Tattoos, burns, or brands to indicate ownership;
- Signs of substance abuse/addiction—tracks, lethargic, incoherent;
- Clothing inappropriate for climate;
- Personal hygiene unkempt, not being allowed to shower or bathe;
- Receives a call or text that makes them want to leave immediately;
- Signs of external monitoring, lack of freedom;
- Scripted responses;
- Financial dependency;
- Communicates they are not in danger when similarly situated individuals might feel afraid; and
- Incomplete or contradictory victim disclosures.

³⁸ “What is Human Trafficking?” Blue Campaign, Department of Homeland Security, accessed November 22, 2019, <https://www.dhs.gov/blue-campaign/what-human-trafficking>.

³⁹ Compliant victim is not used to place any blame on the victim but to note that some victims may appear cooperative in their victimization; See Kenneth V. Lanning, “Chapter 4: Compliant Child Victims: Confronting an Uncomfortable Reality,” *Viewing Child Pornography on the Internet*, (Russell House Publishing, 2016); See also Abraar Karan and Nathan Hansen, “Does the Stockholm Syndrome affect female sex workers? The case for a “Sonagachi Syndrome” *BMC international health and human rights* Vol. 18, Feb. 2018, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5802051/pdf/12914_2018_Article_148.pdf.

⁴⁰ Be advised that intervention may be different with child victims, especially if there are mandatory reporting laws in your jurisdiction.

Sex Trafficking Red Flags

- Fearful, extremely intimidated while speaking to others;
- Inability or unwillingness to make eye contact;
- Physically malnourished;
- Signs of abuse, torture, or injury;
- Tattoos, burns, brands to indicate ownership;
- Signs of substance abuse/addiction—tracks, lethargic, incoherent;
- Clothing inappropriate for climate;
- Personal hygiene unkempt, not being allowed to shower or bathe;



Sex Trafficking Red Flags

- Receives a call or text that makes them want to leave immediately;
- Signs of external monitoring, lack of freedom;
- Scripted responses;
- Financial dependency;
- Communicates they are not in danger when similarly situated individuals might feel afraid; and
- Incomplete or contradictory victim disclosures.



Red Flags in Adolescents

Some red flags that may appear in relation to minors and children⁴¹ include:

- Cuts ties with usual friends;
- Involved in a subordinate relationship with an older “friend”;
- School performance/attendance has dramatically diminished;
- Picked up/dropped off by a much older, unrelated person they described as their boyfriend/girlfriend;
- Refers to sexual situations that are beyond their developmental age;
- Accompanied by someone who monitors who they talk to and what they say;
- Has clothing, jewelry, new hair/makeup, and electronics that they have no income to pay for;
- Complains that someone is “taking all my money”; and
- May appear in denial and put on a brave face.

Minor victims of sex trafficking—while too young to consent to sexual activity with adults—may at times be labeled as prostitutes or juvenile delinquents and treated as criminals rather than being identified and treated as trafficking victims.⁴² Children who are arrested may be placed in juvenile detention facilities instead of environments where they can receive needed social and protective services.⁴³ Recently, the trend among states is to enact “Safe Harbor Laws” that prevent the prosecution of minors for prostitution and related crimes based on the theory that minors cannot consent and should be treated as victims under criminal laws.⁴⁴

Remember that the trafficker may be monitoring the victim’s every move, or the victim’s responses to questions. This is especially true for youth victims who can be more vulnerable to the trafficker’s tactics. The trafficker may have already instructed the victim on how to respond if ever questioned and the victim may fear the trafficker’s threats of harm if they do not comply. The victim may deny any victimization or may react in a manner that does not fit the profile of a typical victim. This conflicting reaction may be confusing to the advocate, so it is important that the advocate use their discretion and experience to determine if the youth is being trafficked. More obvious signs include tattoos with the name of their trafficker, signs of abuse, and appearing malnourished. The victim may have signs of substance abuse/addiction. The trafficker may have introduced the victim to drugs to keep the victim trapped.⁴⁵

⁴¹ “Report Trafficking,” Shared Hope International, accessed November 25, 2019, <https://sharedhope.org/join-the-cause/report-trafficking/>.

⁴² Kristin Finklea, Adrienne L. Fernandes-Alcantara, and Alison Siskin, *Sex Trafficking of Children in the United States: Overview and Issues for Congress* (Congressional Research Service, January 28, 2015), 2, accessed February 9, 2017, <http://fas.org/sgp/crs/misc/R41878.pdf>.

⁴³ Ibid.

⁴⁴ National Conference of State Legislatures, *Safe Harbor: State Efforts to Combat Child Trafficking*, (April 2017), <https://www.ncsl.org/research/civil-and-criminal-justice/safe-harbor-state-efforts-to-combat-child-trafficking.aspx>.

⁴⁵ MHeffern, “ABC’s of Human Trafficking: Debt Bondage, Exploitation, and Force,” *Renewal Forum* (July 11, 2013), accessed September, 19, 2016, <http://renewalforum.org/abcs-of-human-trafficking-debt-bondage-exploitation-and-force/>.

Red Flags in Adolescents

- Cut ties with usual friends;
- Involved in a subordinate relationship with an older “friend”;
- School performance/attendance has dramatically diminished;
- Picked up/dropped off by a much older, unrelated person they described as their boyfriend/girlfriend or “friend”;
- Refers to sexual situations that are beyond their developmental age;
- Accompanied by someone who monitors who they talk to and what they say;
- Has clothing, jewelry, new hair/makeup, and electronics that they have no income to pay for;
- Complains that someone is “taking all my money”; and
- May appear in denial and put on a brave face.



Red Flags in Adolescents

Common red flags include control by the trafficker who may be monitoring the victim’s every move or the victim’s responses to questions. This is especially true for youth victims who can be more vulnerable to the trafficker’s tactics.

The victim may deny any victimization or may react in a manner that does not fit the profile of a typical victim.



Small Group Exercise: “Fact Patterns”

Please review the questions on the slide for your small group discussion. Use the lined spaces to write notes on your assigned fact pattern and group discussion questions.

Exercise Fact Patterns:

1. Sixteen-year-old Trey met a male online. He told Trey he was seventeen years old. Asked him to meet at the mall. When Trey met him he clearly was not seventeen. Trey has gone missing.
2. Samantha is fifteen years old and has a friend named Tina who is also fifteen. Tina would like to introduce Samantha to guys who can hook her up with work. Tina tells Samantha the job will allow Samantha to earn enough money to buy the shoes, makeup, and clothes she’s been wanting. Tina tells Samantha just one job won’t hurt.
3. Adult woman, Toni, is unable to pay her rent. Toni is approached by her landlord and he says he’ll overlook one month’s rent if she does something for him. He tells her he knows some people who may help her with rent in exchange for favors. The landlord tells her if she wants to continue living there she better think seriously about it.
4. Seventeen-year-old runaway, James, is taken in by a friend’s parents. The parents tell James that they need his help and want him to do something so that he can help earn his keep and continue staying with them. James agrees.
5. Adult woman, Summer, has a boyfriend who wants her to make them some quick money. He tells her that there are some high rollers at the casino that he wants her to meet. He said just hang out and give the high rollers what they want—just this once—so they can get caught up on bills. Once turned into more. Now, she feels trapped, but loves her boyfriend.
6. Fourteen-year-old Rebecca’s parents told her she had to help them out financially. The parents tell Rebecca that a friend of theirs needs some help and the friend will treat her well; she just must do a few things for him. Rebecca agrees, gives her parents the money she makes, and goes back to their friend’s house. Rebecca has been missing and word has it she went to the city with him.

Small Group Exercise

Fact Patterns



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Small Group Discussion Questions

Is sex trafficking occurring?

What additional information might be needed to know for certain that this is sex trafficking?

Is there a sex trafficking victim in the scenario?

Are there any red flags?

Why would someone not identify this as a possible sex trafficking scenario?

What are the safety concerns for this potential victim?

What can you do to help or how can you make things safer?



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Interviewing a Victim

Keep in mind that the trauma caused by a sex trafficker(s) can be so great that people may not identify themselves as victims or seek help.⁴⁶ Other barriers to requesting help are language barriers, fear of the trafficker(s), and/or fear of law enforcement. Note that some victims may appear angry and distrustful of all systems. Whatever the timing and context of the interview, victim service providers should begin and end with comfortable topics of conversation to minimize the client's discomfort.

Additionally, it may be helpful to avoid rooms where the victim may feel trapped. Provide the victim the choice of where they will sit during the interview or set up the room to make it easy for the victim to leave if they feel they need to do so. Provide a sense of equality between you and the victim and avoid physical barriers between you during the interview, preferably by sitting at eye level with the victim.

There are numerous ways to empower a victim by allowing the victim to make choices where possible because traffickers have denied the victim decision-making power. It is critical that the victim is empowered to make their own choices and you should support the victim by identifying safety measures despite what options the victim chooses.

Another way to empower the victim is to employ culturally relevant methods of interviewing. Tribal services have often relied heavily on non-Native services, mental health/behavioral health programs, to provide that need rather than looking internally for existing resources that have existed for centuries. One of those tribal traditions is what is known as "visiting." This tradition of visiting has been practiced for generations, in protected safe spaces where people could find support by visiting with mentors, elders, and healers. A victim of violence could turn to a mentor, an elder, or a respected healer for support often around a kitchen table and with no interruptions to acquire support, guidance, and support needed in order to heal. This space and support was considered sacred safe space and information kept confidential. Today, those mentors, elders, and healers are the advocates in tribal communities.

Overall, it is important to keep an open mind and to follow the lead of the victim during the interview process. This will require patience and compassion. Likely, the relationship between the victim service provider and the victim will take time to evolve into a trusting relationship. Victims come from all walks of life and may present in many different ways.

⁴⁶ Blue Campaign, *supra* note 38.

Interviewing a Victim

- Find a private, comfortable space where there will likely be no interruptions
- Share victim's right to confidentiality and organizational confidentiality policies
- Inform victim of limitations such as reporting child abuse and neglect
- Limit the length of each meeting
- Utilizing small talk as appropriate, particularly as an icebreaker
- Be honest with the victim
- Exercise patience as it may take time to gain victim's trust
- Acknowledge the harm caused and validate it may difficult for victim to disclose information
- Differentiate yourself from the trafficker
- Avoid personalizing victims distrust of you or other service providers



Interviewing a Victim

Respect the victim's options to:

- Speak with you
- Decide how much information they will share
- Choose whether they will report to law enforcement
- Select where the interview will be conducted
- Stop the interview at any time
- Return to the trafficker



Initial Safety Assessment

Victims are usually the best judges of the dangers trafficker(s) pose to them. However, an advocate can help a victim assess the risk and develop a practical plan to stay safe—a safety plan. A safety plan is a plan that identifies ways a person can protect themselves from a violent perpetrator and reduce the risk of serious harm.⁴⁷ It is crucial that the victim advocate does not blame the victim.⁴⁸ While evaluating risks and creating safety plans can help a victim, safety planning is not a guarantee that they will not be injured again.

Advocates can encourage the victim to follow the safety plan if they are in immediate danger or leave (if possible) to preserve their safety. When working with a victim on the issue of safety, an advocate must discuss whether the victim plans to stay at their current location or intends to leave. If the person wishes to stay at their current location, advocates should help prepare a safety plan to protect the individual if an incident occurs to increase their chances of avoiding injury or death.

Upon the first contact with a victim, making an initial assessment of safety needs is of critical importance. Because each victim may have unique needs, including family safety concerns, and each situation has distinctive characteristics, it is important to consider all possibilities.

Some important questions to ask the victim are:

- Do you feel safe talking with me right now?
- Is there anything that would help you feel safer while we talk?
- Is anyone watching, listening, calling, or texting you at the moment?
- Is a person controlling you, or one of your group, in the building or waiting outside?
- Are you or someone you love in danger if you talk to me?
- Are you or someone you love in danger if you accept my help to escape?
- Is there anything I can do to make this conversation easier or safer for you?
- Do you have a safe place to sleep and live?

For more information and resources on safety planning, please see <https://humantraffickinghotline.org/faqs/safety-planning-information>.

⁴⁷ "Safety Planning and Prevention for Human Trafficking At-A-Glance," National Human Trafficking Resource Center, Polaris Project, last modified 2011, <http://www.traffickingresourcecenter.org/sites/default/files/Safety%20Planning%20At%20A%20Glance.pdf> (accessed September 12, 2016).

⁴⁸ "Human Trafficking in Indian Country," National Indian Country Clearinghouse on Sexual Assault, Southwest Center for Law and Policy, <http://niccsa.org/human-trafficking/> (accessed September 12, 2016).

Initial Safety Assessment

A **safety plan** is a plan that identifies ways a person can protect themselves from a violent perpetrator and reduce the risk of serious harm. It is crucial that the victim advocate does not blame the victim. While evaluating risks and creating safety plans can help a victim, safety planning is not a guarantee that they will not be injured again.



Initial Safety Assessment

Important Questions to Ask:

- Do you feel safe talking with me right now?
- Is there anything that would help you feel safer while we talk?
- Is anyone watching, listening, calling, or texting you at the moment?
- Is a person controlling you, or one of your group, in the building or waiting outside?
- Are you or someone you love in danger if you talk to me?
- Are you or someone you love in danger if you accept my help to escape?
- Is there anything I can do to make this conversation easier/safer for you?
- Do you have a safe place to sleep and live?



Screening Tools

For victim service providers, screening tools are often used as part of a regular intake process or as part of enrollment for specific programs in an attempt to identify sex trafficking victims. However, screening tools are not exact and cannot definitively declare an individual as a victim of sex trafficking. Instead, these tools should be utilized to raise red flags relative to the possibility an individual is being sex trafficked. Remember, each agency's intake process is unique. Agencies should determine how to best integrate screening tools with their other intake forms or procedures. Screening timing may vary by discipline. The screening should be administered according to prearranged protocols, whether or not the client is believed to be a victim of sex trafficking. Currently, we are unaware of a tribal-specific sex trafficking screening tool in place. However, implementation of screening tools usually involve the following considerations:

- Setting up the client interview;
- Developing client trust;
- Demonstrating respect;
- Maintaining client confidentiality; and
- Understanding effects of trauma and victimization.

Screening tools may also include additional resources such as sample questions for the victim's use.⁴⁹ It is very important to never begin by asking directly whether the person has been beaten or held against their will.⁵⁰

Existing screening tools may not be culturally relevant to the needs of victims of sex trafficking from tribal communities. Some of the existing tools may not include specific questions on being trafficked in a tribal community and how effects of historical trauma have impacted the victim in other ways in addition to the sex trafficking. Some screening tools may not consider the complex jurisdictional issues. If an advocacy program or a law enforcement agency develops its own interview/screening tool, there are many nontribal examples to help shape a unique screening tool for sex trafficking of American Indian and Alaska Native individuals.⁵¹

⁴⁹ "Rescue and Restore Campaign Tool Kits," Administration for Children and Families, Office on Trafficking in Persons, accessed September 16, 2016, <http://www.acf.hhs.gov/endtrafficking/resource/rescue-restore-campaign-tool-kits>.

⁵⁰ Ibid.

⁵¹ See, e.g., Administration for Children and Families Office on Trafficking in Persons, and National Human Trafficking Technical Assistance Center, *Adult Human Trafficking Screening Tool and Guide* (January 2018), https://www.acf.hhs.gov/sites/default/files/otip/adult_human_trafficking_screening_tool_and_guide.pdf; See also Child Welfare Capacity Building Collaborative, *Identifying Minors and Young People Exploited Through Sex Trafficking: A Resource For Child Welfare Agencies*, accessed January 9, 2019, <https://library.childwelfare.gov/cwig/ws/library/docs/capacity/Blob/106060.pdf?r=1&rpp=10&upp=0&w+=NATIVE%28%27recno%3D106060%27%29&m=1>. Note these examples are not adapted for tribes.

Screening Tools

- **Each intake process is unique;** advocates must consider whether the screening tools are appropriate for the situation.
- Screening tools usually focus on information to address issues such as:
 - Setting up the client interview;
 - Developing client trust;
 - Demonstrating respect;
 - Maintaining client confidentiality; and
 - Understanding effects of trauma and victimization.



Screening Tools

Potential problems with “boilerplate” screening:

- May not be culturally appropriate.
- May be used in agencies much different than your own.
- May not have questions about spouse or relative as the trafficker.

Are the screening tools culturally adaptable?

- If an advocacy program or a law enforcement agency develops its own interview/screening tool there are many examples to help shape a unique screening tool.



Small Group Exercise: Developing a Culturally Appropriate Screening Tool

Please review the Screening Questions for your small group discussion.

- Identify questions on the screening tool example that would be helpful to use in your current screening tool/questionnaire/intake form.
- Identify questions that may not be culturally relevant.
- Add culturally relevant questions that you believe need to be included in the screening tool example.

This image shows a blank sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

Small Group Exercise

Developing a Culturally Appropriate Screening Tool



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Developing a Culturally Appropriate Screening Tool

- Identify questions on the screening tool example that would be helpful to use in your current screening tool/questionnaire/intake form.
- Identify questions that may not be culturally relevant.
- Add culturally relevant questions that you believe need to be included in the screening tool example.



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Trafficking Identification Tool (TLPI Template)⁵²

- ☐ Name
- ☐ Date of birth
- ☐ Place of birth
- ☐ Sex of interviewee
- ☐ Source of referral
- ☐ U.S. citizen
- ☐ Last year of completed schooling
- ☐ Have you ever worked without getting the payment you thought you would get?
- ☐ What kind of work or activities were you doing?
- ☐ What payment did you expect and why?
- ☐ What did you receive?
- ☐ Did someone ever withhold payment/money from you? Give your payment to someone else? Control the payment/money that you should have been paid?
- ☐ Did anyone where you worked ever make you feel scared or unsafe? Could you tell me what made you feel scared or unsafe?
- ☐ Did anyone where you worked (or did other activities) ever hurt you or threaten to hurt you? Could you tell me what they did or said?
- ☐ Did anyone where you worked ever harm or threaten to harm people close to you like family or friends?
- ☐ Were you allowed to take breaks where you worked, for example, to eat, use the phone, or use the bathroom?
- ☐ What if you were sick or had an emergency?
- ☐ What do you think would happen if you took a break?
- ☐ Did you have to ask for permission?
- ☐ What did you think would happen if you took a break without getting permission?
- ☐ Were you ever injured or did you ever get sick in a place where you worked?
- ☐ Were you ever stopped from getting medical care?
- ☐ Do you live, or have you ever lived, in the same place where you work?
- ☐ Have you ever felt you could not leave the place where you worked?
- ☐ Could you tell me why you couldn't leave?
- ☐ What do you think would have happened to you if you tried to leave?

⁵² Adapted by TLPI from Vera Institute of Justice, *Screening for Human Trafficking Guidelines for Administering the Trafficking Victim Identification Tool (TVIT)* (New York: Vera Institute of Justice, June 2014), 13–23, accessed February 8, 2017 <https://www.vera.org/downloads/publications/human-trafficking-identification-tool-and-user-guidelines.pdf> (developed from both labor and sex trafficking). Note this resource is not specific to tribes.

- ☐ Did anyone at the place where you lived or worked (or did other activities) monitor you or stop you from contacting your family, friends, or others?
- ☐ Did anyone ever take and keep your identification, for example, your passport or driver's license?
- ☐ Did anyone ever force you to get or use false identification or documentation?
- ☐ Did anyone where you worked (or did activities) ever tell you to lie about your age or what you did?
- ☐ Could you explain why they asked you to lie?
- ☐ Did anyone you ever worked for or lived with threaten to report you to the police or other authorities?
- ☐ Did you ever see anyone else at the place where you lived or worked harmed or threatened with harm?
- ☐ If you are comfortable talking about it, could you tell me what happened?
- ☐ Did anyone where you worked ever trick or pressure you into doing anything you did not want to do?
- ☐ If you are comfortable talking about it, could you please give me some examples? Did anyone ever pressure you to touch someone or have any unwanted physical (or sexual) contact with another person?
- ☐ If you are comfortable talking about it, could you tell me what happened?
- ☐ Did anyone ever take a photo of you that you were uncomfortable with?
- ☐ If you feel comfortable talking about this, could you tell me who took the photo?
- ☐ What did they plan to do with the photo, if you know?
- ☐ Did you ever have sex for things of value (e.g., money, housing, food, gifts, or favors)?
- ☐ Were you pressured to do this?
- ☐ Were you under the age of eighteen when this occurred?
- ☐ Did anyone where you worked (or did other activities) ever take your money for things (e.g., for transportation, food, or rent)?
- ☐ Did anyone you ever worked (or did other activities) for or lived with control how much food you could get?
- ☐ Did you get enough food?
- ☐ Did anyone you ever worked (or did other activities) for or lived with control when you could sleep?
- ☐ Did you get enough sleep?

Unit 2: Additional Resources

1. **Tribal Law and Policy Institute, “Tribal Sex Trafficking Resources,”** www.TribalTrafficking.org.
A website created by the Tribal Law and Policy Institute that contains the latest information on sex trafficking in Indian country. Including the [Sex Trafficking Victim Services Directory](#) and blog [Sex Trafficking in Indian Country Update](#).
2. **Tribal Law and Policy Institute, *Sex Trafficking in Indian Country: Victim/Survivor Resource Book* (2016),** <https://www.tribaltrafficking.org/victim-services>.
This *Resource Book* is intended to provide Tribal Coalitions and tribal advocates with basic information on sex trafficking as it impacts Native people and to provide access to direct services that may assist victims of sex trafficking. This resource contains a 900+-page victim services directory that is organized by state. Only the states with a Tribal Coalition are represented in this directory.
3. **Administration for Children and Families, Office on Trafficking in Persons, “Rescue and Restore Campaign Tool Kits,”** <http://www.acf.hhs.gov/endtrafficking/resource/rescue-restore-campaign-tool-kits>.
This page provides screening information and tool kits for health care providers, social service organizations, and law enforcement officers to utilize in sex trafficking cases, along with other resources on the topic.
4. **Vera Institute of Justice, *Screening for Human Trafficking Guidelines for Administering the Trafficking Victim Identification Tool (TVIT)* (New York: Vera Institute of Justice, June 2014),** <https://www.vera.org/downloads/publications/human-trafficking-identification-tool-and-user-guidelines.pdf>.
Although not tribal specific, this manual is intended primarily for victim service agency staff and other social service providers, who will administer the Trafficking Victim Identification Tool (TVIT) to clients who are potential trafficking victims. Law enforcement, health care, and shelter workers will also find it helpful in improving trafficking victim identification, especially in conjunction with appropriate training or mentoring.
5. **Andrea L. Johnson, “A Perfect Storm: The U.S. Anti-Trafficking Regime’s Failure to Stop the Sex Trafficking of American Indian Women and Girls,” *Columbia Human Rights Law Review* 43 (2012).**
While many characteristics are shared by domestic sex trafficking victims, the risk factors for Native Americans come together in a “perfect storm,” rendering Native women and girls particularly vulnerable to the crime.

- [https://www.ovcttac.gov/taskforceguide/eguide/5-building-strong-cases/53-victim-interview-preparation/trauma-informed-victim-interviewing/.](https://www.ovcttac.gov/taskforceguide/eguide/5-building-strong-cases/53-victim-interview-preparation/trauma-informed-victim-interviewing/)

7. Kristin Finklea, Adrienne L. Fernandes-Alcantara, and Alison Siskin, *Sex Trafficking of Children in the United States: Overview and Issues for Congress* (Congressional Research Service, January 28, 2015),

An overview report created to inform congressional leaders about child sex trafficking and recommendations to address this issue. The report also addresses intergovernmental agency issues and related child sex trafficking policy issues.

- This toolkit provides Native youth an overview of what human trafficking is, tips to keep themselves safe, and additional resources.

[illegible]

Unit 3:

Advocacy for Victims of Sex Trafficking

Unit 3: Advocacy for Victims of Sex Trafficking

This unit and corresponding training workshop will provide participants with practical tips and guidance for effective advocacy on behalf of sex trafficking victims.

By the end of this unit, participants will be able to:

- Identify how a sex trafficking victim may be impacted;
- Identify possible needs of a sex trafficking victim; and
- Discuss how social and systems change are an important part of advocacy efforts that can create safety for victims of sex trafficking.

Please note: Slides 61 -65 are purposely omitted from your workbook.

Training Agenda

- Introductions, Agenda, Overview of Unit, and Learning Objectives
- Using the Medicine Wheel: The Impact of Trauma
- “How Might Trauma Impact a Person as a Whole?”—Small Group Exercise
- Victim’s Service, Safety, and Long-Term Needs
- Establishing and Maintaining Trust
- Why Victims May Fear Accessing Services
- “Finding Services”—Large Group Demonstration
- Remember Poem
- Question and Answer



Learning Objectives

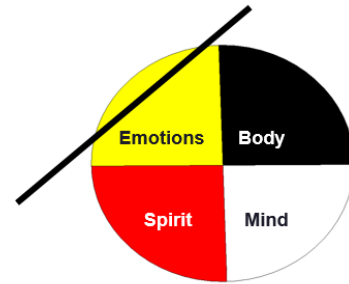
As a result of participating in this workshop you will be better able to:

- Identify how a sex trafficking victim may be impacted;
- Identify possible needs of a sex trafficking victim; and
- Discuss how social and systems change are an important part of advocacy efforts that can create safety for victims of sex trafficking.



Using the Medicine Wheel to Understand the Impact of Trauma

Trauma impacts individuals in many ways. Tribal advocates have found that survivors may find it helpful to be introduced or reintroduced to the traditional and cultural practices of the survivor's tribal community. Advocates can use cultural teachings and resources to provide a better understanding of a Native individual's trauma and path to wellness.



This section of the resource will use the medicine wheel, as understood by one tribal community, to demonstrate the impact of trauma on the whole person and how understanding that impact from a cultural perspective can help guide an advocate's work of providing advocacy, support, and services. In some tribal communities, the medicine wheel is a symbol that has a great deal of meaning and ties in to cultural beliefs. It can be a useful way of thinking about trauma and help forge a path to healing. Remember each tribe is unique and will likely have different cultural ways to evaluate and address trauma.

The quadrants represent many parts of creation and life. In this example, the quadrants represent the four parts of a person (mind, body, spirit, and emotions) that are interconnected and related. The line represents a violation. When a person is healthy in all four areas, they walk in balance. When a person has been traumatized in one area, there is imbalance that impacts the other three areas. So, advocates must understand that they are interacting with an individual who has complex trauma, and healing must focus on the person as a whole. In the context of sex trafficking, a victim from the tribal community with a similar medicine wheel may be impacted in the following ways:

Body: Physical injury, sexually transmitted infection, pregnancy, chronic illness such as headaches, eating disorders, weight loss, untreated illnesses, addiction and withdrawal, traumatic brain injury, or broken bones.

Mind: Decision making and confusion as brought on by societal attitudes and self-blame. Victims of many types of crime may think they caused the victimization.

Emotions: As a result of the victimization, the victim may feel a wide range of emotions. Every victim is different, and the response will vary. Some victims will exhibit no emotional signs of trauma, while others may express or display a wide range of emotions such as fear, depression, anxiety, and sadness.

Spirit: The violence perpetrated by the trafficker may harm the spirit of the victim. The victim may have dissociated, and their victimization may have isolated them from their spiritual and cultural practices.

Using the Medicine Wheel to Understand the Impact of Trauma



Using the Medicine Wheel to Understand the Impact of Trauma



Violation _____

Small Group Exercise: How Might Trauma Impact a Person as a Whole?

Read both of the following questions. Please choose one question and write a response.

Question 1: Please review the medicine wheel on the previous page. While reviewing this medicine wheel, what is the impact of sex trafficking trauma on a whole person?

Question 2: Choose a cultural resource from your community that is analogous to the medicine wheel on the previous page. Within that cultural resource, what is the impact of sex trafficking trauma on a whole person?

[illegible]

Small Group Exercise

How Might Trauma Impact a Person as a Whole?



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Choose One of the Following Questions

Question 1: *Please review the medicine wheel provided. While reviewing this medicine wheel, what is the impact of sex trafficking trauma on a whole person?*

Question 2: *Choose a cultural resource from your community that is analogous to the medicine wheel provided. Within that cultural resource, what is the impact of sex trafficking trauma on a whole person?*



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Victim's Service, Safety, and Long-Term Needs

Despite the seeming multitude of service options for crime victims, victims of sex trafficking need a complex and comprehensive set of services that require sensitivity and specialized training from all that are involved in serving them. Although services for victims listed on the corresponding slide may be helpful, the intricacies of addressing the multilayered crime of sex trafficking make it difficult to rely solely on these established services to meet the needs of victims of sex trafficking. So, advocates may need to find creative solutions to address their client's needs.

The needs of victims and choice of services must come from the victim. As a provider or responder, it is important to respect the choices made by the victim even if you don't agree—it is still their life and it is best for them to make their own choices. Advocacy should always be about empowering the victim and respecting their decisions, concerns, and choices. Additionally, the victim may have information the advocate does not that is guiding their decision making and may be making the best choice considering that information. Finally, while an interview and screening tool should guide advocates, there is always the possibility that a victim has been misidentified. Insisting that a person is a victim when they're not will only frustrate all involved and may make it more difficult to conduct advocacy in the future.

The situations that sex trafficking victims face vary dramatically, and the victim services available will vary greatly across the United States and from one tribal community to another. Victims may require several emergency and long-term nonlegal services.

Additionally, be mindful of the additional barriers LGBTQ/2 clients face when it comes to accessing services. Because it may not be obvious that individuals are part of the LGBTQ/2 community, never assume anything about a person's gender, pronouns (i.e., she/her), sexual orientation, or whether their tribal community or family is a good place to find support. Some LGBTQ/2 individuals face additional challenges and may not always have access to the usual source of support. Try to keep an updated list of LGBTQ/2-friendly services for reference.

Victims of sex trafficking from tribal communities may face unique challenges in accessing resources or seeking justice to address their victimization due to historical trauma, lack of culturally appropriate services, and tribal jurisdiction issues. Generally, Tribal Coalitions are a good point of first contact in exploring available services.

Possible long-term needs are:

- Permanent, affordable housing;
- Employment;
- Health care;
- Education;
- Substance abuse treatment;
- Counseling;
- Advocacy;
- Ongoing safety concerns; and
- Ongoing treatment for physical and psychological trauma.

Victim's Service, Safety, and Long-Term Needs

- Place to live
- Transportation
- Money
- Food
- Clothing
- Other essentials
- Medical care
- Substance abuse assistance
- Support groups
- Interpretation/translation services
- Resources for minor children
- Safety planning
- Bus or plane ticket



Victim's Service, Safety, and Long-Term Needs

- Help filing a police report
- Help with protection orders
- Assistance with child welfare case
- Court support
- Legal advocacy
- Healing ceremonies



Culturally Appropriate Approach to Advocacy

As advocates, it is important to provide a safe, supportive, and comfortable environment for victims. This was a practice used by our grandmothers and aunts where they would share food, coffee, and tea and visit about concerns, joys, and problems. This welcoming, non-threatening environment would elicit better communication and engender trust. This type of environment involves no paperwork, just supporting the victim and discovering where they are in life. Advocates should be trained on active listening, how to provide validation, and asking open-ended questions.

Another advocate responsibility is providing one-to-one counseling or support to victims. This counseling is not therapy although it can result in therapeutic outcomes. From a cultural perspective, it can also be referred to as “visiting.”⁵³ In many tribal communities, it is believed that all are related and as relatives, it is our responsibility to be helpful and supportive to others; this belief makes community education key. Loop in the community with education and awareness, so they may also be good relatives and broaden the support available to the victim.⁵⁴

Community education and awareness is extremely important in a culturally appropriate approach. The community, along with the victim service providers, should be considered first responders and keep the following advice in mind. When a victim of sex trafficking discloses to a family, friend, or relative, it is important that the response is one of support. An appropriate response is one that shows concern for victim’s safety, identifies ways to help the victim gain access to information, and supports choices the victim makes. The victim should never be blamed or shamed for their victimization.

Provide opportunities to participate in tribal healing ceremonies such as welcome home ceremonies, grieving ceremonies, sweat lodge ceremonies, talking circles, or speaking with an elder. Native Nations all have their own unique cultural and traditional practices of healing; it is important for tribal advocates to become familiar with local resources to provide referrals, and accompaniment, when appropriate.

Culturally appropriate advocacy may also involve providing medicines for healing and cleansing. For example, access to smudging with sage, sweetgrass, or cedar can be considered medicines for healing. Keep in mind that each community has its own traditional medicines, so become familiar with regional demographics and culture. Be sure to respect cultural protocols, if you are not part of the same community as the victim, it may not be appropriate for you to provide certain medicines, but you can provide referrals or encourage clients to fall back on their own cultural teachings.

⁵³ See Unit 2: Interviewing for more information on visiting.

⁵⁴ Remember client information is key to victim safety. Privacy, confidentiality, and privilege are reviewed in Unit 4.

Culturally Appropriate Advocacy

- Visit with victims
- Take time to establish trust
- Offer food or something to drink
- Welcome home ceremonies
- Be a good relative to the victim
- Offer support, accompaniment, and transportation, as appropriate
- Work with other responders at victim requests, as appropriate
- Explore traditional tribal justice response to crimes of violence



Culturally Appropriate Advocacy

- Medicines for healing and cleansing the mind and body
- Education about the crime
- Options for the victim, referrals
- Participate in talking circle
- Strengthening the spirit, body, mind will provide overall healing



Advocates As Social Change Agents



The preceding diagram shows the victim at the center along with the word *safe*. It would be challenging for any victim to come forward after being threatened or having family members threatened. Keep in mind that victims may have been deprived of choice, so the ability to be forthcoming with people they hardly know takes courage.

The circles around the victim indicate the investment that service providers must make to keep a victim safe and to ensure that their needs are addressed. This diagram indicates how we will have more cooperative witnesses/victims throughout this process. Service providers must also remember that while this investigation is happening, the victim may continue to have needs. If the victim has children, the children may have needs especially if the family will be rebuilding their life after escaping trafficking.

Service providers will often need victim-centered training. Service providers include anyone that provides services to the victim, such as court staff, judges, law enforcement, and medical personnel. Advocates/victim service providers are those providing direct services and support to the victim, helping them navigate what service providers are available.

The work of advocates does not end with providing direct services. It is critical for advocates to look at the types of responses that other agencies are providing, contributing factors, and the root causes of the problem of sex trafficking. By examining these roots and responses, advocates can create positive changes.



Advocates as Social Change Agents

- Important to look at what may or may not be working well for victims.
- As advocates, look at the other agencies and programs that have key roles in responding to victims.
- What is needed to strengthen advocacy program relationships with those agencies and programs?
- Is there a team, an organized collaborative response that is addressing sex trafficking?
- If not, what would it take to develop such a team?
- What is your organization's capacity to build such a team?
- Who are your allies and is there a strong partnership with these people/organizations?



Establishing and Maintaining Trust

The criminal justice system can be a traumatic place for victims. As victim service providers, we may wonder why victims choose to not move forward with the investigation and criminal justice response. We need to remember that this person was violated, was betrayed by someone they may have grown to care for, and may have developed an emotional bond due to the tactics used by a trafficker. Trusting others may be challenging for the victim. Advocates should:

- Provide as many safety measures as possible;
- Inform victim of their rights and options so they can make informed decisions;
- Address basic needs (food, clothing, housing);
- Not duplicate tactics used by traffickers (appearing forceful, pressuring victim to make decisions, and making a victim feel indebted to you to manipulate their actions);
- Keep the victim informed of the status of case if there is criminal justice involvement; and
- Make sure the victim knows that you respect their decision-making process.

Remember, establishing and maintaining trust is an ongoing process that will take time and patience. With this in mind, be sure to:

- Acknowledge the harm caused;
- Avoid taking the victim's reluctance to divulge information personally;
- Check in with victim from time to time; and
- If appropriate, let victim know you are thinking of them so they remember they can call if necessary.

First and foremost, the advocate must be sure to inform the victim of what happens to the information provided by the victim. The advocate should discuss client consent, mandatory reporting, and any official information-sharing agreements that may exist with other governmental departments. The advocate should explain who will see or hear any information provided by the victim and why the information will be (or must be) shared.⁵⁵

Keep in mind that victims of sex trafficking have likely endured physical and emotional harm or threats of harm. Some may have had their loved ones threatened as well. As such, trust can be difficult; it will not come quickly or easily. This is especially true with victims who appear to cooperate with their own victimization. Advocates and first responders must have patience and maintain consistency as their trustworthiness may be tested.⁵⁶

⁵⁵ Client information sharing is discussed further in Unit 4.

⁵⁶ This includes victims that may have warrants out for their arrest or a criminal record. See Tribal Law and Policy Institute, *Tribal Law Enforcement Protocol Guide: Sexual Assault*, (2008), 16, http://www.tribal-institute.org/download/Tribal_Law_Enforcement_Protocol_Resource_Sexual_Assault.pdf.

Establishing and Maintaining Trust

- Provide as many safety measures as possible
- Inform victims of their rights and options so they can make informed decisions
- Address basic needs (food, clothing, housing)
- Do not duplicate the tactics used by traffickers (appearing forceful, pressuring victim to make decisions, making a victim feel indebted to you as a way to manipulate their actions, etc.)
- Keep victim informed of case status if there is criminal justice involvement
- Make sure the victim knows that you respect their decision-making process



Establishing and Maintaining Trust

- Takes time and patience
- Acknowledge the harm caused
- Inform them of what will be done with information they are providing
 - Who will see it and why
- Avoid taking the victim's reluctance to divulge information personally
- Check in with victim from time to time
- If appropriate, let victim know you are thinking of them so they remember they can call if they need to



Why Victims May Fear Accessing Services

Advocates and other responders should remember the risks the victim is facing and the other fears they may have. Often pressuring the victim to move forward may replicate how they were treated by a trafficker. This type of response may only create apprehension and resistance on the part of the victim. Everyone involved in providing services to the victim should respect the victim's choices and decision-making process. Advocates should not use access to services as a way of forcing a victim to take actions and should limit assistance to the scope of the victim's request.

People may also be afraid to seek help accessing services due to:

- Fear of not being believed;
- Lack of knowledge about potential processes;
- Fear of confidentiality violations;
- Fear of rumors and misperceptions;
- Distrust of criminal justice system;
- Fear of being arrested and jailed;
- Fear of having to testify against the perpetrator;
- Fear of becoming a target of investigation and/or prosecution;
- Fear of being deported; and
- Fear of losing custody of children.

Furthermore, victims may be worried about whether the criminal record that results from being convicted if they are prosecuted for involvement in commercial sex industries can act as a barrier to future employment, housing, and other opportunities.

Why Victims May Fear Accessing Services

- Fear of not being believed
- Lack of knowledge of the processes
- Fear of confidentiality violations
- Fear of rumors and misperceptions
- Distrust of criminal justice system
- Fear of being arrested and jailed
- Fear of having to testify against the perpetrator



Why Victims May Fear Accessing Services

Victims may be worried about the criminal record that results from being convicted and if prosecution for involvement in commercial sex industries can act as a barrier to future employment, housing, and other opportunities.



Large Group Demonstration: Finding Services

Finding services can be incredibly difficult. Native sex trafficking victims need comprehensive, cost-effective services tailored to their victimization type and cultural background. However, there is dearth of appropriate services; one service area may have trafficking services that are designed for non-Natives. Another service may be tribally specific but designed for a different victimization type. And, even basic services like shelters and temporary housing for people escaping violence may not accept a trafficking victim due to the security risk posed by traffickers. Even where services exist, because many tribal communities are in rural areas simply getting your client to a service can prove challenging.

Of course, advocates have their own service area and network of partnerships with direct victim-service organizations. The Tribal Law and Policy Institute (TLPI) has created a useful resource, *Sex Trafficking in Indian Country: Victim/Survivor Resource Book*, which can be found at www.Home.TLPI.org/sex-trafficking. In addition to the *Resource Book*, TLPI created www.TribalTrafficking.org, which contains information and resources that advocates can use to support their clients.

Large Group Demonstration

Finding Services



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Large Group Demonstration

If you are in danger, please call 911 and ask for
Police to go to your location.

TRIBAL SEX TRAFFICKING RESOURCES



WELCOME TO THE TRIBAL SEX TRAFFICKING RESOURCES WEBSITE

This website provides comprehensive information on sex trafficking as it impacts Native people and Native nations, including publication resources, Indian service directories, and training materials. We urge to visit our blog, Sex Trafficking in Indian Country Update, which contains the latest media, news articles, and policy updates on sex trafficking in Indian Country.

We envision this site as a place for Native people to find help when dealing with violence. Individuals can reach out to their local Tribal Co-ordinators for assistance or they can easily use our Indian Services Directory themselves. We suggest, however, that individuals contact their local tribal coalition for assistance first. A Tribal Coalition is comprised of tribal advocates that work to end domestic violence and sexual assault and can help individuals navigate options and services. Finding coalition members can increase a person's chances of receiving services or referrals immediately.

www.TribalTrafficking.org



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Remember Poem

Remember...We are here to listen,

Not to work miracles.

We are here to help “victims” discover

What they are feeling

Not to make the feelings go away.

We are here to help “victims” identify their options.

Not to decide for them what they should do.

We are here to discuss steps with them.

Not to take steps for them.

We are here to help victims discover they can help themselves.

Not to rescue them leaving them still vulnerable.

—Anonymous

Remember Poem

*Remember... We are here to listen,
Not to work miracles.
We are here to help "victims" discover
What they are feeling
Not to make the feelings go away.
We are here to help "victims" identify their options.
Not to decide for them what they should do.*



Remember Poem

*We are here to discuss steps with them.
Not to take steps for them.
We are here to help victims discover they can help themselves.
Not to rescue them leaving them still vulnerable.*

—Anonymous



Unit 3: Additional Resources

1. **Tribal Law and Policy Institute, “Tribal Sex Trafficking Resources,”**
www.TribalTrafficking.org.
 A website created by the Tribal Law and Policy Institute that contains the latest information on sex trafficking in Indian country. Including the [Sex Trafficking Victim Services Directory](#) and blog [Sex Trafficking in Indian Country Update](#).
2. **Tribal Law and Policy Institute, *Sex Trafficking in Indian Country: Victim/Survivor Resource Book* (2016),** <https://www.tribaltrafficking.org/victim-services>.
 This *Resource Book* is intended to provide Tribal Coalitions and tribal advocates with basic information on sex trafficking as it impacts Native people and to provide access to direct services that may assist victims of sex trafficking. This resource contains a 900+-page victim services directory that is organized by state. Only the states with a Tribal Coalition are represented in this directory.
3. **Alexandra (Sandi) Pierce, *Shattered Hearts: The Commercial Sex Exploitation of American Indian Women and Girls in Minnesota* (Minneapolis: Minnesota Indian Women’s Resource Center, 2009),**
http://www.sdcedsv.org/media/sdcedsvfactor360com/shattered_hearts_full_report-web_version.pdf.
 A report on the commercial sexual exploitation of American Indian/Alaska Native women and girls in Minnesota, including sex trafficking.
4. **Sarah Deer et al., *Garden of Truth: The Prostitution and Trafficking of Native Women in Minnesota* (St. Paul, MN: William Mitchell College of Law, October 27, 2011),**
http://www.prostitutionresearch.com/pdfs/Garden_of_Truth_Final_Project_WEB.pdf.
 The study provides powerful personal accounts of violence, poverty, survival, and strength by Native women. The study authors stress that these women’s strengths as well as their vulnerabilities must be seen in the context of a history of systematic harm to Native people, racism, poverty, and a lack of housing, health care, jobs, and education opportunities.
5. **Office for Victims of Crime Training and Technical Assistance Center, “Trauma-Informed Victim Interviewing,”**
<https://www.ovcttac.gov/taskforceguide/eguide/5-building-strong-cases/53-victim-interview-preparation/trauma-informed-victim-interviewing/>.
 This website provides trauma-informed guidance and advice on conducting interviews with victims. Also provides links to other helpful documents.

Unit 4:

Legal Advocacy

Unit 4: Legal Advocacy

This unit and corresponding training workshop will provide participants with practical tips and guidance for effective advocacy within civil and criminal legal systems on behalf of sex trafficking victims. This unit will address a number of crucial issues related to victim advocacy in legal systems, including but not limited to, privacy, confidentiality and privilege related to victim information, basic civil and legal system needs of victims, basic civil and criminal jurisdictional issues in Indian country, victim's rights, and protection orders and enforcement of protection orders. Since protection orders may be needed in most civil and/or criminal cases, the topic of protection orders and enforcement of protection orders is addressed in-depth.

By the end of this unit, participants will be able to:

- Identify critical roles advocates fill when providing victim advocacy;
- Identify legal advocacy needs of sex trafficking victims;
- Identify concerns related to victim information;
- Identify potential needs of victims in criminal systems;
- Identify potential needs of victims in civil systems;
- Identify victim's rights and explain the importance of each right identified; and
- Identify important issues regarding tribal protection order issuance and enforcement.

This unit will discuss both civil and criminal jurisdiction as it impacts tribal advocates working on behalf of sex trafficking victims. It is important to note, however, that these distinctions between criminal and civil actions have been developed from Anglo-American law and did not necessarily exist in traditional Native justice.⁵⁷ Because this unit is only focused on certain aspects of civil and criminal jurisdiction, we highly recommend reading *Introduction to Tribal Legal Studies* (3rd ed.) by Justin B. Richland and Sarah Deer. For those wishing to get a comprehensive overview, relevant chapters are included in the appendix of this resource.

Advocate Tip: Because trafficking victims may present as domestic violence cases, it is imperative to conduct thorough screening to determine whether a domestic violence victim may also be a victim of sex trafficking. Victims of sex trafficking may have many of the same legal needs as victims of domestic violence.

Advocate Tip: If the victim presents as a sexual assault victim, it is imperative to conduct thorough screening to determine whether a sexual assault victim may also be a victim of sex trafficking.

Please note: Slides 86 - 89 are purposely omitted from your workbook.

⁵⁷ Tribal Law and Policy Institute, "General Guide to Criminal Jurisdiction in Indian Country," <http://www.tribal-institute.org/lists/jurisdiction.htm> (accessed September 21, 2016).

Training Agenda

- Introductions, Agenda, Overview of Unit, and Learning Objectives
- “Meeting Legal Advocacy Needs of Victims” – Small Group Exercise
- Victim Advocacy Roles
- Legal Advocacy Responsibilities
- “Meeting the Legal Needs of Victims” – Small Group Exercise
- Overview of Legal Needs in Criminal Systems
- Overview of Legal Needs in Civil Systems
- Navigating Criminal Jurisdiction In Indian country
- Criminal Legal Advocacy
- Victim’s Rights
- Navigating Civil Jurisdiction in Indian country
- Civil Legal Advocacy
- Civil Protection Orders
- Enforcing Tribal Protection Orders
- Full Faith and Credit
- Advocate’s PO Checklist
- Question and Answer



Learning Objectives

As a result of participating in this workshop you will be better able to:

- Identify critical roles advocates fill when providing advocacy;
- Identify legal advocacy needs of sex trafficking victims;
- Identify concerns related to victim information;
- Identify potential needs of victims in criminal systems;
- Identify potential needs of victims in civil systems;
- Identify victim’s rights and explain the importance of each; and
- Identify important issues regarding tribal protection order issuance and enforcement.



Question 1: List 3 possible concerns victims may have about interacting with legal systems.

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

Small Group Exercise

Meeting the Legal Advocacy Needs of Sex Trafficking Victims



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Small Group Exercise

List 3 possible concerns victims may have about interacting with legal systems.

With each concern, brainstorm how an advocate might address those in a realistic but supportive way.



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Victim Advocacy Roles

*Victim advocates are professionals trained to support victims of crime. An advocates' role is to act as the **BIASED** supporter of Indian women experiencing violence, advocating for their **expressed** interests, including safe space and other resources to regain control over their lives; to provide expertise founded on women's experiences within justice, social service and medical systems; and to prioritize women's safety and offender accountability in all aspects of advocacy, including maintaining confidentiality.*⁵⁸

As a biased supporter of a victim's expressed interests, advocates play an important part in empowering victims. Victims of sex trafficking are often faced with making fast-paced and important decisions. The seriousness of those decisions may cause feelings of fear and nervousness, especially when navigating legal systems. Many of those fears may be addressed by equipping the victim with as much accurate information as possible and updating safety plans on a consistent basis.

While supporting the victim in expressing their interests and concerns, a victim advocate fills various roles. Victim advocate positions, despite differences in title, job description, or job experience, may share common roles when it comes to assisting victims in their time of need. Those roles include providing:

- Direct Victim Advocacy
- Emotional and Family Support
- Community and Collaborator Accountability
- Legal System Advocacy

Direct Victim Advocacy

The immediate aftermath of a crime can be a confusing and highly sensitive time for victims. One of the roles that advocates fill is providing immediate crisis intervention following a crime. This is a critical time for victims. The type of response received at this time can either hurt or help heal the victim. Their first point of contact with the advocate can also make or break the victim's willingness to participate within legal processes. It is important for an advocate to have crisis intervention training, practice active listening, and provide clear information about the services the advocate can offer.

⁵⁸ Mending the Sacred Hoop, *The Principles of Advocacy: A Guide for Sexual Assault Advocates*, (1995), 13, <https://mshoop.org/resources/manuals/sexual-assault-advocacy-guide/#close>.

Victim Advocacy Roles

Victim advocate's role is to act as the BIASED supporter of Indian women experiencing violence and advocate for the victim's EXPRESSED interests.



Victim Advocacy Roles

- Direct Victim Advocacy
- Emotional and Family Support
- Community and Collaborator Accountability
- Legal System Advocacy



Emotional and Family Support

When a person is victimized, there is emotional harm to the victim and often to the victim's family, friends, and the community. This is especially true when a family or community member is the perpetrator. An advocate's role is to put the victim's emotional needs first. An advocate must avoid projecting their personal emotional responses on to the victim and should make space for the victim to express their emotions. Relationships with community and agency partners can be particularly useful in maintaining support for the victim's emotional needs, especially when family and friends are not a source of positive emotional support.

Community and Collaborator Accountability

One of the vital roles of advocates is working with agencies on behalf of victims to ensure that services rendered to the victim are appropriate, sensitive, timely, professional, and free from victim-blaming attitudes. Being familiar with who the multi-disciplinary service providers are in the appropriate jurisdiction will prove to be beneficial to the victim. Throughout an advocate's time with the victim, advocates must continue to examine the responsiveness of community agencies and collaborators, including individuals like the victim's lawyer, and hold them accountable to ensure the client is not re-victimized and all services support the victim's healing.

Legal Advocacy

One of the most important roles of an advocate is legal and systems advocacy. Legal advocacy may involve either or both the civil and criminal justice system, depending on the victim's wishes. Both justice systems can be confusing for victims and as such, the advocate should be there to guide the victim through each system. The advocate does this by providing accurate information about what the victim can expect and support the victim's decisions throughout the process. There are some important responsibilities advocates need to keep in mind when fulfilling this role. These duties are discussed further in the next section.

Advocate Tip: Advocates can invoke system change in a variety of ways including but not limited to: educating community, law enforcement, prosecutors, judges and tribal governments on the power and control dynamics of sex trafficking, participating on sex trafficking code development projects and developing strong working relationships with law enforcement (tribal, federal and state), prosecutors (tribal, federal and state), victim advocacy programs (tribal, federal and state), social services agencies, tribal leadership, and tribal courts. Keeping the need for change in the public realm should be an ongoing priority.

Legal Advocacy Responsibilities

Legal advocacy may involve ***either or both the civil and criminal justice system***, depending on the victim's wishes. Both justice systems can be confusing for victims and as such, the advocate should be there to guide the victim through those systems. The advocate does this by providing accurate information about what the victim can expect and support the victim's decisions throughout the process.



Legal Advocacy Responsibilities

There are particular responsibilities that advocates should keep in mind when fulfilling the role of legal advocate. Responsibilities that may assist the victim in navigating justice systems include:

- Protecting victim information;
- Providing emotional support;
- Helping victims with ongoing safety planning;
- Assisting the victim with obtaining a protection order if this remedy is available (in both civil and criminal systems);
- Providing information on victim's rights (in the criminal justice system);
- Providing information to victim on available legal protections and community resources;
- Obtaining information from law enforcement/jail regarding arrests, where the defendant is being held, charges filed if any, and how long the defendant will be held if known;
- Accompanying victim as needed and requested to hearings, trial, and appointments;
- Assisting victim with trial preparation (in civil and criminal systems) and victim impact statement (in criminal system);
- Working with other advocates who may be involved in the case if needed and requested by the victim while adhering to confidentiality policies;
- Assisting victim through civil legal process working with child protection agencies and making referrals as needed for civil legal representation;
- Monitoring cases for compliance with policies, protocols, codes;
- Providing follow up on cases as needed and appropriate; and
- Educating service providers and surrounding community on the best way to assist victims of sex trafficking and their children from a victim-centered perspective while prioritizing victim safety and offender accountability.

Two responsibilities, **protecting victim information and accompanying the victim in the courtroom**, have important implications – ethical and legal – for an advocate to understand. As such, those responsibilities are discussed further.

Legal Advocacy Responsibilities

- Protecting victim information;
- Providing emotional support;
- Help victims with safety planning;
- Assisting a victim with obtaining a protection order (in both civil and criminal system);
- Providing information on victim's rights (in the criminal justice system);
- Accompanying victim as needed and requested to hearings, trial, and appointments;
- Working with other advocates involved in the case;
- Monitoring case for compliance with policies, protocols, codes;
- Providing follow up on cases as needed and appropriate; and
- Educating service providers.



Legal Advocacy Responsibilities

- Protecting Victim Information
- Accompanying the Victim in the Courtroom



Protecting Victim Information

Keeping victim information private is the cornerstone of victim safety. When a victim discloses information to an advocate, the victim usually expects that the information will not be shared with others. Various practices, protocols, and statutes may mandate that the victim's information not be shared with others. Protecting victim information encourages the victim to freely disclose the full story with the assurance that the victim's information will not be shared without the victim's consent.

Before we begin the discussion that follows on ethical and legal duties and victim information, note that there are four basic types of victim advocates and the distinctions are critical:

- Community based (grassroots);
- Hospital based;
- Prosecutor based; and
- Law enforcement based.

Hospital based, prosecutor based, and law enforcement based victim advocates generally do not have the same ability to maintain a victim's private information. Instead, these system's based advocates may have an affirmative duty to share the victim's information with another agency, law enforcement, or the prosecutor. This information, in turn, may need to be turned over to the law enforcement or the court. In legal terms, this is called discovery. Therefore, the community based advocate must understand that disclosure of victim information without client consent to these types of system based victim advocates may compromise victim safety. All four types of advocates should carefully explain to the victim when they may have to disclose victim information without the victim's consent.

Advocate Tip: The community based victim advocate should carefully explain to the victim about disclosing information to hospital, prosecutor, or law enforcement advocates and when the community based victim advocate may be required to share information without the client's consent.

Three related but distinct concepts are core to a community based advocate's responsibility to protect the victim's information: **privacy, confidentiality, and privilege**. Each have an impact on the advocate's ability to communicate honestly with the victim, to protect the victim's safety, and to avoid legal consequences.

Protecting Victim Information

- Community based (grassroots);
- Hospital based;
- Prosecutor based;
- Law enforcement based.



Protecting Victim Information

- Privacy
- Confidentiality
- Privilege



Privacy

Privacy is the expectation that when a victim shares information with another individual (the individual does not have to be a professional), the information will go no further without the victim's consent. Reporting matters of violence may be very humiliating and traumatic for the victim to disclose; this includes disclosures to relatives or friends. Privacy allows the victim to discuss matters with the expectation the information will remain private. An example of privacy includes a victim discussing an issue with a friend over the phone and the victim expecting the information to not be repeated to others.

There are numerous challenges to keeping victim information private as the victim navigates the civil and/or criminal justice systems. For instance, victim service providers working with the victim may not have sufficient protocols and policies to keep victim's information safe. The victim's use of social media may compromise victim information. The victim services location in the tribal community may compromise victim information if community members see the victim coming and going from the location. Signs on the office door may provide information as to why an individual would be entering and exiting the office. Waiting areas that are not private may compromise victim information. Professional service providers that acknowledge victims in public places may also compromise victim information. An advocate must remain cognizant of potential vulnerabilities in communications, facilities, locations, and service provider policies.

Confidentiality

Privacy and confidentiality have some overlap. However, maintaining the confidentiality of communications is an ethical and legal duty to keep the victim's information private. This duty is created by the nature of a professional relationship between the victim and the service provider. Victim statements are meant only for the service provider and the information may only be disclosed with client consent, a court order, or statutory mandate. If the service provider discloses the victim's information without the victim's consent, the service provider may be liable for an ethical breach of duty and may lose their licensure or certifications.

Grant funding may also come with confidentiality restrictions.⁵⁹ For example, the Violence Against Women Act confidentiality provision attached to grants funded by the Office on Violence Against Women prohibits sharing of identifying victim information unless: 1) the victim signs an informed, written, time-limited release; or 2) the release is subject to a legal (court or statutory) mandate.⁶⁰ The Family Violence Prevention and Services Act federal grants have a similar confidentiality provision. Another possible area of concern arises when the tribal victim services provider is a part of the tribal government, which can create additional hurdles in keeping information private from other parts of the tribal government.

⁵⁹ Note that federally funded grants may require funded programs to adhere to very specific confidentiality protocols to be adhered to as a condition for continued funding. The grant award documents and other relevant documents should be reviewed carefully for required protocols.

⁶⁰ 34 U.S.C. § 12291(b)(2).

Protecting Victim Information - Privacy

Privacy is the expectation that when a victim shares information with another individual (the individual does not have to be a professional), the information will go no further without the victim's consent.



Protecting Victim Information - Confidentiality

Protecting the **confidentiality** of communications is an ethical duty to keep the victim's information private. Victim statements are meant only for the service provider and the information may only be disclosed with client consent. If the service provider discloses the victim's information without the victim's consent, the service provider may be liable for an ethical breach of duty and lose any of their licensure or certifications.



Types of information that are usually confidential include:

- Name/address of client requesting services;
- Name/address of client receiving services;
- Other private, identifying information about client (telephone number, birthdate, health issues, etc.);
- Location of victim; and
- Domestic violence shelter location.

Confidentiality breaches might occur when:

- Agency files or information are exchanged with another agency without client consent, or an exchange of information with an agency that has no confidential relationship with the victim;
- Hospital/medical records or information are exchanged without victim consent or an exchange of information with an agency that has no confidential relationship with victim;
- During case reviews, files or information is shared with other agencies without client consent or an exchange of information with agencies that do not have a confidential relationship with the victim;⁶¹
- During civil cases and/or criminal prosecution where the victim's information has been subpoenaed; and
- During the judicial process in which judges put confidential victim information in court orders such as a victim's address or place of work.

Note: Confidentiality issues do NOT arise when the victim grants written permission to disclose information and the information is strictly shared according to the victim's instructions.

The victim's permission to disclose certain victim information should be executed in a written release of information form⁶² that:

- Lists what specific information you can disclose;
- Identifies whom the information can be disclosed to;
- Is signed by the client;
- Includes an expiration date; and
- Provides notice that the client can rescind their permission at any time if they choose.

⁶¹ Many challenges exist with respect to keeping victim information private. Victims may utilize the services of many agencies and not all agencies adhere to sufficient protocols and policies to keep victim information private and protected. Some agencies may be required to disclose victim information to an agency, attorney or law enforcement official. Remember that agreements between agencies do not bind individuals outside of the agencies and disciplines sharing victim information could compromise victim privacy, confidentiality and privilege unless executed very carefully.

⁶² See, e.g., National Network to End Domestic Violence, *FAQS on Survivor Confidentiality Releases*, (2015), accessed January 8, 2019, <https://nnedv.org/?mdocs-file=2531>.

Protecting Victim Information - Confidentiality

Types of information that are usually confidential include:

- Name/address of client requesting services;
- Name/address of client receiving services;
- Other private, identifying information about client (telephone number, birthdate, health issues, etc.);
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Protecting Victim Information - Confidentiality

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- Lists what specific information you can disclose;
- Identifies whom the information can be disclosed to;
- Is signed by the client;
- Includes an expiration date; and
- Provides notice that the client can rescind their permission at any time if they choose.



Privilege

In addition to being confidential, a victim's information may be protected by a privilege. A privilege is an evidentiary rule that prevents the disclosure of information, even if relevant, in court. Particularly, privilege can come into play when the information was originally communicated in a professional or confidential relationship.⁶³ Privileged communications include victim statements and conversations made under circumstances of assured confidentiality and the disclosed information is protected by a statute or case law. Privileged communications are only allowed to be disclosed under a very restricted set of circumstances.

Privileges that protect victim information from disclosure are usually set out in statutes or case law in the applicable jurisdiction.⁶⁴ A disclosure of privileged information may have legal and/or criminal consequences. Further, the information cannot be disclosed (absent victim consent, statutory mandate to disclose such as child abuse/neglect or a court order) even if the agency is called to testify or asked to reveal such privileged conversations to law enforcement. However, the privilege may be waived by the holder of the privilege (the victim who communicated the confidential information, not the person who heard it). Note that not all disciplines are covered by a statute creating a privilege.

Examples of relationships that may have a recognized privilege include:

- Priest/parishioner;
- Lawyer/client;
- Psychologist/patient;
- Doctor/patient;
- Husband/wife;
- Licensed social worker/client; and
- Advocate/victim⁶⁵

Note that a privileged communication may be unintentionally waived⁶⁶ if:

- A third party is in the interview room;
- Providing information to third parties not protected by the privilege; and
- The information is available in other forums (such as Facebook).

Advocate Tip: Be aware that disclosing information relating to a minor is more complicated and varies by tribal, state, and federal law as applicable, including emancipated minors.

⁶³ Garner, Bryan A. "Privilege." Black's Law Dictionary (Fourth Pocket Edition) 596. (2011).

⁶⁴ Note, it is a best practice to have a tribal code that directly sets forth that communications between the victim and the advocate providing services are privileged and not subject to disclosure absent court orders or statutory mandate.

⁶⁵ An exception to this would be victim witness advocates working for the prosecutor, law enforcement, or healthcare agency who share information to build a case for possible prosecution.

⁶⁶ For more information on crafting comprehensive confidentiality policies and procedures, visit <https://www.ovc.gov/publications/infores/VictimsRightToPrivacy/policies.html>.

Protecting Victim Information - Privilege

A **privilege** is an evidentiary rule that prevents the disclosure of information, even if relevant, in court. Particularly, privilege can come into play when the information was originally communicated in a professional or confidential relationship that is covered by law.



Protecting Victim Information - Privilege

Privileges that protect victim information from disclosure are usually set out in statutes or case law in the applicable jurisdiction.

A disclosure of the privileged information may have legal and/or criminal consequences. Note it is a best practice to have a tribal code that directly sets forth that communications between the victim and the advocate providing services are privileged and not subject to disclosure absent court orders or statutory mandate.



Victim Advocacy in the Courtroom

Legal advocacy can involve court appearances for both the victim and the advocate. Courtroom appearances, whether in tribal, state, or federal court, are often stressful. Remember, stay in tune with the victim's needs and fears. Be sure to address them before and throughout the court appearance. Knowing a few tips for courtroom appearances may calm nerves, especially around safety planning and courtroom decorum.

Safety Planning

Safety planning specific to courtroom appearances is critically important. Victims may have a false sense of security. They may think that being surrounded by people like the bailiff, lawyers, friends, and family in the courtroom will keep them safe. Victims may feel it is okay to let their guard down. However, studies have shown that violent outbursts can happen anywhere, even in well-guarded places. This is why it is important to plan and to support victims with a safety plan during court appearances.

- 1) Learn as much about the perpetrator as possible, particularly if the advocate has not seen them before this. Obtain a description of perpetrator, a picture, the make, model, and color of perpetrator's vehicle, and information about friends who may accompany perpetrator. Ensure that anyone accompanying victim has the information about the perpetrator.
- 2) Request law enforcement accompaniment to the courthouse and courtroom.
- 3) Inquire about the presence of cameras in the parking lot. Park near cameras and entrances closest to courtroom if possible.
- 4) Ask those accompanying the victim to remain vigilant of the perpetrator at all times.
- 5) Accompany victim and remain at victim's side at all times such as if victim needs to use the restroom. Find out where the restrooms are located in advance.
- 6) Identify a safe room where an advocate, family, and friends can wait with the victim until victim is called or wants to be in the courtroom.
- 7) Identify all exits out of the courthouse in case there is a need to make a quick escape.
- 8) Inform the bailiff or court security in advance that the perpetrator should not attempt to engage with the victim or come close to the victim for any reason.
- 9) Leave the courtroom and courthouse accompanied, perhaps request that the bailiff or courthouse security officers accompany the victim to their vehicle. If possible, someone may want to pick up the victim at the exit door.

It is suggested that all courtroom personnel be well-trained on the critical need to protect a victim's safety and on the tactics used by perpetrators to gain power and control over a victim. Those tactics may be simple, but not obvious, to anyone but the victim such as a certain type of stare or glance, body language, and other gestures.

Victim Advocacy in the Courtroom – Safety Planning

- Victims may have a false sense of security going to court.
- Victims may feel like they can let their guard down.
- Violent outbursts can happen anywhere.



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Victim Advocacy in the Courtroom – Safety Planning

- Learn as much about the perpetrator as possible, particularly if the advocate has not seen them before.
- Request law enforcement accompany the victim and advocate to the courthouse and courtroom.
- Inquire about the presence of cameras in the parking lot. Park near cameras and closest entrances to the courtroom.



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Courtroom Decorum

The following tips are given from the perspective of an appearance in tribal court with most tips having general applicability to federal and state court.

First and foremost, remember to demonstrate a deep respect for the tribal sovereign. Tribes are all unique sovereigns with their own customs, traditions, and social norms. Do your homework prior to appearing in the tribal court. Know whether tribal law allows a community based advocate to speak on behalf of the victim. A good practice is to visit and observe the tribal court in session with the same judge presiding that will later hear the victim's case.

It is also important to know whether the trial/hearing will be a bench trial or a jury trial. Bench trials are before a judge while jury trials are comprised of a set number of tribal community members which may include non-Indians. The number of jurors to be seated on a jury is found in the tribal code.

Other helpful tips to testifying in tribal court include:

- Be on time for court and urge the victim to be on time, which usually means being in the courthouse at least 30 minutes prior to the hearing;
- Make sure the victim has a safe and private place to wait for the case to be called (you might call ahead and ask the court clerk for such a space);
- Dress respectfully and advise your client to do the same. This would include conservative dress for the tribal community;
- Stand when speaking to the judge;
- Speak clearly and loudly enough so the recorder will capture your words;
- Usually sit on the side of the courtroom as the victim's attorney;
- If the client has been served with a subpoena, appear at the time and place commanded. Do not disrespect the tribal court by not appearing or filing an objection to the subpoena; and
- If the client has been served with a *subpoena duces tecum*, appear at the time and place commanded and bring the documents listed in the *subpoena duces tecum*. The victim may need to seek assistance of legal counsel to object to the disclosure of records. Do not disrespect the tribal court by not appearing or filing an objection.

In addition to the helpful tips on what an advocate should advise the client to do, there are also some helpful tips on what not to do:

- DO NOT bring confidential information with you to court unless court ordered (not a *subpoena duces tecum*) to do so. This is critical as any documentation that is brought to court is subject to discovery.
- DO NOT discuss the case while on the courthouse grounds. It is amazing how many ears are in very private places on the courthouse grounds.

Victim Advocacy in the Courtroom – Courtroom Decorum

- Remember to demonstrate a deep respect for the sovereign (federal, state, or tribal);
- Do your homework prior to appearing in court; and
- Determine whether the trial or hearing will be a bench trial or jury trial.

Tip: Visit and observe the court in session with the judge presiding that will hear the victim's case.



Victim Advocacy in the Courtroom

- Be on time for court and urge the victim to be on time;
 - Tell them to show up at least 30 minutes before the scheduled time;
- Make sure there is a safe and private place to wait for the case to be called;
- Dress respectfully; and
- Stand when speaking to the Judge.



Lastly, Federal Rules of Evidence 612⁶⁷ has been interpreted by some jurisdictions to require a person testifying to produce all documents the person reviewed to refresh their memory for testimony. Some attorneys may know of this rule, while others may not. The victim should be cautioned about reviewing any documents prior to testifying if there is documentation that the victim does not want provided to the court or defense attorney. Remember, victim information is directly connected to victim safety.

Beware of the Unauthorized Practice of Law

As advocates assist clients with the navigation of legal systems, it is crucial to be mindful of the fine line between advocating for your client and the unauthorized practice of law. The unauthorized practice of law is a crime in many jurisdictions.⁶⁸ The unauthorized practice of law may include practicing or engaging as an advisor in a jurisdiction where the advocate is not licensed or certified to practice law. Some tribunals allow advocates to speak on behalf of the client. Repeat only what the client has approved you to share with the court and do not add your own opinions or personal interpretations of the victim's thoughts or feelings. Do not provide legal conclusions or legal advice. Gathering facts is certainly permissible but the legal conclusion and any subsequent advice provided to the client is not and most likely would constitute the unauthorized practice of law.

Advocates are certainly permitted to read and copy statutes that pertain to client needs and discuss the statutes with an attorney to provide a check and balance on whether the attorney is familiar with the statute and why the statute is being argued (or not argued) to the court. Remember the practice of law is complex and various sections of the law may come into play. Competent lawyers will be advising the client with a backdrop of how these various pieces of the law may best serve the client's needs.

Advocate Tip: Be clear that you act in the role of the victim advocate, and not as the victim's lawyer. Unclear information may cause victim confusion, frustration, and/or discouragement and result in negative results for the advocate or for the victim.

Advocate Tip: Remember to safety plan around the weeks following the trial too. Safety planning should be ongoing, revisited, and adjusted based upon every civil or criminal legal maneuver by any attorney, which includes but is not limited to the filing of documents in court, issuance of subpoenas, utilizing discovery tools such as interrogatories or depositions.

⁶⁷ Federal Rule of Evidence 612(a) "Writing Used to Refresh a Witness" sets forth the following: "(a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory: (1) while testifying; or (2) *before testifying, if the court decides that justice requires the party to have those options.*" [Emphasis added] (2020), www.rulesofevidence.org. This rule is provided for illustrative purposes only and tribal law on evidence will apply in tribal court.

⁶⁸ See, e.g., State Bar of California, "Unauthorized Practice of Law", <http://www.calbar.ca.gov/Public/Free-Legal-Information/Unauthorized-Practice-of-Law> (accessed September 5, 2019).

Victim Advocacy in the Courtroom

- DO NOT bring confidential information with you to court unless court ordered (not a *subpoena duces tecum*) to do so.
 - This is critical as any documentation that is brought to court is subject to discovery!
- DO NOT discuss the case while on the courthouse grounds.
 - It is amazing how many ears are in very private places on the courthouse grounds!



Victim Advocacy in the Courtroom

BEWARE OF THE UNAUTHORIZED PRACTICE OF LAW!

Be clear that you are the victim advocate,
and not the victim's lawyer.



Small Group Exercise: Meeting the Legal Needs of Sex Trafficking Victims

Question: What are the legal needs of a sex trafficking victim? Identify civil and/or criminal legal needs with your small group.

Be sure to think very broadly about this. Use the following space to track your ideas:

[illegible]

Small Group Exercise

Meeting the Legal Needs of Sex Trafficking Victims



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Small Group Exercise

What are the legal needs of a sex trafficking victim?

Identify civil and/or criminal legal needs with your small group.



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Overview of Legal Needs in Criminal Systems

In the criminal legal realm, a victim of trafficking may be charged/convicted of a crime. If so, the victim may be able to access the following mechanisms:

- Affirmative defenses (a fact or set of facts asserted by the defendant that, if proven, defeats or mitigates a defendant's otherwise unlawful conduct);
- Immunity provisions (usually offered by the prosecution as an exemption or provision that limits the liability of an individual for misconduct and provides legal protection for cooperation in an investigation for supplying information or testimony); and
- Vacating convictions/expungements (a type of lawsuit wherein a defendant has records sealed or destroyed so that the records become unavailable to jurisdictions).

Additionally, a victim of sex trafficking may have certain rights that afford protection, if the perpetrator has been charged with a crime.⁶⁹ These victim's rights are set out more fully later in this resource in the section titled "Victim's Rights."

A sex trafficking victim may also be involved in the prosecution of their trafficker(s). An advocate needs to be prepared to assist the victim with navigating the local criminal justice system. For example, a sex trafficking victim may need assistance with:

- Filing a police report;
- Submitting a witness statement;
- Trial accompaniment;
- Getting a criminal protection order;
- Advocacy with the prosecutor;
- Victim impact statement; and
- Enforcement of Victim's Rights.

Advocate Tip: If you have a Tribal Coalition in your state or region, it may be helpful to contact them to obtain additional information and training on navigating the criminal justice system, the advocate's role in the criminal legal system, and local laws.

⁶⁹ A list of tribal, state, and federal victim's rights laws may be found at www.victimlaw.org.

Overview of Legal Needs in Criminal Systems

In ***criminal legal systems***, sex trafficking victims will need assistance with preparation for trial, seeking a criminal no contact order, asserting victim's rights, and preparing and delivering victim impact statements.



Overview of Legal Needs in Criminal Systems

- The victim's own criminal case
 - Affirmative defenses, immunity from prosecution, expungements.
- The trafficker's criminal case
 - Filing a police report, witness statements, trial accompaniment, protection orders, victim's rights and general advocacy.



Overview of Legal Needs in Civil Systems

To better advocate for sex trafficking victims in civil legal systems, advocates should be familiar with the legal rights of the victim and determine in which legal system to advocate for the enforcement of those rights. In the context of sex trafficking victimization, a civil legal remedy is simply using the law or authority of the court to enforce a legal right or obtain other legal relief owed to the victim. Victim compensation⁷⁰ and protection orders are types of legal relief.

In the civil legal realm, victims may need access to a variety of civil laws to meet their needs including:

- Victim's compensation;
- Employment law;
- Tort law;
- Housing laws;
- Debtor/creditor law;
- Family law;
- Domestic violence law;
- Public assistance;
- Children's civil legal needs; and
- Protection orders (protection orders may arise in criminal cases as well).

Tribal advocates working with sex trafficking victims who have children must be prepared to deal with many civil legal issues related to that child. In these cases, even the best and most experienced tribal advocate may need civil legal assistance to meet the needs of the client. While an exhaustive discussion of civil legal advocacy for the children of sex trafficking victims is outside the scope of this resource, some of the more common child-related legal issues that may arise for a sex trafficking victim are:

- Child welfares issues;
- Custody issues (issues of which parent will have legal and/or physical custody of the children, child safety during visitation, and addressing child support);
- Protection orders for the child (protection orders that specifically name the children and meet the statutory requirement for obtaining a protection order according to the laws of the jurisdiction issuing the protection order); and
- Truancy issues (legal issues that arise due to the child's absence from school).

Advocate Tip: Advocates who serve child victims of crime should carefully screen to identify if the child client is a trafficking victim. Sex trafficking cases involving minors can be extremely complex and may include the involvement of a variety of systems.

⁷⁰ "State Crime Victims Compensation," Benefits.gov, accessed January 8, 2020, <https://www.benefits.gov/benefit/4416>.

Overview of Legal Needs in Civil Systems

In ***civil legal systems***, a civil legal remedy is simply using the law or authority of the court to enforce a legal right or other legal relief to the victim. Victim compensation and protection orders are types of legal relief.



Overview of Legal Needs in Civil Systems

- Employment law;
- Tort law;
- Housing laws;
- Debtor/creditor law;
- Family law;
- Domestic violence law;
- Children's civil legal needs; and
- Protection orders.



The Basics of Criminal and Civil Jurisdiction

Jurisdiction refers to the power of a government to regulate conduct and to enforce those regulations through a court system. There are generally two types of jurisdiction a court may exercise— criminal and civil.

Criminal jurisdiction refers to the power of a court to hear and decide cases of a criminal nature. If a person is found guilty of a crime, the penalty may be incarceration and/or fines. Criminal cases are initiated by governments; Native Nations, states, or the federal government may be the prosecuting party. The burden of proof in a criminal case requires the prosecutor to demonstrate that the defendant has committed a crime **beyond a reasonable doubt**. This is the highest burden of proof in American jurisprudence as a defendant's freedom may be at issue.

Civil jurisdiction generally refers to the power of a court to handle lawsuits or actions between two private persons or parties sometimes referred to as the plaintiff (person bringing the action) and the defendant (person being sued). The plaintiff usually requests that the court order a defendant to do an act, refrain from doing an act, declare a defendant's action wrongful, or provide compensation for damages. The burden of proof of the plaintiff in a civil action may be a **preponderance of the evidence** (more likely than not plaintiff's assertions are correct).

Generally, there are two prerequisites to a court exercising jurisdiction (authority):

1. **Subject Matter Jurisdiction:** A court's authority over a particular type of case.
2. **Personal Jurisdiction:** A court's authority to require an individual to come before the court. Not all cases require personal jurisdiction as a prerequisite to a court exercising jurisdiction. Individuals can also consent to a court's jurisdiction.

Determining whether a court has jurisdiction over the case can be a complex determination, especially in Indian country. The following sections will introduce foundational knowledge around criminal and civil jurisdiction in Indian country and the entities at play in criminal and civil justice systems, whether in tribal, state, or federal court.

The Basics of Civil and Criminal Jurisdiction

Criminal jurisdiction refers to the power of a court to prosecute a crime. Criminal cases are initiated by governments; Native Nations, states, or the federal government may be the prosecuting party. Those found guilty of a crime may be incarcerated and/or fined.

Civil jurisdiction generally refers to the power of a court to handle lawsuits or actions between two private persons or parties. Generally, there is no risk of incarceration in a civil lawsuit.



Civil and Criminal Jurisdiction

Subject matter jurisdiction generally refers to a court's authority over a particular type of case.

Personal jurisdiction refers to a court's authority over specific people. Not all cases required personal jurisdiction as a prerequisite to a court exercising jurisdiction. And, individuals can consent to a court's jurisdiction.



Navigating Criminal Jurisdiction in Indian country

Three sovereigns may be involved in sex trafficking cases involving Native people: tribes, federal government, and states. This section will provide a brief general overview of tribal criminal jurisdiction in Indian country.

Generally, Native Nations that create tribal trafficking laws will be able to prosecute Indian sex traffickers within the limits of their tribal criminal jurisdiction. Meaning, most Native Nations may prosecute Indians for trafficking any victim, Indian and non-Indian alike. Though, Tribes may not have jurisdiction over non-Indians that commit sex trafficking crimes in Indian country.⁷¹

The question of which sovereign(s) may have jurisdiction over a crime is a complex one that asks a series of subquestions: was the perpetrator Indian or non-Indian, was the victim Indian or non-Indian, what was the crime, and where did the crime occur.

Note that sex trafficking is a federal crime of general federal application and may be prosecuted in the federal system. When the crime is being prosecuted federally, federal laws will apply. The Indian law jurisdictional analysis provided above will apply only to crimes being prosecuted in tribal court.

A thorough discussion of criminal jurisdiction in Indian country is out of the scope of this resource. For an in-depth information on criminal jurisdiction, we highly recommend reading *Introduction to Tribal Legal Studies* (3rd ed.) by Justin B. Richland and Sarah Deer; relevant chapters are included in the appendix of this resource.

⁷¹ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); 25 U.S.C. §1304 (Special Domestic Violence Criminal Jurisdiction).

Navigating Criminal Jurisdiction in Indian country

Three sovereigns may be involved in sex trafficking cases involving Native people: ***Tribes, federal government, and states.***

Generally, Native Nations that create tribal trafficking laws will be able to prosecute Indian sex traffickers within the limits of their tribal criminal jurisdiction.



Navigating Criminal Jurisdiction in Indian country

- In tribal court, the question of which sovereign(s) may have jurisdiction over a crime is a complex one that asks a series of subquestions:

Was the perpetrator Indian or non-Indian?

Was the victim Indian or non-Indian?

What was the crime?

Where did the crime occur?

- The Indian law jurisdictional analysis provided above will apply *only* to crimes being prosecuted in tribal court.



Criminal Legal Advocacy

Victims can initially enter the criminal justice system in one of two ways: being charged with a crime or being the victim of a crime. Either avenue presents various challenges, compounds trauma, and requires ongoing safety planning adjustments.

Victims may fear possible arrest and/or criminal prosecution if they report an occurrence of sex trafficking. Victims may have criminal histories themselves and may have been forced to commit crime as part of the trafficking scheme. Oftentimes, traffickers will use this fear to maintain power and control over the victim. A sex trafficking victim may also be involved in the prosecution of their trafficker(s).

An advocate needs to be prepared to assist the victim with navigating the criminal justice system. As mentioned previously, a sex trafficking victim may need assistance with:

- Filing a police report;
- Submitting a witness statement;
- Trial accompaniment;
- Getting a criminal protection order;
- Advocacy with the prosecutor;
- Victim impact statement; and
- Victim's Rights.

Advocate Tip: An advocate should assist the victim to ensure the victim is receiving accurate information to make informed decisions about whether to file a police report. The advocate should support for the victim's choice even if the advocate disagrees with the victim's choice.

The chart below may prove useful for advocates assisting a victim navigating the criminal justice system and is adapted from the flowchart located on the Federal Bureau of Investigation's homepage for victim services.⁷²

	Enter into system	Prosecution & Pretrial Services	Adjudication	Sentencing & Sanctions	Corrections
<u>CRIME COMMITTED</u>	-Interviews -Investigations -Arrest -Complaints	-Charges Filed -Appearances -Preliminary Hearings -Bail or Defendant Hearing -Grand Jury -Indictments	-Arraignment -Trial -Guilty Plea -Conviction	-Sentencing -Sanctions	-Probation -Prison

⁷² <https://www.fbi.gov/resources/victim-services/a-brief-description-of-the-federal-criminal-justice-process#The-Trial>.

When entering the criminal justice system the victim may encounter the following individuals:

- Law enforcement (federal, state, and/or tribal);
- Prosecutor (federal, state, and/or tribal);
- Victim witness coordinator (note that this advocate works within the prosecutor's office and all victim information will be provided to the prosecutor and may be discoverable by the defense attorney);
- Defense attorney;
- Judge (federal, state, and/or tribal);
- Court staff;
- Pre-sentencing investigator;
- Probation/parole (upon conviction); and
- Warden of the detention facility.

Advocate Tip: Advocates should be mindful that any victim information shared within the confines of a detention facility is most likely recorded, including phone calls coming in and out of the facility.

Advocate Tip: Advocates should consider how the current criminal justice system appears stacked against the trafficking victim. It can hold the victim accountable for illegal behavior the victim was forced to engage in. Advocates should consider possible ways to invoke system change to refocus the criminality on the trafficker not the victim in the tribal, federal and state systems.

Overview of the Criminal Process

<u>CRIME COMMITTED</u>	Enter into system	Prosecution & Pretrial Services	Adjudication	Sentencing & Sanctions	Corrections
	<ul style="list-style-type: none"> -Interviews -Investigations -Arrest -Complaints 	<ul style="list-style-type: none"> -Charges Filed -Appearances -Preliminary Hearings -Bail or Defendant Hearing -Grand Jury -Indictments 	<ul style="list-style-type: none"> -Arraignment -Trial -Guilty Plea -Conviction 	<ul style="list-style-type: none"> -Sentencing -Sanctions 	<ul style="list-style-type: none"> -Probation -Prison



Victim's Rights Laws

Until recently, criminal justice systems often seemed focused on defendant's rights and seemingly indifferent to the victim's needs. Victims were often excluded from courtrooms and denied the chance to speak at the sentencing hearing. The criminal justice system usually left victims on their own to attempt to reclaim their health, security, and dignity. Over the past thirty years, tribal, state, and federal jurisdictions have made sweeping changes to this paradigm. Although victim's rights statutes vary from jurisdiction to jurisdiction, victims now have statutory and sometimes constitutional authority to assert basic victim's rights when an offender has been charged with a crime. The concern over the peripheral role that victims play in the prosecution of crimes led states to begin passing laws that granted victims of crimes increased rights within the criminal justice system.⁷³ Access to victim's rights laws are important because they ensure that victims are informed of, and allowed to participate in tribal, state, and federal criminal processes.

Generally, sex trafficking victim's rights may include the following:⁷⁴

Right to Attend Hearings: Victims may have the right to attend proceedings during the criminal or juvenile justice process. The proceedings that victims may attend, such as bail hearings, trials, or parole hearings, are outlined in federal, state, or tribal law. Some laws may limit the trial attendance of victims who are scheduled to testify as witnesses.

Right to Compensation: Victims may have the right to be financially compensated for certain injuries or damage caused by the crime. States operate victim compensation programs. Victims of federal crime or crime on tribal lands may apply for compensation in the state in which they live. Victims must file an application with the relevant compensation program and meet certain eligibility requirements.⁷⁵

Right to Be Heard: Victims may have the right to make written or oral statements during the criminal or juvenile justice process. Every state gives victims the right to submit a "victim impact statement" at sentencing. Many states also allow victims to make a statement at bail or parole hearings or to meet with the prosecutor to discuss a plea bargain.

Right to Be Informed: Victims may have the right to be informed of events and proceedings in the justice process, such as trial or release of an offender from custody. Victims may also have the right to information about support services, the criminal or juvenile justice process, how to contact officials or agencies, or other matters.

⁷³ Mary Margaret Giannini, "The Swinging Pendulum of Victims' Rights: The Enforceability of Indiana's Victims' Rights Laws," 34 Ind. L. Rev. 1157 (2001).

⁷⁴ This information is provided by the Office of Justice Programs, "Victim Law," accessed June 16, 2017, www.victimlaw.org/victimlaw/pages/victimsRight.jsp.

⁷⁵ Benefits.gov, *supra* note 70.

Victim's Rights Laws

- Every state (plus Washington, D.C., and several territories) has created a body of law granting basic rights and protections for victims of crimes during the criminal process.
- Access to victim's rights laws are important because they ensure that victims are informed of, and allowed to participate in, state and federal criminal processes.
- Several Native Nations have victim's rights laws.



Victim's Rights Laws

Generally, sex trafficking victims' rights may include the following:

- Right to attend hearings;
- Right to compensation;
- Right to be heard; and
- Right to be informed.



Right to Privacy: Victims may have the right to protect the privacy of personal information, such as their name or identity, address, and phone number contained in criminal/juvenile justice documents, compensation records, and court testimony, as well as contact information provided for notification purposes. Certain victim populations, including children, victims of sexual assault, domestic violence, stalking, or trafficking, the elderly, and other vulnerable adults may have additional rights that address their unique privacy or safety concerns.

Right to Protection: Victims may have the right to be protected from intimidation or harassment by the offender or others involved in the criminal or juvenile justice process. Protection may include providing a separate waiting area in court for the victim, allowing victims to seek a court order preventing the offender from contacting the victim, or prohibiting improper questioning by a lawyer.

Right to Restitution: Victims may have the right to obtain restitution, or court-ordered reimbursement from offenders who have caused financial harm. Depending on the state and type of crime, restitution may be mandatory or optional. Many states also have laws about collecting restitution from the offender.

Right to Return of Property: Victims may have the right to the return of their personal property being held as evidence.

Right to a Speedy Trial: Victims may have the right to have the case resolved within a reasonable amount of time. Some states require that courts consider the interests of the victim when ruling on a request to delay, or “continue,” a trial.

Right to Enforcement/Remedies of Victim: A few states give victims a way to have their rights enforced. In some states, victims may be able to file a complaint with a state agency. In others, victims may have the right to file a limited legal action.

While the rights listed in the preceding text are the central focus of many victim’s rights laws, each jurisdiction has its own list, and who qualifies as a “victim” under such laws also varies.⁷⁶ Currently, every state (plus Washington, D.C., and several territories) has created a body of law granting basic rights and protections for victims of crimes during the criminal process.

Several Native Nations have victim’s rights laws including Muscogee Creek Nation, Oneida Indian Nation, and the Confederated Tribes of the Colville Reservation.⁷⁷

⁷⁶ Mary L. Boland and Russell Butler, “Crime Victims’ Rights: From illusion to Reality,” 24 SPG Crim. Just. 4 (2009).

⁷⁷ Code Ann. Title 6, 3-308, NY Oneida Tribe Code; Ch. 11, R. 1101, Confederated Tribes of the Colville Reservation Code, Ch. 31, 3-5-6.

Navigating Tribal Civil Jurisdiction

Due to the complexities of tribal civil jurisdiction, this unit will be limited to the civil legal needs of sex trafficking victims seeking protection orders in tribal court. For tribal civil matters arising in Indian country on tribal lands, it is well settled that tribes have the power to issue civil tribal protection orders in matters involving tribal members.⁷⁸ VAWA 2013 also directly endorses tribal civil jurisdiction over all persons when issuing tribal protection orders when matters arose in Indian country or otherwise was within the authority of the tribe.

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.⁷⁹

While tribal civil jurisdiction is a complex issue,⁸⁰ advocates must learn to navigate all relevant civil legal systems (county, state, etc.) to access all the necessary services and resources available to sex trafficking victims in each jurisdictional system.

Advocate Tip: It is important for advocates to consult the tribal constitution and codes of the tribe to determine how the laws of the tribe exercising civil jurisdiction over a type of case sets jurisdictional parameters. The advocate may need to consult with a legal expert, preferably one familiar with federal Indian law and the tribal court at issue. Advocates may consult with their Tribal Coalition when trying to seek out legal experts on this issue.

⁷⁸ *Williams v. Lee*, 358 U.S. 217 (1959).

⁷⁹ 18 U.S.C. 2265(c).

⁸⁰ In civil matters arising on fee land within Indian country involving nonmembers—including Indians who are members of other federally recognized tribes—two U.S. Supreme Court cases held that tribes have limited powers (to regulate and adjudicate) over matters involving nonmembers on non-Indian lands. *Montana v. United States*, 450 U.S. 544 (1981) and *Strate v. A-1 Contractors*, 5520 U.S. 438 (1997) resulted in a two-pronged test to determine whether a tribal court has jurisdiction over nonmembers in civil matters. The *Montana* test requires the tribal court to find that (1) the parties entered into a consensual relationship with the tribe or its members through commercial dealing, contracts, leases, or “other arrangements” or (2) the conduct threatens or has some direct effect on the political integrity, economic security, or health or welfare of the tribe. If neither of the two factors listed in the *Montana* test are present, the tribal courts may not exercise civil jurisdiction over nonmembers on non-Indian fee lands within the tribe’s Indian country.

Navigating Tribal Civil Jurisdiction

For tribal civil matters arising in Indian country on tribal lands, it is well settled that tribes ***have the power to issue civil tribal protection orders in matters involving tribal members.***

VAWA 2013 also directly endorses tribal civil jurisdiction over all persons when issuing tribal protection orders when matters arose in Indian country or otherwise was within the authority of the tribe.



Navigating Tribal Civil Jurisdiction

Tip: It is important for advocates to ***consult the tribal constitution and codes of the tribe*** to determine how the laws of the tribe exercising civil jurisdiction over a type of case sets jurisdictional parameters. The advocate may need to consult with a legal expert, preferably one familiar with federal Indian law and the tribal court at issue.



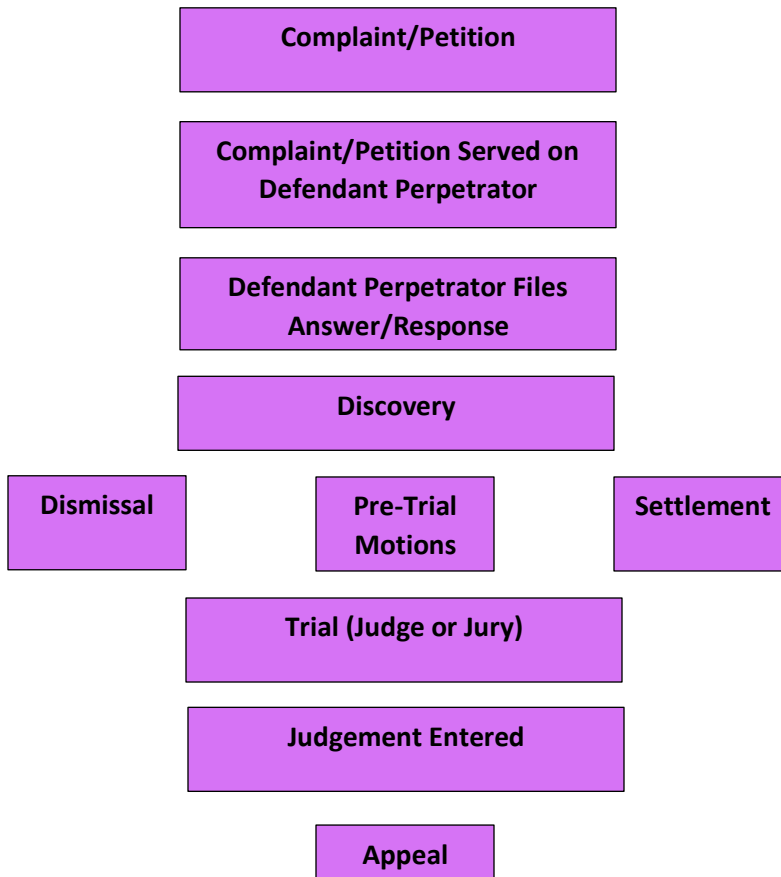
Civil Legal Advocacy

In the civil legal realm, victims turn to a variety of civil laws to meet their needs. Advocates should have some familiarity with the common civil legal issues to help assess a client's needs and create an advocacy plan. Because many of the common civil legal needs highlighted in this section will require specialized legal expertise,⁸¹ an advocate should:

- Be well versed on local civil legal resources and their intake processes;
- Be prepared to refer clients to the appropriate resource;
- Accompany your client, if appropriate, to their initial appointments; and
- Be prepared to advocate for your client's rights with their service providers and civil legal systems.

Because protection orders are arguably one of the most consistent and important immediate civil legal remedies, a large portion of this Unit will address tribal protection orders and their enforcement.

The civil legal system may vary slightly from jurisdiction to jurisdiction but generally will follow along this flowchart:



⁸¹ For more information on specialized civil legal needs, see Appendix E.

Civil Legal Advocacy

Because many common civil legal needs will require specialized legal expertise, an advocate should:

- Know your local civil legal resources and their intake processes;
- Refer your clients;
- Accompany your client to initial appointments; and
- Advocate for your client's rights with their service providers and civil legal systems.



Civil Legal Advocacy

- Because they eventually may be subpoenaed, be careful about discussing possible civil lawsuits with victims.
- Advise victims about how to find competent and caring civil attorneys.
- Always give moral support!



Relevant individuals who the victim may interface with in the civil legal system may include:

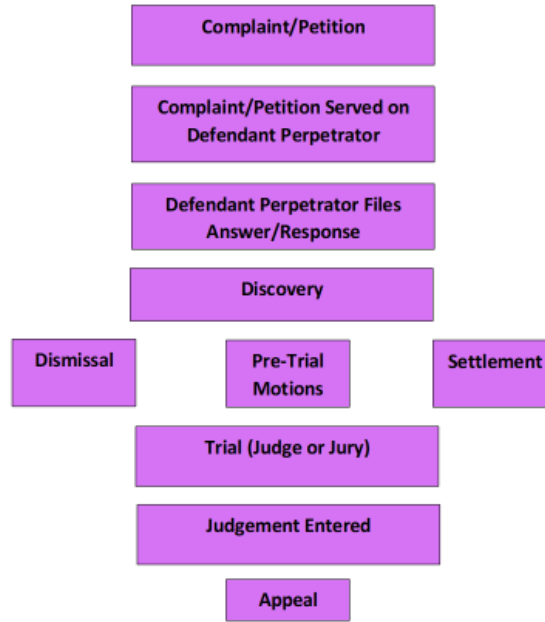
- Victim/plaintiff or petitioner's attorney and attorney's staff;
- Defendant's attorney;
- Tribal victim advocate;
- Social services child welfare (if children are involved);
- Guardian ad litem (if children are involved);
- Court clerk; and
- Judge (federal, state, and/or tribal).

It is important that the advocate identify these individuals and possibly work to build relationships with them in order to provide the most accurate information to the client.

Advocate Tip: Advocates should be aware of the trafficker's resources. Several civil laws would allow a victim to access those resources as damages or restitution for wrongs committed by the trafficker.⁸² However, this may impact victim safety and as such, should be pursued with caution.

⁸² Benefits.gov, *supra* note 70.

Civil Legal Advocacy



Civil Protection Orders

Protection orders may be known by a variety of names: injunctions, restraining orders, civil restraining order, or victim protection order. A protection order is a legal order issued by a court to protect the named person(s) from another person. Protection orders are used to protect victims of abuse, including sex trafficking victims. Generally, there are two types of protection orders available to victims of violence.

1. **Ex parte orders** can be issued without a full hearing if the victim can demonstrate immediate danger. *Ex parte* orders are available in most jurisdictions in emergency situations, but only last for a short period. The court can discuss the matter with one party to a dispute without the other party (i.e., the trafficker) being present.
2. **Permanent orders** can be issued after the defendant has been provided with notice and an opportunity to be heard. Although sometimes referred to as a permanent order, most protection orders will have an expiration date that is set forth by statutes in the issuing jurisdiction. Some can last up to several years, depending on the statute.

The definition of *protection order* under federal law 18 U.S.C. 2266(5):

1. *The term “protection order” includes any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil and criminal court whether obtained by filing and independent action or as a pendent elite 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*
2. *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.*

Advocate Tip: Consult the relevant tribal constitution and laws to determine the tribal definition of a protection order and the timelines for obtaining one. Those laws will determine the scope of tribal civil legal remedies that may be available.

Civil Protection Orders

- A protection order is a legal document that is available to victims of violence in most jurisdictions; a legal order issued by a court to protect the named person(s) from another person.
- Defined under federal law 18 U.S.C. 2266(5).



Civil Protection Orders

***Ex parte* orders** can be issued without a full hearing if the victim can demonstrate immediate danger. *Ex parte* orders are available in most jurisdictions in emergency situations, but only last for a short period.

Permanent orders can be issued after the defendant has been provided with notice and an opportunity to be heard. Most “permanent” protection orders will have an expiration date that is set forth by statutes in the issuing jurisdiction.



Enforcing Tribal Protection Orders

While the process of obtaining a protection order is similar across state and tribal courts, when it comes to enforcement, it can be very difficult to achieve full enforcement of a tribal protection order outside of Indian country. The issue of whether the tribe had jurisdiction to issue the civil protection order is often raised. Tribes should refer to and cite to tribal code provisions related to jurisdiction to issue civil protection orders. Additionally, as previously mentioned, Congress clarified in the VAWA 2013 that tribal courts have full civil jurisdiction over all parties in protection order cases *if* the protection order (1) arose in Indian country or (2) was issued within the authority of the Indian tribe. **These protection order provisions apply to every tribe, including those in Alaska.**⁸³

According to VAWA, a Native Nation must demonstrate:

1. The matter must have arisen on tribal (Indian) land
OR
2. The matter must be within the authority of the Indian tribe.

What constitutes “Indian country” or “Indian land” can be a complex issue for Native Nations, especially those without a contiguous land base.⁸⁴ An advocate must consult the relevant constitution and tribal laws to confirm the nation’s “Indian land” where tribal civil jurisdiction exists.

The VAWA statute also specifically mentions two examples of civil enforcement remedies available to address violations of tribal protection orders by any person (including non-Indians):

1. Tribal court enforcement for violations of protection orders through civil contempt or
2. By excluding the violator from tribal lands.

The statute also recognizes that there are “other appropriate mechanisms” potentially available to enforce violations of protection orders and these remedies might include monetary penalties, community service, restitution, forfeiture, and posting of a Peace Bond. For additional civil remedies available to enforce civil protection orders please see Hallie B. White, Kelly G. Stoner, & James G. White, *Creative Civil Remedies against Non-Indian Offenders in Indian Country*, 44 Tulsa L. Rev. 427 (2013).

⁸³ Please visit www.TribalProtectionOrder.org for more information and resources on this topic.

⁸⁴ See footnotes in Navigating Tribal Civil Jurisdiction.

Enforcing Tribal Protection Orders

Congress clarified in the Violence Against Women Act 2013 Reauthorization (VAWA) that tribal courts have full jurisdiction over all parties in protection order cases if the protection order arose in Indian country or otherwise within the authority of the Indian tribe.

These protection order provisions apply to every tribe, including those in Alaska.



Enforcing Tribal Protection Orders

For a Native Nation to issue and enforce protection orders, VAWA requires that:

1. The matter must have arisen on tribal land,
- OR**
2. The matter must be within the authority of the Indian tribe.

*VAWA provides for civil enforcement remedies against **any person** that violates a tribal protection order.



Full Faith and Credit

Moving across jurisdictional boundaries may pose enforcement issues for sex trafficking victims with tribal protection orders. So, it is critical that the advocate make every effort to ensure that the victim's protection order will be given "full faith and credit" in every jurisdiction.

"Full faith and credit" simply means that every jurisdiction should enforce the protection order as if it had been issued by a court within that jurisdiction. For example, under "full faith and credit" a protection order issued by a California court can be enforced in a Florida court. Tribal courts have historically been treated as "lesser" courts by state government, so it can be difficult to receive "full faith and credit" of a tribal protection order. Progress has been made, but depending on the state, local courts and law enforcement may be unwilling (or lack familiarity) when it comes to tribal protection orders. So, it's up to advocates to learn the federal law requiring "full faith and credit" of tribal protection orders and educate and advocate on behalf of their clients.

Under the VAWA, tribal protection orders must have specific language indicating that VAWA requirements have been met for the protection order to be enforceable in all jurisdictions. VAWA's full faith and credit language 18 U.S.C. 2265(a) states:

Any protection order 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 as if it were the order of the enforcing State, Indian tribe, or territory.

To meet VAWA's full faith and credit requirements found at 18 U.S.C. 2265(b), the following specific issues need to be met:

(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.*

Full Faith and Credit

The protection order is enforced in **every jurisdiction as the order is written.**



Full Faith and Credit 18 U.S.C. 2265(a)

“Any protection order 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 as if it were the order of the enforcing State, Indian tribe, or territory.”



Advocate Tip: Review your protection order forms to ensure that the VAWA full faith and credit language is specifically set out in your protection order form according to 18 U.S.C. 2265(b). This may assist outside jurisdictions in recognizing that VAWA's full faith and credit provisions have been established.

A tribal protection order form should contain the following language:

1. *"This court has jurisdiction over the parties and matter under the law of the Indian tribe"* (consider inserting the name of your tribe for the words "Indian tribe" and insert the tribal code statute number that allows the tribal court to issue protection orders).
2. *"Reasonable notice and opportunity to be heard has been given to the person against whom the order is sought sufficient to protect that person's right to due process."*

Advocate Tip: Look up any applicable tribal laws in your tribal codes and keep a hard copy of those laws handy along with the VAWA 2013 enforcement of protection order language and the full faith and credit language mentioned previously. Consider reviewing the enforcing jurisdiction's laws relating to protection orders and enforcement of protection orders. Many state laws contain language that requires the state to enforce protection orders that meet VAWA requirements (see www.TribalProtectionOrder.org/state-laws). Do not hesitate to respectfully hand a copy of the VAWA statutory provisions and statutes from the enforcing jurisdiction to relevant legal professionals involved in the sex trafficking victim's civil legal protection order case.

Protection Orders under VAWA 18 U.S.C. 2265(b)

(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.



Advocate's Tribal Protection Order Checklist

(For Cross-Jurisdictional Enforcement)

Congress has clarified that properly executed tribal protection orders are valid against *any person*, including non-Indians. And, because such tribal protection orders must receive full faith and credit, it is crucial that they are properly written to be enforceable in other jurisdictions for the safety of victims protected by the order. **In addition to the usual elements of a tribal protection order**, to ensure enforceability across jurisdictions, advocates should be very careful to make sure—by working with the presiding judge, court clerk, or prosecutor—that the following is also included in their client's tribal protection order:

1. The tribal court has clearly stated their civil jurisdiction with the language such as
 - a. "This court has jurisdiction over this matter under the law of the Indian tribe" pursuant to (insert the tribal code statute number that allows the tribal court to issue protection orders). (insert the name of your tribe for the words *Indian tribe*)

AND

 - b. "This court has jurisdiction over the parties (and then explain how with specific facts, such as: because the acts of domestic violence occurred on the Reservation; because the respondent was served on the Reservation; because the Respondent resides on the Reservation; because the Respondent is a member of the Nation or of another Nation; because the Petitioner is a member of the Nation or resides on the Reservation; because the Petitioner is a member of another Nation but resides on your Reservation; because the Petitioner lives in Tribal housing, is the intimate partner of a Tribal member or has children who are members of the Nation;)"
- AND
- c. "Reasonable notice and opportunity to be heard has been given to the person against whom the order is sought sufficient to protect that person's right to due process."
 - d. Jurisdiction is also proper under 25 U.S.C. 2265.
2. The issuing tribal court has asserted (in the protection order form) that
 - a. The matter has arisen on Indian (the Native nation's) land

OR

 - b. The matter is within the authority of the Indian tribe.
3. The protection order (or attached documentation) demonstrates that the defendant was served with notice.
4. The protection order (or attached documentation) demonstrates that the defendant had an opportunity to be heard or will have an opportunity within the time required by Nation's laws that will protect Respondent's due process rights (a court date and time).
5. The issuing tribal court includes "full faith and credit" language in clear compliance with VAWA. 18 U.S.C. 2265(b).

The checklist may increase the probability of enforcement in outside jurisdictions. Visit www.tribalprotectionorder.org for more information and resources related to tribal protection orders. For advocates that may be assisting an official drafting a protection order, a more comprehensive checklist is included as Appendix C of this resource.

Advocate's Tribal Protection Order Checklist

Advocates should ensure that Tribal Protection Orders are enforceable across jurisdictions. The *Advocate's Tribal Protection Order Checklist* in Unit 4 and the *Comprehensive Tribal Protection Order Checklist* in the Participant Workbook appendix serve as helpful reminders of what to include.

Each jurisdiction is different and best practices and laws change, so be sure to create and maintain a checklist that works for your clients and jurisdiction.



Tribal Protection Order Resources

www.TribalProtectionOrder.org



Unit 4: Additional Resources

1. Tribal Law and Policy Institute, “Tribal Sex Trafficking Resources,”

www.TribalTrafficking.org.

A website created by the Tribal Law and Policy Institute that contains the latest information on sex trafficking in Indian country. Including the [Sex Trafficking Victim Services Directory](#) and blog [Sex Trafficking in Indian Country Update](#).

2. Tribal Law and Policy Institute, *General Guide to Criminal Jurisdiction in Indian Country*, <http://www.tribal-institute.org/lists/jurisdiction.htm>.

A detailed tribal criminal jurisdiction chart that provides a general scope of criminal jurisdiction in Indian country among tribal, federal, and state jurisdictions. Please note that this general criminal jurisdiction chart does not apply to jurisdiction where Public Law 280, 18 U.S.C. 1162, or other relevant federal statutes have conferred jurisdiction upon the state.

3. Kathleen Gless and Lindsay Waldrop, “Human Trafficking and Indian Country,” presented at the 12th National Indian Nations Conference, December 10, 2010, <http://www.tribal-institute.org/2010/D13-LindsayWaldrupPP.pdf>.

A presentation sponsored by the U.S. Department of Justice, OVC at the 12th National Indian Nations Conference. This presentation provides a general overview of human trafficking and current efforts by OVC and the Bureau of Justice Assistance. Also contains recommendations from an August 2010 OVC focus group on Human Trafficking of American Indian and Alaska Native Women and Children.

4. Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCAL L. Rev. 1564, 1631 (2016).

This article offers the first comprehensive assessment of the Tribal Law and Order Act and the reauthorization of the Violence Against Women Act, respectively, to show how they relate to one another on the ground and the implications for tribal sovereignty and self-determination based on data compiled for the first time as well as extensive secondary sources.

5. Administration for Children and Families, Administration for Native Americans, “SOAR for Native Communities now available,” (December 18, 2019), accessed January 9, 2020 <https://www.acf.hhs.gov/ana/news/soar-for-native-communities-eblast>.

Through a public health approach, the SOAR for Native Communities online module helps those serving indigenous populations to better understand human trafficking and its impact on Native communities. The training includes resources relevant to indigenous populations and supports professionals in building trauma-informed and culturally responsive interventions to human trafficking in American Indian, Alaska Native, Native Hawaiian, and Pacific Islander communities.

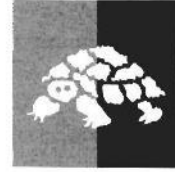
Appendix

Appendix A: Tribal Legal Studies Excerpt (Chapter 12)

Justin B. Richland and Sarah Deer, “Tribal Criminal Jurisdiction,” in *Introduction to Tribal Legal Studies 3rd Ed.* (London: Rowman & Littlefield, 2015), 179–199.

<https://rowman.com/ISBN/9781442232242/Introduction-to-Tribal-Legal-Studies-Third-Edition>

CHAPTER 12



Tribal Criminal Jurisdiction

THE LAST CHAPTER reviewed the responses of three different American Indian legal systems to certain kinds of criminal offenses and how those responses differed from the Anglo-American legal system. This chapter will review the limitations that have been imposed on the criminal jurisdiction of Indian tribes and nations during the history of their relations with the U.S. federal government. Exciting changes to tribal criminal jurisdiction have been developing in the last decade. This chapter will explore one of the most important changes (the Violence Against Women Act). Important new changes to tribal criminal jurisdiction are also discussed in depth in chapter 19 (Indian Civil Rights Act).

Tribal criminal jurisdiction refers to the power and authority that American Indian and Alaska Native tribal courts have to prosecute certain kinds of persons, committing certain kinds of crimes, in certain locations, and, if these people are found guilty, to punish them. Generally speaking, this jurisdiction has been recognized as part of the inherent sovereign power that tribes had to regulate the people and affairs in their territory, as independent nations prior to their domination by the United States.

As we explained earlier, criminal jurisdiction is a very important element of the right to self-governance, as it gives tribes the power to protect their people, culture, and nation. If a tribe has jurisdiction over a criminal case, this ensures that its laws, based on values and beliefs, will be applied to the actions of a wrongdoer. This is especially important given the differences between tribal criminal justice and Western criminal justice discussed in previous chapters.

180 CHAPTER 12

Over the history of tribal relations with the United States, however, limitations have been placed on the criminal jurisdiction that tribes and their courts can exercise. And these limits have been justified as arising from the loss of certain inherent sovereign power that tribes suffered by virtue of being conquered by the United States. It is a combination of each tribe's unique legal heritage, the federal limits imposed on that heritage, and how tribes have dealt with those limits that shape the contemporary face of tribal criminal jurisdiction. As a result, criminal jurisdiction in Indian country can be a confusing maze of rules and restrictions.

The purposes of this chapter are to (1) provide an overview of the limitations placed on the exercise of tribal criminal jurisdiction; (2) address mechanisms or methods for preserving tribes' criminal jurisdiction; (3) explain some recent restoration of tribal authority; and (4) examine how tribal courts have addressed questions regarding jurisdiction.

“Indian Country” as Defined in Federal Law for the Purposes of Criminal Jurisdiction (18 U.S.C. 1151)

In order to make laws that affect tribes, the U.S. government has defined what land areas these laws will impact. The U.S. government defines this area as “Indian Country.” The definition of Indian country is in 18 U.S.C. 1151:

- (a) All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
- (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and
- (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

However, the U.S. Supreme Court, in the case *Alaska v. Native Village of Venetie Tribal Government, et al.* (522 U.S. 520 [1998]) gave a narrow interpretation to the term “dependent Indian communities” as used in the 18 U.S.C. 1151 definition of “Indian Country.” In that case, the court explained that the term refers to a limited category of Indian lands that are neither reservations nor allotments and that satisfy two requirements: (1) the lands must have been set aside by the United States for the use of the Indians as Indian lands; and (2) the lands must be under federal superintendence. The court then concluded that the lands at issue in that case did not constitute “Indian

Country” over which the Native Village of Venetie Tribal Government could assert criminal jurisdiction. Those lands had once been part of the Neets’aii Gwich’in Indians’ reservation surrounding the Village of Venetie, but after that reservation was extinguished by the Alaska Native Claims Settlement Act of 1971, the Native Corporation created by ANCSA to govern the region took title to the land, but not in a way, the court said, that maintained its status as “Indian Country” (*Alaska v. Native Village of Venetie Tribal Government, et al.* 522 U.S. 520 [1998]). The effect of that decision was to disqualify the vast majority of lands held by Alaska Native Corporations as “Indian Country” over which Native governments could exercise criminal jurisdiction. This was just one of a number of significant restrictions that the U.S. government has imposed on tribal criminal jurisdiction over the years, restrictions that have, for the most part, worsened the problems of crime in tribal jurisdictions. Only recently has Congress acknowledged these problems and the role that restrictions on tribal criminal jurisdiction has played in exacerbating them. Indeed, as we will discuss below, for the first time in its history, the U.S. Congress has passed laws that have eased the restrictions on the kinds of punishments that tribal jurisdictions can impose for criminal offenses in their territory, as well as easing restrictions on tribal criminal jurisdiction over non-Indians committing certain kinds of crimes arising in Indian country.

Federal Authority over Crimes between Indians and Non-Indians: General Crimes Act (18 U.S.C. 1152)

In the early years of the republic, federal treaties and statutes regarding tribal criminal jurisdiction primarily concerned the prosecution of offenses arising between Indians and non-Indians. In much of this early legislation, such “interracial” crimes became the jurisdiction of the federal courts.¹

The Indian Country Crime Act—more commonly known as the General Crimes Act, 18 U.S.C. 1152—gave federal courts criminal jurisdiction over interracial crimes committed in Indian country. This law, initially enacted in 1817, provides as follows:

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations,

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the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Under this law, non-Indians committing crimes against Indians in Indian country were subject to federal prosecution. Cases in which Indians committed crimes against non-Indians in Indian country were, by this law, still under the subject-matter jurisdiction of the tribe if tribal law handled them first. Tribes continued to have jurisdiction over all crimes committed by Indians in their territory, regardless of the victim. This was true because tribal criminal jurisdiction was seen as part of a tribe's inherent sovereign power to maintain social order among their members within their territorial boundaries.

**Federal Jurisdiction over Indian Defendants:
Major Crimes Act (18 U.S.C. 1153)**

The Major Crimes Act was passed by the U.S. Congress in 1885 as a response to *Ex parte Crow Dog*, 109 U.S. 556 (1883). As discussed in the previous chapter, *Crow Dog* was an important case concerning tribal criminal jurisdiction. The U.S. Supreme Court held that, in the absence of federal statutes limiting tribal criminal jurisdiction, tribes possessed complete, inherent, and exclusive criminal jurisdiction in Indian country. *Ex parte Crow Dog* interprets the General Crimes Act as excluding crimes between two Indians and thereby upholds exclusive tribal criminal jurisdiction over crimes between Indian defendants and Indian victims.

The Major Crimes Act grants federal criminal jurisdiction over Indians who commit any of the designated offenses (felony crimes like homicide and rape). The Major Crimes Act grants federal courts jurisdiction instead of the states when the listed offenses are committed by an Indian against the person or property of another in Indian country. But the federal government has concurrent jurisdiction with tribal courts—the Major Crimes Act does not strip tribal courts of their jurisdiction to handle the same offenses. Many tribal courts do not pursue the Major Crimes Act's offenses, but that is often due to the misconception that they do not have the authority, the belief that the federal courts will handle the offenses, or lack of resources. But as tribes revise their tribal codes, more are incorporating and prosecuting these major crimes.

As set forth below from Russell's account of the *Crow Dog* case, the Supreme Court's decision, along with a misrepresentation of tribal society as "lawless," led to the passage of the Major Crimes Act of 1885. This act was the first assertion of federal criminal jurisdiction over crimes committed by

Indians against Indians in Indian country, and it constitutes a major inroad into the exclusive criminal jurisdiction that tribes previously had.

MAKING PEACE WITH CROW DOG'S GHOST: RACIALIZED PROSECUTION IN FEDERAL INDIAN LAW

*Steve Russell**

Crow Dog killed Spotted Tail on the Great Sioux Reservation in 1881. Both parties were Brule. While Crow Dog had a self-defense claim to litigate, there was never any doubt that he in fact committed the homicide. He was called to account within the Brule justice system and ordered to make substantial payments to Spotted Tail's family. Since Crow Dog apparently posed no ongoing danger to the peace of the reservation, that would have been the end of the matter.

Public opinion was not disposed to let that be the end of the matter because the media of the time portrayed Spotted Tail as an assimilationist Indian and Crow Dog as a rebel. Indians might call the differences between the two men tactical rather than strategic, but the public perception was otherwise. So it was that Crow Dog was indicted in a U.S. territorial court, tried, convicted, and sentenced to hang by the neck until dead for the homicide of Spotted Tail.

Crow Dog's writ of habeas corpus arrived in the Supreme Court as a case of first impression: do United States courts have inherent jurisdiction over a crime by one Indian against another on Indian land? The Court held that the United States has no such jurisdiction, and Crow Dog escaped the noose. To hold otherwise, said the Court, would be to try Indians:

Not by their peer, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature, one which measures the red man's revenge by the white man's morality.

* Steve Russell, *Making Peace with Crow Dog's Ghost: Racialized Prosecution in Federal Indian Law*, 21 *Wicazo Sa Review* 61 (2006).

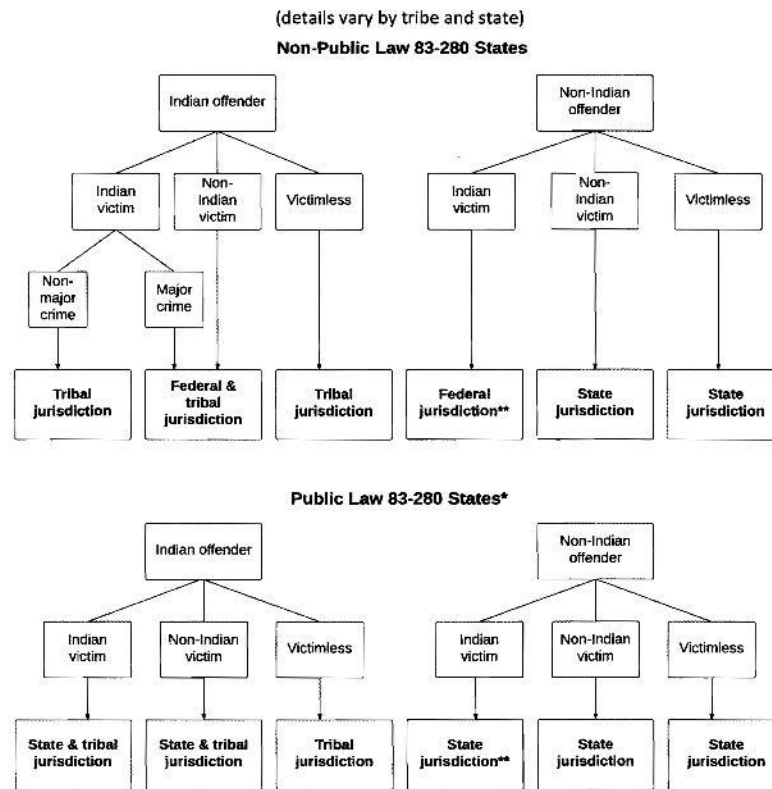
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One wonders whether the Court understood that it was “the red man’s revenge” that preserved Crow Dog’s life while “the white man’s morality” wanted to kill him, but the law spoken seems plainly correct. If Indian nations were not separate sovereigns in the sense of criminal law, then it is unclear how they could have the sovereignty to cede to the United States the land it claimed then and claims now under numerous and often conflicting cession treaties. The blind paternalism of the opinion is an artifact of the times, but the holding is a plain victory for tribal justice, albeit coupled with a statement that Congress could extend federal jurisdiction upon Indian land if it chose.

Congress accepted the Court’s invitation with alacrity in the Major Crimes Act. Within a month of the act’s passage in 1885, Kagama killed lyouse in the Hoopa Valley Reservation and Indian sovereignty was once more put to the test. The paternalism of *Crow Dog* survived in *U.S. v. Kagama*; the dominance of Indian sovereignty did not. Leaving aside that the *Crow Dog* opinion practically invited the Major Crimes Act, it seems clear in hindsight that the United States had to have authority over the persons of Indians in order effectively to assert authority over Indian land not ceded by treaty and therefore, from the Indian point of view, reserved forever for exclusive Indian use.

**Intrusion of State Jurisdiction in Indian Country:
Public Law 280 (18 U.S.C. 1162)**

To make matters of tribal criminal jurisdiction even more confusing, in 1953, Congress passed Public Law 280, legislation that transferred to certain named states the federal jurisdiction over crimes occurring in the Indian country located within their borders (passed without tribal consent). Public Law 280 did not take away powers from tribes. But this legislation did add yet another layer of complexity to the picture of criminal jurisdiction—one where the question of whether a tribe, a state, or the federal government has the power to prosecute a crime depends on who committed the crime (Indian or non-Indian) and where it was committed (Indian country or not, and in what state). The impact of this statute (and others like it) varies from state to state and from tribe to tribe. Public Law 280 experts Professor Duane Champagne and Professor Carole Goldberg have noted that “[i]f the officials maintaining the policing and justice systems are not accountable to the tribal government and community . . . disparities will lead to divergent priorities, poor institutional performance, and perceived illegitimacy of the policing and justice systems.”² In short, Public

FIGURE 12.1. General Summary of Criminal Jurisdiction on Indian Lands

* Under the Tribal Law and Order Act of 2010, tribes can opt for added concurrent Federal jurisdiction, with Federal consent. Neither this tribe-by-tribe issue nor the various configurations of "Optional 280" status are shown in this chart.

** Under the Violence Against Women Act Reauthorization of 2013 (VAWA), after 2015, tribes may exercise Special Domestic Violence Jurisdiction with the Federal government and with States for VAWA-defined domestic violence crimes.

Law 280 has often caused more problems than it has solved, and today's tribes affected by PL280 have continued to struggle with establishing independent court systems.

Upholding Tribal Sovereignty: *United States v. Wheeler*, 435 U.S. 313 (1978)

The U.S. Constitution protects individuals against double jeopardy, which prohibits a citizen of the U.S. from being prosecuted twice for the same crime

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by the same government. In *Wheeler*, the defendant was prosecuted and convicted in the Navajo Nation's tribal courts and then in federal court for the same crime. The defendant claimed the later federal prosecution violated his right against double jeopardy. The U.S. Supreme Court ruled that the source of the power to punish offenders is an inherent part of tribal sovereignty and not a grant of federal power. Thus, because the two prosecutions were by separate sovereigns, the Navajo Nation and the United States, the subsequent federal prosecution did not violate the defendant's right against double jeopardy.

**No Tribal Criminal Jurisdiction over Non-Indians:
Oliphant v. Suquamish Indian Tribe,
 435 U.S. 191 (1978)**

As far back as original contact with Europeans, tribal governments had exercised criminal jurisdiction over non-Indians, especially those that did harm to Native people. However, the U.S. Supreme Court, in *Oliphant v. Suquamish*, 435 U.S. 191 (1978) put a temporary end to the ability of tribes to exercise criminal jurisdiction over non-Indians. While some sovereignty has been restored in cases of domestic violence (as of 2015—discussed below), it is important to understand the ramifications of the *Oliphant* case, since it still applies to other forms of crimes committed by non-Indians.

Oliphant was a non-Indian who lived on the reservation and was charged with a crime in the Suquamish Tribal Court. He challenged the tribe's criminal jurisdiction over him, arguing that the tribe did not have criminal jurisdiction over non-Indians because this power had been given up to the federal government. The U.S. Supreme Court ruled that tribes do not have criminal jurisdiction over nonmembers, which was a devastating decision from the perspective of tribal governments. The Court reasoned that attempts to exercise criminal jurisdiction over nonmembers was a relatively new phenomenon and that few tribes had anything resembling a court until recently, and thus criminal jurisdiction over non-Indians was not a power practiced historically. The Court also stated that, according to congressional history, although Congress never expressly removed criminal jurisdiction over non-Indians, it was implicit in its legislative actions. According to the Supreme Court, any criminal jurisdiction over nonmembers that tribes exercised in the past was lost by submitting to the overriding sovereignty of the United States. Congress has responded to *Oliphant* in two major ways: the "Duro-fix" and the 2013 Violence Against Women Act reauthorization.

**Criminal Jurisdiction over Nonmember Indians:
Duro v. Reina, 495 U.S. 676 (1990) and
 Congressional *Duro-Fix***

Only six years after the *Oliphant* decision, the ability of tribal courts to exercise criminal jurisdiction over nonmember Indians was challenged. *Duro* was an Indian, but not an enrolled member of Salt River Pima-Maricopa Indian Community. At a hearing in 1984 before the Salt River Tribal Court, *Duro* challenged the tribal court's jurisdiction over his misdemeanor prosecution. The tribal court ruled that *Oliphant* concerned criminal jurisdiction over non-Indians, not nonmember Indians, and thus the Court had jurisdiction over the defendant, but *Duro* appealed this decision through the federal courts. Six years later, the U.S. Supreme Court, in *Duro v. Reina*, 495 U.S. 676 (1990), extended the logic of *Oliphant* to find that, because of their domination by the United States, tribes also no longer possess criminal jurisdiction over offenses committed by nonmember Indians even when such crimes are committed in Indian country. The Court ruled that the power to prosecute nonmember Indians was a power surrendered by tribes in their submission to the overriding sovereignty of the United States. Thus, the tribes had no criminal jurisdiction over nonmember Indians. Or, put another way, Tribes had criminal jurisdiction *only* over their own enrolled members.

The *Duro* decision, however, prompted Congress to restore tribal criminal jurisdiction over nonmember Indians by amending the language defining the "powers of self government" in the Indian Civil Rights Act of 1968 (25 U.S.C. 1301) as meaning "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." These Indian Civil Rights Act amendments are commonly referred to as the "congressional *Duro-fix*." This *Duro-fix* was initially enacted by Congress on a temporary basis in 1990 (Public Law 101-511), but then made permanent in 1991 (Public Law 102-137). The amendments recognized that tribes have jurisdiction over nonmember Indians and that this power over nonmember Indians was inherent and never relinquished by tribes.

Nonmember Indians, however, challenged the congressional *Duro-fix*. They contended that it was a delegation of federal authority rather than recognition of inherent tribal sovereign authority (despite the clear congressional intent). If the federal courts were to hold that the congressional *Duro-fix* was a delegation of federal authority, then it would be a violation of double jeopardy (being prosecuted for the same crime twice) for nonmember Indian defendants to be charged in both federal and tribal court. If it were to be held that the tribe is prosecuting the nonmember Indian through delegated

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federal authority, then the tribe would not be a separate sovereign. Consequently, prosecution of the nonmember Indian in both federal and state court would have been prohibited. This would have greatly limited the ability of tribal courts to exercise their inherent sovereign authority through the ability to take immediate action when a criminal offense occurs. Tribal courts would have been forced to either (1) hold off on prosecution of nonmember Indians until after the federal government made a prosecutorial decision or (2) commence a tribal prosecution, which would have prohibited any later federal prosecution.

In an affirmation of the tribal position in the U.S. Supreme Court, the Court ruled 7 to 2 in *U.S. v. Lara*, 541 U.S. 193 (2004), that double jeopardy does *not* apply since the tribe acted in its capacity as a sovereign authority when it prosecuted the nonmember Indian. In effect, the Court held that the congressional *Duro*-fix was recognition of inherent tribal sovereign authority rather than a delegation of federal authority. It should be noted, however, that the decision did not necessarily address all possible challenges to the tribal criminal prosecution of nonmember Indians. It is likely, therefore, that nonmember Indians will continue to challenge tribal criminal jurisdiction over them.

**Easing Restrictions on Tribal Criminal Jurisdiction:
Violence Against Women Reauthorization Act of 2013,
Title IX: Safety for Indian Women, a Partial *Oliphant*-Fix**

Native women experience some of the highest levels of domestic violence in the world. Statistics also show that most Native women report that their abusers are non-Native. This data seems to be caused by at least two factors. First, Native women have a very high rate of “interracial” marriage—most Native women are married to non-Indians. But many experts believe non-Indians are able to commit more crimes against Native women because of the *Oliphant* decision, which stripped the tribes of criminal authority in these cases. Tribal sovereignty advocates began speaking out on this crisis in the late 1990s. Grassroots efforts to lobby Congress for a change in the law picked up steam throughout the first twelve years of the twenty-first century. Congress finally took action in the 2013 reauthorization of the Violence Against Women Act. Like the *Duro*-fix, the VAWA amendments restored tribal authority that had been taken by *Oliphant*. In VAWA, Congress restored inherent criminal jurisdiction over non-Indians who commit acts of domestic violence against a Native woman in Indian country. This is often called a “partial *Oliphant*-fix” because it reverses the Supreme Court’s judgment—but only for crimes committed by a spouse, ex-spouse, or dating

partner (intimate partner relationships). Five tribes were selected by the U.S. Department of Justice to begin exercising this jurisdiction in 2014. However, as of 2015, the VAWA amendments now apply to all tribal governments. This means that tribal governments now have the option of exercising jurisdiction over non-Indians in cases of domestic violence, despite *Oliphant*. In order to exercise the restored authority, tribes must meet certain legal requirements designed to assure that the defendants will have essentially the same constitutional rights they have in state or federal court. Details about the obligations of jurisdiction are discussed in detail in chapter 19.

The Criminal Jurisdiction Maze

The jurisdictional maze set forth by the above legislation and U.S. Supreme Court cases is summarized in figure 12.1. The confusing, piecemeal approach to jurisdiction is typically criticized as being too complicated to really allow tribes adequate control over criminal jurisdiction.

Tribal Criminal Jurisdiction Today: Working within the Limits

The standing federal law is clear. Tribal courts possess very limited criminal jurisdiction over non-Indians who commit crimes within tribal borders. Many reservations have considerable non-Indian resident and tourist populations, so at first glance, aside from the advances made in the tribal prosecution of domestic violence crimes committed by non-Indians in their jurisdiction, such a limitation would seem to severely hamper the inherent power of tribal nations to maintain peace and order on their land. While this remains a good argument against the *Oliphant* decision, and for increasing the relaxation of restrictions against tribal criminal jurisdiction over non-Indians, it is also the case that tribal nations have found some success in addressing the problems caused by these restrictions by coming up with creative legal formulas for dealing with the problems caused by non-Indians in ways that do not involve their criminal jurisdiction. In this section, we will consider some of those alternatives, review some tribal legal codes in which these alternatives have been enumerated, and read some tribal cases that consider a tribe's criminal jurisdiction.

These excerpts reveal the ways in which tribal jurisdiction is being asserted by different tribes today. As you read these excerpts, think about how these tribes have tried to assert their power to regulate offensive behavior on their reservation in light of the federal limits placed on their criminal jurisdiction.

TRIBAL EFFORTS TO ADDRESS PROBLEMS PRESENTED BY THE LACK OF TRIBAL CRIMINAL JURISDICTION OVER NON-INDIANS

*Jerry Gardner**

The *Oliphant* decision has presented substantial problems for Indian Nations and tribal court systems in maintaining law and order in their communities and in making it clear to the non-Indians who live in Indian country or who travel to Indian country that they are not above the law. The lack of criminal jurisdiction over non-Indians was especially problematic for the many Native women who were victims of domestic and sexual violence by non-Indians. In response to this problem, Congress passed the Violence Against Women Reauthorization Act of 2013 (VAWA) which recognized the inherent sovereignty of Native nations to criminally prosecute certain non-Indians who commit specific crimes related to domestic violence in Indian country. As of 2015, this Special Domestic Violence Criminal Jurisdiction (SDVCJ) is available to all Native nations whose courts comply with the Tribal Law and Order Act of 2010 (TLOA) and other VAWA provisions designed to protect Due Process rights of non-Indian defendants.

Because most Native nations are not compliant with TLOA, and criminal jurisdiction under VAWA is quite limited, *Oliphant* is still an obstacle to justice in Indian country. The following is a partial list of some of the methods that tribes have developed and attempted to implement in order to address the problems presented by the lack of criminal jurisdiction over non-Indians.

1. *Police Power to Arrest and Hold for Another Jurisdiction:* Although tribal courts do not have the power to criminally prosecute non-Indians, Indian Nations still have the inherent sovereign authority—or policing power—to stop and detain all persons (including non-Indians) suspected of criminal activity. This power includes the authority to hold that person for state or federal agencies that do have the power to criminally prosecute them and to take that person to the jurisdiction or reservation boundaries.

* Jerry Gardner, *Tribal Efforts to Address Problems Presented by the Lack of Tribal Criminal Jurisdiction over Non-Indians* (1997, updated 2015) (Tribal Law and Policy Institute, used with permission).

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2. *Exercise Power of Exclusion or Banishment:* Indian Nations have inherent sovereign authority to exclude (or banish) persons (including non-Indians).
3. *Exercise Jurisdiction through Consent or Stipulation of Non-Indians:* Although it is subject to legal challenge, some tribes have continued to exercise criminal jurisdiction over non-Indians through the stipulation or consent of the non-Indians.
4. *Decriminalize Certain Actions (or Create Infractions System):* Many Indian Nations have changed their tribal codes to make certain minor offenses (such as traffic offenses) into civil actions (or infractions) rather than criminal actions. This is accomplished by removing the possibility of imprisonment (and other criminal language and provisions) from the tribal code provisions for these offenses.
5. *Prosecute through Civil Action:* Many actions (such as child abuse) can be handled as a criminal and/or civil action. Consequently, tribes handle the offense as a civil action when a non-Indian is involved.
6. *Use Civil Forfeiture Laws:* Many Indian Nations have expanded the use of civil forfeiture laws to handle offenses involving non-Indians. For example, a non-Indian who is stopped for an alleged driving while intoxicated offense can have their vehicle impounded and be required to appear at a civil forfeiture hearing in order to recover the vehicle.
7. *Use Civil Contempt Power:* Tribal courts still maintain the power to punish—through the court's contempt power—anyone (including non-Indians) who violates court orders.

A PRIMER ON TRIBAL COURT CONTEMPT POWER

Matthew L. M. Fletcher*

Defining “Civil Contempt” in General

Professors Shoben and Tabb offered a “model case” exemplifying coercive civil contempt:

* Matthew L. M. Fletcher, *A Primer on Tribal Court Contempt Power* (2008) (<http://ssrn.com/abstract=1134936>).

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A court determines in a divorce proceeding that certain out-of-state property held in the husband's name should be deeded to the wife. The husband refuses to obey the order directing him to make the conveyance.

The court may jail the husband until he complies. The imprisonment is not punishment for past disobedience; it is to compel an act in the present for the benefit of the wife. The husband has the "jail keys in his pocket" because he will be out of jail as soon as he makes the conveyance. This imprisonment is coercive civil contempt.

The distinction between criminal contempt and coercive civil contempt is a critical one for tribal courts. Tribal courts have no criminal jurisdiction over non-Indians, while they may have civil jurisdiction over non-Indians. As such, in theory, tribal court would not be able to issue criminal contempt penalties to non-Indians, but would be able to issue coercive civil contempt penalties to non-Indians. According to the Hopi Tribe appellate court:

It is important to determine whether an instance of contempt of court is either civil or criminal for the following reasons: (1) according to federal law, there is no right to a jury trial for civil contempt; (2) civil contempt judgments are not appealable if they are considered non-final judgments; (3) a non-Indian can be found in civil contempt, but it is questionable whether a non-Indian can be found in criminal contempt; . . . (4) the burden of proof differs, in accordance with the different burden of proof for any civil or criminal offense.

What is the difference? It is no simple feat to find a clear distinction. The United States Supreme Court has not provided very clear guidance on this question. According to Justice Scalia:

At common law, contempts were divided into criminal contempts, in which a litigant was punished for an affront to the court by a fixed fine or period of incarceration; and civil contempts, in which an uncooperative litigant was incarcerated (and, in later cases, fined) until he complied with a specific order of the court. Incarceration until compliance was a distinctive sanction, and sheds light upon the nature of the decrees enforced by civil contempt. That sanction makes sense only if the order requires performance of an identifiable act (or perhaps cessation of continuing performance of an identifiable act). A general prohibition for the future does not lend itself to enforce-

ment through conditional incarceration, since no single act (or the cessation of no single act) can demonstrate compliance and justify release. One court has expressed the difference between criminal and civil contempts as follows: "Punishment in criminal contempt cannot undo or remedy the thing which has been done, but in civil contempt punishment remedies the disobedience."

The difference between criminal contempt and civil contempt lies in the purpose for which the contempt order is issued. The Oregon Supreme Court offered a succinct statement for purposes of distinguishing the two:

Contempts may be civil or criminal. In a civil contempt the contemnor violates a decree or order of the court made for the benefit of an adverse party litigant. In a criminal contempt a court's process is violated or disobeyed and disrespect of the court is manifested.

The Hopi Appellate Court provided a definition of its civil contempt power in a recent case:

[T]he court's civil contempt power is not considered statute based. Rather, courts have generally held that "[a] court's civil contempt power rests in its inherent limited authority to enforce compliance with court orders and ensure judicial proceedings are conducted in an orderly manner." Thus, regardless of whether a statute authorizes a court to use civil contempt, it is to the court's discretion whether such usage is appropriate. Further, unlike a criminal contempt order, a civil contempt order has no statutory limitation as to the extent of punishment issued by the court. Courts have generally held that imprisonment until the contemnor complies with the court's order is a permissible form of civil sanction for contempt.

The Hopi court also noted that there are limits to the court's civil contempt power, focusing on the purposes to which the incarceration penalty has been put:

The court's use of civil contempt has limits. Though it is generally held that courts have the power to issue a civil contempt order that includes an indefinite jail term, such an order is permissible only as long as it is reasonable in coercing the disobedient party to comply. Thus, some courts have placed limitations on such an indefinite order. It is generally held that where the civil contempt order is unable

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to force compliance or the disobeying party has expressed a clear intention not to comply with the court order, then there is nothing to coerce and thus the sanction is actually criminal.

The Hopi court in that case held that the incarceration resulting from the lower court's civil contempt citation was "unable to coerce compliance" from the defendant, and then held that the civil contempt had moved into the territory of criminal contempt, a tribal code-based tribal court authority.

The Fort Peck Tribes Court of Appeals offered this analysis:

We note at the outset that the first tier of the analysis, distinguishing between criminal and civil contempt, is no mere formality. In general terms, civil contempt is coercive in nature, forcing action (e.g. compelling a witness to testify; compelling disclosure of some kind) or it may be remedial and thus used to vindicate or protect the rights of a litigant. Civil contempt does not exist to punish the contemnor or to vindicate the court's integrity; it exists as a remedial sanction to be used to obtain compliance with the court's order or to compensate for damages sustained as a result of noncompliance.

On the other hand, "criminal contempt is a crime in the ordinary sense" and "criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings.

EASTERN BAND OF CHEROKEE INDIANS V. AMUFLO TORRES

*Eastern Band of Cherokee Indians,
Cherokee Supreme Court**

All parties stipulated that defendant Torres is a citizen of the republic of Mexico (United Mexican States).

* Eastern Band of Cherokee Indians, Cherokee Supreme Court, *Eastern Band of Cherokee Indians v. Amuflo Torres*, 4 Cherokee Reporter 9 (2005).

Defendant Torres was charged with driving while impaired and failure to stop for a stop sign on September 10, 2003. While released on bond for these charges, defendant on September 21, 2003 was charged with driving while impaired and driving while license revoked. Again, on pre-trial release, defendant was charged with second-degree child abuse of an enrolled member on November 13, 2003. During this time period, defendant was living at 4031 Wrights Creek Road (the residence of an enrolled member), which this Court takes judicial notice is located in Indian country within the Qualla Boundary (the reservation of the Eastern Band of Cherokee Indians in North Carolina). . . .

We now turn to the issue of jurisdiction.

This is a case of first impression. The issue for decision is: Does the Cherokee Court, an independent tribal court of the Eastern Band of Cherokee Indians, a federally recognized Indian tribe, have jurisdiction to try and to punish the defendant Torres, a citizen of Mexico who is not an Indian, for violating the criminal laws of the Eastern Band of Cherokee Indians? We answer the issue, yes.

Our research does not disclose any authority directly addressing this issue. We consider that the better reasoned analysis requires and supports the conclusion that the Cherokee Court does have criminal jurisdiction over non-Indians who are not citizens of the United States, i.e. aliens.

In reviewing issues of jurisdiction the Court is guided by Chapter 7, Section 2 (2000) of the Cherokee Code. Section 2 (c) states: "The Judicial Branch shall not have jurisdiction over matters in which the exercise of jurisdiction has been specifically prohibited by a binding decision of the United States Supreme Court, the United States Court of Appeals for the Fourth Circuit or by an Act of Congress."

Our research does not disclose any Act of Congress specifically prohibiting the exercise of criminal jurisdiction by Indian tribal Courts over non-Indians who are not citizens of the United States. Nor do we find any such decision of the United States Court of Appeals for the Fourth Circuit.

The Supreme Court of the United States has addressed the criminal jurisdiction of Indian Courts in four opinions during the last twenty-five years. The Court has reviewed jurisdiction over non-Indian citizens of the United States, *Oliphant v. Suquamish Tribe*; jurisdiction over member Indians, *United States v. Wheeler*; and jurisdiction over non-member Indians, *Duro v. Reina*, *United States v. Lara*. Each of these cases specifically involved the rights of citizens of the United States. Throughout its extensive history of jurisprudence regarding Indian tribal sovereignty, the Supreme Court has never considered the powers and status of the Tribes with regard to non-citizens of the United States. The Cherokee Court,

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drawing upon history and references from precedent concluded that the Eastern Band of Cherokee Indians maintained the “inherent authority” to prosecute non-citizens of the United States. . . .

The Court in *United States v. Lara, supra*, re-affirms many of the principles supporting our decision in *Torres*, e.g., “The common law conception of crime as an offense against the sovereignty of the government”; “Indian tribes are unique aggregations possessing attributions of sovereignty over both their members and their territory.” In several places the Court in *Lara* again refers to the interest of the United States in protecting citizens of the United States: “whether the . . . Due Process or Equal Protection Clauses prohibit tribes from prosecuting a non-member citizen of the United States”; “non-member Indian citizens of the United States . . .”; “We hesitate to adopt a view of tribal sovereignty that would single out another group of citizens, non-member Indians, for trial by political bodies that do not include them.” Kennedy, J. concurring, states: “*Lara*, after all, is a citizen of the United States. To hold that Congress can subject him, within our domestic boundaries, to sovereignty outside the basic structure of the Constitution is a serious step. . . . The National Government seeks to subject a citizen to the criminal jurisdiction of a third entity . . . subject American citizens to the authority of an extra-constitutional sovereign. . . .” *Lara*, 541 U.S. 193 at 212. Justice Souter, in dissent, cites *Oliphant* for its holding that “Indian tribes therefore necessarily give up this power to try non-Indian citizens of the United States. . . .”

Therefore, we hold that *Oliphant* does not control the *Torres* appeal. *Oliphant* concerns Indian tribal court jurisdiction of criminal cases against non-Indian citizens of the United States. *Torres* concerns Indian tribal court jurisdiction of criminal cases against non-Indian aliens of the United States.

We hold that the sovereign power of inherent jurisdiction of the Eastern Band of Cherokee Indians to try and punish non-Indian aliens of the United States has not been expressly terminated by Treaty, Act of Congress, or specifically prohibited by a binding decision of the Supreme Court of the United States or the United States Court of Appeals for the Fourth Circuit. . . .

The facts of this case demonstrate the necessity of preserving the criminal jurisdiction of the Eastern Band of Cherokee Indians over non-Indian aliens of the United States in order to protect the safety, health, economic development, liberty and the general welfare of the Eastern Band of Cherokee Indians and all other people who live, work or visit on Tribal lands. The records of the Cherokee Court disclose that aliens of the United States are seeking and receiving the protection of the Cherokee

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Court in criminal cases arising on the Qualla Boundary against enrolled members of the Eastern Band of Cherokee Indians. To allow criminal jurisdiction when an alien is the victim and deny jurisdiction when an alien is the perpetrator, would indeed be inconsistent with the status of the Eastern Band of Cherokee Indians as a dependant sovereign nation.

Questions

1. The Supreme Court's decision in *Ex parte Crow Dog* can in some ways be read as a victory for the tribe and a recognition of its inherent criminal jurisdiction over its own members. But in other ways, the reasoning behind the Supreme Court's decision furthers the myth of the "lawless" Indian and can be seen as giving Congress a reason for acting to limit tribal criminal jurisdiction, as it did with the Major Crimes Act. Explain.
2. According to Russell, what were the "paternalistic" beliefs about Indians and federal law that were behind the passage of the Major Crimes Act? How was this a shift in U.S. federal policy toward Indians and tribal sovereignty?
3. Of the alternatives discussed in Gardner, which do you think would be the most effective in deterring offensive activities by non-Indians?
4. Do you think any of the alternatives described by Gardner could be as effective as, or perhaps even more effective than, criminal punishment? Could this make these alternatives more effective in deterring non-Indian crime in tribal territory?
5. What factors does a tribal judge need to consider when exercising civil contempt power?
6. If Torres appealed his tribal conviction to the U.S. Supreme Court, what do you think the outcome would be?
7. Will the restored criminal jurisdiction over non-Indians in domestic violence cases (VAWA 2013) be upheld by the U.S. Supreme Court if it is challenged in federal courts?

In Your Community

1. If you are a member of a tribe, does your tribe have tribal land in a state listed in Public Law 280? If a member of your tribe commits a crime on tribal lands, where is that crime prosecuted?
2. Does your tribal nation exercise any authority over non-Indians? What kinds of statutory law are in place to protect the community from criminal acts committed by non-Indians?

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3. Has your tribal nation changed its tribal criminal laws to account for the changes announced in VAWA 2013? If so, how? If not, why not?

Glossary

Alacrity: Cheerful eagerness; liveliness.

Concurrent: Parallel, noncompeting authority.

Conveyance: Transfer of title (ownership paper) to property.

Double jeopardy: To be prosecuted for the same crime twice by the same government.

Explicit: Fully developed or described.

Inherent sovereign power: National authority not derived from another; powers originating from the nature of government or sovereignty that are not dependent on being granted by another government.

Nonmember Indians: Indians who are not members of the tribe asserting jurisdiction over them.

Respondent: The person against whom an appeal is taken or against whom a motion is filed.

Suggested Further Reading

Books

- Duane Champagne & Carole Goldberg, *Captured Justice: Native Nations and Public Law* 280 (Carolina Academic Press)(2012).
David Lest, *Crime and the Native American* (1999).

Articles

- Christopher B. Chaney, *The Effect of the United States Supreme Court's Decisions during the Last Quarter of the Nineteenth Century on Tribal Criminal Jurisdiction*, 14 Brigham Young University Journal of Public Law 173 (2000).
Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey through a Jurisdictional Maze*, 18 Arizona Law Review 504 (1976).
Sam Ennis, *Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of Oliphant*, 57 UCLA Law Review 553 (2009).

TRIBAL CRIMINAL JURISDICTION 199

- Indian Law & Order Commission, *A Roadmap for Making Native America Safer*, Report to the President and Congress of the United States, <http://www.aisc.ucla.edu/iloc/report/index.html>.
- Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction under Public Law 280*, 47 *American University Law Review* 1627 (1998).
- Kevin Meisner, *Modern Problems of Criminal Jurisdiction in Indian Country*, 17 *American Indian Law Review* 175 (1995).
- Catherine Baker Stetson, *Decriminalizing Tribal Codes: A Response to Oliphant*, 9 *American Indian Law Review* 51 (1982).
- T. Vollman, *Criminal Jurisdiction in Indian Country*, 22 *University of Kansas Law Review* 387 (1974).
- Kevin Washburn, *American Indians Crime and the Law: Five Years of Scholarship on Criminal Justice in Indian Country*, 40 *Arizona State Law Journal* 1003 (2008).

Notes

1. The term *interracial* was used during the time of these treaties and statutes to refer to non-Indian perpetrators and Indian victims. However, in ways that we shall explore more fully in later chapters on the Indian Civil Rights Act, many argue that it is not appropriate to speak of members of Indian tribes as members of an Indian race, or ethnic minority. The contemporary legal understanding is that tribal (political) identity is more salient than racial identity. Furthermore, it is by virtue of their membership in a tribe, not their ethnicity, that American Indian people are owed special duties and obligations from the federal government.

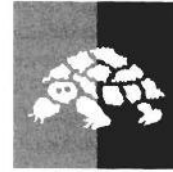
2. Duane Champagne & Carole Goldberg, *Captured Justice: Native Nations and Public Law 280* at 38 (2012).

Appendix B: Tribal Legal Studies Excerpt (Chapter 13)

Justin B. Richland and Sarah Deer, "Tribal Civil Jurisdiction," in *Introduction to Tribal Legal Studies 3rd Ed.* (London: Rowman & Littlefield, 2015), 200–219.

<https://rowman.com/ISBN/9781442232242/Introduction-to-Tribal-Legal-Studies-Third-Edition>

CHAPTER 13



Tribal Civil Jurisdiction

AS YOU WILL recall, civil law in the Anglo-American legal system concerns those norms that govern the legal rights, duties, and obligations between individual citizens, corporations, and sometimes the government as they arise in the legal relationships created by business contracts, adoption, marriage, property dealings, and a variety of other kinds of relationships that emerge between individuals and institutions. Violations of these norms are treated as harms to the individual, but are not treated as crimes.

The civil law part of the Anglo-American legal system has norms, structures, and practices that work to determine if there existed a legal relationship that has been violated, who is to blame for that violation, and how the offender can remedy the loss suffered by the harmed individual. The focus of civil lawsuits is on compensating an individual, corporation, or the government for a loss. Such compensation is usually in the form of money, but it can also be in the form of an injunction (when the court orders a party to act or not act in a certain way) or a declaratory judgment (when the court declares one party to have a certain relationship to the other party or to have been responsible in one way or other for some harm committed to another party). There can be a punitive element to civil judgments called “punitive damages.” This usually involves a sum of money above and beyond what is deemed necessary to compensate someone for the actual loss they suffered, and it is paid by the responsible party because they acted in a particularly harmful, reckless, or inhumane way. This however is still not a criminal proceeding and thus does not, by itself, normally result in jail time.

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Regulatory and Adjudicatory Jurisdiction

As with criminal jurisdiction, the U.S. government has imposed certain limits on the civil authority of tribal courts. However, the rules limiting civil jurisdiction are different from the rules limiting criminal jurisdiction. Because the initial federal changes imposed on the scope of tribes' inherent civil jurisdiction were initiated against tribal regulatory (lawmaking) jurisdiction, not their adjudicatory (law-applying) jurisdiction, it is important to understand the distinction between regulatory powers and adjudicatory powers.

Regulatory jurisdiction is the authority a government has to make laws over people, places, and things—that is, the power to regulate. Adjudicatory jurisdiction is the power to determine when and how those regulations should be applied in specific instances where a dispute, or a harm, or a potential crime has occurred. In the Anglo-American system, the adjudicatory jurisdiction of the U.S. government rests in courts and their authority to apply laws to conflicts and disputes, and the lawmaking or regulatory jurisdiction powers generally rest in the U.S. Congress and the agencies that Congress establishes. Examples of regulatory jurisdiction include hunting and fishing laws, environmental laws, tax law, and zoning laws. Under the framework established by federal Indian law, tribal governments usually retain a significant amount of regulatory jurisdiction over their lands. The decision to legalize certain kinds of gaming, for example, falls under the broad general category of tribal regulatory jurisdiction.

Any time a government tries to make a law, it must have jurisdiction over the people, territory, and kinds of norms, structures, and practices (subject matter) that it hopes to regulate by that law. If the government lacks any one of these elements, then it lacks the regulatory jurisdiction required to make the law in question. Consequently, the authority that a tribal nation has to exercise control over the people and activities on their territory can be as much altered by changes to their civil regulatory jurisdiction as it is by the changes we saw made to their criminal adjudicatory jurisdiction.

Federal Changes to the Scope of Tribal Civil Jurisdiction

The majority of limitations to tribal civil jurisdiction have addressed the powers of tribal governments to exert regulatory powers over the activities of nonmembers that take place within tribal borders. At first, these limits only extended to the power tribes had to regulate non-Indians on non-Indian fee lands existing within the borders of their territory, but one recent case has hinted that these limits on the power to regulate nonmembers may extend to Indian trust land as well as nonmember fee lands. Furthermore, these limits

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on tribal civil regulatory jurisdiction have now also been extended to tribes' civil adjudicatory jurisdiction over non-Indians.

The federal government has limited certain segments of tribal civil authority but has recognized additional authority in other areas. Even as the limitations just described were being imposed by Congress and, in some cases, the U.S. Supreme Court, the federal government was also authorizing tribes to assert regulatory jurisdiction concerning some activities on all lands within reservation boundaries, whether these activities were undertaken by Indians or non-Indians. For example, Congress and administrative agencies like the Environmental Protection Agency (EPA) have passed laws and policies authorizing tribes to regulate pollution and polluter activities within tribal territorial borders.

The initial twentieth-century parameters of tribal civil jurisdiction were set out by the U.S. Supreme Court in *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269 (1959) and *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245 (1981). These cases demonstrate the Supreme Court's initial conceptions of the inherent tribal civil jurisdiction of tribes and, in the *Montana* case particularly, the perceived limitations of tribal civil jurisdiction. The court extended those limitations in later cases, especially in the majority opinions that decided the cases of *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *Nevada v. Hicks*, 533 U.S. 353 (2001); and *Plains Commerce Bank v. Long Family Land and Cattle Corp.*, 554 U.S. 316 (2008).

After reviewing these first cases, and the initial parameters of tribal civil jurisdiction articulated by the U.S. Supreme Court, we will then consider two other Supreme Court cases, namely, *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), and *Carcieri v. Salazar*, 555 U.S. 379 (2009). In the first case, the Supreme Court was asked to decide whether the Oneida Indian Nation had the authority to reassert its regulatory civil jurisdiction over lands that had been illegally purchased by the state of New York in the late eighteenth century but which the tribe had repurchased in the 1990s. In the second case, the Court considered whether the Narragansett Tribe, a federally recognized tribe located in what is now Rhode Island, had the power to ask the secretary of the interior to take land in trust to establish a Narragansett reservation, as authorized by the Indian Reorganization Act and the federal-Indian trust responsibility, even though the Narragansett Tribe was not federally recognized at the time that act was passed in 1934.

We will then turn to two Supreme Court cases in which the Court is asked to decide questions of when and how individuals or corporations involved in disputes with tribal entities or tribal members in cases arising on tribal lands must first raise those matters in tribal court. Both of these cases—

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National Farmers Union Insurance Co. v. Crow Tribe, 471 U.S. 845 (1985), and *Iowa Mutual Insurance Co. v. LaPlante, et al.*, 480 U.S. 9 (1987)—stand for a legal principle sometimes called the “tribal exhaustion doctrine.” This principle requires that in cases like these, tribal court jurisdictions must be “exhausted” before the matter can be set for trial in federal court.

Of course, when studying any aspect of tribal legal authority, it is never enough to simply consider the changes imposed on tribal authority by the federal government. Much of tribal civil jurisdiction concerns the power and authority of the tribe over its members and nonmember Indians—areas of tribal power with which the federal government has much less concern. Consequently, we will also spend time in this chapter reviewing how at least some tribes are choosing to exercise that authority, as well as their authority over non-Indians, in light of the federal limitations we just described. This includes especially a 1997 case from the Hopi Tribal Appellate Court—*Coin v. Mowa*¹—in which the question of the court’s civil jurisdiction was raised not as it related to federal or state jurisdiction, but as it related to the jurisdiction of the traditional village authorities who also have power under the Hopi Constitution to resolve certain kinds of disputes. This case is an important reminder that contemporary tribal legal systems face complex matters of jurisdiction not only as they confront the powers of nontribal entities (like U.S. state and federal jurisdictions) beyond the tribal nation, but equally legitimate and powerful confrontations with other sources of authority and power from within. To ignore these complexities, and what tribal courts are saying about their own civil jurisdiction, would be to erase the very core of tribal sovereignty that tribes have been successfully defending and enriching (often in the face of federal opposition) since their origins. Keep in mind that tribal civil jurisdiction (and federal changes to that jurisdiction) is an extraordinarily complicated and ever-changing legal arena and thus must be constantly monitored for changes in the law.

Federal Changes: Reducing Tribal Civil Jurisdiction

The primary question that the federal government has raised concerning tribal civil jurisdiction is whether or not tribes should have the power to make and apply their civil law to non-Indians. Generally speaking, tribes’ civil jurisdiction—both regulatory and adjudicatory—over member and nonmember Indians has been far less controversial to the U.S. Congress and the Supreme Court. For example, it is a well-established principle of the federal law concerning tribes that anyone (Indian or non-Indian) who wants to sue an Indian for a claim arising within Indian country must do so in tribal court, though even this is subject to certain legislative constraints, like Public

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Law 280 (which we will discuss below). The exclusive jurisdiction that a tribe has over civil causes of action between Indians in Indian country comes from the fact that a tribe's power to make and apply civil law to people and things in its territory is a fundamental part of tribes' inherent sovereign power as nations.

In the 1959 case, *Williams v. Lee*, the Supreme Court recognized the inherent civil jurisdiction of tribes, even over non-Indian activities conducted on tribal lands. In that case, Lee, a non-Indian trader on the Navajo Reservation, brought a civil suit against Williams, a Navajo man, to retrieve some items that the Navajo man had purchased on credit from Lee's Ganado Trading Post. Lee brought his lawsuit in Arizona court, but Williams challenged the suit, claiming that only tribal court had jurisdiction over the dispute. Looking both to prior Supreme Court cases as well as to U.S. treaties with the Navajo, the Supreme Court held that the Arizona court lacked adjudicatory jurisdiction over the civil dispute. Finding that "[i]t is immaterial that [Lee] is not an Indian," the Court went on to argue,

He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized the authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it.²

This language stood as a strong statement that tribal nations retained inherent adjudicatory jurisdiction over all people, whether Indian or non-Indian, who are engaged in civil disputes arising on their lands.

But by the 1980s the Supreme Court began to whittle away at tribal civil jurisdiction over non-Indians. In *Montana v. United States*, 450 U.S. 544 (1981), the Supreme Court found that the Crow Tribe did not have civil regulatory jurisdiction over non-Indians hunting and fishing on a state-controlled river running through its reservation. The *Montana* opinion focused on the fact that the non-Indians in question were engaged in activities on non-Indian private property within the reservation (known as "fee lands").

The *Montana* decision did not completely eliminate tribal civil jurisdiction over non-Indians. Even after this decision, tribes appeared to still have civil regulatory jurisdiction over non-Indians on tribal lands (fee or trust) and tribal member-owned lands (either fee or trust allotments). Furthermore, the *Montana* decision also described certain situations where tribes would continue to have civil regulatory jurisdiction over non-Indians on non-Indian fee lands. These situations include the following:

1. when the non-Indian had entered into “consensual relations” with the tribe or its members, such as through business contracts, commercial transactions, and leases; or
2. when the non-Indian was engaged in activities that threatened or directly affected the “political integrity, the economic security, or the health or welfare of the tribe.”

Under these rules (known as the *Montana* test), non-Indian individuals or corporations working under business contracts with Indian tribes or tribal members—such as store owners—are still regulated by tribal civil laws, even if their stores are located on non-Indian fee lands. Also, non-Indians engaged in activities that are central to the tribal life will be subject to the civil regulations of tribes, whether they have contracts with the tribe or not. So, for example, even if non-Indian store owners—operating a reservation store on lands they own—do not have a contract with the tribe, if they are the only store on the reservation, or perhaps hire many tribal members, their activities are central to the life of the tribe. Under the *Montana* ruling, they might still be subject to tribal regulations.

Thus, the limitations to tribal civil jurisdiction announced in the *Montana* case, while substantial, were by no means a total erasure of the civil authority of tribes over non-Indians.

In more recent decisions, however, the Supreme Court has considerably expanded these limitations on tribal civil jurisdiction. In *Strate v. A-1 Contractors*, the Court extended the limitations on tribal regulatory jurisdiction in *Montana* to the tribe’s civil adjudicatory jurisdiction as well. In *Strate*, the Court wrote, “As to nonmembers, we hold, a tribe’s adjudicative jurisdiction does not exceed its legislative [regulatory] jurisdiction.”³ While it still may have been possible after the *Montana* decision for tribal courts to address civil disputes involving non-Indians on non-Indian fee land, after *Strate*, this is much less likely.

Then, in *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001), the Court broadened the *Montana* limitations to tribal civil regulatory jurisdiction by making the situations under which tribes could still exercise that jurisdiction even narrower. Under the *Atkinson* decision, for a tribe to exercise civil regulatory jurisdiction over a non-Indian on non-Indian-owned land within a reservation, that regulation must be related or linked to the “consensual relationship” that a non-Indian enters with a tribe or its members through contract, commercial transaction, or lease. Before the *Atkinson* decision, it may have been possible, for example, for a tribe to regulate how non-Indian tribal employees use the land they own within the reservation—say, to prohibit them from opening a liquor store—even though that store would not

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be operated through any commercial contract or lease with the tribe. In such a situation, the consensual relationship of being a tribal employee would give the tribe broad civil regulatory jurisdiction over other activities of these non-Indians. But after *Atkinson*, the tribe would be less likely to have regulatory jurisdiction in this situation, unless they could show that the liquor store threatened or had a direct effect on the health and welfare of the tribe (that is, that it met the second *Montana* exception listed above).

Most recently, in *Plains Commerce Bank v. Long Family Land and Cattle Corp.*, 554 U.S. 316 (2008), the Supreme Court continued to expand the *Montana* limitations to tribal civil adjudicatory jurisdiction with regard to non-Indian conduct on non-Indian fee land, finding that a non-Indian bank could not be sued in tribal court for discriminatory practices against tribal members when it sold fee land on a reservation to another non-Indian. In this case the tribal members, the Long Family, complained in tribal court that they were discriminated against by the bank when it sold the fee land they had been leasing from it to a non-Indian at a rate better than the one the bank had offered to them. The bank challenged the jurisdiction of the tribal court over them, claiming that because the tribe had no regulatory authority over their sale of the fee land to another non-Indian, it could not have adjudicatory jurisdiction. The Court agreed, and in doing so, additionally held that the bank's sale of land to non-Indians did not constitute the kind of "nonmember conduct within the reservation" over which a tribe has regulatory, and thus adjudicatory, jurisdiction.⁴

Using the same approach to tribal authority, in *Nevada v. Hicks*, 533 U.S. 353 (2001), the Supreme Court found that under some circumstances, the *Montana* limitations to tribal civil jurisdiction may prohibit their civil authority over non-Indian activities on *all* tribal lands, even those still held in trust for the tribe. The facts in this case are somewhat unique, insofar as they involved a civil lawsuit brought by a tribal member in tribal court against a Nevada state game warden who came onto tribal lands to follow up on a crime committed on state property. The uniqueness of these facts may mean that the decision in *Hicks* only limits tribal civil jurisdiction over state officers coming onto tribal lands. However, if applied more broadly, this decision could result in near complete divestiture of the power of tribes to exert civil jurisdiction over non-Indians within their territory. It remains to be seen what effects this decision will have on future determinations of tribal civil jurisdiction. As we can see, though, these Supreme Court decisions appear to be moving in the direction of denying tribal courts the ability to exercise civil jurisdiction over non-Indians.

As you might expect, efforts by tribes to recoup their original civil jurisdiction over lands that had been illegally taken from them have also been

met with hostility from the Supreme Court. In *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), the Court held that the Oneida Indian Nation could not claim that the fee lands within their reservation, that they had repurchased in the 1990s, were exempt from city and state property taxes, even though those lands had never legally transferred from tribal control. In the late 1700s to early 1800s, the lands in question were part of three hundred thousand acres of aboriginal Oneida lands, recognized as a reservation for them by the United States and the state of New York, and which under the Non-Intercourse Act of 1790 could not be divested by the tribe without approval of the U.S. government. But in 1805, these and other lands were purchased by the state of New York, without the approval of the federal government. Thus when the Oneida Indian Nation of New York repurchased the lands in 1997 and 1998, they claimed that they had never legally become fee simple lands, and instead were returned to their sovereign authority as Indian country, subject only to their tribal civil regulatory jurisdiction. They claimed they were not subject to taxation by the city or state of New York. The Supreme Court disagreed, arguing that so much time had passed since their purchase in 1805, with no effort made by the federal government or the tribe to assert their sovereign authority over the lands in question, that even with their repurchase by the tribe, the lands could no longer be considered "Indian Country" subject only to tribal regulatory jurisdiction. Thus even claims by tribes to rectify limitations on their civil regulatory jurisdiction made through historic wrongdoing have fallen on deaf ears in the Supreme Court.

This trend toward restricting Indian country has continued in Supreme Court opinions, most recently in *Carcieri v. Salazar*, 555 U.S. 379 (2009). In *Carcieri*, the secretary of the interior (Salazar) had taken into trust a thirty-one-acre parcel of land in Charlestown, Rhode Island, adjacent to the 1,800-acre reservation of the Narragansett Indian Tribal Nation. The Narragansett was a well-known entity before the founding of the United States, having been placed under guardianship by the government of the Colony of Rhode Island in 1709. In 1880, the tribe relinquished its authority and sold all but two acres of its reservation land, but almost immediately thereafter began trying to purchase back those lands, with no help from the federal government, which argued it was under Rhode Island state jurisdiction. This continued until 1978, when to settle a dispute with Rhode Island, the Narragansett received title to 18,000 acres that became its reservation. And in 1983, pursuant to the Indian Reorganization Act of 1934, the Narragansett received official recognition from the federal government as a tribal nation with which the United States has a government-to-government relationship. Under the Indian Reorganization Act, the secretary of the interior can acquire land and hold it in trust "for the purpose of providing lands for Indians."⁵ The act

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defines *Indian* to include “all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction.”⁶

The state of Rhode Island and the city of Charlestown challenged the secretary of the interior’s power to take the thirty-one-acre parcel into trust for the Narragansett, claiming that the IRA only authorizes such actions for tribes that were federally recognized at the time of the act’s passage, in 1934. The Supreme Court’s majority opinion agreed with the petitioners, despite the fact that this analysis ignores that the plain meaning of the Indian Reorganization Act was to authorize the secretary of the interior to take land into trust on behalf of federally recognized Indian tribes. It also ignores the fact that the better definition on which to ground an analysis of the IRA’s application to this case would be to apply the definition of “Indian tribe,” not “Indian,” since it involves the actions that the secretary of the interior has taken on behalf of the Narragansett Tribe, not a particular Narragansett or other Indian individual. The definition of “Indian tribe” in the IRA does not refer to tribes “now” under federal jurisdiction, nor impose any other kind of time restrictions on who might count as a “tribe” under the act. For this and other reasons, the Narragansett clearly meet the definition of a tribe under the IRA and would seem to be precisely the kind of Indian community for whom the secretary of the interior could hold, and in countless prior instances has held, land in trust for their benefit.

The decision in *Carcieri* threatens to significantly disrupt the status of tribal lands held in trust all across Indian country. This is true because it reverses the long-standing practice of the secretary of the interior regarding taking land into trust for tribes. As a result, many federal Indian law scholars and tribal leaders are hoping Congress will step in and “fix” the harm of this opinion with new legislation amending the language of the Indian Reorganization Act.⁷ Until this happens, *Carcieri* will stand in the still-growing line of cases demonstrating the open hostility of the Supreme Court to tribal civil jurisdiction at the dawn of the twenty-first century.

Adding to Tribal Civil Jurisdiction

Paradoxically, during the very same period that the Supreme Court has articulated specific limitations to tribal civil authority, the U.S. Congress and administrative bodies have issued laws and regulations that recognize (and encourage) inherent tribal authority over non-Indians. These congressionally authorized civil powers have been given to tribes to regulate and enforce certain kinds of civil laws. The best examples of this have been in the arena of environmental law, where Congress and the Environmental Protection Agency (EPA) have been making and administering laws that give tribes

the power to set and enforce pollution emission standards above the levels required by federal law.

It is these federal restrictions and expansions of tribal civil jurisdiction that constitute some of the fundamental changes to tribal civil authority since their domination by the United States. As you may already have noted, most of these changes were made very recently and their full impact on tribal sovereign power has yet to be revealed. Nonetheless, or maybe because these developments are so recent, attempting to understand at least the basic ways in which the federal government is changing the scope of tribal civil jurisdiction is critical to any good analysis of tribal legal systems as they operate today.

Contemporary Tribal Civil Jurisdiction: The Exhaustion Doctrine

In order to understand the impact of federal limitations on tribal civil jurisdiction, it is essential to look at how tribal governments express their own understandings of their civil jurisdiction—both regulatory and adjudicatory—over the different persons and activities operating within their territory. Such an investigation can reveal how tribes exercise their civil powers in light of (and sometimes in explicit disregard for) the changes imposed by the federal government. Perhaps even more importantly, it can also reveal how tribes understand and exercise these powers in terms of their own legal heritages. As sovereigns, tribes have never taken federal law as the sole or even primary source of their authority. Instead, tribal governments look first and foremost to their own histories and foundations to express and explain that power. Observing how tribal governments are defining their own civil authority thus fills in a picture only outlined (and sometimes poorly so) by federal law and reveals how tribes see how their civil powers are to be applied to all members of their communities—non-Indian and Indian, member and nonmember.

There remains yet another reason why it is important to look at how tribal codes and the decisions by tribal courts describe tribal civil jurisdiction. Two significant decisions written in the mid-1980s by the Supreme Court have held that people bringing civil lawsuits for actions arising in tribal territory must always bring their complaints to tribal court first before challenging tribal civil jurisdiction in federal court. In *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845 (1985), a Crow Indian was hit by a motorcycle in a school parking lot located on land owned by the state of Montana (non-Indian fee land) within the Crow Reservation. The individual filed a civil lawsuit in tribal court against the insurer of the school district who ran the school. The non-Indian insurance company (National Farmers Union) failed to show up or respond to the complaint in the tribal court trial

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and so lost the case. The tribal court ordered the insurance company to pay the plaintiff \$153,000.

Instead of paying the damages ordered by the tribal court, the company filed a complaint in U.S. federal court, claiming that the tribal court did not have civil jurisdiction over its case (because they were non-Indians operating on non-Indian-owned land) and asked the federal court to stop the tribal court from enforcing its decision against them.

The Supreme Court found that the insurance company committed an error when it failed to show up in tribal court. It held that even when a non-Indian company or individual is seeking to challenge the civil jurisdiction of a tribal court, it must first raise those challenges in tribal court, not federal court. Furthermore, even if the tribal court at first rejects these challenges, the person making these claims must exhaust all their chances to appeal that rejection in the tribal legal system before coming to federal court. This is called the *exhaustion doctrine*. Among the reasons the Supreme Court provided to explain this doctrine were that

the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty. . . . We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. . . . Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.⁸

This decision did not mean that the insurance company had to pay the tribal court's judgment against them. But it did mean that federal courts would have to give tribal courts the first opportunity to determine the scope of their civil jurisdiction, even over non-Indians, before allowing anyone to challenge that jurisdiction in tribal court. The non-Indian insurance company thus had to go back to the Crow tribal court and try to challenge its civil jurisdiction there.

The exhaustion doctrine was further supported by the Supreme Court's decision in *Iowa Mutual Insurance Co. v. LaPlante, et al.*, 480 U.S. 9 (1987). This case involved a Blackfeet Tribal Nation citizen who was injured while working on a ranch owned by the tribe. He sued the non-Indian company insuring the ranch in tribal court and won. Instead of then challenging that

decision and the tribal court's civil jurisdiction in the Blackfeet Tribal Court of Appeal, the insurance company again went first to federal court. The Supreme Court wrote,

The federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts. At a minimum exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts. . . . Until appellate review is complete, the Blackfeet Tribal Courts have not had a full opportunity to evaluate the claim and federal courts should not intervene.⁹

The implications of these decisions are significant. When federal courts are called to review the actions and jurisdiction of other courts, they are required to be very respectful of the decisions made by those other courts. In this context, when federal courts review whether a tribal court correctly asserted its jurisdiction over non-Indians, they must presume that these courts made the correct assertion, unless it appears that it was "clearly erroneous." It can be hard to show that a tribal court or judge made a clearly erroneous decision with regard to civil jurisdiction. A federal judge cannot just "think" the tribal court lacked jurisdiction if it wants to overturn tribal court civil jurisdiction; the federal judge would have to be firmly convinced that the tribal judge was wrong. In this way, the exhaustion doctrine protects tribal civil jurisdiction and even favors tribal courts' efforts to determine that jurisdiction over the efforts by federal courts.

Consequently, reviewing how tribal courts evaluate and explain their civil jurisdiction is important not just as an academic exercise—it is also fundamental to the procedures by which federal courts themselves have to determine tribal civil jurisdiction.

To end the chapter, we turn to a case from the Hopi Tribal Appellate Court that reveals how the issues raised in tribal courts regarding tribal civil jurisdiction are so much broader than those that have been the focus of federal concern. In this case, *Coin v. Mowa*, AP-005-095 (1997), a Hopi woman brought a civil lawsuit against a Hopi husband and wife from her village to whom she was related. In the course of this civil dispute, over the sale of a mobile home, the Hopi Appellate Court had to decide whether or not this conflict was a "family dispute," as defined by the Hopi Constitution. If it was, only the Hopi leaders from the parties' village, and not the Hopi tribal court, could exercise subject-matter jurisdiction to hear and resolve the case.

Reading excerpts from this case will show how many complex issues of tribal civil jurisdiction can emerge, even when the civil disputes are between

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tribal members. In these situations, tribal courts are much less occupied with conforming to federal limits placed on their civil authority. Instead, they are concerned with the equally difficult task of expressing and exercising their contemporary civil powers in ways that are consistent with their own unique legal norms, practices, and structures. Any failure by tribal courts to show their members that their contemporary civil powers comport with the tribes' legal heritage can be as devastating to legitimate tribal authority as any violation of federal law. Including this case here is a reminder that tribal courts are always undertaking the difficult balancing act between satisfying tribal legal expectations and traditions on the one hand, and U.S. federal legal oversight on the other.

In the excerpt below, consider how tribal courts could turn to their own customs and traditions to argue for taking jurisdiction over non-Indian activities on non-Indian fee land within their reservation.

***ROSALINE COIN V. AUGUSTINE MOWA JR.
AND FRED MOWA, HUSBAND AND WIFE
RESPONDENTS***

*Appellate Court of the Hopi Tribe**

Before Sekaquaptewa, Chief Justice, and Lomayesva and Abbey, Justices

Opinion and Order

The primary issue in this appeal is whether the trial court erred in finding that it was devoid of jurisdiction over this contract dispute because of Article III, section 2 of the Constitution and By-Laws of the Hopi Tribe that reserves certain subject matter jurisdiction to the individual villages.

Factual and Procedural Background

The parties to this appeal are members of the Hopi Tribe, residing at Shungopavi Village. On May 10, 1994, the parties entered into an oral con-

* Appellate Court of the Hopi Tribe, *Rosaline Coin v. Augustine Mowa Jr. and Freda Mowa*, 1997.NAHT.0000011 at <http://www.vcrsuslaw.com>.

tract for the sale of a mobile home belonging to the respondents, Augustine Mowa Jr. and his wife, Frieda Mowa. The contract did not include the sale of any land. According to the terms of this contract, appellant Rosaline Coin was to pay \$2,000.00 to the Mowas and pay the \$172.07 outstanding loan payment to the lien holder, SPFS, Division of Bank of America. In addition to supplying the mobile home, the Mowas agreed to make needed repairs to the mobile home. Pursuant to the contract, Coin paid \$800 down payment to the Mowas with the remainder of the contract price to be paid in installments. Between May and December 1994, Coin made a total of six additional payments for the mobile home. During this time, the Mowas never made any effort to make the agreed repairs.

On January 25, 1995, the Mowas gave Coin a one-day notice to vacate the mobile home and expressed their intent to repudiate the parties' contract. Later that same day, Coin demanded a return of the money that she had given to the Mowas. Although not receiving her refund, Coin complied with the Mowas' request and vacated the mobile home. On February 10, 1995, Coin filed suit for breach of contract. After filing their response, the Mowas filed a Motion for Change of Venue and Motion to Allow the Kikmongwi of the Village of Shungopavi to Judge the outcome of this Matter. In addition to this motion, Radford Quamahongnewa, as spokesperson for the Kikmongwi of Shungopavi, wrote a letter to the trial court judge expressing the Kikmongwi's desire to exercise his traditional authority and jurisdiction to handle the matter in a way traditional to the Village.

Although the Mowas' motion was entitled a motion to "change venue," the Mowas invoked Article III of the Constitution and By-Laws of the Hopi Tribe in their argument. Recognizing that the Mowas actually sought a dismissal of the action, the trial judge granted the Mowas' dismissal without prejudice pursuant to the Constitution and By-Laws of the Hopi Tribe, Article III, section 2(b). However, the trial judge specifically noted that Coin could re-file her complaint if the case was not resolved by the village of Shungopavi within four months of the order.

Coin appealed this order of dismissal on the grounds that: (1) the trial court erred in referring the matter to the jurisdiction of the Village of Shungopavi; (2) the trial court erred in determining that this was a family matter falling within the reserved jurisdiction of the Kikmongwi of Shungopavi pursuant to Article III, section 2(b) of the Constitution and By-Laws of the Hopi Tribe; (3) the trial court erred by not providing a proper hearing and basing its decision on evidence unsupported by foundation testimony; (4) the trial court erred in interpreting the Mowas' Motion for Change of Venue and Motion to Allow Kikmongwi of Village

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of Shungopavi to Judge Outcome of this matter as a motion to dismiss for lack of subject matter jurisdiction; (5) referring this matter to the Village of Shungopavi violated Coin's freedom of religion in violation of the Constitution and By-Laws of the Hopi Tribe, the Indian Civil Rights Act of 1968, and the United States Constitution; and (6) the trial court erred in finding that Radford Quamahongnewa, as a member of the Sun Forehead Clan, was a proper spokesperson for the Kikmongwi of Shungopavi.

Issues Presented on Appeal

Although appellant has raised a variety of grounds for appeal, the crux of appellant's argument is that the trial court had proper jurisdiction of this matter and erred when it dismissed the complaint. In essence, there are two threshold issues that must be addressed before any other issues become relevant: (1) whether the trial court erred in liberally construing the motion to change venue as a motion to dismiss; and (2) whether the trial court erred in finding that it was devoid of jurisdiction over this dispute pursuant to Article III, section 2(b) of the Constitution and By-Laws of the Hopi Tribe.

Discussion

The Trial Court Erred in Interpreting Article III, Section 2(B) of the Constitution and By-Laws of the Hopi Tribe as Precluding Tribal Court Jurisdiction over This Cause of Action

Having appropriately decided to consider the jurisdictional issue, the trial court considered the language of Article III, section 2 of the Constitution and By-Laws of the Hopi Tribe. This provision provides in pertinent part that: The following powers which the Tribe now has under existing law . . . are reserved to the individual villages:

- a. To appoint guardians for orphan children and incompetent members.
- b. To adjust family disputes and regulate family relations of members of the villages.
- c. To regulate the inheritance of property of members of the villages.
- d. To assign farming land, subject to the provisions of Article VII. Constitution and By-Laws of the Hopi Tribe Art. III, § 2.

This narrow reservation of powers to the individual villages should be contrasted with the broad grant of power to the Tribal Court in Ordinance 21:

[T]he Hopi Tribal Court shall have jurisdiction over all civil actions where there are sufficient contacts with the Hopi Indian Reservation upon which to base the exercise of jurisdiction, consistent with the constitution and laws of the Hopi Tribe and the United States. It is the intent of this section to authorize the broadest exercise of jurisdiction consistent with these limitations. (Hopi Ordinance 21, § 1.7.1)

Because of this broad grant of power to the Tribal Court and the narrow reservation of subject matter jurisdiction to the individual villages, there is a presumption that the Tribal Court has jurisdiction over disputes not described in Article III. The trial court considered whether any of these provisions encompassed the present dispute and concluded that this was a “family dispute” within the meaning of Article III. Accordingly, the court dismissed the complaint.

The Hopi Tribal Court Had Jurisdiction over This Contract Dispute

Having decided the appropriate standard of review, it is necessary to interpret the Hopi Constitution. Article III specifically reserves certain subject matter jurisdiction to the individual villages. Before the trial court, the parties assumed that a dispute must fall within one of the four enumerated categories before the Hopi Tribal Court would be divested of jurisdiction. The current contract dispute relating to a mobile home (not including the land) does not invoke the villages’ jurisdiction to appoint guardians for orphan children or incompetent members, to regulate the inheritance of property, or to assign farming land. However, the Mowas argued, and the trial court agreed, that this was a family dispute within the meaning of Article III.

In their brief, the Mowas argue that, “[t]hough the Petitioner and Respondents are not brother and sister they do share relatives common among them as members of the Village of Shungopavi and also by Clan relations.” The Mowas are correct that Article III, section 2(b) should be interpreted broadly to encompass the Hopi concept of family. Nonetheless, the Mowas interpret Article III too broadly.

Under the Mowas’ interpretation of Article III, the individual villages would have jurisdiction over all disputes between village members. Article III of the Constitution and By-Laws of the Hopi Tribe is designed to allocate subject matter jurisdiction between the individual villages and the Tribal Courts. According to the Mowas’ definition of “family dispute,” it is

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difficult to imagine any dispute that would not be handled by the villages. Because this definition would not properly allocate jurisdiction between the villages and the Tribal Court, it is not the proper definition of the term “family dispute.” Rather, Article III contemplates disputes in which the parties’ familial relations are an essential factor giving rise to the underlying cause of action. In this case, the underlying cause of action is the alleged breach of a contract to purchase a mobile home for a given price. This agreement does not depend upon the parties’ familial relations. At no point do the parties seek to affect their familial ties. This is a contract dispute, not a conflict over matters related to the parties’ family status. Therefore, this is not a “family dispute” within the meaning of Article III, section 2(b) of the Hopi Tribal Constitution. . . .

Finally, the Mowas introduced statements at both the Tribal Court and appellate court level by the Kikmongwi of Shungopavi expressing his desire to adjudicate the dispute. The Kikmongwi’s desire to hear the case is not controlling in the constitutional analysis of subject matter jurisdiction under Article III. Hence, the Tribal Court erred in dismissing the complaint for lack of subject matter jurisdiction under Article III of the Constitution and By-Laws of the Hopi Tribe. Because of the conclusion that the trial court erred in dismissing Coin’s complaint on constitutional grounds, there is no need to address Coin’s other arguments on appeal.

Order of the Court

For the foregoing reasons, the judgment of the Tribal Court is REVERSED and this case is REMANDED to the Tribal Court for proceedings consistent with this opinion.

Questions

1. What are different kinds of relief that can be granted in a civil case?
2. What is regulatory jurisdiction and how is it different from adjudicatory jurisdiction?
3. Given the trend of the U.S. Supreme Court in limiting tribal civil jurisdiction over non-Indians, what strategies can tribal governments take that will best protect their authority?.
4. In your opinion, is there any difference between civil powers that come from a tribe’s inherent sovereignty and those that were granted to tribes via congressional authorization? Explain.

In Your Community

1. Find out if there are any lands owned by non-Indians within the territory of your tribe. Also find out if there are any state highways running through the tribal territory. Finally, find out the size of the non-Indian population living within tribal territory. Based on what you find out, do you think that the federal limits on tribal civil jurisdiction negatively affect the power of the tribal government to ensure the health and welfare of tribal society?
2. Who handles civil disputes in your tribal judicial system? Is the court system the best way to handle noncriminal disputes between tribal members?

Glossary

Civil law: Law relating to private rights and remedies (as opposed to criminal law).

Clearly erroneous: In Anglo-American law, it refers to a standard that appellate courts must apply when deciding whether to uphold or overturn a decision by a lower court. *Black's Law Dictionary* defines this standard as one whereby "a [lower court's] judgment is reversible if the appellate court is left with the firm conviction that an error has been committed."

Congressionally authorized: U.S. Congress and administrative bodies assert their authority over non-Indians.

Declaratory judgment: A judge's decision (about a real problem with legal consequences) that states the rights of the parties or answers a legal question without awarding any damages or ordering that anything be done.

Divestiture: The act of divesting; the compulsory transfer of title or disposal of interests upon government order.

Exclusive jurisdiction: That power that a court or other tribunal exercises over an action or over a person to the exclusion of all other courts; that forum in which an action must be commenced because no other forum has the jurisdiction to hear and determine the action.

Exhaustion doctrine: When a non-Indian company or individual is seeking to challenge the civil jurisdiction of a tribal court, it must first raise those

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challenges in tribal court, not federal court. Even if the tribal court first rejects these challenges, the person making these claims must exhaust all their chances to appeal that rejection in the tribal legal system before coming to the federal court.

Immaterial: Of no substantial consequence, unimportant.

Implied divestiture: Known indirectly—the compulsory transfer of title or disposal of interests upon government order.

Inherent sovereign power: An authority possessed without its being derived from another. A right, ability, or faculty of doing a thing, without receiving that right, ability, or faculty from another; powers originating from the nature of government or sovereignty.

Injunction: A judge's order to a person to do or refrain from doing a particular thing. An injunction may be preliminary or temporary (until the issue can be fully tried in court), or it may be final or permanent.

Non-Indian fee lands: Lands located within a tribe's territorial borders but owned by non-Indians.

Nonmember fee lands: Lands within Indian country not owned by or held in trust for the tribe or its members.

Tribal civil jurisdiction: The power and authority that American Indian and Alaska Native tribal courts have to prosecute certain kinds of persons, committing certain kinds of crimes, in certain locations, and if these people are found guilty, to punish them.

Suggested Further Reading

- D. F. Coursen, *Tribes as States: Indian Tribal Authority to Regulate and Enforce Federal Environmental Law and Regulations*, 23 *Environmental Law Reporter* 10579 (1993).
- Jerry Gardner & Ada Pecos Melton, *Public Law 280: Issue and Concerns for Victims of Crime in Indian Country* (2000).
- Carole Goldberg-Ambrose, *Planting Tail Feathers: Tribal Survival and Public Law 280* (1997).
- James R. Hintz, *Wilson v. Marchington: The Erosion of Tribal Court Civil Jurisdiction in the Aftermath of Strate v. A-1 Contractors*, 20 *Public Land & Resources Law Review* 145 (1999).

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- G. William Rice, *Employment in Indian Country: Considerations Respecting Tribal Regulation of the Employer-Employee Relationship*, 72 North Dakota Law Review 269 (1996).
- Catherine T. Struve, *How Bad Law Made a Hard Case Easy: Nevada v. Hicks and the Subject Matter Jurisdiction of Tribal Courts*, 5 University of Pennsylvania Journal of Constitutional Law 288 (2003).
- Melissa L. Tatum, *Civil Jurisdiction: The Boundaries between Federal and Tribal Courts*, 29 Arizona State Law Journal 705 (1997).

Notes

1. 1997.NAHT.0000011, www.versuslaw.com
2. 358 U.S. 217, 223 (1959).
3. 520 U.S. 438 (1997) at 453.
4. 554 U.S. at 328 [2008], quoting *Montana*, 450 U.S., at 564–65.
5. 48 Stat. 985, 25 U.S.C. 465.
6. 25 U.S.C. § 479.
7. Noah Nehemiah Gillespie, *Preserving Trust: Overruling Carcieri and Patchak While Respecting the Takings Clause*, 81 George Washington Law Review 1707–1732 (2013).
8. 471 U.S. 845, 856–57 (1985).
9. 480 U.S. 18, 16–17 (1987).

Appendix C: Tribal Protection Order Checklist

Tribal Law & Policy Institute and National Center on Protection Orders and Full Faith and Credit, *Drafting an Enforceable Tribal Protection Order Involving a Non-Member: Information Guide and Checklist*, (2019), <https://www.bwjp.org/resource-center/resource-results/checklist-tpo-non-member.html>.

Drafting an Enforceable Tribal Protection Order Involving a Non-member

Information Guide and Checklist

Using this checklist: The following general information guide and checklist suggests topics/issues for advocates to discuss with each victim relative to preparing to file a tribal protection order and drafting a tribal protection order in cases involving non-members. Recall that the U.S. Supreme Court has placed restrictions on a tribe's civil and criminal jurisdictional authority in matters occurring in Indian country involving non-members.¹ The language that follows also connotes the possible enforcement of the protection order by the exercise of Special Domestic Violence Criminal Jurisdiction (SDVCJ) over non-Indian violators of protection orders in Indian Country.² Note that each victim will present varying danger/safety factors and the importance of ongoing lethality assessments and safety planning cannot be overstated. Additionally, victim-centered advocacy requires that the victim determine what remedies and options are needed.

Caution: *The information provided is not legal advice and advocates should take care to consult with attorneys that are trained in the subject matter and trauma-informed, victim-centered service delivery. The following checklist does not include the language necessary to invoke the federal firearms prohibition. The checklist is not jurisdiction specific, so the advocate should consult local rules, statutes and procedures in applicable jurisdictions and consult with legal counsel.*



¹ For civil restrictions see *Montana V. United States*, 450 U.S. 544 (1981) and for criminal restrictions see *Oliphant v. United States*, 435 U.S. 191 (1978).

² Special Domestic Violence Criminal Jurisdiction is optional for tribes. Tribes implementing SDVCJ over non-Indians for dating violence, domestic violence and/or violations of a protection order crimes must meet the requirements set forth in 25 USC 1304.

Common Terms³

Emergency Protection Order: A temporary protection order that will expire in a short time, usually ordered after hearing only the Petitioner's side of the story, without notice to the respondent.

Petition for a Protection Order: The document making the request to the court for a protection order

Petitioner: Individual making a request of the court

Respondent: Individual being sued or accused in court

Protection Order: A court order that is issued to prevent acts of domestic violence against a person or to prevent a person from stalking, intimidating, or harassing another person. Orders are issued by both civil and criminal state courts. The terminology referring to a protection order and the information contained in them vary from jurisdiction to jurisdiction. This checklist uses the terms restraining order and protection order interchangeably.

Temporary Protection Order: A temporary protection order that will expire in a short time, usually ordered after hearing only the Petitioner's side of the story, without notice to the respondent.

Violence Against Women Act (VAWA) Protection Order: The term "protection order" includes any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil and criminal court whether obtained by filing and independent action or as a pendent elite 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 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 found at 18 U.S.C. §2266(5).

Permanent Protection Order: a final court order that is issued to prevent acts of domestic violence against a person or to prevent a person from stalking, intimidating, or harassing another person. Orders are issued by both civil and criminal state courts. The terminology referring to a protection order and the information contained in them vary from jurisdiction to jurisdiction. This checklist uses the terms restraining orders and protection orders interchangeably.

³ For additional information on protection orders, including definitions, please contact the National Center on Protection Orders and Full Faith & Credit.

A. Tribal Statutory Review

Please place the tribal constitution and/or tribal statutory citation in the blanks below.

1. Subject matter jurisdiction over civil matters involving non-member Indians has been reviewed.
Citation: _____
2. Personal jurisdiction over respondent in civil matters has been reviewed.
Citation: _____
3. Statutes pertaining to how to serve the respondent have been reviewed.
Citation: _____
4. Timelines setting forth the time-period for a full hearing have been reviewed.
Citation: _____
5. Party qualifies to file a protection order under the tribal statute.
Citation: _____
6. Party meets any residency requirement under the tribal statute.
Citation: _____
7. Party meets any relationship requirement under the statute.
Citation: _____
8. Elements necessary to meet the requirements of the tribal protection order statute have been reviewed with client.
9. Remedies necessary to meet the needs of the client have been reviewed and are allowed by the tribal protection order statute. (this includes custody of the children)
10. Confidentiality of client's location has been reviewed in the statute.
11. Protection Order forms located in the tribal statutes or tribal court forms have been gathered.

B. Drafting the Style or Heading of the Protection Order

1. Court exercising jurisdiction is identified and contact information such as address and phone number to the court is listed.
2. Names of the parties are listed and spelled correctly (include any aliases).
3. Type of case is listed (for example: petition for a protection order, emergency *ex parte* protection order, permanent protection order).

4. Court docket number appears on the document unless the document is a petition and the clerk will assign a docket number and place the docket number on the petition.
5. National Crime Information Center (NCIC) identifiers are listed on the document (usually a small grid on the face of the document that includes information such as respondent's date of birth, race, height, weight, hair color, eye color and scars/tattoos)

C. Protection Order Introductory Paragraph

Includes:

1. which judge presiding over the case;
2. date court hearing is being held;
3. names of parties appearing, and indicates if appearance is with or without counsel (note that counsel may include a tribal lay advocate where tribal code allows);
4. whether each party is a member Indian or a non-member Indian, and indicates tribal affiliation;
5. the filing or pleading that brings this matter before the court and the date the pleading was filed;
6. whether each party resides in Indian country (18 USC §1151)⁴ and the county (if required by tribal statutes);
7. attorneys' names and addresses and which party the attorney represents;
8. citations of applicable tribal constitutional provisions and tribal statutes listed above.

⁴ 18 U.S.C. 1151. Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

D. Subject Matter Jurisdiction Language in the Protection Order

1. Tribal Constitution and Tribal Code provisions provide the tribal court with authority to hear civil protection orders involving non-member Indians should be clearly stated in the protection order (citation should be in section "A" above).
2. Clearly state Violence Against Women Act (VAWA) codified at 18 USC 2265(e).⁵
3. Clearly addresses the Montana test, which requires the tribal court to find either that:
 - a. the parties entered into a consensual relationship with the tribe or its members through commercial dealing, contracts, leases or "other arrangements"; or
 - b. the conduct (in this case domestic violence) threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe.

Note: if the tribal court does not find that either or both Montana factors are present, outside jurisdictions may hold that the tribe lacked civil jurisdiction over non-members on non-Indian lands within Indian country and the protection order may be held unenforceable in outside jurisdictions.

⁵ 18 USC 2265 (e): "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." *Note that the text states full tribal civil authority to issue protection orders involving any person in matters arising anywhere in the Indian country or otherwise within the authority of the tribe so arguably this is a federal statute that. Therefore, the issue of jurisdiction may revolve around where the domestic violence (as that term is defined in tribal law and may include fear or emotional abuse) has or continues to occur. Additionally, for tribes with checkerboarded land bases the use of the Montana v. United States, 450 U.S. 544 (1981) factors should establish subject matter jurisdiction where domestic violence has occurred outside of Indian country but where the domestic violence continues on Indian lands. Though Montana addressed the tribe's civil regulatory authority over non-members on non-Indian fee land within a reservation, the case has been extended to apply to the tribe's authority to adjudicate matters involving non-members on fee land in Indian country via Strait v. A-1 Contractors, 520 U.S. 438 (1997) and upheld in Plains Commerce Bank v. Long Family Land and Cattle Co., (554 U.S. 316 (2008)). In Plains Commerce Bank, the Court narrowly construed the Montana's first factor to matters that had a discernable effect on tribes or its members and narrowly construed the second factor to require a showing of more than injury to the tribe but and required a showing that the issue would imperil the subsistence of the tribal community (a catastrophic consequence). The Montana factors may also establish subject matter jurisdiction in cases where 19 USC 2265(e) is held not to have relaxed federal restriction placed tribal subject matter jurisdiction over non-members on non-Indian lands within a tribe's reservation via the Montana cases.*

E. Jurisdiction Over the Parties⁶

1. A detailed list of all contacts the petitioner and the respondent have to the tribe. (Examples include membership, married to or having a child in common with a member, employment with the tribe or tribally owned entities, child is a member, tribal car tags, health care benefits and any other benefit that flows from the tribe).
2. A detailed list of any other contacts to demonstrate a high likelihood the petitioner would seek help from the tribe.
3. Details outlining the respondent's presence in the court after proper service according to the tribal law and excepting appearances to contest jurisdiction.

F. Due Process

1. Respondent has been served with a copy of the petition requesting a protection order in the manner provided by tribal law.
2. Timelines regarding hearings has been adhered to according to tribal law OR the judge has made a good cause finding (with language in the order) to allow the timelines to vary and the judge's timelines are being followed.
3. Respondent appeared in person, with/without counsel or did not appear despite being duly served or did not appear and was not served.
4. Respondent was provided a copy of the petition for a protection order and supporting documents and was provided an opportunity to be heard and ask questions of the petitioner in open court.

⁶ Personal jurisdiction over a respondent usually requires that the party respondent has certain minimum contacts with the forum in which the court sits. *International Shoe v. Washington*, 326 US 310 (1945). Note that federal caselaw may not apply directly to Indian country but this case is cited to provide guidance as to what the federal and state systems view as minimum contacts. Recall that 18 USC 2265 (e) requires personal jurisdiction over the respondent but that term is not defined in the federal statute. Note that there is a split among circuit courts with some courts requiring the respondent have contacts with the forum exercising jurisdiction while other courts are finding that domestic violence cases are akin to status cases similar to custody cases and do not require personal contacts with the forum. See Cody J. Jacobs, *The Stream of Violence: A New Approach to Domestic Violence Personal Jurisdiction*, Vol. 6 UCLA Law Rev. Issue 3, (Dec. 2017).

G. Findings of Fact⁷

1. Detail facts that demonstrate petitioner is a proper person to request a protection order under tribal law.
2. Detail facts that demonstrate petitioner meets any residency requirements (if any).
3. Detail the relationship necessary to obtain an order of protection (if any).
4. Detail facts of service of the petition for a protection order, notice of hearing on the respondent, and respondent was provided an opportunity to be heard regarding the allegations.
5. Detail facts that demonstrate the respondent entered a consensual relationship with a non-member Indian or member Indian.
6. Detail facts that demonstrate the petitioner has contacts with Indian country.
7. Detail facts that demonstrate the respondent has contact with Indian country.
8. Detail facts that demonstrate reasonable foreseeability that the petitioner might file an action seeking protection in the tribal court.
9. Detail facts that domestic violence has a direct effect on the political integrity, economic security, and/or the health or welfare of the tribe. (National statistics should be cited where appropriate as well as local statistics that may be provided by the clerk of the tribal court or the tribal victim advocate, also federal law such as the VAWA may also be useful here).
10. Detail all facts the judge believes to be true regarding the allegations set forth in the petition for a protection order.
11. Detail all the facts the judge believes to be true regarding the oral testimony during the hearing.
12. Detail all facts the judge believes to be true regarding any additional evidence admitted during the hearing.

⁷ Recall that the findings of fact are critical to the case and may alert law enforcement to the level of physical violence and/or lethality related to the case. The findings of fact may also engage presumptions regarding custody and visitation and may provide some of the elements necessary for holding a non-Indian batterer accountable for violations of the protection order that occurred in Indian country if the enforcing tribe is exercising Special Domestic Violence Criminal Jurisdiction. The findings of fact may also bolster a habitual offender charge in the federal system by providing details on the violence. Consider requesting that the judge make these findings of fact in the protection order. If necessary, have a prepared order with findings of fact ready for the judge as a convenience courtesy.

13. Detail all facts the judge believes is necessary to support the requested remedies.

H. Conclusions of Law

1. Judicial determination that all findings of facts listed in Section "G" above support the necessary conclusions of law:
 - a. Conclude subject matter jurisdiction is proper over non-member.
 - b. Conclude personal jurisdiction over the respondent is proper.
 - c. Conclude due process regarding service of the petition for a protection order and notice of hearings are properly made on the respondent, hearing timelines has been established.
 - d. Conclude Petitioner is person allowed to file a petition for a protection order pursuant to tribal law.
 - e. Conclude residency requirements (if any) have been met.
 - f. Conclude that Domestic violence has occurred
 - g. Conclude Petitioner (and possibly the children) need(s) protection.

I. Remedies

1. Cite to the remedies section of the tribal code.
2. Draft each remedy tightly enough to withstand the scrutiny of a prosecutor who must demonstrate a violation of the remedy beyond a reasonable doubt.
3. Tailor each remedy to meet the needs of the victim and/or children with safety at the forefront of the remedy.

J. Other Matters

1. The protection order has been served on the respondent in the manner provided by tribal law.
2. The victim has been instructed to consult with the advocate on where to store or hold certified copies of the protection order.
3. Clerk or other personnel should be instructed to enter the protection order in NCIC or other national criminal justice registry.

4. Provide warnings in the protection order and verbal warnings that the protection order is entitled to full faith and credit across all jurisdictional boundaries.
5. Provide warnings in the protection order and verbal warnings to the respondent that indicate possible criminal sanctions for violations and any applicable tribal firearm prohibitions.
6. Provide warnings to the respondent in the protection order and verbal warnings that the protection order is directed to the respondent the petitioner cannot violate the protection order

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Appendix D: Trafficking Fact Sheet

Tribal Law and Policy Institute, *Sex Trafficking in Indian Country It is Happening! Fact Sheet* (2016), <https://www.home.tlpi.org/sex-trafficking>.



SEX TRAFFICKING IN INDIAN COUNTRY IT IS HAPPENING!

Fact Sheet



WHAT IS HUMAN SEX TRAFFICKING AND COMMERCIAL EXPLOITATION?

Federal law defines sex trafficking as the recruitment, harboring, transportation, provision or obtaining of a person for the purpose of a commercial sex act in which the act is induced by force, fraud or coercion or if a person forced into sex acts is under the age of 18.

TRAFFICKER TACTICS

Sex traffickers use a variety of methods to "condition" their victims including starvation, confinement, beatings, physical abuse, rape, gang rape, threats of violence to the victims and the victims' families, forced drug use and the threat of shaming their victims by revealing their activities to their family and their families' friends.

WHERE SEX TRAFFICKING IS HAPPENING

- | | |
|-------------------|------------------|
| ♦ Internet | ♦ Powwows |
| ♦ Strip Clubs | ♦ Homes |
| ♦ Escort Services | ♦ Truck Stops |
| ♦ Casinos | ♦ Bike rallies |
| ♦ Hotels | ♦ Shopping malls |

WHY NATIVE WOMEN ARE AT INCREASED RISK

- | | |
|--|---|
| ♦ History of sexual abuse or past violence | ♦ Lack of access to jobs |
| ♦ Homeless | ♦ Chemical abuse/addiction |
| ♦ Financial challenges | ♦ Mental Health challenges (depression) |

Resources and Help for Victims

- National Human Trafficking Resource Center
1-888-373-7888 or text Be Free (233733)
- The Rape Abuse Incest National Network
1-800-656-4673
- National Runaway Hotline
1-800-RUNAWAY or 1-800-786-2929
- National Domestic Violence Hotline
1-800-799-SAFE (7223)
1-800-787-3224 (TTY)
- Local shelter for battered women
- Local sexual assault program
- Call 911

Tribal Law and Policy Institute



A product of Tribal Law and Policy Institute

TLPI Website- www.home.tlpi.org • TLPI Sex Trafficking Resources Website- www.tribalcoalitions.org •

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Impact and Harm to Victims

- Drug and alcohol addiction
- Broken bones, concussions, burns
- Traumatic brain injury – perhaps resulting in memory loss, dizziness, headaches
- Sexually transmitted diseases
- Sterility
- Miscarriages or forced abortions
- Long-lasting psychological trauma – fear, shame, grief, distrust, self-hatred, suicide/suicidal thoughts
- Malnutrition
- Chronic illness due to undiagnosed, untreated injuries and illnesses

Primary needs for victims of sex trafficking

- Safe and secure housing (emergency, transitional and long-term)
- Food and clothing
- Individual counseling and peer support
- Substance abuse treatment
- Medical services
- Legal services
- Job training and placement
- Education

Red Flags

- Lacks health care, may appear malnourished
- Shows signs of physical and/or sexual abuse, physical restraint, confinement, or torture
- Not in control of his/her own money, no financial records, or bank account
- Physical marks such as bruises, bites, or cut marks
- Appears anxious, guarded
- Having a significantly older "boyfriend or girlfriend"
- Tattoos, branding of traffickers name
- Suicide attempts
- Alcohol or drug use
- Having unaffordable new things such as clothes, money, or technological devices
- Getting excessive phone messages or calls
- Scripted communication
- Has hotel keys
- Possesses fake identification
- Entering or leaving cars or with unknown persons
- Behavioral signals, such as aggressive or disruptive behavior, withdrawal, running away, or delinquent behavior
- Change in school patterns; specifically, reduced attendance, inability to concentrate, excessive daydreaming, sudden changes in grades
- Pregnancy
- Sexualized activity or conversations not developmentally appropriate for the child's/ youth's age
- Lacks adult supervision particularly during late night hours/curfew hours

What Can Communities Do To Address the Problem

- Awareness of the safety needs of victims escaping this life. Provide support and validate victims fears and visit with them about their fears
- Offer to accompany them to a place of safety, to report crime to law enforcement
- Avoid being judgmental
- Educate yourself and your community about sex trafficking and recognizing the signs.
- Encourage vigilance in the community. Community members are the eyes and ears and they can report suspicious activity however communities may not be familiar with the signs to identify trafficking.
- Encourage your tribal leadership to develop and adopt a sex trafficking tribal code/law
- Believe victims. Avoid shaming a victim or questions that place blame on the victim
- Speak out about the problem
- Awareness of resources that a victim of sex trafficking may need (emergency shelter, transportation, medical attention, emotional support)
- Work with tribal leaders and other service providers to create services for victims or to expand existing services.
- Reduce supply and demand- Supply are the victims, the people being recruited and the demand are the buyers.

Appendix E: Specialized Civil Legal Needs

Employment Law: If the sex trafficking victim has missed work or lost their job as a result of being victimized, they may be able to sue their trafficker in civil court. Additionally, sex trafficking victims may also have a legal right to several workplace accommodations in their current jobs—these protections were designed to allow a victim the flexibility they need to address the many issues created by sexual assault, including sex trafficking. Prior to filing an employment law claim, be sure to discuss this option with the client and their legal representation to address any safety concerns that might stem from bringing a legal action.

Under federal antidiscrimination laws, it is illegal to discriminate against a person because they previously complained about discrimination (including sexual harassment), filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. Discrimination of this kind is prohibited under federal law and is enforced by the Equal Employment Opportunity Commission.⁸⁵ Because sex trafficking can overlap with legal employment, business owners, and employee supervisors, a sex trafficking victim may be able to sue under antidiscrimination laws.

Advocate Tip: Familiarize yourself with employment law resources that may be helpful to sex trafficking victims. Because specialized legal assistance is needed, contact your local legal aid office or law school pro-bono clinic program for referral assistance. Prior to bringing any civil employment claim against an employer, be careful to weigh the pros and cons and be dedicated to addressing any safety issues that might arise from suing in civil court. If the victim determines a civil employment suit is an option to be exercised, then note the different options that might be available under tribal, state, and federal laws.

Employment Law Resources: Please visit the American Bar Association's *Labor and Employment Law Pro Bono Web Resources* for comprehensive resources on this topic.⁸⁶

Tort Law: A tort is simply an act that causes harm, a civil wrong that does not necessarily require criminal prosecution. Tort law is a large category that encompasses many kinds of lawsuits that can be brought in civil court. Because sex trafficking inevitably causes harm to the victim, the victim may be able to sue their trafficker(s) in civil court to recover damages (usually money). In the context of sex trafficking, a victim may be able to sue for a variety of harms caused by the trafficker, including physical harm, emotional harm, property damage, theft of property, and identity theft. Tort law *does not* include harm caused by breaking a contract.

Advocate Tip: Sex trafficking victims will need assistance from an experienced tort attorney. Familiarize yourself with local and national tort law resources that may be helpful. Note that recovery in a tort action likely requires proof the trafficker has assets that can be seized or sold.

⁸⁵ Please visit www.eeoc.gov/eeoc/interagency/trafficking.cfm for more information.

⁸⁶ www.americanbar.org/groups/labor_law/resources/pro_bono_work/probono_resources.html.

Tort Law Resources: The National Crime Victim Bar Association provides referrals to local attorneys specializing in victim-related litigation. Please visit www.victimsofcrime.org/our-programs/national-crime-victim-bar-association/for-advocates for more information. Questions about this free referral service can be e-mailed to victimbar@ncvc.org.

Housing Laws: Sex trafficking victims may need assistance with local housing laws for issues such as unlawful evictions, nuisance ordinances, evicting a trafficker, removing a trafficker from a lease, and breaking a lease to move away and/or advocating for governmental housing assistance. Some states have specific legislation related to housing rights for victims of domestic violence, rape, sexual assault, and stalking, all of which can overlap with sex trafficking victimization. And, if a victim develops a disability as a result of their victimization, Section 504 of the Rehabilitation Act of 1973 can be used to protect their housing rights. Tribal housing laws will usually be set out in tribal codes and may also have a federal housing component depending on the funding source.

Advocate Tip: Fortunately, there are usually several state resources that can be used to deal with legal issues related to housing. Most housing issues will require assistance from an attorney or other legal advocate, so be prepared to provide referrals. You will likely be able to directly work with sex trafficking victims on accessing, or asserting rights to, governmental housing assistance programs. For sex trafficking cases that overlap with domestic violence, advocates should look to local domestic violence–related programs, resources, and legal rights.

Housing Law Resources: The American Civil Liberties Union has created a helpful “know your rights” page specific to public and private housing rights: www.aclu.org/know-your-rights/survivors-domestic-violence-your-rights-private-or-public-housing. Additionally, the National Sexual Violence Resource Center has published a comprehensive guide “Opening the Door: An Advocate’s Guide to Housing and Sexual Violence” that contains a section on victim housing protections under federal law: http://www.nsvrc.org/sites/default/files/nsvrc_publications_guides_opening-the-door-an-advocates-guide-to-housing-and-sexual-violence.pdf.

Debtor/Creditor Law: Sex trafficking victims may have been subject to financial crimes by a trafficker or may simply have credit or bankruptcy issues caused by their victimization.

Advocate Tip: Advocates should be prepared to provide local referrals to free or low-cost legal services related to their client’s financial legal issues. Advocates *should not* attempt to give advice on legal finance matters unless they have the proper training and licensing required.

Debtor/Creditor Law Resources: The National Asian Pacific American Bar Association has created a *National Legal Aid Directory* that is a helpful starting point for advocates that need to make legal referrals: www.napaba.org/page/nat_leg_aid_dir.

Family and Domestic Violence Law: Sex trafficking victims may need assistance with family law proceedings, including divorce, child custody, and issues related to domestic violence. Tribal laws will apply to family law cases in tribal court. It is important to note that in many instances tribes may apply customs and tradition related to a tribe's concept of healthy families and child rearing. Tribes may also apply tribal rules related to extended families.

Advocate Tip: Advocates should be prepared to provide referrals to free or low-cost legal services related to their client's family law issues. Many courts have specialized family court personnel that can guide advocates and sex trafficking victims through each proceeding. Be sure to see if your state has an anti-trafficking task force; these task forces can provide helpful information on any special family laws related to sex trafficking.

Family and Domestic Violence Law Resources: The American Bar Association's Commission on Domestic and Sexual Violence runs a program called the National Domestic Violence Pro Bono Directory, which is a comprehensive service that provides information and resources for victims that need legal assistance and the advocates that work on their behalf (www.probono.net/dv/). Attorneys included in this resource will likely have specialized training related to the dynamics of domestic violence.

Children's Civil Legal Needs: A sex trafficking victim who is also a parent will likely need assistance related to their children's civil legal issues.

Advocate Tip: Advocates should check with their tribal court, social services, Indian Child Welfare Act (ICWA) worker, or guardian ad litem for assistance with relevant referrals. Advocates should be aware that sex trafficking victims with children may need specialized legal assistance with:

- Asserting rights under ICWA, a federal law that provides enhanced protections for the Indian family, Indian child, and tribe;
- Visitation rights, especially if they have children with the trafficker(s);
- Reunification with children. If child welfare or social services are involved, their parent will need assistance with that civil court case. This could include help completing a court-ordered case plan;
- Custody issues, asserting who will have legal and/or physical custody of the children;
- Protection orders;
- Truancy issues (legal issues that arise due to the child's absence from school); and
- Child support, regardless of which parent(s) or guardian(s) are responsible for payments.

Children’s Civil Legal Resources: The National Center for Victims of Crime hosts a web page dedicated to meeting the needs of children involved in trafficking cases. The web page is specific to child trafficking victims but many of the resources can apply to the children of adult trafficking victims (www.victimsofcrime.org/our-programs/other-projects/child-trafficking/child-trafficking-resources). For information related to child welfare and ICWA, please visit www.NICWA.org.

Social Services: Trafficking victims may be eligible for a wide range of federally and locally funded public benefits, but usually need assistance to access these benefits. The services available to them may depend on their income, legal status, marital status, age, criminal record, and other factors. Public benefits offices may not be familiar with sex trafficking and may not apply the appropriate criteria for assessing eligibility. Note that tribes may provide a wide range of social services based upon tribal eligibility criteria.

Advocate Tip: Receiving monetary awards from civil or criminal cases can make some victims of crime ineligible for public benefits.

Social Services Resources: A useful Online Directory of Crime Victim Services, created by the Office for Victims of Crime (OVC). You can search for the type of services needed and the agency type at <https://ovc.ncjrs.gov/findvictimservices/default.html>.



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