

# Expanding the Network of Safety: Tribal Protection Order for Survivors of Sexual Assault

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## INTRODUCTION

The right to exist in a world free from violence is a basic tenet in many indigenous cultures and governments. The epidemic of sexual violence perpetrated against Native American women in the United States reflects a fundamental breakdown in the cultural and legal norms that have served to provide protection to Native women from time immemorial. Current rates of sexual violence against Native women are extremely high and the response from the criminal justice systems is arguably weak or, in some cases, nonexistent. This article will examine what we know about the nature and extent of sexual violence against Native women as distinct from other forms of violence, the impact of legal obstacles on survivors<sup>2</sup> and tribal communities, and will offer one potential legal remedy for tribal judicial systems wishing to address the problem. This legal remedy offers the option of civil protection orders for survivors of sexual violence. It has been enacted in a few states and is currently being considered by several other state legislatures. This article develops an independent analysis of the need for sexual assault protection orders at the tribal level, in light of the reality of sexual violence against Native women and the unique limitations on tribal criminal jurisdiction.<sup>3</sup> Part I lays the foundation for the development of a tribal response to sexual violence by examining what is known about the rate and impact of sexual violence perpetrated against Native women. Part II explores the historical and contemporary response to sexual violence by tribal governments, including the limitations imposed by U.S. federal law, and Part III outlines my proposal for the development of a civil legal remedy in tribal court for survivors of sexual violence.

## **I. Reality of Sexual Violence Against Native Women**

### **A. High Rate of Sexual Violence**

The urgency for developing an independent analysis of the legal remedies for Native survivors of sexual violence is largely grounded in the extremely high rate of victimization. However, specific data concerning the precise rate of sexual assault perpetrated against American Indian and Alaska Native women on tribal lands is often difficult to obtain. Historically, few sexual assault research studies

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<sup>2</sup> I use the term "survivor" to identify persons who have been victimized by sexual violence. I prefer the term "survivor" to "victim" because it focuses on personhood and strength rather than a criminal act.

<sup>3</sup> This article is limited to examining the issue of sexual violence perpetrated against adult Native women. The lack of response to child sexual abuse is also a significant problem in Indian country and warrants further attention. *See, e.g.,* Larry Echohawk, *Child Sexual Abuse in Indian Country: Is the Guardian Keeping in Mind the Seventh Generation?*, 5 N.Y.U. J. of LEGIS. & PUB. POL'Y 83 (2001).

have directly addressed Native women as a specific category., However, recent statistics from the Department of Justice indicate that American Indian and Alaska Native women suffer a higher rate of rape and sexual assault than any other group of people in the United States.<sup>4</sup> The National Violence Against Women Survey concluded that 34.1% of American Indian/Alaska Native women will be raped during their lifetime – more than 1 in 3 women.<sup>5</sup> The National Crime Victimization Survey data also shows a consistently high rate of sexual violence against Native women, with an average annual rate of 7.2 per 1,000 persons, compared to 1.9 per 1,000 persons for all races.<sup>6</sup> One weakness in the applicability of these findings, for purposes of analyzing the criminal justice response, is the lack of distinction between crimes occurring on tribal lands (including reservations) and crimes occurring in non-reservations or urban areas. It is difficult to ascertain the precise extent of sexual assault on tribal lands because there are no national standard reporting requirements for crimes in Indian country.<sup>7</sup>

National studies regarding the reporting of sexual assault indicate that rape is one of the most underreported crimes in our nation.<sup>8</sup> While few studies specifically look at the reporting rates among American Indian and/or Alaska Native women, anecdotal accounts of reporting among Native women reflect the same trend.<sup>9</sup> Bonnie Clairmont, a HoChunk advocate for survivors of sexual assault, has summarized the primary barriers that inhibit reporting of sexual assault by American Indian and Alaska Native women. The primary barriers are:

<sup>4</sup> See LAWRENCE A. GREENFELD & STEVEN K. SMITH, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME (1999). The high rate of sexual assault victimization among American Indian/Alaska Native women has been found in local studies as well. See, e.g., PETER HOVMAND, MICHIGAN VIOLENCE AND INTENTIONAL INJURY PREVENTION PROGRAM, SEXUAL ASSAULT SURVEILLANCE SYSTEM (July 1999) (reporting that in a study examining data collected between 1992-1997 at Michigan HIV counseling and testing sites in Michigan, American Indians/Alaska Native female clients had the highest ratio of reported sexual assault). See also LUCY BERLINER, OFFICE OF CRIME VICTIM ADVOCACY, SEXUAL ASSAULT EXPERIENCES AND PERCEPTIONS OF COMMUNITY RESPONSE TO SEXUAL ASSAULT: A SURVEY OF WASHINGTON STATE WOMEN (2001) (finding that American Indian women in Washington State were more likely than women of other racial backgrounds to be victims of sexual assault).

<sup>5</sup> PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN (2000).

<sup>6</sup> Ronet Bachman, The Epidemiology of Rape and Sexual Assaults Against American Indian Women: An Analysis of NCVS Data, Address to the Federal Response to Sexual Assault on Indian Women Federal and Tribal Working Group (Sept. 29, 2003).

<sup>7</sup> Depending on jurisdiction, there are at least four different law enforcement entities that may respond to the rape of a Native woman on tribal lands: Tribal law enforcement, the Federal Bureau of Investigation, the Bureau of Indian Affairs Law Enforcement, and state, county, or municipal law enforcement. No standard method of collecting and analyzing incident reports from these multiple agencies exists. NATIONAL SEXUAL VIOLENCE RESOURCE CENTER, SEXUAL ASSAULT IN INDIAN COUNTRY: CONFRONTING SEXUAL VIOLENCE 4 (2000).

<sup>8</sup> CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992-2000 (2002) (finding that nationwide, 63% of rapes, 65% of attempted rapes, and 74% of completed and attempted sexual assaults were not reported to law enforcement).

<sup>9</sup> See Bill Donovan, *Crime Stats: Tuba City Leads in Murders*, Navajo Times Online Edition, February 27, 2003, at <http://www.navajotimes.com/tribalnws8.html> (last visited March 1, 2003) (reporting that Navajo Police say that many rapes go unreported). See also SUSAN LEWIS & SUZANNE BLUE STAR BOY, NATIONAL SEXUAL VIOLENCE RESOURCE CENTER, INFORMATION-GATHERING FOCUS GROUPS ON CREATING A TRIBAL SART (July 2001).

1. Need to protect family honor
2. Fear of retaliation by perpetrator or by perpetrator's family
3. Fear of gossip
4. Going against unspoken rules that you don't turn in your own
5. Fear and distrust of systems, maltreatment and racist treatment
6. Fear they may be arrested for past legal problems unrelated to sexual assault<sup>10</sup>

An additional, significant facet of why Native women may be reluctant to report sexual assault to law enforcement is the perception that the criminal justice system will not respond to the crime.<sup>11</sup> One recent study suggests that less than half of all rapes and sexual assaults committed against American Indian women are reported to law enforcement.<sup>12</sup> Thus, the actual numbers of American Indian and Alaska Native women who are victims of rape and sexual assault may be much higher than is currently indicated.

The development of legal remedies for survivors of sexual assault also requires an analysis of the perpetrators. For example, if most perpetrators of sexual assault of Native women were unknown to the victim, it would be difficult (if not impossible) to develop an appropriate legal remedy. However, studies on rape and sexual assault have repeatedly shown that rape by an acquaintance is far more common than rape by a stranger. In the United States, the vast majority of sexual assault survivors are victimized by someone they know.<sup>13</sup> Statistics concerning the perpetrators of crimes against Native people in the United States are consistent with this finding, with over half of all violent crimes being perpetrated by someone the victim knows.<sup>14</sup>

Sexual violence can also be a component of intimate relationships and marriages. No study has specifically examined the issue of spousal or intimate partner rape among Native peoples. However, anecdotal information does indicate that sexual assault is often a facet of domestic violence within the lives of Indian women.<sup>15</sup> As with rape generally, spousal rape is unlikely to be reported to law enforcement by victims.<sup>16</sup>

There is no doubt that further research on the nature and extent of sexual violence perpetrated on tribal lands is warranted. Nonetheless, it can be extrapolated from the existing data that there are a high number of American Indian

<sup>10</sup> Bonnie Clairmont, *Non-Stranger Sexual Assault in Indian Country*, National Non-Stranger Sexual Assault Symposium: Proceedings Report (1999).

<sup>11</sup> See *inter alia*, discussion regarding prosecution rates at note 64.

<sup>12</sup> TIMOTHY C. HART & CALLIE RENNISON, U.S. DEP'T OF JUSTICE, REPORTING CRIME TO THE POLICE 1992-2000 (Mar. 2003).

<sup>13</sup> TJADEN & THOENNES, *supra* note 5. Acquaintance rape includes assault by relatives, dates, neighbors, co-workers, service providers, friends, and any other person with whom the victim has some connection. This is distinguished from stranger rape, which is an assault perpetrated by someone unknown to the victim.

<sup>14</sup> GREENFELD & SMITH, *supra* note 4, at 3.

<sup>15</sup> Minn. Indian Women's Resource Center Sexual Assault Program, *An American Indian Perspective on Marital Rape*, in Songidee Biimadaziwin, Ch. 2 (June 2001) (a handbook for Native advocates who work with sexual assault victims); See also DEVON ABBOTT MIHESUAH, *INDIGENOUS AMERICAN WOMEN* 56 (2003).

<sup>16</sup> Patricia Mahoney, *High Rape Chronicity and Low Rates of Help-Seeking Among Wife Rape Survivors in a Nonclinical Sample: Implications for Research and Practice*, 5 VIOLENCE AGAINST WOMEN 993 (1999).

and Alaska Native survivors of sexual assault, most of them victimized by people they know. It is also likely that many of these cases of sexual assault never enter any criminal justice system, because the survivors choose not to report to law enforcement for a variety of reasons.<sup>17</sup> However, survivors of sexual assault in Indian country who do report the crime to law enforcement face a complex maze of criminal jurisdiction issues. Moreover, the social and emotional after-effects of sexual assault have far-reaching implications for both individual women and tribal communities as a whole.

### **B. The Impact of Sexual Violence on Native Women**

The devastating impact of sexual violence on women has been well established. General studies about the impact of rape indicate that women survivors are at a high risk for developing mental and physical problems as a result of the assault.<sup>18</sup> Other ramifications of sexual assault on the lives of individual women can include school dropouts, drug addiction, suicide, and criminal behavior.<sup>19</sup> The unique impact of sexual violence in the lives of Native women provides further justification for the development of remedies at the tribal level.

Many advocates working with women survivors of violence in Indian country recognize the unique needs of the sexual assault survivors and their distinct paths to healing. We cannot assume that the legal remedies for domestic violence survivors will be appropriate or applicable to survivors of sexual assault. A woman who is sexually assaulted by a person who is not an intimate partner may experience many of the same emotions and issues as a woman who is a survivor of domestic violence, but there are also some significant differences. The dynamics of each crime are distinct and warrant separate examination. For example, a survivor of domestic violence may need representation to file for legal separation, divorce, or child custody. A sexual assault survivor may have other kinds of civil legal needs, especially in regards to housing (if she was assaulted in her home or apartment), employment, or education. Unlike victims of domestic violence, who may experience repeated assaults over a period of months and years, a victim of sexual assault may experience the crime only once. Nonetheless, that single experience has the potential to shape her entire life.

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<sup>17</sup> See *supra* notes 8-12 and accompanying text.

<sup>18</sup> See Sarah E. Ullman & Henriett H. Filipas, *Correlates of Formal and Informal Support Seeking in Sexual Assault Victims*, 16 J. OF INTERPERSONAL VIOLENCE 1028 (2001).

<sup>19</sup> Many studies have shown the general after-effects of sexual violence on survivors generally. Much more research is needed in this area in order to better understand the specific ramifications of sexual violence in the lives of Native women. A few studies suggest that sexual violence has a devastating impact. A small study of 30 Native American women indicated a high correlation between substance abuse, depression, suicide attempts and lifetime physical and sexual abuse. D.K. Bohn, *Lifetime Physical and Sexual Abuse, Substance Abuse, Depression, and Suicide Attempts Among Native American Women*, 24 ISSUES IN MENTAL HEALTH NURSING 333 (2003). Another study found that sexual abuse is correlated with suicide attempts among American Indian and Alaska Native youth. Iris Wagman Borowsky, et al., *Suicide Attempts Among American Indian and Alaska Native Youth: Risk and Protective Factors*, 153 ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 573 (1999). In 1982, it was reported that 80% of Native women seeking psychiatric services at a five-state area center had experienced sexual assault. Phyllis Old Dog Cross, *Sexual Abuse: A New Threat to the Native American Women*, 6 LISTENING POST: A PERIODICAL OF THE MENTAL HEALTH PROGRAMS OF THE INDIAN HEALTH SERVS. 18 (1982).

Some advocates who work with survivors of sexual violence in Indian country indicate that the sexual nature of rape and sexual assault has a particularly difficult impact on American Indian and Alaska Native survivors.<sup>20</sup> Because of the shame associated with being a victim of sexual assault, very few survivors seek assistance from existing advocacy organizations.<sup>21</sup> There are also reports from Native women who have had negative experiences with non-Indian sexual assault advocacy organizations. These experiences range from indifference and ignorance to outright racism.<sup>22</sup>

Some non-Indian legal scholars have described rape as “soul murder”<sup>23</sup> and “spiritual murder.”<sup>24</sup> The impact of sexual assault on the lives of native women has similar manifestations. A well-known advocate for Oglala Lakota Sioux women describes rape as “cutting to the core of who you are as a woman.”<sup>25</sup> Another advocate who works primarily with Osage women indicates that there is a greater risk for suicide among women who have been raped.<sup>26</sup> In looking at the survivors of trauma, one expert has described the impact as having lifelong implications: “resolution of the trauma is never final; recovery is never complete.”<sup>27</sup> The loss of control is a central feeling of victims who have been sexually assaulted.<sup>28</sup> The perpetrator, in committing the crime, has taken control of the survivor’s life. If she was assaulted outside of her home, she may fear leaving her home, or if she was assaulted in her home, she may never want to return home. If someone she trusted raped her, she may doubt her own intelligence, decision-making ability, and sanity. Several studies have analyzed the level of self-blame experienced by survivors of rape by acquaintances and found self-blame to be a significant factor in the recovery and general well being of survivors.<sup>29</sup>

For American Indian and Alaska Native survivors of sexual assault, the impact on the individual must be understood in the historical context of colonialism and conquest.<sup>30</sup> The power of women’s sexuality, because of its potential to affect reproduction and identity, is often a target of those seeking to destroy a people.<sup>31</sup> Prior to the formation of the United States, many European explorers

<sup>20</sup> Telephone Interview with Diane Payne, Children’s Justice Specialist, Tribal Law and Policy Institute (Feb. 27, 2003).

<sup>21</sup> LEWIS & BLUE STAR BOY, *supra* note 9, at 3.

<sup>22</sup> See generally Carol Maicki, *Cultural Competency and Native Women: A Guide for Non-Natives who Advocate for Battered Women and Rape Victims* (Sacred Circle, n.d.); See also Andrea Smith, *Colors of Violence*, 3 COLORLINES 4 (2000).

<sup>23</sup> Lynne N. Henderson, *What Makes Rape a Crime*, 3 BERKELEY WOMEN’S L. J. 192, 225 (1988).

<sup>24</sup> Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1448 (1993).

<sup>25</sup> Telephone Interview with Karen Artichoker, Director, Cangleska, Inc. (Feb. 18, 2003).

<sup>26</sup> Telephone Interview with Rosemary Shaw, Osage Nation Counseling Center (Feb. 26, 2003).

<sup>27</sup> JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* 211 (1992).

<sup>28</sup> Minn. Indian Women’s Resource Center, *supra* note 15, at Ch. 8, p.3.

<sup>29</sup> See, e.g., Rebecca Campbell, *Mental Health Services for Rape Survivors: Current Issues in Therapeutic Practice*, available at <http://www.vaw.umn.edu/documents/commissioned/campbell/campbell.html>.

<sup>30</sup> Andrea Smith, *The Sexual Colonization of Native Women*, in REMEMBERING CONQUEST: FEMINIST/WOMANIST PERSPECTIVES ON RELIGION, COLONIZATION AND SEXUAL VIOLENCE (Nantawan Boonprasat-Lewis et al. eds., 1999).

<sup>31</sup> DAVID STANNARD, *AMERICAN HOLOCAUST: CONQUEST OF THE NEW WORLD* 121 (1993).

committed rape and sexual violence against Native women.<sup>32</sup> There are specific accounts of rape and sexual violence against Native women throughout the history of the United States, including the mutilation and destruction of women's reproductive organs.<sup>33</sup> The impact of sexual assault on an individual can be compounded by the influence of this historical trauma, and the survivor may experience a sexual assault as part of a larger policy to silence, dis-empower, and ultimately destroy her nation.<sup>34</sup> Because sexual assault has been used as a tool of genocide, the psychological impact can be one of ultimate destruction<sup>35</sup> – even if the perpetrator is Native as well. For a Native survivor, then, relying on an external jurisdiction to provide a resource for healing and justice may feed into that sense of destruction. The pursuit of justice might only be appropriate and logical in the context of her own people and traditions.

The high rate of sexual violence in the lives of Native women and the corresponding negative effects upon the individual lives of these women no doubt has a devastating effect on tribal communities. Native women are an integral part of strong tribal governments.<sup>36</sup> Because of their roles as mothers, grandmothers, wives, sisters, healers, and leaders, the pain and anger of Native women can have a rippling effect throughout a community. The challenge for contemporary tribal justice systems is to develop local community responses to these crimes, which can restore a survivor's connection to her identity and power, while restoring her control over her own life and decisions. The following sections explore the role of tribal courts in adjudicating sexual assault, both from a historical and modern perspective.

## II. Tribal Response to Rape and Sexual Assault

### A. The Historical Tribal Response to Rape and Sexual Assault

Historically, tribal nations, as sovereigns, exercised full jurisdiction over crimes against women (including sexual assault). Several scholars have

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<sup>32</sup> See, e.g., Antonia I. Castañeda, *Sexual Violence in the Politics and Policies of Conquest* in BUILDING WITH OUR HANDS (Adela de la Torre & Beatriz M. Pesquera, eds., 1993). Evidence of the rape of Native women by Europeans extends as far back as Columbus. Michele de Cuneo, one of Columbus' shipmates, kept a journal in which he boasted of his rape of a Carib woman during the 2nd voyage. Letter from Michele de Cuneo (Oct. 28, 1495).

<sup>33</sup> See generally WHO'S THE SAVAGE?: THE DOCUMENTARY HISTORY OF THE MISTREATMENT OF THE NATIVE NORTH AMERICANS (David R. Wrono & Russell S. Nelson, Jr., eds., 1982).

<sup>34</sup> See, e.g., Andrea Smith, *Not an Indian Tradition: The Sexual Colonization of Native Peoples*, 18 HYPATIA 70 (2003).

<sup>35</sup> This is not to say that women who experience sexual assault are doomed to a life of despair and pain. On the contrary, Native women survivors who have shared their stories of survival with me have impressed upon me their strength of will and resolve in the face of brutality and oppression. Native women can indeed survive and heal after sexual violence, but the immediate and lingering after-effects of the crimes can result in significant impairments in their lives. What is important for the purposes of this paper is to acknowledge and document the devastation left in the wake of sexual violence, and how tribal legal systems might play a role in responding to this devastation.

<sup>36</sup> Elsie B. RedBird, *Honouring Native Women: The Backbone of Native Sovereignty*, in POPULAR JUSTICE AND COMMUNITY REGENERATION: PATHWAYS OF INDIGENOUS REFORM (Kayleen M. Hazlehurst ed., 1995).

documented the traditional strong response of tribal communities to domestic violence.<sup>37</sup> While there is no comprehensive, definitive evidence of the adjudicative nature of sexual assault in pre-colonial times, historians have indicated that most tribal communities had a strong response to sexual crimes against women, including corporal punishment and banishment.<sup>38</sup> For example, in Iroquois culture, it was said that a man could not achieve a leadership position if he had ever sexually assaulted a woman.<sup>39</sup> Some scholars have hypothesized that sexual assault was extremely rare or even non-existent in indigenous cultures prior to colonization, due in part to the strength of oral traditions regarding the importance of respecting and upholding women.<sup>40</sup> As tribes began to develop written laws in response to pressure from the United States government, some included laws against rape that reflected oral legal traditions that honored the victim's story and wishes.<sup>41</sup> When compared to the European and early American laws on rape, which often punished women for the actions of rapists, the tribal response to sexual assault was comparatively progressive and respectful of survivors.<sup>42</sup> Early American rape laws, based in large part on the common law of England, treated women as subordinate, at best, or as chattel at worst.<sup>43</sup> In contrast, indigenous systems of justice include philosophies of inter-gender respect and balance that are consistently found in oral traditions and anthropological studies.<sup>44</sup>

## B. United States Federal Limitations on Tribal Responses to Rape

Over the last one hundred years, tribal governments in the United States have been significantly stripped of their ability to protect women from rape and to hold rapists accountable by tribal standards. The ability of tribal nations to engage in rigorous, pro-active responses to all crimes has been impeded by federal statutes

<sup>37</sup> See, e.g., Gloria Valencia-Weber and Christine P. Zuni, *Domestic Violence and Tribal Protection of Indigenous Women in the United States*, 69 ST. JOHN'S L. REV. 69 (1995).

<sup>38</sup> See, e.g., *Complementary but Equal: Gender Status in the Plateau*, in WOMEN AND POWER IN NATIVE NORTH AMERICAN 87 (Laura F. Klein & Lillian A. Ackerman eds., 1995)

<sup>39</sup> Ines Hernandez-Avila, *In Praise of Insubordination*, in TRANSFORMING A RAPE CULTURE (Emilie Buchwald et al. eds., 1993).

<sup>40</sup> Jim Zion & Elsie Zion, *'Hazho 'Sokee'—Stay Together Nicely: Domestic Violence Under Navajo Common Law*, 25 ARIZ. ST. L. J. 407, 411-413 (1993).

<sup>41</sup> See, e.g., Sarah Deer, *What She Say, It Be Law: Rape Laws in Muskoke (Creek) Culture*, 4 MENDING THE SACRED HOOP NEWSLETTER 2, 5 (2002) (describing the 1824 rape law of the Muscogee Nation).

<sup>42</sup> Sally Roesch Wagner, *SISTERS IN THE SPIRIT: HAUDENOSAUNEE (IROQUOIS) INFLUENCE ON EARLY AMERICAN FEMINISTS* 67 (2001).

<sup>43</sup> English Lord Chief Justice Matthew Hale is given considerable credit for the development of modern American sexual assault jurisprudence, yet his philosophy indicates a serious element of misogyny. See PEGGY REEVES SANDAY, *A WOMAN SCORNED* 61 (1996). Lord Hale is credited with originating the jury instruction that rape is "easy to charge and hard to prove" and the common law rule that a woman cannot be raped by her husband. MATHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 634 (Sollom Emlyn ed., Am. ed. 1778).

<sup>44</sup> See, e.g., Bethany Ruth Berger, *After Pocahontas: Indian Women and the Law, 1830 to 1934*, 21 AM. INDIAN L. REV. 1, 17 (1997); Teresa D. LaFromboise, et al., *Changing and Diverse Roles of Women in American Indian Cultures*, 22 SEX ROLES 455, 457 (1990); JEAN CHAUDHURI & JOYOTPAUL CHAUDHURI, *A SACRED PATH: THE WAY OF THE MUSCOGEE CREEKS* 44 (2001); PAULA GUNN ALLEN, *OFF THE RESERVATION* 80 (1998); THEDA PERDUE, *CHEROKEE WOMEN* 100 (1998).

and case law. In some instances, the federal laws are not necessarily explicit limitations on tribal jurisdiction, but rather have created a presumption of lack of authority that has resulted in a practical lack of response at the tribal level. Three of the most significant federal laws and one U.S. Supreme Court case which have limited the ability of tribal nations to respond to violence in their own communities are examined below: the Major Crimes Act, Public Law 280, the Indian Civil Rights Act, and *Oliphant v. Suquamish Indian Tribe*. The limitations described below are not unique to the crime of rape. However, the examination is explored in the context of rape and in light of the high rate of sexual assault perpetrated against Native women.

### 1. Major Crimes Act and the Adjudication of Sexual Assault

In 1885, Congress passed the Major Crimes Act<sup>45</sup> in response to the Supreme Court decision in *Ex Parte Crow Dog*.<sup>46</sup> The Major Crimes Act was the first significant law enacted to establish federal jurisdiction over crimes committed in Indian country.<sup>47</sup> The crime of rape was included in the Major Crimes Act in its original version and has remained in its contemporary form.<sup>48</sup> One of the practical results of the Major Crimes Act is the elimination of exclusive tribal responsibility for prosecuting major crimes occurring in Indian country.<sup>49</sup> While there has been a history of presuming that the Major Crimes Act pre-empted tribal authority,<sup>50</sup> federal case law indicates that tribes have always retained concurrent jurisdiction over the enumerated crimes.<sup>51</sup> Nonetheless, the Major Crimes Act was the first major intrusion by the federal government in the adjudication of sex crimes in Indian country. Today, the federal government is tasked with investigating and prosecuting sexual violence throughout much of Indian country, even though the rates of arrest and prosecution for sexual assaults are low. Later restrictions on tribal courts, as explained below, have hampered the ability of tribal governments to exercise concurrent jurisdiction over these crimes.

### 2. Public Law 280 and its impact on Sexual Assault

The ability of tribal governments to adjudicate sexual assault and other serious crimes was further impaired with the passage of Public Law 280

<sup>45</sup> 18 U.S.C. § 1153.

<sup>46</sup> 109 U.S. 556 (1883). The *Crow Dog* case concerned an Indian defendant who was charged with murder. The Supreme Court of the United States affirmed tribal jurisdiction, finding that the Indian nation had exclusive jurisdiction over crimes occurring within Indian country. Many non-Indian people were outraged by this decision, which some viewed as Supreme Court approval of Indian "blood feuds." See generally SIDNEY L. HARRING, *CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY* 129-141 (1994).

<sup>47</sup> Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 526 (1976).

<sup>48</sup> 18 U.S.C. § 1153(a)

<sup>49</sup> Warren Stapleton, *Indian Country, Federal Justice*, 29 ARIZ. ST. L.J. 337 (1997).

<sup>50</sup> See Tim Vollman, *Tribal Sovereignty and Defendants' Rights in Conflict*, 22 KAN. L. REV. 387 (1974).

<sup>51</sup> *Westit v. Stafne*, 44 F.3d 823 (9th Cir. 1995). But see *Sam v. United States*, 385 F.2d 213, 214 (10th Cir. 1967) (suggesting, in dicta, that tribal courts do not have jurisdiction over the crime of rape.)



(hereinafter P.L. 280) in 1953.<sup>52</sup> P.L. 280 affected tribal criminal jurisdiction in two significant ways. First, it extended state criminal jurisdiction and state criminal laws onto tribal lands in certain states. Second, it eliminated the federal jurisdiction over crimes in those same states. Although P.L. 280 did not explicitly divest the tribal courts of concurrent criminal jurisdiction<sup>53</sup>, scholars and historians have noted that the practical impact for many tribes was equivalent to a divestment of that jurisdiction.<sup>54</sup>

With state governments taking the lead in the investigation and prosecution of crimes on tribal lands, the federal government was able to justify reducing financial assistance to tribal justice systems.<sup>55</sup> As a result, many tribes in states with P.L. 280 status have not developed contemporary tribal court systems.<sup>56</sup> Consequently, Native survivors of rape and sexual assault in tribes affected by P.L. 280 are largely dependent upon the state judicial systems to provide safety and justice.<sup>57</sup> Analysis of the impact of P.L. 280 indicates that many state law enforcement agencies and court systems are reluctant to become involved in Indian country crimes.<sup>58</sup>

### 3. Indian Civil Rights Act and punishment for sexual assault

The Indian Civil Rights Act of 1968<sup>59</sup> (hereinafter ICRA) created additional significant limitations for tribal courts to address violent crimes against Indian women. ICRA includes a provision that severely limits the penalty that Indian criminal courts could impose in criminal cases. The maximum sentence was originally 6 months imprisonment or \$500 fine, or both. In 1986 this limitation was changed to allow for one-year imprisonment or a \$5000 fine, or both.<sup>60</sup> This limitation effectively prevents many tribal prosecutors from prosecuting serious

<sup>52</sup> Act of August 15, 1953, ch. 505, 67 Stat. 588-590 (codified at 18 U.S.C. § 1162, 25 U.S.C. § 1360 and other scattered sections in the 18 and 28 U.S.C.) The original version of P.L. 280 conferred jurisdiction on five states: California, Minnesota, Nebraska, Oregon and Wisconsin. Upon admission to the Union in 1958, Alaska was added to this list. Other states have exercised the option to assume jurisdiction. Other states do not specifically fall under P.L. 280 status, but other federal legislation has created the same impact. *See, e.g.*, Act of June 8, 1940, ch. 276, 54 Stat. 249 (codified at 18 U.S.C. § 3243) (“The Kansas Act”).

<sup>53</sup> U.S. DEP’T OF JUSTICE, CONCURRENT TRIBAL AUTHORITY UNDER PUBLIC LAW 83-280 (November 9, 2000); *See also* Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627 (1998).

<sup>54</sup> CAROLE GOLDBERG-AMBROSE, *PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280* 8 (1997).

<sup>55</sup> *Id.* at 12.

<sup>56</sup> *See* Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405 (1997).

<sup>57</sup> *See* Ada Pecos Melton & Jerry Gardner, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, <http://www.tribal-institute.org/articles/gardner1.htm> (last visited Sept. 28, 2003).

<sup>58</sup> Carole Goldberg & Duane Champagne, *A Second Century of Dishonor: Federal Inequities and California Tribes*, (UCLA American Indian Studies Center) Mar 26, 1996, available at <http://www.sscnet.ucla.edu/indian/ca/Tribes.htm>.

<sup>59</sup> 25 U.S.C. §§ 1301-1303 (2000).

<sup>60</sup> Pub. L. No. 99-570, Tit. IV, Sec. 4217, 100 Stat. 3207-146 (1986).

crimes because the sentences are too minimal to be effective against felony crimes such as rape and sexual assault.<sup>61</sup>

The result of ICRA on crimes against women is that tribal governments may have the capability to investigate, arrest, and prosecute crimes such as rape and felony assault, but cannot provide adequate punishments for convicted persons. When the Honorable William C. Canby, Jr., a justice on the 9th Circuit Court of Appeals, testified before the Senate Committee on Indian Affairs in August of 1995, he stated:

In some instances in the past when Indians have committed major crimes but the federal authorities are too distant or too busy to investigate or prosecute, the tribe has resorted to prosecution of the offender for some lesser misdemeanor. In that regard, the tribal court ends up doing the federal court's business, but it cannot do it as thoroughly because its jurisdiction is limited.<sup>62</sup>

The ability of tribes to provide punishments such as fines and incarceration was curtailed by the passage of ICRA. Indeed, many tribal codes classify the serious crime of sexual assault as a "misdemeanor" – probably due to the limitations imposed by ICRA.<sup>63</sup> When federal or state prosecutors decline cases, whether because of lack of resources or an inability to establish an effective case, the crime of sexual assault easily goes unpunished.<sup>64</sup>

<sup>61</sup> Congressional intent for the penalty limitations in ICRA is unclear. The legislative history for the Act indicates that much of the motivation for ICRA was to ensure the protection of Indian citizens' civil rights. See Donald L. Burnett, *An Historical Analysis of the 1968 'Indian Civil Rights Act'*, 9 HARV. J. ON LEGIS. 557, 584 (1972). There is not a clear link between civil rights of Indians and the limit on tribes' authority to sentence criminals to incarceration. The provision limiting the ability to sentence may have been linked to the same fear which later drove the Supreme Court to remove tribal jurisdiction over non-Indians in *Oliphant* – the unfounded concern that defendants must be protected from "arbitrary and unjust actions of tribal governments." S. Rep. No. 841, 90th Cong., 1st Sess. at 6 (1967). Another possibility is that the Bureau of Indian Affairs desired to maintain control over tribal courts and councils by limiting the severity of penalties. Burnett, *supra* at 583. More likely, perhaps, is that Congress interpreted the Major Crimes Act as eliminating tribal jurisdiction over felonies, and thus, wanted to prevent Indian tribal courts from giving lengthy sentences for misdemeanors. Whatever the rationale for limiting tribal sentencing, it is clear that the ICRA was passed by Congress over strong tribal objections and is considered to be a severe infringement on tribal sovereignty. See STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 279 (2002).

<sup>62</sup> Hon. William C. Canby Jr., Statement to the Senate Committee on Indian Affairs (Aug. 2, 1995).

<sup>63</sup> See, e.g., Poarch Band of Creek Indians Code, § 8-3-2 (1999); Yankton Sioux Tribe Criminal Code § 3-13-1 (1995).

<sup>64</sup> Data regarding the rate of federal prosecution for sexual assault against Native women is not readily available. The overall rate of federal prosecution for sex offenses, however, may provide some indication of the number of rape cases against Native women prosecuted by the federal government. In FY 2000, U.S. Attorneys received 841 sexual abuse offense suspects. U.S. DEP'T OF JUSTICE, *COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2000*, Table 2.1 at 27 (2002). In the same time period, 435 sexual abuse cases were filed in U.S. District Courts across the nation and 311 cases resulted in conviction. FEDERAL JUSTICE STATISTICS RESOURCE CENTER, at <http://fjsrc.urban.org/index.cfm>. "Sexual abuse offenses" includes crimes against children

#### 4. *Oliphant v. Suquamish and the Non-Indian Perpetrator*

As a result of the 1978 Supreme Court decision in *Oliphant v. Suquamish Indian Tribe*,<sup>65</sup> Indian nations have no criminal jurisdiction over non-Indian persons who commit crimes on their reservations. *Oliphant* stripped tribal courts of all criminal jurisdiction over non-Indian criminals. Thus, non-Indians may not be held accountable for criminal actions by tribal governments.<sup>66</sup>

This ruling has a profound effect on the criminal prosecution of sexual assault, because statistics indicate that American Indian and Alaska Native women are much more likely to be raped by a non-Indian than an Indian.<sup>67</sup> American Indian and Alaska Native women who are raped by non-Indians are left with no option for criminal justice in the tribal court system. However, the *Oliphant* decision does not limit the ability of a tribal government to impose civil sanctions on a non-Indian.<sup>68</sup> However, civil sanctions are a weak substitute for the important punitive power imposed by a criminal justice system for a crime such as rape.

#### C. Contemporary Tribal Response to Violence Against Women

It is a challenge to develop strong law and policies at the tribal level to address sexual violence given the enormous barriers faced by tribal governments in addressing violent crimes. The contemporary tribal response to sexual assault can be analyzed on two levels – first, the existence of criminal laws that prohibit sexual assault and second, enforcement of those laws. In terms of the laws themselves, many modern tribal governments do have criminal statutes prohibiting rape and/or sexual assault.<sup>69</sup> Unfortunately, many of these laws mirror language from state rape laws of the early to mid- twentieth century. Criminal provisions in many

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as well as adults. Moreover, the federal government prosecutes not only crimes in Indian country but also crimes occurring on all federal lands.

<sup>65</sup> 435 U.S. 191 (1978). This case involved the prosecution of two non-Indians by the Suquamish Indian Tribe. The U.S. Supreme Court ruled that Indian tribes do not have jurisdiction to try and punish non-Indians. One of the court's rationales for eliminating tribal jurisdiction over non-Indians was a concern that tribal courts would be unfair to non-Indian defendants. For example, the court noted that the non-Indian would be judged by, "a different race, according to the law of a social state of which he has an imperfect conception." *Id.* at 211 (quoting the decision in *Ex parte Crow Dog*). The Court also expressed a concern that non-Indians were excluded from Suquamish juries. In addition, the *Oliphant* decision indicated that the federal government recognized tribal sovereignty only over internal affairs, and that exercising tribal authority over non-Indians would jeopardize the tribes' protected status.

<sup>66</sup> 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 B.Y.U. J. OF PUB. L. 2 (2000).

<sup>67</sup> GREENFELD & SMITH, *supra* note 4, at 7. "About 9 in 10 American Indian victims of rape or sexual assault were estimated to have had assailants who were white or black."

<sup>68</sup> Catherine Baker Stetson, *Decriminalizing Tribal Codes: A Response to Oliphant*, 9 AM. INDIAN L. REV. 41, 62 (1981).

<sup>69</sup> See, e.g., Fort Peck Comprehensive Code of Justice Sec. 200, § 226 (1986); Eastern Band of Cherokee §§ 14-20.2 – 14-20.3 (2000); Salish and Kootenai Tribal Offenses §§ 2-1-601 – 2-1-602; Law and Order Code of the Fort McDowell Yavapai Community §§ 6-63 – 6-65 (1995); Pawnee Tribe Law and Order Code §§ 231-234.

contemporary tribal codes date back to the Indian Reorganization Act<sup>70</sup> era, in which most federally-recognized tribal governments adopted Constitutions and laws that were heavily influenced by the American system via the Bureau of Indian Affairs.<sup>71</sup> Therefore, many current sexual assault statutes in tribal codes do not reflect the genuine Native perspective, but rather the American beliefs on rape from the era prior to rape law reform during the 1970s.

Although there has been a great deal of reform in state sexual assault statutory laws since the 1970s,<sup>72</sup> reform at the tribal level has been minimal at best. Many of the tribal sexual assault statutes have weaknesses, which include requiring proof of violence or force in order to secure a conviction, instead of lack of consent.<sup>73</sup> In addition, numerous tribal laws continue to include a “marital rape” exemption, meaning that a man cannot be prosecuted for raping his wife. Still other tribal governments do not have any criminal laws that address sex crimes against adult women.

Given the numerous limitations imposed upon tribal nations, it is extremely difficult, though not impossible, for a contemporary tribal prosecutor to pursue a criminal rape case. No definitive statistics are available to determine how many tribes have prosecuted sexual assault in past years but the numbers are believed to be small. One advocate who has been involved with the issue of violence against Indian women for over 20 years said, “In my experience, I’ve never heard of a tribe prosecuting rape. They see it as a federal responsibility that they can’t handle.”<sup>74</sup> However, some tribal prosecutors are pursuing cases against Indian sex offenders<sup>75</sup>, a trend that appears to be motivated, in part, by frustration with the lack of prosecution at the state or federal levels.

Tribal prosecutors are truly limited in their power over sexual assault defendants. They can only prosecute if the defendant is Indian, and then only for a maximum sentence of 1 year incarceration or a \$5,000 fine or both. Moreover, most tribal justice systems suffer from an incredible lack of resources for both

<sup>70</sup> Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified as amended in scattered sections of 25 U.S.C.).

<sup>71</sup> For a discussion of the impact of the Indian Reorganization Act on tribal laws, see Robert B. Porter, *Strengthening Tribal Sovereignty Through Government Reform: What Are the Issues?*, 7 KAN. J. L. & PUB. POL’Y 72, (1997). Contemporary tribal laws continue to be heavily influenced by the federal government, since funding requirements often require conformity with so-called “model codes” derived from the Bureau of Indian Affairs courts. Bruce G. Miller, *Contemporary Tribal Codes and Gender Issues*, in CONTEMPORARY NATIVE AMERICAN CULTURAL ISSUES 103 (Duane Champagne ed., 1998).

<sup>72</sup> Ronald J. Berger et al., *The Dimensions of Rape Reform Legislation*, 22 LAW & SOC’Y REV. 329 (1988). See also Carole Goldberg-Ambrose, *Unfinished Business in Rape Law Reform*, 48 J. OF SOCIAL ISSUES 173 (1992).

<sup>73</sup> For example, the threshold for proving rape in some existing tribal statutes is that the defendant compelled the victim to submit by “force or threat of imminent death or serious bodily injury.” In order to sustain this proof, the prosecution must establish that the victim put up the “utmost resistance.” This extremely high threshold has been largely repealed in many states. See STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 30-33 (1998).

<sup>74</sup> Telephone Interview with Karen Artichoker, Director, Cangleska, Inc. (February 18, 2003).

<sup>75</sup> See, e.g., *United States v. Lester*, 992 F.2d 174, 175 (8th Cir. 1993) (noting that the federal investigation was completed six months after the Standing Rock Sioux Tribal Court convicted the appellee of rape and assault).

adjudication and incarceration.<sup>76</sup> Given the limited options and resources available to tribal prosecutors, many survivors of sexual assault may be interested in other mechanisms to find justice and safety.<sup>77</sup> Exploring tribal responses to domestic violence, including utilization of civil protection orders, may offer an alternative to the criminal justice system for survivors of sexual assault.

Protection orders have become increasingly used in tribal courts as tools for women victimized by their partners in cases of domestic violence. A protection order is a court order (usually civil) that is requested by the victim of a crime from the court to protect her against another person or persons.<sup>78</sup> Depending on the laws of the particular tribe, a protection order can order the named individual to: stop committing violence acts, stay away from the victim and her family, stop contacting the victim, and other requirements designed to provide safety to the victim.

In recent years, significant attention has been given to the issue of domestic violence and the improvement of contemporary tribal justice systems in responding to intimate partner violence.<sup>79</sup> Because of reform of tribal statutory law and changes in tribal procedural rules, Native women survivors of domestic violence have increasingly been able to obtain orders of protection in tribal courts.<sup>80</sup> Many tribal codes outlining protection order statutes are specific to domestic violence, requiring that the petitioner have a history of (presumably consensual) intimacy with the respondent.<sup>81</sup> Survivors of sexual assault who do not have a history of intimacy with their assailant, may not be eligible for a protection order. (See Appendix A). Examples of sexual assault survivors who currently may not be eligible for a protection order in these tribal courts include the following:

- A casino employee who is raped by a co-worker
- A mother of three who is sexually assaulted by a neighbor
- An 18-year old pregnant woman raped by a person purporting to be a traditional healer
- A 25-year old woman molested by a medical professional
- A grandmother sexually assaulted by her niece's husband
- A 15 year-old high school student who is raped at a party by a former childhood friend<sup>82</sup>

<sup>76</sup> See generally U.S. COMM'N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 77-81 (July 2003).

<sup>77</sup> One creative solution employed by a Navajo survivor of sexual assault by a government employee was based in treaty rights. Venita Tsosie sued in the United States Court of Claims for relief under art. I of Navajo Treaty, June 1, 1868, 15 Stat. 667, which provides that if "bad men" among the whites commit "any wrong" upon the person or property of any Navajo, the United States will reimburse the injured Navajo for the loss. *Tsosie v. United States*, 825 F.2d 393, 394 (1987).

<sup>78</sup> See generally Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 167 (1993).

<sup>79</sup> See, e.g., Eileen Luna, *Protecting Indian Women from Domestic Violence*, NAT'L INST. OF JUST. J. 28 (Jan. 2001).

<sup>80</sup> *Id.*

<sup>81</sup> Tribal protection order statutes are not unique in this regard. Most state statutes governing protection orders have similarly defined eligibility requirements, which often do not allow a survivor of sexual assault to obtain a civil protection order.

<sup>82</sup> All of the scenarios described in this list are based on actual cases from newspaper reports or described to me by survivors and advocates.

None of the women in this list would be eligible for a protection order in tribes with codes like the examples in Appendix A. Indeed, the only survivors of sexual assault who would be eligible for a protection order under the example laws are those women who were sexually assaulted by an intimate partner or family member. However, it is clear in any of the six scenarios described above that the survivor may have justifiable fear for her safety since all of them would be at risk for future contact with the perpetrator. The examples above do not indicate the race of the perpetrator, but it can be extrapolated that if the assailant in the above scenarios were a non-Indian, the likelihood of protection in the existing system would be negligible due to the lack of criminal jurisdiction.<sup>83</sup>

Some tribal codes do include provisions for civil “restraining orders” or “injunctions.” These are distinct from domestic violence protection orders and there are several reasons why these options may not provide adequate relief. Most civil restraining order statutes are not designed with victimization and healing in mind. First, there is often a filing fee or court costs associated with a restraining order. Second, the orders lack provisions for emergency orders (also known as “\_ex parte\_” orders), which may leave a survivor vulnerable to violence in the immediate aftermath of crime. Third, the restraining orders may offer only injunctive relief against actions such as trespassing and may not reflect the safety and security needs of the victims. Many generic tribal restraining order codes require that the petitioner show irreparable harm if the order is not granted.

Even for those tribal courts whose codes technically allow for the issuance of a protection order in cases of acquaintance rape (as opposed to intimate partner rape), many survivors of sexual assault may not be familiar with the provisions of the code. Advocates may also not recognize that a protection order may be a useful tool for the survivor, because their experience with the process has been limited to cases of domestic violence.<sup>84</sup>

### III. Protection Orders for Survivors of Sexual Assault

Tribal governments face the challenge of providing a judicial response that effectively addresses sexual violence against women, notwithstanding the barriers established by the evolution of federal Indian law. Such approaches should provide for women’s safety, establish accountability for sex offenders, and honor the strength and ability of survivors. Because of the limitations imposed on modern tribal courts’ criminal jurisdiction, it is unlikely that a survivor will be able to achieve a just result through arrest and prosecution. In the event of arrest and arraignment, however, criminal no-contact orders issued by a tribal court can serve as a form of protection order, and are recognized by federal law as being eligible for full faith and credit.<sup>85</sup> Tribal judges who issue no-contact orders in conjunction with pre-trial release in criminal sexual assault cases should provide the survivor

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<sup>83</sup> See discussion *supra* note 64 and accompanying text.

<sup>84</sup> See, e.g., Shannon Walker, Washington Coalition of Sexual Assault Programs, *Survivors of Sexual Assault and Their Use of Protection Orders* (2002) (Reflecting that one tribal court judge rarely handles a protection order in a sexual assault case.)

<sup>85</sup> 18 U.S.C. § 2265(a) (2000).

with a copy of the no-contact order so that she will be cognizant of the court's protection.

There are also at least two other significant ways in which a tribal government could assert its authority to protect women from rapists outside of the context of the criminal justice system. If the perpetrator is an employee of the tribal nation or a tribal enterprise, the tribal government, depending on the tribal law, may have the ability to terminate his employment. At least one tribal court has ruled in favor of terminating the employment of a sex offender, based on the tribal government's authority to terminate employees who present safety and security concerns.<sup>86</sup>

Another important area in which tribal governments continue to have significant jurisdiction is the issuance and enforcement of civil protection orders. However, as noted earlier, many current tribal protection order statutes are limited to intimate partner violence. Tribal governments can provide an option for sexual assault survivors to obtain a protection order by enacting new ordinances that allow survivors of sexual assault to file for an order of protection.

#### **A. How Civil Protection Orders Can Help Survivors of Sexual Assault**

The goal of any new protection order statute should be to provide for at least four important components: safety; accountability; prevention; and healing. Safety should be the paramount goal in any protection order system. Studies indicate that almost half of all women survivors of sexual assault report that they feared severe bodily injury or death during the assault.<sup>87</sup> Statistics indicate that Native women are at particular risk for injury as a result of sexual assault, and are more than three times as likely as non-Native rape survivors to have been attacked with a weapon.<sup>88</sup> The pain and trauma associated with sexual assault is such that women can re-experience the mental anguish of the assault whenever they re-encounter the perpetrator. Repeated exposure to the perpetrator, even without additional physical violence, can compound the trauma.<sup>89</sup> Protection orders can provide survivors of violence with a sense of security and safety. A protection order may offer some degree of control over the survivor's life, particularly for those survivors who believe that their perpetrator will continue to present a danger to her. Because she will not have to wait until an additional assault occurs to contact law enforcement authorities, a court order can provide peace of mind and a sense of safety. A sexual assault protection order should, at a minimum, require the perpetrator be required to stay away from the survivor's person, place of residence, school, employment, or other location.

Accountability for perpetrators of sexual assault may be difficult to attain in tribal courts, where criminal jurisdiction has been diminished. However, the issuance of a protection order to a sexual assault survivor may provide a significant

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<sup>86</sup> See, e.g., *Trokov v. Off. of the Director of Reg.*, No. GDTC-AA-99-107, 2000 NAMG 0000001 (Mohegan Gaming Disputes Trial Ct. of Appeals (May 8, 2000)) (upholding the authority of the tribal gaming regulators to terminate the employment of a person arrested for sexual assault).

<sup>87</sup> CRIME VICTIMS RESEARCH & TREATMENT CTR., RAPE IN AMERICA: A REPORT TO THE NATION 5 (1992).

<sup>88</sup> Bachman, *supra* note 6.

<sup>89</sup> Native American Circle, Domestic Violence, Sexual Assault and Stalking, § 3, at 18-19 (2001).

level of accountability in the civil system, providing that appropriate sanctions are in place.<sup>90</sup> While the protection order itself may be a civil order, the tribal code can provide that violations of such an order can result in criminal sanctions. Indian perpetrators who violate a civil protection order may then be subject to incarceration and other criminal penalties. For the Native survivor of an interracial sexual assault, a civil protection order available at the tribal level would offer additional protection that was eliminated by *Oliphant*.<sup>91</sup> Tribes still retain jurisdiction over non-Indians in many civil matters.<sup>92</sup>

Prevention of future sexual assault is difficult to predict or guarantee. However, the issuance and enforcement of protection orders in a swift and consistent manner can send a strong message to the perpetrator and community that sexual assault is not acceptable behavior. Holding offenders accountable at the community level may also serve as a deterrent to recidivism or send a message to other potential perpetrators. Tribal legislatures can take pro-active steps to condemn sexual violence against Native women by enacting laws to protect survivors and hold offenders accountability.

### **B. Civil Protection Orders as a Healing Alternative**

As noted earlier, the ability of tribal governments to prosecute criminals has been gradually but significantly eroded over the last 100 years. The civil nature of protection orders provides an alternative to the criminal justice system. Another advantage of having civil protection orders available for survivors of sexual assault is that the civil nature of the proceedings does not require the survivor to contact law enforcement or otherwise become involved with the criminal justice system.<sup>93</sup> A civil proceeding offers more control to the survivor because she is making her decision independent of the criminal justice system. The criminal justice system, as already described earlier, is not an option for many women. In addition, the criminal justice system puts control of the case in the hands of the prosecutor. Many women do not want to relinquish control of their story. The Anglo-American legal system has a notorious history, well documented by feminist

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<sup>90</sup> Sanctions for violating a protection order are usually set forth by statute, and may include incarceration, community service, public apology, fines, or other requirements.

<sup>91</sup> In order to provide sanctions for non-Indian perpetrators of sexual assault, it is important that tribal statutes include civil sanctions for violation of protection orders, as well as protocols for enforcement of foreign protection orders.

<sup>92</sup> *But see* Melissa L. Tatum, *A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Act*, 90 KY. L.J. 123 (2001-2002)(providing detailed analysis of rules regarding tribal civil jurisdiction over non-Indians.) Note that the Violence Against Women Act of 2000 provides that “tribal court[s] shall have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe.” 18 U.S.C. § 2265(e) (2000). One quandary concerns the phrase “matters arising within the authority of the tribe.” Since tribal governments do not have jurisdiction over non-Indians, per *Oliphant*, the challenge is to carefully draft protection orders against non-Indians such that they can be adequately enforced using civil authority.

<sup>93</sup> Walker, *supra* note 84.



legal theorists, of blaming the victim and minimizing the impact of rape.<sup>94</sup> Indeed, some studies of the mainstream systems have indicated that a poor response from the medical or judicial system can actually exacerbate the negative impact of sexual assault on a particular individual.<sup>95</sup>

For many survivors, the opportunity to tell their story of survival to a judge may be integral to their healing and re-integration into the community. A Tlingit survivor of rape, Diane Benson, has stated that to be silent “makes you crazy.”<sup>96</sup> Scholars and advocates have documented the general healing power of storytelling for survivors of sexual assault.<sup>97</sup> A protection order hearing can serve as a forum for the stories of survivors, and offers a formal setting in which survivors can choose to ask for protection from further harm.

Survivors of sexual violence often indicate the importance of finding justice in the healing process. Even though a protection order is not equivalent to a criminal conviction or a lengthy incarceration, the protection order can provide a survivor with the knowledge that there is a public acknowledgement of her story. A protection order is a public record of the reality of the need for protection, and expresses that the court believes the survivor.

### C. Protection Orders for Sexual Assault - Limitations

Protection orders for sexual assault will have some limitations when compared to protection orders issued for domestic violence. For example, the issuance of a protection order for a sexual assault victim will not trigger the Brady Act prohibition on possession of a firearm.<sup>98</sup> In addition, not all survivors of sexual assault will be able to utilize protection order statutes. Protection orders will also not be useful in cases of stranger rape, because the survivor does not have information necessary to file for a protection order against a particular person – nor will the tribal court have the ability to provide notice and service to an unknown party.

Protection orders generally have other weaknesses as well – regardless of whether they are issued in a case of domestic violence or a case of sexual assault. In order for the protection order approach to be useful to sexual assault survivors, there must be law enforcement available to enforce the order. The civil protection order “solution” will not be practical in locations where there are not enough law

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<sup>94</sup> See e.g., SUSAN ESTRICH, REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO (1987); Lynn Hecht Schafran, *Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist*, 20 FORDHAM URB. L.J. 439 (1993).

<sup>95</sup> R. Campbell et al., *Community Services for Rape Survivors: Enhancing Psychological Well-Being or Increasing Trauma?*, 67 J. OF CONSULTING AND CLINICAL PSYCHOL. 847 (1999).

<sup>96</sup> Sandi Gerjevic, *Ways of Healing*, ANCHORAGE DAILY NEWS, May 29, 2001, at A2.

<sup>97</sup> See, e.g., Amanda Konradi, *Having the Last Word: An Examination of Rape Survivors' Participation in Sentencing*, 6 VIOLENCE AGAINST WOMEN 353 (2000).

<sup>98</sup> 18 U.S.C. § 921(a)(32)(2000) (requires that the Plaintiff/Petitioner be an intimate partner of the Defendant/Respondent for a protection order to trigger the firearms prohibition. “Intimate partner” is defined as a spouse, former spouse, parent, or cohabitant.)

enforcement officers.<sup>99</sup> In addition, if a law enforcement officer raped a woman, she may not want to rely on law enforcement to protect her from further harm.<sup>100</sup>

As advocates for survivors of domestic violence can attest, protection orders are never a panacea for any survivor of violence. The process of obtaining an order is by no means easy for someone who has experienced a trauma. In order to persuade the court that a protection order is justified, a survivor of sexual assault will be required to put forth evidence that provides legal justification for the protection order. Should a respondent choose to challenge a protection order, he may be allowed to cross-examine the petitioner in a court hearing, either on his own behalf or through hired counsel. Many survivors of sexual assault may not want to expose themselves to this kind of public questioning and scrutiny. The open forum of a tribal courtroom is not necessarily a comforting locale for someone who has been raped; and it is possible that survivors who are reluctant to report the assault to law enforcement due to shame or embarrassment will feel no differently about reporting the crime to a judge.

Even if issued, a court order cannot provide a guarantee that any particular violent individual will stop posing a threat to a particular victim. However, the protection order will provide law enforcement with probable cause to arrest an individual who violates the order's provisions. Protection orders, then, provide an extra level of security beyond the status quo. Ultimately, the proposal to expand protection order statutes to include survivors of sexual assault is a matter of offering additional choices and options to survivors. The sense of empowerment and control that this additional choice and option provides is significant. In my experience working with survivors of sexual assault, even the decision to decline a particular course of action is preferable to having no options at all.

#### **D. Proposal to include crimes of sexual violence in tribal protection order statutes**

The question now arises about the logistics of expanding the tribal protection order process to include sexual assault survivors as eligible applicants. There is debate among activists and researchers in the field of violence against women as to whether existing domestic violence protection codes should be expanded to include the crime of sexual assault, or whether a separate and distinct sexual assault protection code (a "stand-alone" code) should be drafted. Tribal legislative bodies are not limited or controlled by state legislative approaches to sexual assault protection orders, but an examination of the issues addressed by state legislation can illuminate key issues to consider. Several state sexual assault coalitions that are attempting to address the issue at the state level have asserted that a stand-alone protection order to address sexual assault is the best

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<sup>99</sup> Lack of adequate law enforcement is a major issue for many tribal communities. See STEWARD WAKELING, ET AL., POLICING ON AMERICAN INDIAN RESERVATIONS, NAT'L INST. OF JUST. J. 2 (Jan. 2001).

<sup>100</sup> Unfortunately, reports of law enforcement officers raping Native women are not unusual. See, e.g., Jim Holland, *Man Sentenced for Rape of Woman and her Daughter*, RAPID CITY JOURNAL, Jan. 29, 2003 (describing the sentencing of a former tribal police officer convicted of rape).

method.<sup>101</sup> However, the state of Oklahoma recently amended its “Protection from Domestic Abuse Act” to include victims of rape as eligible to file for protection orders, regardless of an existing or prior relationship.<sup>102</sup> Other states have also expanded already-existing protection order statutes to include victims of rape and sexual assault as eligible for protection orders.<sup>103</sup>

The following are some key components for tribal legislatures to consider when drafting a stand-alone protection order statute for sexual assault survivors. These include:

- There should be no charge for filing and/or registering a sexual assault protection order. There should also be no charge for dropping a protection order, if the survivor should later decide that the order is not in her best interest.<sup>104</sup>
- The protection orders should be available to any victim who alleges a single incident of non-consensual sexual conduct or sexual penetration as defined by tribal law.<sup>105</sup>
- The language of the protection order statute should invoke a “rape shield law” or similar provision to protect the victim’s privacy.<sup>106</sup>
- The victim’s eligibility for an order of protection should not be dependent upon reporting the sexual assault to law enforcement or participating actively in the criminal justice system.<sup>107</sup>
- The court should not require physical injury or medical/forensic examination of the victim in determining whether to issue a protection order.<sup>108</sup>

In order for a protection order protocol to be effectively used by survivors of sexual assault, several other elements in the tribal justice system need to be in place.

1. The survivor must know that the protection order is an option for her.

<sup>101</sup> See Walker, *supra* note 93. See also Lyn Schollett, *ICASA Pursues Innovative Legal Remedy for Rape Victims*, ICASA Coalition Commentary (Winter 2001).

<sup>102</sup> 22 Okla. Stat. § 60.2 (Supp. 2004) now reads: “A victim of domestic abuse, a victim of stalking, a victim of harassment, a victim of rape, any adult or emancipated minor household member on behalf of any other family or household member who is a minor or incompetent, or any minor age sixteen (16) or seventeen (17) years may seek relief under the provisions of the Protection from Domestic Abuse Act” (emphasis added).

<sup>103</sup> See, e.g., MONT. CODE ANN. § 40-15-102 (2001); Md. Cts. Jud. Proc. § 3-1503 (2002).

<sup>104</sup> Charging survivors of crime for filing petitions for civil protection orders is contrary to public policy and victim safety, since it would create an undue barrier for indigent victims. Moreover, jurisdictions that charge victims for the filing, issuance, service, or registration of a protection order are prohibited from receiving funding under the Violence Against Women Act. 42 U.S.C. §§ 3796gg-5(a)(1) and 3796hh(c)(4).

<sup>105</sup> This component is similar to most statutory requirements to receive a domestic violence protection order. Note that the tribal government must define the prohibited contact in order to facilitate the remedy.

<sup>106</sup> Because a survivor’s prior consensual sexual activity is irrelevant to an incident of sexual assault, the respondent should be prohibited from raising such matters in opposition to the protection order. For an overview of this evidentiary principle, see 29 Am. Jur. 2d Evidence § 499.

<sup>107</sup> Similar to domestic violence protection orders, this remedy is independent from any action taken by the tribal prosecutor in regards to a criminal case. Moreover, the burden of proof for obtaining a civil protection order is lower than that required for criminal conviction in most tribal courts.

<sup>108</sup> The burden of proof issue in a civil protection order case should not require medical evidence. Indeed, many survivors of sexual assault do not have physical evidence of the assault.

2. The judge must issue the protection order.
3. Law enforcement must know to enforce the protection order.

The first step is code revision, and these last three elements require training and education. As mentioned above, many tribal governments have a system in place that is designed for the needs and safety of survivors of domestic violence. The challenge for tribes is to expand the notion of the protection order to include survivors of sexual assault. Because the dynamics of surviving a sexual assault outside the context of domestic violence can be very different, it is important to provide specific training on the appropriate response to sexual assault cases and the unique ways in which protection orders may be useful for survivors.

#### **E. Full Faith and Credit of Tribal Protection orders for Sexual Assault**

The full faith and credit provisions of the Violence Against Women Act (VAWA) include a very broad definition of “protection order”, which includes protection orders for victims of sexual assault.<sup>109</sup> Nothing in 18 U.S.C. §2265 or 18 U.S.C. §2266 makes specific reference to domestic violence. Therefore, tribal nations that develop stand-alone protection order codes for sexual assault survivors (or include sexual assault victims in existing protection order codes) can assert that such protection orders must be enforced by other jurisdictions, including states and local governments.<sup>110</sup> Because most state protection order statutes do not allow survivors of sexual assault to obtain protection orders, tribal governments have a unique opportunity to provide a leading example to the entire nation in the field of sexual assault response. Given the strong traditional responses to sexual assault in tribal communities, it is only natural that tribal governments lead the way in addressing the needs of sexual assault survivors in the contemporary context.

### **IV. Conclusion**

Tribal governments have a strong tradition of providing protection and safety for their people. However, because of limitations imposed on modern tribal governments by the federal government, tribal nations have few options in protecting and honoring survivors of sexual assault and rape. The existing jurisdictional scheme leaves Native women residing on tribal lands more vulnerable to violent sex crimes, and limits their options for seeking justice. Today, more than one-third of all Native women will experience the crime of rape and its accompanying after-effects. Because the safety of women is of utmost importance to the well-being and sovereignty of a tribal nation, tribal governments have an obligation to find the best way to provide safety to women, notwithstanding the

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<sup>109</sup> 18 U.S.C. § 2265 (2000).

<sup>110</sup> Although VAWA requires states to recognize and enforce tribal protection orders, there is still resistance to implementing this requirement in some states. See Sarah Deer & Melissa L. Tatum, *Tribal Efforts to Comply with VAWA's Full Faith and Credit Requirements*, 39 TULSA L. REV. 403, 412-413 (2003); See also National Coalition Against Domestic Violence, Native American Women and Full Faith and Credit, available at <http://www.ncadv.org/publicpolicy/tribal.htm> (last visited Sept. 28, 2003). More awareness and education on the full faith and credit provisions in VAWA is needed in order to help ensure the safety of all survivors who obtain protection orders.

significant barriers in criminal jurisdiction. By developing comprehensive codes and enforcement practices to protect all victims of violence, tribal governments have the opportunity not only to provide an additional legal remedy for survivors of sexual assault, but also to set an example for state and local governments. In taking these actions, tribal governments can create a harbor of safety that does not exist in many non-tribal communities.

However, expanding tribal protection order statutes to include survivors of sexual assault as eligible applicants is only one minor step in addressing a problem that warrants much more attention. The staggering rates of sexual assault perpetrated against Native women demands a more comprehensive response than is currently in place, and may require wholesale reform of the criminal justice systems operating at the federal, state, and tribal levels. While it is important to critique the response to sexual assault of Native women by the state and federal systems, the ability to restore strength and dignity to the survivors of sexual assault in Native communities should be centered in the tribal justice system, because the restoration of power and dignity ultimately lies within the community.

Tribal governments should consider re-thinking the current response to rape, beginning with reform of existing tribal criminal laws on sexual violence, many of which reflect outmoded Anglo-American jurisprudence. Changes to the tribal response to rape should be grounded in the stories and voices of survivors and women's advocates, who are the true experts in shortcomings of the current system. If tribal courts can move towards offering a forum where more women can be heard and believed, and where the community takes responsibility for the protection of women who have been assaulted, there is a potential for lessening the amount of shame, self-blame, and humiliation experienced by survivors of sexual assault. Tribal governments will be strengthened by the reconnection to traditional life-ways that promote and protect the safety and sovereignty of women.

**APPENDIX A:****EXAMPLES OF ELIGIBILITY REQUIREMENTS IN EXISTING TRIBAL PROTECTION ORDER ORDINANCES.<sup>111</sup>****TRIBE A:**

## Availability of Petition:

- (1) A petition to obtain an order of protection under this Section may be filed by:
  - a. Any person claiming to be the victim of domestic violence,
  - b. Any family member or household member of a person claimed to be the victim of domestic violence, on behalf of the alleged victim, or
  - c. The Tribal Prosecutor.
- (2) A petition shall allege the existence of domestic violence, and shall be verified or supported by an affidavit made under oath stating the specific facts and circumstances justifying the requested order.

## Definitions:

“Domestic Violence” means an act of abuse by a perpetrator on a family member or household member of the perpetrator.

“Family member or household member” of a person means a spouse, a former spouse, a person related by blood, a person related by an existing or prior marriage, a person who resides or formerly resided with the person, or a person with whom the person has a child in common regardless of whether the parents of the child have been married or have lived together at any time.

**TRIBE B:**

## Eligible petitioners for order.

1. A person who is or has been a victim of domestic or family violence may file a petition for an order for protection against a family or household member who has committed an act of domestic or family violence.
2. A parent, guardian, or other representative may file a petition for an order for protection on behalf of a minor or dependent person against a family or household

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<sup>111</sup> It is not the purpose of this paper to criticize any one particular tribe’s codes as they relate to this issue. Therefore, the source of the sample tribal codes is not relevant. The examples provided herein, which are taken from existing tribal protection order codes, are to illustrate the nature of the problem only.

member who commits an act of domestic or family violence. Minors who are at least 16 years of age or are legally married or emancipated may seek relief for themselves.

Definitions.

Unless the context requires otherwise, terms used in the Domestic and Family Violence Ordinance are defined as follows:

“Domestic or family violence” means the occurrence of one or more of the following acts by a family or household member, but does not include acts of self-defense by the victim:

1. attempting to cause or causing physical harm, bodily injury, or assault to another family or household member;
2. placing a family or household member in fear of the infliction of physical harm, bodily injury, or assault; or
3. causing a family or household member to engage involuntarily in sexual activity by force, threat of force, or duress.

“Family or household members” include:

1. current or former spouses;
2. persons who live together or have lived together;
3. persons who are engaged in or have engaged in a sexual relationship;
4. persons who have a child in common or who are expecting a child together;
5. persons related by blood, adoption, or marriage; and
6. minor children, foster children, or adopted children of persons described in (1) through (5) above.