

TRIBAL LEGAL CODE RESOURCE:
CRIMES AGAINST CHILDREN

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*GUIDE FOR DRAFTING OR REVISING TRIBAL LAWS
ON CRIMES AGAINST CHILDREN*

FEBRUARY 2022



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A product of:

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Diane Payne contributed significantly to the initial versions of this Crimes Against Children resource. Diane worked tirelessly on behalf of American Indian and Alaska Native children throughout her career. She served as the Tribal Law and Policy Institute's Children's Justice Specialist for many years and led TLPI's Alaska office with a commitment and passion that was remarkable. Diane's advocacy on behalf of Native children has had an impact that is long lasting – a legacy that would have made her proud.

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Foreword

By B. J. Jones

AMERICAN INDIAN TRIBES CONSIDER THEIR CHILDREN SACRED BEINGS. That sacredness is stripped away when those children are the victims of crimes of abuse and neglect and present and future generations of children suffer as a result. Sadly, even the American legal system, in its attempt to promote the best interests of Indian children, has contributed to the emotional turmoil and pain suffered by Indian children and their families. Indian children have been the targets of a multiplicity of federal and state laws designed to preserve their perceived physical and mental security oftentimes at the expense of their tribal ties. These laws have failed to recognize a fundamental tenet of tribal life—Indian tribes have always protected the sacredness of their children and remain best suited to create systems of care to protect their security, emotions, and cultures. When others have attempted to dictate to Indian tribes what is best for their children, invariably the children have suffered the consequences of these actions.

Unfortunately, these attempts have also created a complex array of federal, state, and tribal regulations that must be understood before Indian children can be truly protected by written law. The American Indian population in the United States is, by most accounts, the youngest of all ethnic groups in the United States. With many Indian reservations in this country inhabited by a majority population of children, the rule of law applicable to American Indians is predominately an examination of the treatment of the young.

For Indian tribes to carry out their roles as protectors of the children, they must recognize the need to embody into their written laws the appropriate criminal sanctions that assure their children protections from the many dangers Indian children face in contemporary tribal life. Legislating for Indian children not only involves passing criminal codes to protect these children but also doing so in a manner that permits tribal members to understand and endorse the purposes and goals of the law. State and federal laws are typically written for lawyers to understand. Tribal law must be written in a way that tribal members understand and endorse.

Tribal criminal codes designed to protect Native children must also factor in several other considerations. First, although the federal government in many tribal communities has jurisdiction to enforce federal law, and sometimes state law designed to protect Indian children, tribes cannot assume that the existence of federal or state law always means that those laws will be enforced by the federal government. Tribes have the inherent authority to enact codes and enforce those codes in tribal court even when they may overlap with the federal authority to prosecute pursuant to the Major Crimes Act, 18 U.S.C. § 1153, or the Indian Country Crimes Act, frequently referred to as the General Crimes Act, 18 U.S.C. § 1152. For example, a 2006 amendment to the Major Crimes Act added the crime of felony child abuse or neglect as a crime that is prosecutable by the United States if committed by an Indian in Indian country, 18 U.S.C. § 1153.

Second, for Indian tribes covered by Public Law 280 or P.L. 280, 18 U.S.C. § 1162, where state criminal jurisdiction may lie, tribes must remain vigilant in enacting appropriate criminal laws and sanctions. It is now settled that tribes in P.L. 280 states have concurrent criminal jurisdiction over crimes committed by Indians in their communities. Just as federal prosecutions may be lacking, states do not always prosecute crimes against Native children and without appropriate tribal criminal codes, offenders may go unpunished. The recent enactment of federal law demanding that Indian tribes create sex offender registries within their communities as part of the Adam Walsh Act¹, or lose the authority to require registration and prosecute those who fail to register to state governments, derived directly from a perception that Indian tribes lacked sufficient criminal penalties to regulate sex offenders who moved into tribal communities.

Third, tribes must, of course, assure that any criminal justice system designed to prosecute those who commit violations against Native children and other children within tribal communities comports with the protections afforded defendants by the Indian Civil Rights Act or ICRA, 25 U.S.C. § 1301 *et seq.* Difficult questions regarding children testifying against their perpetrators in criminal trials must be addressed by Indian tribes in their codes in a manner that ensures compliance with the ICRA. However, ICRA is to be interpreted in a manner that is consistent with tribal notions of due process. Therefore, Indian tribes may have more latitude in designing criminal justice systems that protect children from the stresses related to procuring convictions of perpetrators than may state or federal courts that may be bound by court precedents that can be perceived as valuing the rights of perpetrators over those of victims.

“The Tribal Legal Code Resource: Crimes against Children, Guide for Drafting or Revising Tribal Laws on Crimes against Children” (hereinafter referred to as the Guide) that follows is the best resource yet on how Indian children can be protected by Indian tribes in a manner that achieves the goal of protecting the sacredness of children while assuring due process protections for those accused of committing crimes against children. It is a process that tribal governments and their members can utilize to achieve the goal of enacting a culturally appropriate criminal code that both assures the sacredness of Indian children and complements federal and state prosecutions of serious crimes against Indian children. The Guide attempts to incorporate federal and state law, where appropriate, but ultimately strives for the tribal voice to protect children.

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¹ Public Law 109 – 248, [Adam Walsh Child Protection and Safety Act of 2006](#), Title I Sex Offender and Notification Act. See Section 127 Election by Indian Tribes for further information relevant to tribes.

Part I: Overview

Tribal governments across the United States are creating programs to improve their responses to crimes committed against children occurring in their communities. It is important to note that this Guide uses the term “children” to include all individuals under the age of 18 years but tribes may define the term using other ages or factors.

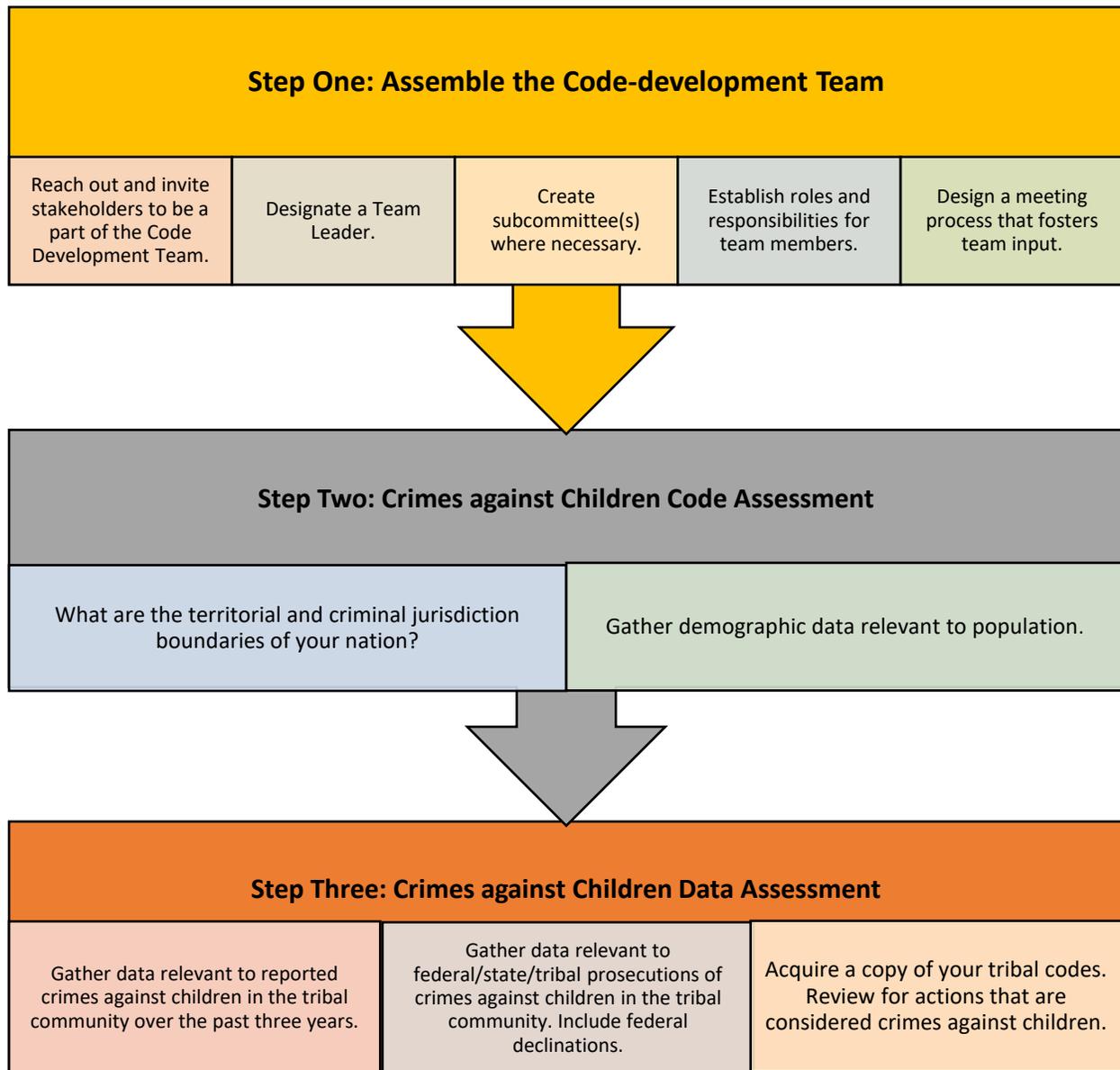
A key piece of responding to crimes committed against children is to draft or review and revise tribal laws. This Guide was developed to provide a starting point for drafting or revising tribal laws addressing crimes committed against children. It is written with the philosophy that tribal laws should reflect tribal values. In addition, writing a tribal code usually requires careful consideration of how state and/or federal laws might apply in the community. The Guide takes a team approach to the code development process—although individuals taking on this task can use this Guide as well.

This Guide includes examples from a variety of existing tribal codes and exercises that are designed to help tribal community members determine the best code options for their community. The examples may not be appropriate for every community. Please consider all the options and related issues before making final decisions.

To help you consider various options, this Guide also includes issue considerations in the form of flowsheets found at the beginning of each part and space for users to record their answers to the exercises provided throughout the Guide in the form of worksheets at the end of a chapter or part.

The main goal of this Guide is to offer suggestions on how tribal laws can be drafted in a way that provide safety and support for child victims.

Part I: Flowsheet



Chapter 1: Introduction

Every year, millions of children in this country are exposed to violence and yet only a few of these children ever receive help to recover from the harm the violence has caused.² American Indian and Alaska Native (AI/AN) children suffer exposure to violence at rates higher than any other race in the United States.³

The immediate and long-term effects of this exposure to violence includes increased rates of altered neurological development, poor physical and mental health, poor school performance, substance abuse and overrepresentation in the juvenile justice system. This chronic exposure to violence often leads to toxic stress reactions and severe trauma; which is compounded by historical trauma. Sadly, AI/AN children experience post traumatic stress disorders at the same rate as veterans returning from Iraq and Afghanistan and triple the rate of the general population. With the convergence of exceptionally high crime rates, jurisdictional limitations, vastly under-resourced programs, and poverty, service providers and policy makers should assume that all AI/AN children have been exposed to violence.⁴

Today, increased child protection in AI/AN communities is dependent upon a process of tribal law development and reform with consideration being given to traditional tribal beliefs and values as well as a careful consideration of tribal, state, and federal law. Tribal law reflects a combination of community values, lifeways, and policy choices. The following are examples of the intersection between development of tribal codes and the role of traditional practices and beliefs:

- A commitment to reinforce customs, traditions, and/or generally accepted local practices;
- Use of traditional or alternative restorative justice practices, such as dispute-resolution practices like “peacemaking,” “talking circles,” and/or mediation;
- A commitment to pursue traditional or therapeutic healing practices such as traditional healers and/or “drug courts” or “wellness courts”;
- Recognition of traditional or respected authorities, leaders, or elders; and
- Recognition of the roles, duties, obligations, privileges, and rights of relatives of a certain type (including tribally defined “extended family,” “bands,” “clans,” etc.).

Beginning in 1989, the Office for Victims of Crime began providing support and funding to improve the capacity of tribal justice systems to handle serious cases of child abuse. Since then,

² Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice, [Report of the Attorney General’s National Task Force on Children Exposed to Violence](#) (Dec. 2012), 65.

³ Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice, [Report of the Attorney General’s National Task Force on American Indian/Alaska Native Children Exposed to Violence: Ending Violence so Children Can Thrive](#) (Nov. 2014), 2.

⁴ Ibid.

many Native nations have enhanced their justice systems to improve the reporting, investigation, prosecution, and processing of child abuse cases. Native nations have also sought to reduce additional trauma to children within their child welfare systems and criminal justice systems. Increasingly, Native nations are committed to developing systems that incorporate their unique cultural beliefs, using those beliefs to shape both the procedure and substance of their laws. Native nations are recommitting to an approach that addresses underlying issues and are not just concentrated on punishment. Native nations want their members to return to wellness and to a world where tribal values guide their daily actions.

While it is possible for most violent crimes to have a child victim, this Guide will focus the following crimes: contributing to the delinquency of a child, kidnapping and abduction of a child, criminal child neglect/endangerment, criminal child abuse, commercial exploitation of a child, specifically sex trafficking of a child and child pornography, and sexual assault of a child.

This introductory chapter describes how to make best use of this Guide in developing effective laws addressing crimes committed against children that incorporates the traditions of your community. Part I ends with a discussion on how a tribe can use a team approach for code drafting. All parts should be reviewed before starting to draft tribal code, a process outlined in more detail in Part IV. Parts I–III provide vital considerations and decision-making prompts that should be discussed before drafting.

A. Purpose of This Guide

The main goal of this Guide is to offer suggestions on how tribal laws on crimes against children can be drafted in a way that provides safety and support for children while incorporating tribal traditions and cultural values.

This Guide provides information and group exercises to help establish a team comprised of multidisciplinary representatives that will work together through the code development process. As the code drafting team works through the exercises, the team can determine how to effectively address crimes against children in their tribal community. The team will engage in reviewing, drafting, or amending existing tribal codes. Exercises are added to provoke thought on how to add specific tribal culture and traditions into the drafting of the tribal code. Worksheets correspond to exercises offered in a particular chapter or part. The cultural and traditional component is critical, often driving how successful the codes are accepted by the tribal community.

B. Guide Components

The Guide is divided into four sections and various chapters are contained within each section.

Part I contains three chapters focused on introducing the Guide, assembling a code development team, and exploring the effects of violence on children. Part I begins with a flowsheet outlining steps to develop a code drafting team and conduct an initial code and data assessment. At the end of Part I is a series of exercises and worksheets that ask code drafters to think through assembling a team, collecting data and legislative material on the topic of violence committed against children, and drafting a vision statement that encompasses what the drafters are hoping to accomplish.

Part II contains three chapters on criminal and civil jurisdiction, the criminal trial process, and procedures relevant to crimes committed against children, including crime victims' rights statutes that focus on protection of child victims during the criminal process. Part II begins with a flowsheet outlining steps to review a tribe's criminal legal process and victim protections. At the end of Part II is an exercise and worksheet focusing on assessing current tribal code for victim protections.

Part III contains eight chapters focused on a crime committed against children code's general provisions and specific crimes committed against children including examples from tribal codes and federal statutes. Part III begins with a flowsheet outlining how to use the Guide to tackle tribal code review. In Part III, the exercises and worksheets are split up by chapter. At the end of Part III, you will find a summary worksheet that can be used to record answers to all exercises presented in this part.

Part IV culminates with one chapter focused on the actual code drafting process. Part IV starts with a flowsheet outlining how to draft tribal code(s) using this Guide and submit drafts for code adoption. At the end of Part IV, there are exercises and worksheets that help pull together information discovered through the previous exercises in Parts I–III and outline the tribe's codification process.

This code drafting Guide is divided so that each part (and each chapter) may be used separately by a code drafting team in discussions of additions or amendments to a specific section of its code. This Guide can also be used for a complete review and revision of tribal laws on crimes against children.

There may be existing tribal documents or other written resources that can be used to create and revise tribal codes. Researching and sharing these documents with all team members prior to convening work sessions will be valuable to staying on task and organized. Examples of those documents and resources include, but are not necessarily limited to:

- Tribal constitution and/or bylaws;

- Any existing controlling or impacting tribal/federal/state codes;
- All related tribal codes;
- Copies of any tribal court opinions related or relevant crimes against children in the community;
- Any written values and vision statements the Native nation⁵ may have relevant to protecting children;
- Indian Civil Rights Act (ICRA) found at 25 U.S.C. §1301 *et seq.*;
- A dictionary; and
- This Guide.

C. What This Guide Can Do

This Guide can provide a directed journey for a tribal team wishing to draft tribal codes that address crimes against children. This Guide is intended to give the code drafting team a summary of comparative tribal code examples and a relevant federal statute example (if available) for the drafting of tribal laws on crimes committed against children.

D. What This Guide Cannot Do

This Guide is not a “model” code. None of the tribal code examples should be adopted without a thorough discussion and analysis by the appropriate tribal bodies and their legal counsel. There are advantages and disadvantages to adopting each provision of the code. Tribal governments have different needs, resources, values, and policies. The worksheets and exercises are provided to assist in such discussion and analysis.

This Guide does not address civil child welfare issues or provisions (also known as “civil dependency codes”). Because the Guide is specifically designed for criminal justice system enhancements, the definitions of civil child abuse and neglect are not covered here. The Tribal Law and Policy Institute has developed the [Tribal Legal Code Resource: Civil Dependency and Related Laws—Guide for Drafting or Revising Tribal Civil Dependency and Related Laws](#)⁶ to assist with law reforms that further a civil justice response to child abuse and neglect. Tribal civil jurisdiction and relevant civil remedies will be discussed as those issues relate to protection of child victims of crime, restitution, and other civil remedies stemming from crimes committed against children.

⁵ This publication will use the terms *Native nations* and *tribes* interchangeably to refer to the federally recognized tribes in the United States.

⁶ Maureen I. White Eagle, Kori Cordero, and Pat Sekaquaptewa, [Tribal Legal Code Resource: Civil Dependency and Related Laws—Guide for Drafting or Revising Tribal Civil Dependency and Related Laws](#) (West Hollywood, CA: Tribal Law and Policy Institute, Apr. 2017).

E. A Few Words of Caution

Protocol development is a necessary part of code implementation. This Guide is not a replacement for protocol development and/or training. Tribal employees and others who work with, or may encounter, abused or victimized children should receive special training on the appropriate responses for working with child victims and child abuse reporting requirements and/or mandatory reporting laws.

Chapter 2: How Violence Affects American Indian/Alaska Native Children

Drafting tribal statutes or codes that address the effects of violence on AI/AN youth requires an understanding and appreciation of the trauma that these youth experience. Data demonstrates that Native youth are 2.5 times more likely to experience trauma than their non-Native peers.⁷ This chapter provides background information on AI/AN children exposed to violence, and it is taken largely from the *Attorney General's Advisory Committee on American Indian and Alaska Native Children Exposed to Violence: Ending Violence So Children Can Thrive*.⁸ This chapter also discusses the effect violence and crimes have on children in general and specifically AI/AN children.

“Violence in American Indian and Alaska Native (AI/AN) communities occurs at very high rates compared with non-AI/AN communities—higher for AI/AN than all other races.⁹ And violence, including intentional injuries, homicide, and suicide, accounts for 75 percent of deaths of AI/AN youth ages twelve through twenty.”¹⁰ Sadly, Indian children cannot escape the violence that surrounds them and repeated exposure to violence has a profound lifelong impact on a child’s health and well-being.

The *Adverse Childhood Experiences (ACE) Study* demonstrates that persons who experience four or more of the childhood adversities measured by the study have a four- to twelvefold increased risk for alcoholism, drug use, depression, and suicide attempt when compared to those who had experienced none.¹¹ This study, coupled with data that show AI/ANs have a fivefold higher risk of being exposed to four or more adverse childhood events,¹² underscores the overwhelming impact of exposure to violence in AI/AN communities.

“AI/AN communities may differ substantially in culture and geography; however, one common feature of nearly all of these communities is a shared history of

⁷ National Congress of American Indians, [VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report](#) (2018), 25.

⁸ Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice, [Report of the Attorney General's National Task Force on American Indian/Alaska Native Children Exposed to Violence: Ending Violence So Children Can Thrive](#) (Nov. 2014).

⁹ U.S. Department of Justice, *Ending Violence So Children Can Thrive*, 94 citing Steven Perry, “American Indians and Crime: A BJS Statistical Profile 1992–2002” (Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, Dec. 2004), 5.

¹⁰ *Ibid.*, 94 citing Center for Native American Youth at the Aspen Institute, [“Fast Facts: Native American Youth and Indian Country”](#) (Apr. 2014).

¹¹ *Ibid.*, 94 citing V. J. Felitti, Anda R. F., Nordenberg D., et al., [“Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences \(ACE\) Study,”](#) *American Journal of Preventative Medicine* 14(4) (1998).

¹² *Ibid.* citing M. P. Koss, Yuan N. P., Dightman D., et al., [“Adverse Childhood Exposures and Alcohol Dependence among Seven Native American Tribes,”](#) *American Journal of Preventative Medicine* 25(3) (Oct. 2003), 238–44.

destructive federal policies intended to assimilate Indian people into the American way of life. These federal policies included forced relocation, forced removal of their children to be educated in boarding schools, and prohibition of spiritual and cultural practices.”¹³ Tribes describe the forced removal of Indian children from homes and placement in boarding schools far from their families and communities as one of the most profoundly detrimental federal action to tribe’s existence.¹⁴ The removal of generations of children over time has disrupted once well-established and venerable parenting practices and to this day, historical trauma continues to amplify current traumatic experiences for Native children and families. AI/AN children experience Post Traumatic Stress Disorder (PTSD) at the same rate as veterans returning from Iraq and Afghanistan and triple the rate of the general population.¹⁵

AI/AN children are exposed to many types of violence in their communities, including simple assaults, violent threats, sexual assault, sex trafficking, and homicide. The child abuse rate in the United States is highest among AI/AN victims.¹⁶ “The Indian Women’s Resource Center, working with AI/AN women and girls victimized by sex trafficking, found that Mexican gangs in their area specifically target Native girls and that 85 percent of the women and girls trafficked in Minneapolis were Native. This happens because the traffickers can represent Native girls as many different ethnicities, thus enhancing their ‘marketability.’”¹⁷ In 2001, the health directors of the Oglala Sioux Tribe estimated that between 95–98 percent of the tribal population had experienced sexual abuse as children.¹⁸

Although crimes committed against children often occurs in the community, violence in the home is oftentimes interrelated and intertwined with community violence. “Every single day, a majority of American Indian and Alaska Native (AI/AN) children are exposed to violence within the walls of their own homes. This exposure not only contradicts traditional understandings that children are to be protected and viewed as sacred, but it leaves hundreds of children traumatized and struggling to cope over the course of their lifetime.”¹⁹

“Children who have been exposed to intimate partner violence in their families also are at high risk for severe and potentially lifelong problems with physical health, mental health, school and

¹³ Ibid.

¹⁴ Ibid.

¹⁵ National Congress of American Indians, *VAWA 2013 Special Domestic Violence Criminal Jurisdiction Five-Year Report* (2018), 25.

¹⁶ Statista Research Department, *Child Abuse Rate in the U.S. –Victims by Race/Ethnicity 2018*, <https://www.statista.com/statistics/254857/child-abuse-rate-in-the-us-by-race-ethnicity/> (accessed Aug. 27, 2020).

¹⁷ U.S. Department of Justice, *Ending Violence So Children Can Thrive*, 97 citing to Park, Patina Interim Director of the Minnesota Indian Women’s Resource Center, Urban Listening Session on May 20, 2014, Summary, and Park, Patina Interim Director of the Minnesota Indian Women’s Resource Center, Testimony before the Task Force on American Indian/Alaska Native Children Exposed to Violence, Minneapolis, MN, Urban Listening Session, May 20, 2014.

¹⁸ Ibid., 74.

¹⁹ Ibid., 72.

peer relationships, and disruptive behavior. Children who witness or live with intimate partner violence are often burdened by a sense of loss or by profound guilt because they believe that they should have somehow intervened or prevented the violence—or, tragically, that they caused the violence.”²⁰

Generally, children living with batterers are at a much greater risk of being physically and sexually assaulted. National studies show that men who batter their companion also abuse their children in 49 to 70 percent of the cases.²¹ Child abuse investigations reveal violence against the mother in 28 to 59 percent of the cases.²²

Additionally, we know that one in every three AI/AN women is sexually assaulted, often in childhood.²³ Sexual abuse can have a devastating impact on a child and sexual abuse places children at high risk for serious and often chronic problems with health, PTSD, and other mental health disorders, suicidality, eating disorders, sleep disorders, substance abuse, and distortions about problems with sexuality and appropriate sexual behavior. Sexually abused children may become hyper vigilant about future sexual violation and experience a sense of betrayal that compromises the trust they feel for adults who should care for and protect them.

There is a vital link between tribal sovereignty and protecting AI/AN children. Tribes cannot afford to allow their children to be destroyed by violence and trauma. Designing or amending tribal codes to reflect the unique cultures and beliefs of a tribe can more adequately enable tribes to respond to tribal children’s exposure to violence. Tribes may be hesitant to rely solely on the federal response to crimes committed against children in Indian country. From 2016–18,²⁴ the FBI reports that it administratively closed a total of 72 child physical abuse cases arising in Indian country and 672 child sexual abuse cases arising in Indian country. For a variety of reasons, these cases were never submitted to the USAO for prosecution.²⁵

²⁰ Ibid.

²¹ Ibid.

²² Ibid. citing Carter, Janet, “Domestic Violence, Child Abuse, and Youth Violence: Strategies for Prevention and Early Intervention.”

²³ Ibid., 74 citing to Amnesty International USA, [Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the United States](#) (New York: Amnesty International Publications, 2007).

²⁴ U.S. Department of Justice, [Indian Country Investigations and Prosecutions, 2018](#) (2018); [Indian Country Investigations and Prosecutions, 2017](#) (2017); [Indian Country Investigations and Prosecutions, 2016](#) (2016).

²⁵ U.S. Department of Justice, *Indian Country Investigations and Prosecutions, 2018*, 3 (Crimes that the FBI closed administratively without referral for prosecution due to a lack of evidence of a federal crime, or no evidence of criminal activity was uncovered).

Chapter 3: Teamwork

A. Assemble the Team

Teamwork is a cornerstone to effectively utilizing this Guide. The Guide provides instruction on assembling a code drafting team with suggestions regarding various disciplines that would provide useful, if not critical, input during the exercises provided. Team discussion will enrich the exercises and assist in identifying gaps or barriers in the current tribal code relative to crimes committed against children. The code drafting team will draft tribal statutes that address the needs and customs of the tribe. The team may spend several days in a row working through this Guide or may choose to meet regularly at designated days of the month at a given time. While meeting in person usually provides the greatest opportunity to exchange information, teams may choose to meet virtually by phone, video conference, or e-mail.

Team members should work through the exercises and gather any requested information for future use in the drafting process. Once the information is assembled, the team will discuss various responses. Each team member should place their responses to the questions, which can be recorded in the provided worksheets, in their drafting notebook for easy reference in later exercises. You may choose to record group consensus responses on a different colored paper for easy reference.

The makeup of the code drafting team should be unique to the needs of your community. Team members/stakeholders in the realm of crimes committed against children might include:

- Child and/or adult protective services agencies;
- Survivors of crimes committed against a child;
- Tribal court judge;
- Victim advocate from community-based advocacy program;
- Tribal prosecutor;
- Representative(s) of appropriate law enforcement department;
- Tribal court personnel;
- Healthcare personnel (Indian Health Service and other);
- Tribal government, tribal leaders;
- Corrections and probation personnel;
- Staff such as counselors, security personnel from schools, tribal colleges, universities;
- Mental health professionals;
- Social services workers;
- Tribal elders or spiritual leaders; and
- Other types of victim advocates (such as those advocates located in law enforcement offices or hospital settings).

The code drafting team will work collaboratively throughout the Guide's exercises; welcoming involvement from various disciplines with an interest in child victim safety and offender

accountability creates a comprehensive and broad base of support. It also encourages the community to take ownership of the problem and the solutions. However, keep in mind that selecting a team that is too large may increase the chance of having personality conflicts, pushing personal agendas, and straying from relevant tasks. A small team may work just as well as a large team depending on the tribe's size and resources.

A facilitator can be helpful in scheduling code drafting team meeting dates/times, keeping the team focused and on task while working through the exercises in this Guide. The facilitator may also serve as a repository of information and/or research the team has gathered. They can also keep notes on topics that may require additional research. The facilitator may also assist the planning team in scheduling focus groups and/or community forums on selected topics. However, a facilitator is not mandatory and one of the team members may serve in the role.

B. Ten Tips to Working as a Team

As you move through this Guide, the following tips may be useful to the process. Go over these tips and provide a copy to each team member.

1. The primary work should be done by a group of “problem solvers.” The effort will not succeed if it simply becomes a process of finger-pointing and blaming others for weaknesses in current tribal systems or resources.
2. There should be representation from various tribal agencies and advocacy programs. Equal representation is important.
3. The work should be completed in a setting of mutual respect. The setting should be a safe environment in which the group can share, learn, and explore. It is okay to acknowledge differences of opinion, but not in a stereotypical or judgmental manner. The safety of children must be respected.
4. The agenda for each team meeting should be focused upon areas of mutual concern or shared interest. Try to focus on areas of common interest instead of differences. A shared vision (such as “a safe community with healthy families”) can create confidence and trust.
5. The team should be willing not just to examine the way things are but also be willing to explore ways of improving the laws. All team members must be willing to explore new ways to help make sure that children are safe. However, different people may have different ideas. Listen to and learn from each other.
6. To be successful the team members should be willing to be creative and persistent. The process will undoubtedly have frustrations and difficult times. Think “outside the box.”
7. The team members should be willing to share the burden by sharing resources, training, technical assistance (TA), and limited available funding, and to alternate locations of community meetings and/or focus groups.
8. All team members should be allowed input into discussions.
9. Consider traditional/culturally appropriate strategies. In some cultures, it is important to share and provide food for participants. You will be spending a great deal of time together, so make sure everyone is comfortable. (Please note that there are substantial restrictions on the use of federal grant funds for food. The safest practice is to use

nongrant funds for food. If you are considering using federal grant funds, be sure to check with your grant manager.)

10. Expect to spend a great deal of time working together. It cannot be stressed enough that this is a lengthy project, but one that is well worth the effort. Your cooperation will help protect the children and families in your community.

C. Getting Started

As the code drafting team sits down together to begin the process of reviewing, amending, and drafting tribal codes, consider writing down the team's ultimate goal and reviewing this goal at the beginning of each meeting. The goal might include keeping children safe. The goal might also include some beliefs on healthy families. The goal can be viewed as a draft vision statement to reference as new or amended codes are being developed. The vision statement should be aspirational, providing a description of what the team would hope to achieve in effectively addressing crimes against children in the tribal community.

Team lead should gather the following documents and disseminate to other team members prior to your first meeting:

- Tribal constitution and bylaws.
- Current tribal statutes that may be relevant to crimes committed against children. This includes criminal statutes and civil statutes (that address protection, restitution, or other civil needs). You might locate additional statutes to add to your research as the code drafting progresses.
- Copies of tribal court opinions that your tribe may have issued.
- Current law enforcement protocols related to crimes committed against children.
- ICRA found at 25 U.S.C. § 1301 *et seq.*
- Current tribal court statistics.
- Relevant federal law like mandatory reporting of child abuse.²⁶

Many times, existing tribal laws may have originated from the laws of another tribe, state, or federal statute. Take the time to go through and review your current codes relevant to crimes committed against children for relevance to your tribal community. When customs or beliefs are being discussed, the team should consider bringing in elders or others who are wise in these ways to educate and guide the team on any current statutes that conflict with these concepts and how to incorporate these concepts into the tribal code.

The team should review your tribal constitution and bylaws or other foundational legal documents. Next, review current criminal statutes on crimes committed against children. Note that these statutes may be scattered among the other criminal statutes in the tribal code. Review and select those statutes that pertain to children or could pertain to children. It will be

²⁶ See 34 U.S.C. §20341 (Child Abuse Reporting) and 18 U.S.C. §1169 (Reporting Child Abuse).

important to view the statutes and note any provisions that are provided for child victims. This will give the team an idea of provisions the team feels must be addressed when a child is the victim. Be sure to analyze the strengths and weaknesses in any current laws and note any gaps the team identifies related to statutes that need to be drafted.

D. Terminology

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

- A general dictionary, such as [*Merriam-Webster's Dictionary*](#);
- A law dictionary, such as [*Black's Law Dictionary*](#); or
- A law dictionary for nonlawyers, such as [*Law Dictionary for Non-Lawyers*](#) by Daniel Oran.

A glossary is also included in **Appendix A** at the end of this resource.

Part I: Exercises

Part I: Exercise #1—Assemble the Team

Lesson Objectives: Assemble the team. Designate a team leader. Schedule timelines for working through the Guide. Structure the meetings to provide the greatest opportunity for inclusion of all perspectives.

Reading: Part I, Chapter 3: Teamwork paying close attention to **10 Tips to Working as a Team.**

Instructions: Perform the following tasks.

Team Lead Tips: Consider providing team members with three-ring binders with dividers to hold the results of the exercises and notes taken during team discussion sessions. In each meeting, the team leader may want to have large Post-it notes and markers available to capture ideas, responses, and consensus concepts as well as provide pens and note paper. It may be helpful to provide colored paper for meetings where the planning team is working toward consensus to keep each planning team member's individual responses separate from the consensus response(s). Each planning team member should place both their individual responses and a colored paper copy of the consensus response(s) in the binder for easy reference.

1. **DEVELOP** a list of potential team members, who are essential for the team, and secondary members whom the planning team may consult with on specific issues or exercises. Select planning team members with various viewpoints who have demonstrated interest, expertise, or experience in addressing the safety of their children exposed and who are knowledgeable about the community resources and systems.
2. **REACH OUT** personally and in writing to each potential team member with a short description of the goals to explore and review tribal codes and other laws to identify gaps and barriers to keeping child victims safe and holding perpetrators accountable. Inquire about their willingness to participate in working through the Guide.
3. **ENSURE** that one of your team members is a tribal child victim advocate and/or a member of the tribal domestic violence coalition in your state. For information on tribal coalitions and contact information, see www.atcev.org/tribal-coalitions.
4. **DESIGNATE** a team leader.
5. **CREATE** subcommittees, as necessary, within the group and assign manageable tasks to team members or subcommittees to be accomplished within established time frames.
6. **ESTABLISH** time frames in phases, include a preparatory phase in which a team leader and team note takers are appointed. The team leader is responsible for scheduling meetings, preparing meeting agendas, and ensuring that team notebooks contain all work products resulting from the exercises in this Guide. The team note taker records notes of all meetings, copies those notes, e-mails/sends those copies of notes to all code drafting team members for review, and assembles any documents that code drafting team members provide or request.

7. **DESIGN** a meeting process that invites broad-based participation in identifying issues and making recommendations.
8. **INCORPORATE** the perspective of child crime victim survivors in the process if possible.

Part I: Exercise #2—Crimes against Children Code and Data Assessment

Lesson Objectives: Identify current boundaries of the tribe’s Indian country for criminal jurisdiction purposes. Identify the population demographics for the tribe. Identify the number (for the tribal community) of criminal cases committed against a child litigated or pending in tribal, state, and federal courts. Identify the perception of crimes committed against children in the tribal community.

Reading: The team should consider reading **Part I, Chapter 2: How Violence Affects AI/AN Children** and **Chapter 3: Teamwork**; review the tribal constitution and tribal codes to identify the tribe’s criminal jurisdictional boundaries and criminal statutes relative to crimes committed against children and review tribal court decisions (if available and relevant to crimes committed against children).

Instructions: Each planning team leader should keep a record of consensus-based responses to the questions in the code development binder. During the meeting and as consensus is attempted, the team lead will record the consensus answers on a colored paper for inclusion in the binder as well.

Team Lead Tips: Please proceed with an open forum discussion and have the team leader record a response for each question that achieves as much consensus as possible. Note that some of the questions may require research, so this exercise may be assigned in advance with planning team members attending the meeting having already gathered information and recorded their individual responses in their notebooks. Outside assignments for each or several of the questions in the following text can be assigned to individuals on the team or in small groups or subcommittees who report to the team during discussion.

1. **WHAT** are the criminal jurisdiction/territorial boundaries of our tribal nation? Please include source of information, as well as the number of counties and states covered.
2. **WHAT** is the population that lives within our tribal nation? List the estimated number of citizen residents, Native residents of other tribes, and non-Natives (if available).
3. **HOW** many crimes against children cases were reported in our tribal nation over the past three years? Can you identify the number of individual perpetrators (including information on the Indian or non-Indian status of the perpetrator) as well as repeat offenders? List number of cases. If possible, list the number or approximate number of police contacts over the past three years relative to crimes against children.
4. **HOW** many federal or state criminal prosecutions resulted from against children that occurred within our tribal nation’s territory? How many cases were referred for federal prosecution? How many cases were denied for federal prosecution? (Tribal prosecutor may have this information.)

Part I: Exercise #3—Drafting a Vision Statement

The vision statement is aspirational and provides a description of what the team aspires to achieve in effectively addressing crimes against children in the tribal community. The focus should include child safety, cultural beliefs and practices, and perpetrator accountability. Exploring the following discussion topics will assist the code drafting team in developing a vision statement. The vision statement can act as a grounding tool to which the team can return, when necessary, to refocus and find common ground in times where a consensus becomes difficult.

The following example of a vision statement is provided for illustration only.

VISION STATEMENT: To draft tribal statutes that target crimes against children, promotes the tribe’s belief that children are to be protected by the tribal community, and hold that child safety and perpetrator accountability are essential components to the well-being of child victims of crime. The drafting team shall seek to utilize tribal law, custom, and tradition to promote safety and justice, and to protect the rights of all litigants while providing a comprehensive, collaborative, and culturally appropriate approach to case resolution.

Note: The initial vision statement will evolve and include additional details as the team moves through the exercises. This Guide will request that the planning team revisit and adjust the vision statement as information is gathered and reviewed and the team’s knowledge base grows.

Please complete the following exercise and worksheet #3.

Lesson Objectives: Identify traditional beliefs relative to keeping children safe from perpetrators. Identify traditional practices regarding the protection of children. Identify the importance of incorporating traditional practices or beliefs in establishing the tribal response to crimes committed against children.

Reading: Review **Part I, Chapter 2: How Violence Affects AI/AN Children.**

Instructions: The code drafting team should answer the following questions to create the team’s vision statement regarding crimes against children committed in the tribal community.

Team Lead Tips: During the team meeting, the facilitator (or team lead) should allow as much discussion as necessary to reach a consensus on responses. The team should work through rewording and reorganizing the responses to each question until consensus or near consensus has been reached. The team will then compile the consensus responses and utilize the information to develop a vision statement. Be sure to incorporate traditional practices and traditional values into the vision statement so that the statement reflects tribal values relative children being safe. This exercise will be revisited in subsequent exercises.

1. **WHAT** are some the traditional beliefs relative to keeping children safe from perpetrators? How do traditional practices keep the family in harmony? Please provide stories or examples, if helpful to others. Are these traditional practices currently in place either by tribal governmental mandate, tribal code, or practice of the court?
2. **IDENTIFY** traditional practices relevant to keeping children safe from perpetrators.
3. **IDENTIFY and EXPLAIN** the importance of incorporating traditional practices or beliefs in establishing the tribal response to crimes committed against children. For example, does the tribal response need to utilize traditional beliefs/practices and incorporate those beliefs practices into a tailored tribal response?
4. **HOW** might traditional beliefs or practices be implemented to achieve child safety and perpetrator accountability in criminal cases with child victims? For example, is it appropriate to incorporate some traditional insights into the tribal code? Is it appropriate for the tribal judge to request traditional insights from an elder or panel of elders?
5. **UTILIZE** the responses to develop a draft of the vision statement that the drafting team will utilize moving through this Guide. Note that the vision statement will be revisited and modified as the team moves through the Guide.

Part I: Worksheets

Part I: Worksheet #1—Assemble the Team

STEP ONE: ASSEMBLE THE TEAM			
Make a list of potential members of your code development team	What discipline does this individual represent?	What experience, education, or resources does this team members bring to the process?	What role will this team member fulfill as part of your team?
Team Member Name: Child Victim Advocate or Adult who was a child victim of crime (this member is essential to bring the victim’s voice to the process)			
Team Member Name:			

Note: The team will need to select a team lead from the members outlined in the preceding text. Circle the name of the team lead.

Part I: Worksheet #2—Crimes against Children Code and Data Assessment

STEP TWO AND THREE: CRIMES AGAINST CHILDREN CODE AND DATA ASSESSMENT		
SCOPE OF AUTHORITY		
What are the criminal jurisdiction boundaries of your nation (reservation boundaries, tribal lands, etc.)?	Legal Source of Authority (reference and treaty, code or legislative provisions)?	Over whom do you exercise criminal jurisdiction (Indian/non-Indian)?
What is the source of authority for your tribal court to address crimes in your nation?	Legal Source of Authority (reference and treaty, code or legislative provisions)?	List the current population of the tribal community. Include the number of Native and non-Native children residing in the tribal community.
SCOPE OF PROBLEM		
List the number of crimes against a child <i>reported</i> to relevant tribal agencies in the past three years. (Include data on whether the perpetrator was Indian or non-Indian if available.)	List the number of federal/tribal <i>prosecutions</i> of crimes against children in the tribal community over the past three years (if available).	List the number of federal/tribal <i>declinations</i> for prosecutions of crimes against children in the tribal community over the past three years (if available).
Total:	Total:	Total:
Type of Crimes:	Federal:	
	State:	
Indian Perpetrator Total:	Tribal:	
Non-Indian Perpetrator Total:		

What actions or omissions are considered crimes against children in your tribal code, if any? (Include reference.)	Compare the crimes against children in your code to the data collected. Are there any gaps? List the gaps.	Why should those gaps be addressed? If there are no gaps, are there other problems or issues that need to be addressed and why?

Part I: Worksheet #3—Vision Statement Drafting Considerations

Vision Statement Drafting Considerations

- Long-term view of where the team wants the tribal community to be on the issue
- Team’s expression of hope and optimism
- Inspire others
- Not always achievable in our lifetime
- What are the tribe’s values with respect to crimes being committed against children (for the victim, for the family, for the perpetrator)?
- What are the tribe’s responsibilities toward their children (keeping families together when it’s safe for the child, providing services, protecting victims)?
- What is the goal of the tribal criminal justice system (hold offenders accountable, provide and protect defendant’s rights)?

Traditional/Cultural Beliefs

- Included in the vision statement
- Need a meeting with elders to gather information and report back to team (e.g., tribe’s vision of healthy families, tribe’s belief toward children, tribe’s belief toward punishing perpetrators that harm children)
- Not appropriate to address currently

Part II: Protecting Child Victims of Crime during the Criminal Process

Children suffer abuse at the hands of their parents and caretakers as well as strangers. Children are exposed to violence when they witness crimes in their homes and neighborhoods. Children have a limited capacity to understand the violence they experience and very little capacity to protect themselves. By taking child victimization seriously, including the drafting of statutes that focus on the protections needed for child safety and perpetrator accountability, a tribe can send a message to their community about how serious this issue is and improve the criminal justice response for child victims of crime.

Why is it important to protect children during the criminal process?

It is important to protect children during the criminal process to avoid retraumatizing child victims. The criminal process requires a heavy burden of proof to prove the crime and ultimately hold offenders accountable. “Crime victims, including child-victims, may find themselves called upon to participate in civil and/or criminal court proceedings arising out of their victimization. Whether the offender is a family member, a friend, or a stranger, for victims already experiencing post-traumatic stress reactions such participation may exacerbate those reactions, resulting in a re-traumatizing experience.”²⁷ Evidence obtained through victim testimony can be vital to meeting that burden, and to ultimately holding an offender accountable. Child victims can provide testimony in a safe environment that minimizes further trauma thereby improving prosecutorial outcomes.

How can statutory protections be afforded to child victims of crime?

The criminal process is unfriendly. Child victims often face difficult issues that may retraumatize them and impact their ability to effectively participate in the criminal justice system. The criminal justice system is not designed to meet the needs of child victims but certain tools should be available to lessen the trauma. For instance:

- Accessing trial accommodations for child victims grounded in statutes that allow the child to testify with a trusted person nearby or by closed circuit television or other similar processes;

²⁷ National Crime Victim Law Institute, “[Protecting Children’s Rights: What Practitioners Need to Know About Traumatic Stress](#),” *Child-Victim’s Rights Bulletin* (Jan. 2013) citing courts and mental health professionals alike have recognized that court proceedings may be trauma-inducing events; See, e.g., [Maryland v. Craig](#), 497 U.S. 836, 853 (1990) (discussing the state’s interest in protecting the welfare of children and noting the “growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court”); [In re Jam. J.](#), 825 A.2d 902, 916 (D.C. 2003) (“There is substantial empirical support for the proposition that a significant amount of trauma and upset experienced by the child witness is due to the presence and proximity of the accused.”) (internal citation omitted, citing support); Dorothy F. Marsil, Jean Montoya, David Ross, & Louise Graham, [Child Witness Policy: Law Interfacing with Social Science](#), 65 *Law & Contemp. Probs.* 209, 213 (2002) (noting that “the phenomenon of confrontational stress experienced by children is amply supported by social science evidence” and citing sources).

- Providing protections and rigid parameters to protect the child from pro-se defendants that wish to cross-examine the child during trial;
- Creating rules of evidence that provide protections to child victims; and
- Providing statutes of limitations that are tolled to some degree for disclosures of sexual abuse.

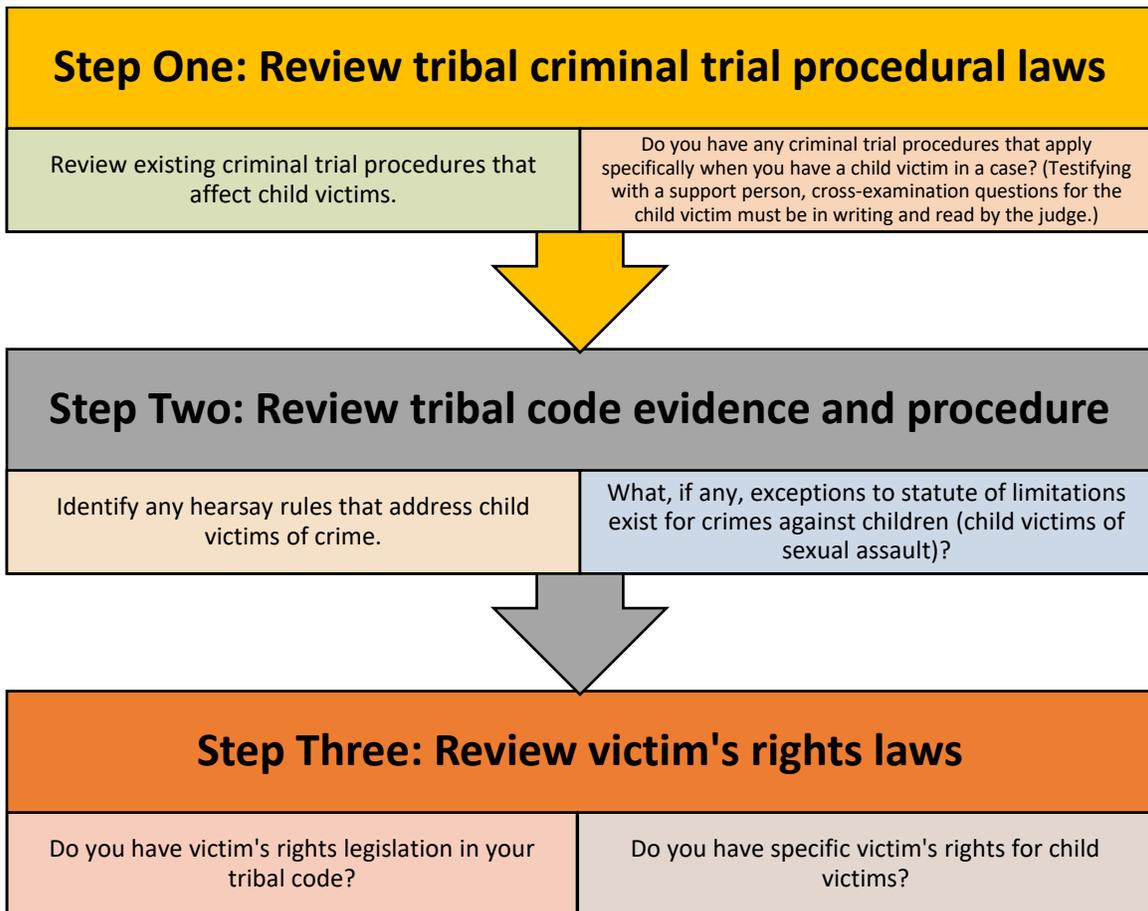
Statutes that address these issues send a message to the community and to child victims that the seriousness of the crimes are recognized by the community and the protections for the child victim are being prioritized. The material discussed in the preceding text indicates some statutes that can protect or at least reduce retraumatization during the criminal process.

Chapter 4 will focus on criminal jurisdiction in Indian country and explore civil jurisdiction in Indian country as it relates to protecting and compensating child victims of crime. **Chapter 5** will focus on using the rules of evidence and statutes of limitation to protect child victims.

Chapter 6 will target the importance of victim's rights statutes for child victims.

Immediately following this section is a flowsheet that presents a big picture overview of considerations relevant to the protection of child victims during the criminal process. At the conclusion of **Part II**, you will find an exercise and worksheet that serves as a resource for your code drafting team. The exercise and worksheet for **Part II** assists your drafting team in assessing your tribal code for current protections for child victims during the tribal criminal process.

Part II: Flowsheet



Chapter 4: Jurisdiction in Indian Country

Jurisdiction refers to the power of a government to regulate conduct and to enforce those regulations through a court system. Jurisdictional authority impacts the ability of law enforcement to make arrests, the ability of prosecutors and individuals to file charges or complaints, and the ability of courts to render legal decisions. Jurisdiction is important for your team to understand because it provides a legal basis for a tribe to legislate activities and adjudicate disputes. This chapter will offer a focused discussion of jurisdiction, focusing on issues relevant to crimes committed against children. For a deeper study of tribal jurisdiction, your team can review the criminal and civil jurisdiction chapters from *Introduction to Tribal Legal Studies* (3rd ed.) by Justin B. Richland and Sarah Deer included in **Appendix B** of this Guide.

Why is understanding tribal jurisdiction important to drafting tribal provisions or codes?

A court order issued by a court without jurisdiction is void and unenforceable,²⁸ so understanding the parameters of tribal criminal jurisdiction is essential. While tribes are sovereigns and are governed by their own tribal constitutions, Congress has from time-to-time placed limitations on a tribe's sovereign judicial powers using the Plenary Power Doctrine.²⁹ Additionally, Congress has sometimes loosened or removed those limitations.³⁰ Determining tribal jurisdiction is critical to a tribe's ability to keep victims of crime safe by prosecuting and holding perpetrators accountable.

What is the difference between criminal and civil jurisdiction?

Criminal jurisdiction refers to the power of a court to hear and decide cases of a criminal nature. Criminal cases are usually prosecuted by governments: tribal, state, or federal. The burden of proof in a criminal case requires the prosecutor to prove that the defendant 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. If a person is found guilty of a crime, the penalty may be incarceration and/or fines.

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

²⁸ *Rose v. Himely*, 4 Cranch 241, 2 L ed 608 (1808); *Pennoyer v. Neff*, 95 US 714, (1877); *Thompson v. Whitman* 18 Wall 457, 21 L ed 897 (1873); *Windsor v. McVeigh*, 93 US 274, 23 L ed 914 (1876); *McDonald v. Mabee*, 243 US 90, 37 Sct 343, 61 L ed 608 (1917).

²⁹ [Talton V. Mayes](#), 163 U.S. 376 (1896).

³⁰ Example: Violence against Women Act of 2013, Special Domestic Violence Criminal Jurisdiction (25 U.S.C. § 1304).

A. How Is Criminal Jurisdiction Relevant to Protecting Child Victims of Crime?

Exercising tribal criminal jurisdiction to protect children is an important function of sovereignty. Child victims going through the criminal process do best when statutes provide protections including statutory provisions that address the trauma a child victim may be experiencing. These protections are discussed thoroughly in a later chapter. Specific to the exercise of tribal criminal jurisdiction over perpetrators of violence, there are limitations that a tribe must be aware of and navigate. A discussion of some of those limitations is included here.

Three sovereigns may be asserting criminal jurisdiction over crimes committed against children in Indian country: tribal, federal, and state. In the analysis of which sovereign may exercise criminal jurisdiction, you must consider the crime committed, the status of the territory where the crime was committed, and the Indian or non-Indian status of the perpetrator and the victim. Additionally, tribal criminal jurisdiction may run concurrently (at the same time) with federal or state criminal jurisdiction. A combination of federal statutes and federal court decisions have created this complex maze of laws and regulations that can make it difficult for tribes to address crime committed against children in Indian country.

Tribal Criminal Jurisdiction

Tribal jurisdiction exists over all crimes committed by Indians in Indian country.³¹ A substantial hurdle to tribes protecting child victims is a limitation on a tribal criminal court's jurisdiction over non-Indians. The U.S. Supreme Court decision in *Oliphant v. Suquamish Indian Tribe*³² limited the ability of tribal governments to try and punish non-Indians.³³ Congress has loosened that limitation somewhat through 25 U.S.C. § 1304—tribal jurisdiction over certain crimes of domestic violence (known as Special Domestic Violence Criminal Jurisdiction [SDVCJ]). SDVCJ can be exercised by a tribe that meets federally mandated due process protections.³⁴ A tribe can exercise SDVCJ over three categories of crimes: dating violence, domestic violence, or violation of a protection order.³⁵ Most relevant for protecting child victims from non-Indian perpetrators may be a violation of a protection order. In cases in which an Indian child is a victim and protected by a protection order, a term specifically defined in the federal statute,³⁶ SDVCJ would allow a tribe that meets the federal statutory mandates to exercise tribal criminal jurisdiction over a non-Indian who violates the Indian child's protection order in Indian country or Alaska Native villages. For further reading on SDVCJ, please review TLPI's [Tribal Legal Code Resource: Tribal Laws Implementing TLOA Enhanced Sentencing and VAWA Enhanced Jurisdiction](#) and the National Congress of American

³¹ [U.S. v. Lara](#), 541 U.S. 193 (2004).

³² [Oliphant v. Suquamish Indian Tribe](#), 435 U.S. 191 (1978).

³³ *Ibid.*; the terms *Indian* and *non-Indian* are used throughout this Guide. Whether a perpetrator or victim are recognized as members of a federally recognized tribe (Indian) or are non-Indians is vital to determining a tribe's criminal jurisdiction.

³⁴ 25 U.S.C. § 1304(d).

³⁵ 25 U.S.C. § 1304 (c)(1) and (2).

³⁶ 25 U.S.C. § 1304 (c)(2).

Indians’ [VAWA 2013’s Special Domestic Violence Criminal Jurisdiction: Five-Year Report](#), which have a greater discussion of the requirements, tribal code examples, and guidance on SDVCJ.

Reviewing your tribal code to determine whether your tribe is currently exercising SDVCJ is an important step in assessing gaps and strengths of the code to address crimes committed against children.

In addition to limiting tribal criminal jurisdiction over non-Indians, federal laws may also impact tribal criminal sentencing power. Examples include the Indian Civil Rights Act (ICRA)³⁷ and enhanced sentencing authority under the Tribal Law and Order Act (TLOA).³⁸ Understanding ICRA and determining whether your tribe exercises enhanced sentencing authority under TLOA will be important as your team considers penalties and sanctions for crimes committed against children. Be sure to review **Chapter 14: Penalties and Sanctions** for a more thorough discussion of sentencing issues.

Criminal Jurisdiction on Reservations Not Affected by P.L. 280/State Jurisdiction³⁹

<i>Indian Status</i>	<i>Type of Crime Major Crime (as defined by Major Crimes Act (MCA, 18 U.S.C. § 1153))</i>	<i>All Other Crimes (including General Crimes Act (GCA, 18 U.S.C. § 1152))</i>
Indian perpetrator, Indian victim*	Federal (under MCA) and tribal jurisdiction	Tribal jurisdiction
Indian perpetrator, non-Indian victim**	Federal (under MCA) and tribal jurisdiction	Federal (under GCA) and tribal jurisdiction
Non-Indian perpetrator, Indian victim	Federal jurisdiction (under GCA)***	Federal jurisdiction (under GCA) ***
Non-Indian perpetrator, non-Indian victim****	State jurisdiction	State jurisdiction

* If listed in the Major Crimes Act (MCA), there is federal jurisdiction, exclusive of the state, but probably not of the tribe. If the listed offense is not otherwise defined and punished by federal law applicable in the special

³⁷ 25 U.S.C. § 1301–1304. ICRA applies to any tribal court criminal proceeding and it limits a tribe’s ability to sentence for any one crime to one year in jail and/or a \$5,000 fine. If a person is convicted of more than one crime such as kidnapping and rape, federal law allows up to one year for each offense for a maximum sentence of three years.

³⁸ 25 U.S.C. § 1302(b). TLOA provides that if a tribe complies with the prerequisites in the statute, the tribe’s criminal court can sentence certain defendants to three years imprisonment and/or impose a \$15,000 fine for a single offense. Additionally, a tribal court can stack sentences up to a cumulative total of nine years for multiple offenses addressed in one criminal proceeding.

³⁹ “General Guide to Criminal Jurisdiction in Indian Country,” Tribal Law and Policy Institute, <http://www.tribal-institute.org/lists/jurisdiction.htm> (accessed Mar. 9, 2021).

maritime and territorial jurisdiction of the United States, state law is used in federal courts. See section 1153(b). If not listed in MCA, the tribal jurisdiction is exclusive.

** If not listed in MCA, there is federal jurisdiction, exclusive of the state, but not of the tribe, under the General Crimes Act (GCA, 18 U.S.C. § 1152) but only if the crime is not committed by one Indian against the person or property of another Indian, nor if the Indian committing the offense in Indian country has been punished by the local law of the tribe nor to any case where treaty stipulations provides for exclusive tribal jurisdiction over the criminal matter. If the GCA offense is not defined and punished by a statute applicable within the special maritime and territorial jurisdiction of the United States, state law is used in federal courts under 18 U.S.C. § 13. The GCA may also apply in crimes committed by a non-Indian against the person or property of an Indian in Indian country.

*** Tribal jurisdiction for crimes under VAWA 2013 Title IX, when the tribe is exercising Special Domestic Violence Criminal Jurisdiction (SDVCJ). (25 U.S.C. § 1304)

**** [U.S. v. McBratney](#), 104 U.S. 621 (1881)

Note: There is federal jurisdiction in Indian country for federal crimes of general applicability including, but not limited to, certain drug offenses, bank robbery, felon in possession of firearm, mail fraud, embezzlement or theft from tribal organization, theft from casino, or failure to report child abuse.

Public Law 83-280

Another substantial hurdle to tribal justice systems protecting child victims is Public Law 83-280 (P.L. 280). Public Law 83-280 (commonly referred to as “Public Law 280” or “PL-280”), was originally enacted in 1953 and did two things to alter the usual allocation of criminal jurisdiction in Indian country. First, on the reservations to which it applied, it took away the federal government’s authority to prosecute Indian country crimes based on 18 U.S.C. § 1152 (the Indian Country General Crimes Act) and 18 U.S.C. § 1153 (the Major Crimes Act). Second, it authorized the states of Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin- and then Alaska upon statehood (referred to as the mandatory states) to prosecute most crimes that occurred in Indian country. Exceptions were set forth for a few topic areas and on a few reservations, but the main result of Public Law 280 is that for most reservations in the mandatory states, federal criminal jurisdiction in Indian country became extremely limited while state jurisdiction was greatly expanded.

P.L. 280 also permitted the other states to acquire jurisdiction at their option (the so-called optional states). For optional P.L. 280 states, it appears that federal criminal jurisdiction is concurrent with tribal jurisdiction. See [Archived Department of Justice Criminal Resource Manual Jurisdiction Summary](#) (Jan. 2020) and a [2017 Memorandum for Unites States Attorneys in “Optional” Public Law 280 States](#).

P.L. 280 has generally brought about:

- An increased role for state criminal justice systems in “Indian country” and Alaska Native villages;

- A virtual elimination of the special federal criminal justice role (and a consequent diminishment of the special relationship between tribes and the federal government for the mandatory six states); and
- Numerous obstacles to individual nations subject to P.L. 280 in their development of tribal criminal justice systems.⁴⁰

For further education on P.L. 280, review [Public Law 280: Issues and Concerns for Victims of Crime in Indian Country](#) by Jerry Gardner and Ada Pecos Melton⁴¹.

**Criminal Jurisdiction in Indian country where P.L. 280 Applies
(Mandatory States⁴² and Optional States⁴³)**

<i>Indian Status</i>	<i>Type of Crime Major Crime (as defined by Major Crimes Act (MCA, 18 U.S.C. § 1153))</i>	<i>All Other Crimes (including General Crimes Act (GCA, 18 U.S.C. § 1152))</i>
Indian perpetrator, Indian victim*	<i>Mandatory States</i> - State and tribal jurisdiction <i>Optional States</i> – State, federal (under MCA), and tribal jurisdiction	<i>Mandatory States</i> - State and tribal jurisdiction <i>Optional States</i> – State and tribal
Indian perpetrator, non-Indian victim*	<i>Mandatory States</i> - State and tribal jurisdiction <i>Optional States</i> – State, federal (under MCA), and tribal jurisdiction	<i>Mandatory States</i> - State and tribal jurisdiction <i>Optional States</i> – State, federal (under GCA), and tribal jurisdiction
Non-Indian perpetrator, Indian victim*	<i>Mandatory States</i> - State and possible tribal jurisdiction** <i>Optional States</i> – State and possible tribal jurisdiction**	<i>Mandatory States</i> - State and possible tribal jurisdiction** <i>Optional States</i> – State, federal jurisdiction (under GCA), and possible tribal jurisdiction**
Non-Indian perpetrator, non-Indian victim***	State jurisdiction	State jurisdiction

*Under TLOA, a tribal government may request federal concurrent jurisdiction over crimes in PL 280 states, subject to approval of the U.S. Attorney General. (25 U.S.C. § 1321)

** Tribal jurisdiction for crimes under VAWA Title IX when a tribe has opted into SDVCJ. (25 U.S.C. § 1304)

*** [U.S. v. McBratney](#), 104 U.S. 621 (1881)

⁴⁰ “Public Law 280,” Tribal Law and Policy Institute, <http://www.tribal-institute.org/lists/pl280.htm> (accessed Mar. 9, 2021).

⁴¹ Jerry Gardner and Ada Pecos Melton, [P.L. 280: Issues and Concerns for Victims of Crime in Indian Country](#) (2004).

⁴² Referring to P.L. 280 states of Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin- and then Alaska upon statehood.

⁴³ All other P.L 280 states and P.L. 280- like states.

Note: There is federal jurisdiction in Indian country for federal crimes of general applicability including, but not limited to, certain drug offenses, bank robbery, felon in possession of firearm, mail fraud, embezzlement or theft from tribal organization, theft from casino, or failure to report child abuse.

The charts above were adapted to incorporate material from the U.S. Department of Justice Criminal Resource Manual, 689. Jurisdictional Summary, updated January 2020 and accessed at: <https://www.justice.gov/archives/jm/criminal-resource-manual-689-jurisdictional-summary>. The charts also reflect a [2017 Memorandum for Unites States Attorneys in “Optional” Public Law 280 States](#) which affirmed that the federal government does have concurrent criminal jurisdiction under 18 U.S.C. §§ 1152 and 1153 over Indian-country crimes that fall within an “optional P.L. 280” State’s jurisdiction.

B. How Is Civil Jurisdiction Relevant to Protecting Child Victims of Crime?

Similar to criminal jurisdiction, the world of tribal civil jurisdiction is complex. The U.S. government has imposed limitations on the civil authority of tribal courts and those limitations are different from the limitations applied to tribal criminal jurisdiction.⁴⁴ In light of the foregoing limitations on the exercise of tribal criminal jurisdiction over the conduct of non-Indians within Indian country, it is important to consider what civil jurisdictional authority may afford in terms of the accountability of non-Indian offenders. A discussion of tribal civil jurisdiction is important to protecting child victims of crime because victims may need various civil legal remedies including protection orders, restitution, and other types of civil relief. A child might need to bring a civil action to seek restitution for things such as medical bills or destruction of property.⁴⁵ Note that civil law is not primarily concerned with punishing offenders, like criminal law, but rather is concerned with the legal relationship between two parties and providing various remedies that do not include incarceration.

Tribal Civil Jurisdiction

Because of its complexity, a case-by-case determination will need to be made to know whether a tribe has civil jurisdiction. Considerations include the type of civil jurisdiction exercised (regulatory - lawmaking, authority to regulate, or adjudicatory - law-applying, authority to hear and decide a case), the status of the parties (Indian or non-Indian, tribal member or nonmember), and where the tribe is attempting to exercise its civil authority.

The most important case law precedent limiting tribal civil jurisdiction relates to tribes exercising civil authority over non-Indians. Two U.S. Supreme Court cases from the 1980s and 1990s directly address tribal court civil jurisdiction over nonmembers and over non-Indian

⁴⁴ Justin B. Richland and Sarah Deer, “Tribal Civil Jurisdiction,” in *Introduction to Tribal Legal Studies*, 3rd ed. (London: Rowman & Littlefield, 2015), 201.

⁴⁵ Check the applicable statute to determine who is authorized to bring suit on behalf of child, for example, a parent, guardian, or guardian ad litem.

defendants: *Montana v. United States*, 450 U.S. 544 (1981) and *Strate v. A1 Contractors*, 520 U.S. 438 (1997). For further learning on tribal civil jurisdiction and nonmembers and non-Indians, please see **Appendix B** and review Matthew Fletcher’s recent Stanford Law Review article, [Indian Lives Matter: Pandemics and Inherent Tribal Powers](#) (April 14, 2020).

Public Law 83-280

The main congressional intervention into tribal civil jurisdiction is P.L. 280.⁴⁶ As discussed in the criminal jurisdiction subsection, P.L. 280 was a transfer of jurisdiction in Indian country from the federal government to the state governments. The U.S. Supreme Court has found that P.L. 280 provided civil adjudicatory, but not civil regulatory authority to the states.⁴⁷ Remember, P.L. 280 did not divest any tribal authority and thus tribes can hold concurrent jurisdiction with the state where P.L. 280 is in effect.

For the purposes of this Guide, we will focus our discussion on tribal civil authority to issue protection orders and provide civil relief to a child victim. Tribal codes provide guidance on the types of civil protections a child victim might request from a tribal court.

Civil Protection Orders

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.⁴⁸ Additionally, the Violence Against Women Act of 2013 (VAWA 2013) endorses tribal civil jurisdiction over all persons when issuing tribal protection 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.*⁴⁹ (Emphasis added)

For VAWA 2013, “protection order” refers to any order, temporary or permanent, issued by a civil or criminal court to prevent violent or threatening acts or harassment against, or contact,

⁴⁶ Public Law 83-280 (18 U.S.C. § 1162, 28 U.S.C. § 1360), formal title: “An act to confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes.” This law, commonly referred to as P.L. 280, was the 280th public law passed by the 83rd Congress.

⁴⁷ [Bryan v. Itasca County](#), 426 U.S. 373 (1976).

⁴⁸ [Williams v. Lee](#), 358 U.S. 217 (1959).

⁴⁹ 18 U.S.C. § 2265(e).

communication with, or physical proximity to the person seeking protection.⁵⁰ It also includes support, child custody, or visitation provisions, orders, or remedies issued as part of a protection order.⁵¹ Should a non-Indian, subject to a VAWA qualifying protection order, violate the provisions of the order, it follows that they could be held accountable for any such violation in any court. For more information on protection orders and VAWA-qualifying protection orders, visit www.TribalProtectionOrder.org.

The VAWA 2013 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.⁵²

Lastly, the statute 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.⁵³ For more information on civil remedies, read Hallie Bongar, Kelly Gaines Stoner, and James G. White’s article in the Tulsa Law Review, [Creative Civil Remedies against Non-Indian Offenders](#) (2013).

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

Chapter 5: Using Rules of Evidence and Statutes of Limitation to Protect Child Victims

This chapter focuses on using rules of evidence and trial accommodations to protect child victims of crime during the criminal process. This chapter will emphasize utilizing rules of evidence to minimize the trauma to a child victim in three ways: (1) by offering accommodations while testifying at trial; (2) by relaxing some of the rules pertaining to hearsay to allow prosecutors to minimize the child's exposure on the witness stand; and (3) by providing a statute that tolls the time within which a child victim's criminal sexual assault complaint can be prosecuted. A word of caution: drafting statutes that may infringe on the criminal defendant's right to confront or face witnesses may be interpreted as a violation of the ICRA⁵⁴ so the evidentiary rules described in the following text should be carefully considered.

For a long time, the expression, "children should be seen but not heard" was courtroom policy, where children were deemed incompetent witnesses and not allowed to testify. Today, in the "pursuit of justice," children are often forced to speak when they would rather remain silent. This is especially true in child sexual abuse cases where the child-victim plays a central role in the prosecution, and children as young as three and four are required to publicly recount the very events that traumatized them.⁵⁵

Statutes that provide rules specific to child victims can help minimize the trauma to a child during the criminal process by:

- Authorizing the appointment of a dedicated attorney or guardian ad litem to litigate and advance the child's voice;
- Requiring the protection of the child's privacy by requiring the following:
 - Using the child's initials or a pseudonym in pleadings filed with the court,
 - Requiring that documents or the information in them that concerns a child be disclosed only to persons who, by reason of their participation in the proceeding, have reason to know such information, and
 - Keeping all documents that disclose the name or any other information concerning a child in a secure place to which no person who does not have reason to know their contents has access.
- Removing the child from the defendant's presence to allow the child to testify by closed-circuit television or testifying behind a screen for providing testimony;
- Authorizing access to support persons or animals; and

⁵⁴ Indian Civil Rights Act, 25 U.S.C. § 1302 (a)(6).

⁵⁵ National Crime Victim Law Institute, "[Practical Tips and Legal Strategies for Protecting the Child-Victim While Testifying](#)," *Victim Law Article* (2008), 1.

- Authorizing the use of an expert to explain what might be perceived as oppositional or noncooperating behavior that may result from trauma.⁵⁶

Rules of evidence facilitate an efficient court process and the pursuit of a just result for the parties by providing baseline protections that are intended to ensure that evidence presented to the court is reliable. “The rules of evidence describe when, how, and for what purpose evidence can be placed before the court for consideration.”⁵⁷ Many jurisdictions have adopted rules of evidence that apply when a child is the victim. Some jurisdictions have chosen to place these special rules of evidence directly into the criminal code provisions that address crimes against children. For example, in the definition of child sexual abuse, a subsection could address how child testimony could be handled in a child sexual abuse case. For more discussion on drafting definitions for criminal statutes affecting crime against children, see **Chapter 8: Drafting the Definitions**.

The Federal Rules of Evidence provide protections to child victims, including allowing into evidence past child molestation convictions as substantive evidence by the prosecution in child molestation cases.⁵⁸ Many jurisdictions provide statutes known as “rape shield” rules to protect all sexual assault victims to include children.⁵⁹

Because a broad discussion of evidentiary rules is outside the scope of this resource, the following discussion focuses on rules of evidence related to criminal trials where the victim is a child.

A. Utilizing Rules of Evidence—Testifying in Criminal Cases

Testifying in court can be a very frightening experience. Children who are forced to testify may suffer a second round of victimization.⁶⁰ Forty-one percent of state trial court judges reported allowing a child to testify while on an adult’s lap and more than 90 percent of prosecutors in a national survey indicated always or frequently using a support person with children.⁶¹ Asserting a child’s victim’s rights in the criminal justice realm is essential. Many jurisdictions have statutes that authorize the advocate to accompany child victims to the witness stand.⁶² While the advocate may remain near the witness stand to comfort the child, the advocate cannot prompt

⁵⁶ National Crime Victim Law Institute, “[Protecting Children’s Rights: What Practitioners Need to Know About Traumatic Stress](#),” *Child-Victim’s Rights Bulletin* (Jan. 2013), 2–3.

⁵⁷ White Eagle, Cordero, and Sekaquaptewa, *Tribal Legal Code Resource: Civil Dependency and Related Laws*, 123.

⁵⁸ Federal Rules of Evidence, [Rule 414](#).

⁵⁹ Federal Rules of Evidence, [Rule 412](#).

⁶⁰ National Crime Victim Law Institute, “Practical Tips and Legal Strategies,” 1, citing George K. Goodhue, Comment, *Maryland v. Craig: Balancing Sixth Amendment Confrontation Rights with the Rights of Child Witnesses in Sexual Abuse Trials*, 26 *New Eng. L. Rev.* 497, 498 (2001).

⁶¹ Bradley D. McAuliff et al. “[Supporting Children in U.S. Legal Proceedings: Descriptive and Attitudinal Data from a National Survey of Victim/Witness Assistants](#),” *Psychology, Public Policy, and Law: An Official Law Review of the University of Arizona College of Law and the University of Miami School of Law* 19(1) (2013): 98–113.

⁶² National Crime Victim Law Institute, “Practical Tips and Legal Strategies,” 1, citing e.g., 18 U.S.C. § 3509(i); Cal. Code § 868.5; Col. Rev. Stat. § 16-10-401; and Haw. Rev. Stat. § 621–28.

or assist the child's testimony. Further, the advocate's actions will be scrutinized following a conviction to determine if their presence in some way violated the criminal defendant's right to a fair trial.⁶³

In cases in which the victim is a child, the practitioner should consider filing a motion with the court to allow the child to testify by closed-circuit television. In the federal criminal system, the child victim can testify by closed-circuit television or video-taped deposition without violating defendant's right to confrontation:

if the court finds that the child is unable to testify in open court in the presence of the defendant, for any of the following reasons:

- (i) The child is unable to testify because of fear.
- (ii) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying.
- (iii) The child suffers a mental or other infirmity.
- (iv) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.⁶⁴

The child might also be allowed to testify in a closed courtroom. "The Sixth Amendment grants a defendant the right to a public trial, but the presumption of openness may be overcome by an overriding interest based on findings that closure is essential to preserve higher values. Closure of the courtroom may be permissible if an open court would cause substantial psychological harm to the child."⁶⁵

In cases in which defendants have waived their right to counsel and are proceeding pro se (definition: for one's own behalf; in person), many victims fear facing cross-examination by the perpetrator. In cases involving children, some courts require the defendant's questions be put in writing to be read by the Court.⁶⁶ "Courts have held that to justify limiting a defendant's right to personal cross-examination, the state or practitioner must show that there is an 'important

⁶³ National Crime Victim Law Institute, "Practical Tips and Legal Strategies," 1, citing *Sexton v. Howard*, 55 F.3d 1557, 1559 (11th Cir. 1995); *People v. Dablon*, 34 Cal. Rptr. 2d 761, 768–69 (1996); *State v. Suka*, 777 P.2d 240, 243 (Haw. 1989); *Brooks v. State*, 330 A.2d 670, 675 (Md. Ct. Spec. App. 1975); *State v. Dompier*, 764 P.2d 979, 979 (Or. Ct. App. 1988); and *State v. Hoyt*, 806 P.2d 204, 210 (Utah 1991).

⁶⁴ 18 U.S.C. § 3509(b)(1)(B).

⁶⁵ National Crime Victim Law Institute, "Practical Tips and Legal Strategies for Easing Victims' Concerns About Testifying," *NCVLI News* (Winter 2007–8) 2 citing 18 U.S.C. § 3509(e); *Waller v. Georgia*, 467 U.S. 39, 44–47 (1984); and *Garcia v. Bertsch*, 470 F.3d 748, 754 (8th Cir. 2006).

⁶⁶ National Crime Victim Law Institute, "Practical Tips and Legal Strategies for Easing Victims' Concerns," 2, citing *Fields v. Murray*, 49 F.3d 1024, 1037 (4th Cir. 1995); *Massachusetts v. Conefrey*, 570 N.E.2d 1384, 1390–91 (Mass. 1991); *State v. Taylor*, 562 A.2d 445, 454 (R.I. 1989); and *State v. Eastbrook*, 842 P.2d 1001, 1006 (Wash. Ct. App. 1993).

state interest' that outweighs defendant's right. Protecting child witnesses from emotional trauma has qualified as such an interest."⁶⁷ For a survey of select state and federal laws providing victim's rights that are specific to children, see <https://law.lclark.edu/live/files/22778-ncvli50-state-surveykey-child-victim-specific>.

In 1990, the Victims of Child Abuse Act (VCAA) (18 U.S.C. § 3509) was enacted in response to the alarming increase in reports of suspected child abuse cases made each year and because of the complexities of investigating and prosecuting these cases, the system had not paid sufficient attention to the needs and welfare of the child victim. The VCAA amended federal law to ensure protection of children's rights in court and throughout the criminal justice system.⁶⁸ The VCAA amended the U.S. criminal code to allow alternatives to a child testifying in the courtroom. Those alternatives include a child testifying at trial using two-way closed-circuit television or giving a videotaped deposition.⁶⁹ These alternatives protect children from having to physically appear in an intimidating courtroom, see the alleged perpetrator, and so forth. Prosecutors must file a motion with the court seeking these alternatives at least seven days prior to trial.⁷⁰ For the alternatives to apply, the court must find the child is unable to testify in court for one or more of the following reasons:

- The child is unable to testify because of fear.
- There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying.
- The child suffers a mental or other infirmity.
- Conduct by defendant or defense counsel causes the child to be unable to continue testifying.

The VCAA also included a child competency presumption⁷¹ and privacy protections.⁷² Some tribes' evidence rules have adopted specific codes to address alternatives to child in-court testimony like those provided in the VCAA. Attorneys representing child victims of crime must utilize every tool available to protect the child and prevent retraumatization.

⁶⁷ National Crime Victim Law Institute, "Practical Tips and Legal Strategies for Easing Victims' Concerns," 2, citing *Fields v. Murray*, 49 F.3d 1024, 1037 (4th Cir. 1995).

⁶⁸ For additional information, see Office of the U.S. Attorneys, Department of Justice, [U.S. Attorney's Manual: 9-75.000— Child Sexual Exploitation, Sexual Abuse, and Obscenity](#), Justice.gov (Apr. 2000).

⁶⁹ 18 U.S.C. § 3509(b)(1-2).

⁷⁰ 18 U.S.C. § 3509(b)(1)(A).

⁷¹ 18 U.S.C. § 3509(c).

⁷² 18 U.S.C. § 3509(d).

B. Utilizing Rules of Evidence—Child Hearsay Exceptions

In cases of crimes committed against children, hearsay is often needed to build the prosecution's case because, for several reasons, it may not be appropriate to ask a child victim to testify. Prosecutors may choose not to put a child on the stand due to fear, potential retraumatization, and/or unavailability. This may require the prosecutor to use statements that the child has made to others outside of court such as friends, family, social workers, and police officers. Hearsay exceptions balance the criminal justice system's need to seek the truth through the admission of reliable and necessary evidence and the defendant's rights (right to confront witnesses against them).

Hearsay

Hearsay is an out-of-court statement, made in court, to prove the truth of the matter asserted in that statement.⁷³ An out-of-court statement is a statement that is given by a witness at trial who repeats what others have said out of court and not what the trial witness knows personally. Thus, the statement's credibility lies with someone other than the witness. That out-of-court statement is hearsay when it is offered in court as evidence to prove that the statement is true. Because of credibility issues and other reliability concerns, hearsay is usually inadmissible unless there is an applicable exemption or exception ("the hearsay rule").

Tribes may adopt hearsay statutes and hearsay exemptions or exceptions that will apply in tribal court. The federal rules are used here as an example of how hearsay and the exemptions or exceptions may apply in federal court. In the federal system, there are numerous exemptions and exceptions to the hearsay rule that apply in various circumstances.⁷⁴ For example, Federal Rules of Evidence 803 (FRE 803) sets forth hearsay exceptions that can be made regardless of whether the declarant (person making the out-of-court statements) is available as a witness at the trial. Here are a few from FRE 803:

Rule 803. Exceptions to the Rule Against Hearsay

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

- (1) *Present Sense Impression*. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
- (2) *Excited Utterance*. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.
- (3) *Then-Existing Mental, Emotional, or Physical Condition*. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional,

⁷³ See Federal Rules of Evidence, Rule [801](#) for the FRE's exact definition of hearsay.

⁷⁴ Federal Rules of Evidence, Rules [801](#), [803](#), [804](#), [807](#).

sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) *Statement Made for Medical Diagnosis or Treatment*. A statement that:
(A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and
(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

[omitted].

In crimes committed against children, hearsay statements may include out-of-court statements made by a child to service providers.

Child-Specific Hearsay Exceptions

The Federal Rules of Evidence lack a specific hearsay exception addressing out-of-court statements made by a child. However, frequently used hearsay exceptions, like FRE 803(4) the medical hearsay exception, do apply in child victim cases.⁷⁵ Additionally, some states have adopted child hearsay exceptions in particular cases.⁷⁶ The hearsay rule and exceptions apply in both civil and criminal cases. However, in criminal cases, the hearsay rule may run afoul of the defendant's right to confront witnesses even if the hearsay statement fits within an exception or exemption. Tribes should be cautious when balancing a defendant's right to confront witnesses and a child's well-being when considering including child specific hearsay exceptions in tribal code.

⁷⁵ See [U.S. v. Kappell](#), 418 F.3d 550 (6th Cir. 2005).

⁷⁶ National District Attorneys Association, [Rules of Evidence or Statutes Governing Out of Court Statements of Children](#).

Hearsay and the Criminal Defendant's Right to Confront Witnesses

Congress passed ICRA in 1968, which incorporated most, but not all, of the rights included in the Bill of Rights in criminal cases.⁷⁷ ICRA recognizes a criminal defendant's right to confront witnesses against him.⁷⁸ The defendant's rights to confront witnesses may be violated when the prosecutor seeks to enter certain hearsay statements in a criminal trial. While the U.S. Constitution does not apply in tribal court,⁷⁹ it is useful to review U.S. Supreme Court rulings on this issue to better inform prosecutorial decisions related to this issue.

The Supreme Court's decision in *Crawford v. Washington*⁸⁰ addressed the issue of whether admitting certain hearsay statements violated the defendant's right to confront witnesses. The Court held that testimonial statements made by declarants who do not testify at trial may not be admitted unless the declarant is unavailable and there was a prior opportunity to cross-examine the declarant.⁸¹ The Court drew a distinction between hearsay statements that were testimonial in nature and hearsay statements that were nontestimonial in nature. The Court provided some guidance on what hearsay statements were "testimonial" in nature but did not provide a comprehensive list of statements that are deemed testimonial in nature. A statement is deemed "testimonial" if "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."⁸²

When drafting tribal codes or prosecuting criminal cases in tribal courts, tribes and tribal prosecutors should be mindful of the use of hearsay statements against a defendant in a criminal trial. Federal courts are familiar with interpreting U.S. constitutional rights and may apply the same interpretations to tribal criminal cases that wind through the federal system on review.

The **Mashantucket Pequot** addressed the issue of child hearsay in Rule 802 (b) indicating that in any proceeding before the court wherein it is alleged that a child is the victim of child abuse or neglect, the court may admit and consider oral or written evidence of out-of-court statements made by the child and rely on that evidence to the extent of its probative value.⁸³

⁷⁷ "Indian Civil Rights Act," Tribal Law and Policy Institute, <http://www.tribal-institute.org/lists/icra.htm> (accessed Sept. 1, 2020).

⁷⁸ 25 U.S.C. § 1302(a)(6).

⁷⁹ *Talton v. Mayes*, 163 U.S. 376 (1896).

⁸⁰ *Crawford v. Washington*, 541 U.S. 36 (2004).

⁸¹ *Ibid.*

⁸² *Davis v. Washington*, 547 U.S. 813, 822 (2006).

⁸³ Mashantucket Pequot Tribal Code Rule 802(b), <http://www.mptnlaw.com/laws/Single/MASHANTUCKET%20PEQUOT%20RULES%20OF%20COURT.pdf> (accessed Aug. 31, 2020).

C. Statutes of Limitation in Sexual Assault Cases

Statutes of limitation are laws that set a deadline for pressing criminal charges or filing a civil lawsuit. After the deadline has passed, charges may not be filed against a defendant. Data from the Department of Justice indicates that 86 percent of child abuse goes unreported.⁸⁴ When a child victim does disclose sexual abuse, a high percentage of those victims delay disclosure into adulthood.⁸⁵

Statutes of limitation may be “tolled” (extended) or eliminated by statute.⁸⁶ Some examples of when a statute of limitations would toll include where a defendant has left the jurisdiction of the tribe or where a defendant has exercised control over a victim during the victim’s minority, or during any period where a federal or state agency is investigating a crime—and where the tribal authorities are hampered in their efforts to investigate the crime. Be aware that the statutes of limitations section of a tribal code may be in the rules of criminal procedure chapter of a tribal code and may be labeled “time limitations.”

For example, the **Tulalip Tribal Code**⁸⁷ set forth in 3.05.080 (e): time limitations that prosecution for an offense where the victim is a minor must be commenced within six years of the victim’s eighteenth birthday. The **Confederated Salish and Kootenai of the Flathead Reservation Tribal Code**⁸⁸ set forth time limitations in 2-1-109 indicating, unless otherwise specified by statute, prosecution for certain crimes where the victim is a minor or has a mental disorder at the time the offense occurred, prosecution must be commenced within one year after the legal disability terminates. The **Fort Peck Tribal Code**⁸⁹ sets forth that where the complaint alleges the crime of sex trafficking, rape, or aggravated sexual assault of a child, and the alleged victim was eighteen years of age or less at the time of the offense, there is no time limit for filing the complaint.

⁸⁴ U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, [Youth Victimization: Prevalence and Implications](#) (Apr. 2003). See also Child USA, The National Think Tank for Child Protection, [Delayed Disclosure, A Fact Sheet Based on Cutting Edge Research on Child Sexual Abuse](#) (Mar. 2020), 2.

⁸⁵ Child USA, [Delayed Disclosure, A Fact Sheet Based on Cutting Edge Research on Child Sexual Abuse](#), 2.

⁸⁶ For federal examples, see 18 U.S.C. § 3282 *Offenses Not Capital* and 18 U.S.C. § 3283 *Offenses against Children*.

⁸⁷ Tulalip Tribal Code, <https://www.codepublishing.com/WA/Tulalip/> (accessed Aug. 31, 2020).

⁸⁸ Confederated Salish and Kootenai of the Flathead Reservation Tribal Code, <https://csktribes.org/title-ii-chapter-1> (accessed Aug. 31, 2020).

⁸⁹ Fort Peck Tribal Code, https://static1.squarespace.com/static/594c44e12cba5ec4cb294563/t/59930d99cd0f686525d796d7/1502809498209/sec_102.pdf (accessed Aug. 31, 2020).

Chapter 6: Victim's Rights

Victim's rights statutes may prove extremely helpful to child victims and all victims in general. This chapter discusses the importance of having victim's rights in a tribal code and focuses on rights that are particularly protective of child victims. One of the paramount rights to consider for children is the right to privacy, a right that is generally reinforced by many provisions contained within victim's rights statutes. The discussion includes various tribal examples of selected rights that are relevant to child victims.

Why are victim's rights important to child victims of crime?

Access to victim's rights laws are important because they ensure that victims are informed of and allowed to participate in the criminal justice process. Until recently, criminal justice systems often focused only on defendant's rights and were seemingly indifferent to the victim's needs as a criminal case progressed through the process. Historically, victims were often excluded from the courtrooms and denied the chance to speak at the sentencing hearing. The criminal justice system usually left the victim 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 may vary from jurisdiction to jurisdiction, victims may now have statutory sometimes constitutional authority to assert basic victim's rights when a perpetrator has been charged with a crime.

Having a victim's rights code or chapter within your code ensures that your criminal justice system focuses on victim safety throughout the process. Additionally, it communicates to crime victims that they are an important part of the process and can enhance victim reporting and victim participation in prosecutions. Victim's rights most often come into play in criminal cases, but your community can decide if there are aspects of civil cases that should include provision of victims' rights and safety.

What victim's rights are important to child victims of crime?

While all the victim's rights listed in the following text are critical to empower and protect victims during the criminal process, child victims of crime may need additional rights that can be placed into a tribe's victim's rights statutes. For example, appointing a dedicated attorney to litigate and advance the child's voice, utilizing statutes to protect the child's privacy, seeking courtroom accommodations such as closed-circuit television or testifying behind a screen for providing testimony, providing access to support persons or animals, and using an expert to explain what might be perceived as oppositional or non-cooperating behavior that may result from trauma.⁹⁰

⁹⁰ National Crime Victim Law Institute, "[Protecting Children's Rights: What Practitioners Need to Know About Traumatic Stress](#)," *Child-Victim's Rights Bulletin* (Jan. 2013), 2–3.

A. Importance of Drafting Victim’s Rights Statutes

Most tribal traditions include strong victim-centered beliefs. Tribal governments may wish to codify the tribal philosophy toward victims or include traditional words or phrases to more properly reflect tribal beliefs. Generally, having these rights set out in tribal statutes forces the justice system to provide some protections for the victim. The topic of incorporating tribal philosophy is expanded on in **Chapter 7: Drafting the Findings and Purpose**.

Note that the term victim should be defined in the statute (see **Chapter 8** for more on drafting definitions) and might include:

- Victims of certain types of crimes (felonies, violent crimes, sexual assault, domestic assaults);
- Categories of victims (elders, children, disabled, domestic violence); and
- Surviving family members of a homicide victim.

Here is a tribal code example of from **Little Traverse Bay Bands of Odawa Indians. Little Traverse Bay Band** includes⁹¹ a definition of victim in the tribal code as follows:

1. Any individual who suffers direct or threatened physical, financial or emotional harm as a result of the commission of a crime;
2. A parent, guardian or custodian of a victim who is less than eighteen (18) years of age if the parent, guardian or custodian so chooses; or
3. A parent, guardian or custodian of a victim who is so mentally incapacitated that he or she cannot meaningfully understand or participate in the legal process.
4. If a victim is physically unable to exercise the rights under this Statute, the victim may designate his or her spouse or a child of fifteen (15) years of age or older, parent, sibling, grandparent or legal representative of the victim to act in place of the victim during the duration of the physical disability.

Note that **Little Traverse Bay Bands of Odawa Indians** includes an individual who suffers direct or threatened physical, financial, or emotional harm as the result of the commission of a crime, which would include child victims of crime. The definition does not require that a police report be filed or a criminal complaint be lodged. Also, the parent, guardian or custodian of a victim under the age of eighteen meets the definition of a victim if the parent, guardian, or custodian so chooses.

When drafting victim’s rights statutes or code, the drafters will need to include a mechanism by which the victim can seek enforcement of their rights. This may involve the prosecutor, who can raise the issue on the victim’s behalf or this may be done through a separate committee

⁹¹ Little Traverse Bay Bands of Odawa Indians Tribal Code, Title IX Chapter 6 §9.604, <https://www.ltbodawa-nsn.gov/TribalCode.pdf> (accessed Sept. 2, 2020).

that receives, investigates, and attempts to resolve crime victim complaints. Your nation may want to limit the available remedies. For example, the tribe may decide that violation of a right does not create a civil cause of action against the government agency or official or that a defendant cannot rely on the violation of a victim's right as grounds for an appeal. Tribes may choose to assign the enforcement duties to a prosecutor, the court or a committee of individuals. The important issue is to assign the enforcement duties to an identified agency or committee.

Pascua Yaqui tribal code indicates that the tribal prosecutor may assert and seek enforcement of any of the victim's rights in the tribal code.

Pascua Yaqui Tribe

Title 4. Criminal Code

Chapter 5. Victims Rights

Subchapter C Victim's Right to Participate

Section 290 Standing to Invoke Rights (4 PYTC § 5-290)

At the request of the victim, the prosecutor may assert in the victim's behalf any right to which the victim is entitled.

B. Core Victim's Rights

Victim's rights may vary by jurisdiction.⁹² The following is a general list of core rights. Drafting enforceable victim's rights statutes may require designating responsible official(s) for providing notice of and enforcing the right at the victim's option. The statutes may also include a mandate for designated responsible officials to explain relevant victim rights and provide information and the process for accessing the rights. For more information on victim's rights and child victim's rights, including a website that allows a search by tribal jurisdictions for particular victim's rights, see www.VictimLaw.org and www.NCVLI.org.

- **The right to be treated with fairness, dignity, sensitivity, and respect:** This ensures that the justice system recognizes and implements procedure and processes that are victim sensitive and encompasses cultural interpretations of fairness, dignity, sensitivity, and respect. Victims should be free from intimidation, harassment, or embarrassment.
- **The right to attend and be present at criminal justice proceedings:** This ensures that victims see the criminal justice process at work and generally includes the trial, sentencing, and parole hearing, but some jurisdictions specify that victims have the right to attend those proceedings at which a defendant has the right to be present. You may also decide to provide an evidentiary exception for the exclusion of witnesses—allowing

⁹² This list and explanations are taken in large part from www.VictimLaw.org.

victims to remain in the courtroom during the testimony of other witnesses, or requiring a court ruling that the victim's testimony is likely to be influenced by testimony before the victim can be excluded.

- **The right to be heard in the criminal justice process:** This right generally includes the right to confer with the prosecutor and submit a victim impact statement at sentencing, parole, and other similar proceedings. This may include the right to provide written or oral victim impact statements concerning the economic, physical, and psychological effect the crime has had and for that impact to be considered by the court. You may also want to require the prosecutor to obtain the views of the victim before a disposition is final or even require the prosecutor to certify that they consulted with the victim before a plea can be accepted. Limited to specific crimes, it can include the right to request an order for and given results of testing of the offender for sexually transmitted diseases.
- **The right to be informed of proceedings and events in the criminal justice process:**⁹³ This right may include notice of the criminal justice process. This right includes notice of the release (including all types of post-trial release) or escape of the offender pretrial, trial and post-trial and any resulting legal rights and remedies. This right may require notice of any dismissals, plea agreements, or other similar proceedings. It may also include available benefits and services, and access to records, referrals, and other information.
- **The right to protection from intimidation and harassment:** This right may take the form of a generally stated right to protection or may include specific protective measures. Most jurisdictions have made it a crime to intimidate victims or witnesses. Examples of protective measures include police escorts to and from court, secure waiting area separate from the accused and his/her family, witnesses and friends during court proceedings, witness protection programs, residence relocation, and denial of bail or imposition of specific conditions of bail (e.g., no contact orders).
- **The right to restitution from the offender:** "Restitution" commonly refers to payment in the form of damages, but it can also refer to the return or repair of property stolen or damaged during the crime.
- **The right to privacy:** This right is crucial because fear of harassment or retaliation from offenders who may learn their names or find out where they. Consider how to protect victim privacy in criminal justice documents, compensation records, and court testimony, as well as contact information provided for notification purposes. Statutory protections often include (1) prohibition against compelling testimony related to personal information in open court; (2) exclusion or limited disclosure of victim identifying information in criminal justice records (law enforcement reports, court materials and prosecution documents); and (3) protection from release of addresses and/or phone numbers provided for notice purposes. This right would include but not be limited to the right to not have personal identifiers including e-mail address disclosed or used for a purpose unrelated to the official duties of an agency, employee, or official.

⁹³ For a comprehensive list of pretrial, trial, and post-trial victim services and rights in the federal system see 34 U.S.C. § 20141. See also, 18 U.S.C. § 3509 (Child Victims and Child Witnesses) and 18 U.S.C. § 3771 (Crime Victims' Rights Act).

- **The right to apply for crime victim compensation.**
- **The right to the expeditious return of personal property seized as evidence whenever possible:** In an effort to avoid depriving the victim of their property for the months or even years it may take to appeal or retry a case, you may want to impose specific time requirements for the return of property or authorize a photograph of the item to be used as evidence.
- **The right to a speedy trial and other proceedings free from unreasonable delay:** Many jurisdictions require that, in ruling on a continuance requested by a party, the court must also consider the impact of the delay on the victim. Additionally, several jurisdictions give priority to certain types of cases, including domestic violence.
- **The right to enforcement of these rights and access to other available remedies:** This ensures that the victim's rights will be enforced and may also designate an official (prosecutor or court) that is responsible for the enforcement oversight of these rights. May include a designated entity to receive, investigate, and attempt to resolve complaints of violations. Depending on the drafting of the statute, this right may or may not create a civil cause of action against a governmental agency or official for failing to enforce these rights. Typically, a violation of these rights does not provide the defendant with a right to appeal because of the violation.

Little Traverse Bay Bands of Odawa Indians Tribal Code⁹⁴ sets forth the tribe's victim's rights as follows:

- A. **Right to be Protected.** The following measures may be taken to protect victims as necessary and appropriate:
1. Have police escorts to and from court;
 2. Have secure waiting areas separate from those of the accused and his or her family, witness and friend during court proceedings;
 3. Have bail denied or have specific conditions imposed on bail release such as protective orders for defendants who are found to present a danger to the community, the victims, or witnesses;
 4. Have the victim's address, place of employment, and other personal identification information kept confidential based upon the victim's reasonable apprehension of acts or threats of physical violence or intimidation by the defendant or at the defendant's direction against the victim or the victim's immediate family; and
 5. Have any other action taken that is necessary to protect the victim from the accused.
- B. **Right to Notice.** The right to reasonable, accurate, and timely notice of the victim's rights and any public court proceeding, or any parole proceeding, involving the crime or any release or escape of the accused and the right not to be excluded from any public court proceeding.

⁹⁴ Little Traverse Bay Bands of Odawa Indians Tribal Code, Title IX Chapter 6 §9.605, <https://www.ltbodawa-nsn.gov/TribalCode.pdf> (accessed Sept. 2, 2020).

1. Initial Notice. Within twenty four (24) hours after the initial contact between the victim of a reported crime and law enforcement having the responsibility of investigating that crime, law enforcement must give the victim information about the availability of emergency and medical services and the rights of the victim.

2. Notice of Charges. The right to be notified immediately, if the Prosecutor chooses not to file charges against the Defendant or drops charges being held against the Defendant.

[section omitted]

D. Right to be Heard During Proceedings. The right to be heard at any court or agency proceeding involving release, plea, sentencing, or any parole proceeding.

1. The victim has the right to submit or make a written or oral impact statement to law enforcement for use in preparing investigations and reports.

2. The victim has the right to appear and make an oral impact statement at the sentencing of the defendant.

3. The victim has the right to address or submit a written statement for consideration by a probation officer, a parole board or any other group or person having authority over the prisoner's release.

E. Right to Confer with the Prosecutor. The Prosecutor must offer the victim an opportunity to consult with the Prosecutor to obtain the victim's views about the disposition of a crime, including the victim's views about dismissal, plea or sentence negotiations, and pretrial or probation programs.

F. Right to Restitution. The right to full and timely restitution as provided by law.

G. Right to Proceedings without Unreasonable Delay. The right to proceedings free from unreasonable delay. If the Court is ruling on a continuance or other delay in the proceedings, the Court must consider the impact of the delay on the victim. Victims who are children, elders, or otherwise vulnerable must be given preference in setting the Court docket.

H. Right to be Treated with Fairness and Respect. The right to be treated with fairness and with respect for the victim's dignity and privacy. The victim must be treated with fairness, respect, and dignity throughout the criminal justice process. During proceedings the Prosecutor and the Court must take this into consideration when requesting or ordering testing, testimony, or any other potentially invasive act.

I. Right to Return of Property. The right to the expeditious return of personal property seized as evidence whenever possible. Law enforcement must promptly return to the victim property belonging to that victim which is taken in the course of the investigation, except that law enforcement:

1. Must not return property which is contraband;

2. Must not return property if the ownership of the property is disputed until the dispute is resolved; and

3. Must retain as evidence any weapon used in the commission of the crime and any other evidence if the Prosecutor certifies that there is a need to retain that evidence in lieu of a photograph or other means of memorializing its possession by a law enforcement officer.

J. Right to Enforcement. The right to enforcement of these rights and access to other available remedies under the laws of LTBB. Upon request of a victim, the Prosecutor must ask the Court to enforce the rights of the victim.

K. Right to View Copies of Record and Evidence. The right to view copies of reports and other evidence related to the proceeding, provided that the records will not compromise the prosecution of the case. Upon the closing of an investigation or if still open, before the statute of limitations has run on the particular crime or within one year after the case goes cold, the victim has a right to view any and all records and evidence gathered by law enforcement. Such items do not include anything that is privileged. If any of the items contain confidential information, that information must be redacted before the victim is allowed to view it.

Notice that the **Little Traverse Bay Bands of Odawa Indian's** tribal code includes a critical right to child victims embedded in the right to protection: the right to privacy. Federal law has codified a child victim's rights including various protections of a child victim's privacy at 18 U.S.C. § 3509, which sets forth:

[Some sections omitted]

(d) PRIVACY PROTECTION.—

(1) CONFIDENTIALITY OF INFORMATION.—

(A) A person acting in a capacity described in subparagraph (B) in connection with a criminal proceeding shall—

(i) keep all documents that disclose the name or any other information concerning a child in a secure place to which no person who does not have reason to know their contents has access; and

(ii) disclose documents described in clause (i) or the information in them that concerns a child only to persons who, by reason of their participation in the proceeding, have reason to know such information.

(B) Subparagraph (A) applies to—

(i) all employees of the Government connected with the case, including employees of the Department of Justice, any law enforcement agency involved in the case, and any person hired by the Government to provide assistance in the proceeding;

(ii) employees of the court;

(iii) the defendant and employees of the defendant, including the attorney for the defendant and persons hired by the defendant or the attorney for the defendant to provide assistance in the proceeding; and

(iv) members of the jury.

(2) FILING UNDER SEAL.—All papers to be filed in court that disclose the name of or any other information concerning a child shall be filed under seal without necessity of obtaining a court order. The person who makes the filing shall submit to the clerk of the court—

(A) the complete paper to be kept under seal; and

(B) the paper with the portions of it that disclose the name of or other information concerning a child redacted, to be placed in the public record.

(3) PROTECTIVE ORDERS.—

(A) On motion by any person the court may issue an order protecting a child from public disclosure of the name of or any other information concerning the child in the course of the proceedings, if the court determines that there is a significant possibility that such disclosure would be detrimental to the child.

(B)A protective order issued under subparagraph (A) may—

(i) provide that the testimony of a child witness, and the testimony of any other witness, when the attorney who calls the witness has reason to anticipate that the name of or any other information concerning a child may be divulged in the testimony, be taken in a closed courtroom; and

(ii) provide for any other measures that may be necessary to protect the privacy of the child.

Additional information on victim’s rights in the federal Crime Victim’s Rights Act can be found at <https://www.justice.gov/usao/resources/crime-victims-rights-ombudsman/victims-rights-act>. Protecting child victims through victim’s rights legislation is a powerful way to exercise tribal sovereignty.

Part II: Exercise

Part II: Exercise—Tribal Criminal Code Review: Children’s Protections Assessment

Lesson Objectives: Review the current tribal code criminal section to identify current trial process protections for a child victim of crime in criminal cases and identify any gaps.

Reading: The team should consider reading **Chapter 5** and **Chapter 6** and review the tribal criminal codes to identify the tribe’s criminal statutory protections for child victims of crime including a child victim testifying, rules of evidence regarding use of out-of-court statements made by a child, and statute of limitations that apply to child victims of sexual abuse.

Instructions: Each planning team leader should keep a record of consensus.

Team Lead Tips: Once all team members have completed their responses to the exercise questions, please proceed with an open forum discussion and have the team leader record a response for each question that achieves as much consensus as possible. Note that some of the questions may require prior preparation, so each member should be provided a copy of relevant tribal codes to review prior to the meeting.

1. **IDENTIFY** the criminal trial process protections for a child victim of crime the team feels are needed for your tribal community?
2. **WHAT** are the child victim rights protections found in your tribal criminal code? Does the tribal code contain hearsay exceptions and testimonial accommodations for a child victim of crime?
3. **WHAT** is the tribal code statute of limitation/time limitation for filing a criminal complaint when a child is the victim of crimes that may include sexual abuse, physical assault, neglect or child abuse?
4. **IDENTIFY** and list any gaps/barriers found between the answers to question 1 and the answers to questions 2 and 3.

Part II: Worksheet

Part II: Worksheet—Tribal Criminal Code Review: Children’s Protection Assessment

Child Victim’s Protections Assessment			
CODE PROVISIONS	Are these protections currently in your code? (reference treaty, code, or legislative provisions)	Do these protections need to be added or amended?	What protections or rights need to be added?
CRIMINAL TRIAL PROCESS			
Provision allowing child advocate to accompany child		<input type="checkbox"/> yes <input type="checkbox"/> no	
Appointment of a dedicated attorney or guardian ad litem for the child victim		<input type="checkbox"/> yes <input type="checkbox"/> no	
Closed-circuit testimony, screen and/or closed courtrooms to protect child while testifying		<input type="checkbox"/> yes <input type="checkbox"/> no	
Provisions limiting cross-examination through written questions to be read by the court		<input type="checkbox"/> yes <input type="checkbox"/> no	
Provisions allowing video-taped depositions		<input type="checkbox"/> yes <input type="checkbox"/> no	
Provisions allowing the child to access support persons or animals		<input type="checkbox"/> yes <input type="checkbox"/> no	
Rules of evidence that provide accommodations to child victims (such as hearsay exceptions for the child’s statements)		<input type="checkbox"/> yes <input type="checkbox"/> no	
Statute of limitations applicable to crimes against children particularly sexual assault		<input type="checkbox"/> yes <input type="checkbox"/> no	
CHILD VICTIM’S RIGHTS			
Provisions to protect child’s privacy		<input type="checkbox"/> yes <input type="checkbox"/> no	
Comprehensive Child Victim’s Rights Code		<input type="checkbox"/> yes <input type="checkbox"/> no	
Enforcement provisions as part of Child Victim’s Rights Code		<input type="checkbox"/> yes <input type="checkbox"/> no	

Part III: Crimes Committed against Children Code Provisions

Although civil codes are imperative to addressing the immediate safety needs of children and fostering family reunification or adoption, criminal statutes are necessary to provide a legal mechanism that will hold offending parties accountable for their injurious actions toward a child. It is important to remember that the burden of proof for civil and criminal cases is different, Procedural rules, evidentiary issues, and statutory elements are important considerations when drafting criminal laws.

Tribes may choose to incorporate several different crimes into their criminal laws to ensure that tribal justice system officials are able to adequately prosecute and hold offending parties accountable. This is in addition to incorporating general provisions such as findings and purpose or definitions. As tribes develop and expand upon specified crimes against children, code drafting teams may want to consider including the following:

- Drafting the Findings and Purpose (**Chapter 7**)
- Drafting the Definitions (**Chapter 8**)
- Child Neglect and Endangerment (**Chapter 9**)
- Child Abuse (physical, psychological and/or emotional) (**Chapter 10**)
- Commercial Exploitation of a Minor (**Chapter 11**)
- Sexual Abuse of a Child (**Chapter 12**)
- Contributing to the Delinquency of a Minor (**Chapter 13**)
- Penalties and Sanctions (**Chapter 14**)

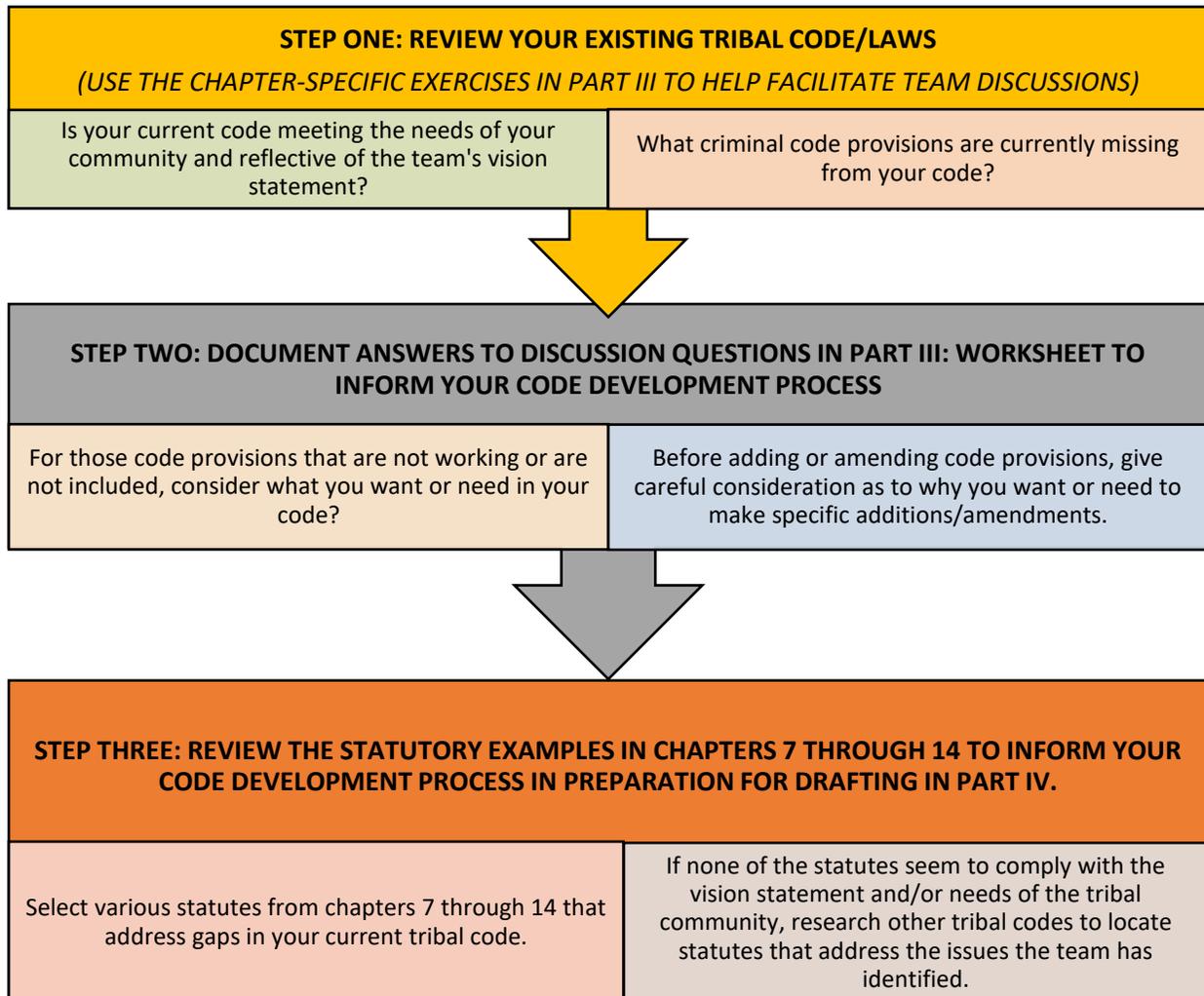
Each chapter in this section will provide:

- Information relevant to specific crimes;
- A summary of selected tribal and federal code examples (will include short citations); and
- Examples of selected tribal and federal codes (will include full citations; although every effort was made to include current versions of code provisions, some included examples may have been amended after this publication being released therefore please refer to code provisions as examples and not for legal purposes).

It is important to note that the applicability of federal statutes will vary depending upon the whether the offending party and the victim are Indian or non-Indian. For clarification and further discussion on criminal jurisdiction in Indian country and the applicable statutes, please refer to **Part II, Chapter 4**.

Finally, at the conclusion of **Part III**, you will find a summary worksheet. The exercises in this part help guide and facilitate your group discussions and ultimately help your team identify which, if any, specified crimes need to be drafted or amended to meet the needs of the community and child victims. The worksheets provided in this part are designed to help your team capture the information gleaned from your discussions as you complete the exercises.

Part III: Flowsheet



Chapter 7: Drafting the Findings and Purpose

This chapter discusses the function of a findings and/or purpose section in a crimes committed against children code. Whether drafting new code or advancing legislation to amend existing codes, the findings and/or purpose section establishes a foundation to guide the interpretation of the outlined legal provisions.

What are findings?

Tribal codes may include an initial section describing the existing problems that the code will address. This section is often referred to as the findings. The findings provide the context and philosophy for the entire code. In that way, the findings section often guides the interpretation of the rest of the code. To make a specific finding, a tribe should look for data on existing issues to be addressed by the code. Sources could include national, state, local, and tribal-specific data on crimes committed against tribal children. Other sources could include documented results of community meetings, hearings, or other gatherings focused on this topic, tribal court records, and the voices of child survivors.

What is the purpose section?

The findings section can work hand in hand with a purpose section, which sets out the purpose of a particular code. The purpose section sets the guiding principles for the code and may be used by judges to inform how other provisions should be read and applied in real cases. The purpose section also sets out the theory or processes of the new law. For example, if the purpose of the code is to deter and punish perpetrators of criminal child abuse, the purpose section may state that the code will set harsher sentences for such crimes.

A findings section and a purpose section can also operate separately—meaning both sections may not be necessary or appropriate for your community’s goals. Both sections guide the interpretation of the legal provisions set forth. If the focus is documenting the state of the issues, then a singular findings section may be appropriate. If the focus is providing notice on how certain actions will be dealt with, then a singular purpose section may be appropriate.

How do the findings and purpose work together?

Findings: Provides the context and philosophy for the entire code. Describes the problems that exist and what issues will be addressed by the code. Think of this section as the “What” and “Why”—what conditions or issues exist and why do they need to be addressed.

Purpose: Sets the guiding principles for the code. Sets out the theory or processes of the new law. Think of this section as the “How”—how will the findings, the “What” and “Why,” be addressed.

There are many ways to approach drafting code on crimes committed against children. A tribe can write a comprehensive, stand-alone code on crimes against children or have various provisions throughout a criminal code that address crimes against children. The latter is the most common option and involves the review and amendment of several sections within an existing criminal code to incorporate or amend provisions pertaining to crimes against children and to child victims. Under this option, a tribe could include a provision in its findings and purpose section for the general criminal code that is inclusive of a cultural value or commitment to protect children. Expressing your tribe's underlying principles and values in this section may help ensure that your code is interpreted according to tribal customs and traditions. Additionally, legislation developed to amend various codes may be well served by a findings and purpose section. This will create a record that could be referenced in interpreting the amended legal provisions.

Note that tribes may have findings and purpose sections aimed at protecting children in a juvenile or child welfare code that can be looked to for inspiration while considering the inclusion of a findings and purpose section in a crimes committed against children code.

Be sure to review **Chapter 2** before drafting a findings and purpose section. These chapters provide information pertinent to the development of the "What," "Why," and "How" of your crimes against children code.

Summary of Selected Codes—Findings and Purpose

The following code examples were selected for summary in this chapter. At the time of this writing, a stand-alone tribal crimes against children code with a findings and purpose section could not be located.⁹⁵ However, the selected codes are examples of findings and purpose sections in various forms: in a tribal criminal code, a tribal children’s code, and a federal code.

- **Sault Ste. Marie Tribe of Chippewa Tribal Code**
- **Pueblo of Zuni Tribal Code**
- **Federal Statute**

The **Sault Ste. Marie Tribe of Chippewa** purposes section comes from the criminal code. It outlines the purposes of the entire criminal code, including crimes against children provisions. It splits the purposes section by first focusing on how the code approaches defining offenses, followed by how it approaches sentencing and treatment of offenders. In 71.101(1), the tribe establishes that conduct criminalized in the code causes harm to individual or tribal interests. It recognizes not only an individual harm but also a collective harm. The tribe’s code also puts all on notice regarding what conduct is considered criminal. In 71.101(2), the tribe does a few things. It notes that the purpose to sentencing and offender treatment is primarily punitive. However, deterrence and rehabilitation are also goals. This will help explain any differences in approaches to sentencing or offender treatment. This section also encapsulates the power of the tribe to remove offenders from the tribal community, in line with the recognition in section 71.101(1) that some offenses have a collective harm.

The **Zuni Code** is taken from the Zuni children’s code. The purpose section indicates that young people are the Pueblo’s most important resource. Capturing this tribal value in this way, Zuni lays the foundation for the rest of its children’s code. The purpose section also indicates that a purpose of the code is to protect the peace, safety, and security of the Pueblo’s community members. This provides a broad statement that encompasses the entire community. Finally, it states that preserving a child’s right to a cultural and spiritual identity will be accomplished whenever possible. This is in addition to protecting the traditional rights of the tribe and Zuni parents. Overall, the purpose section signals to the community that at the center of the children’s code is child welfare as guided by Zuni custom and tradition, including the welfare of the tribe, the child’s family, and the community at large. Application of any provisions of the Zuni children’s code should be in line with these principles as indicated in 9-1-2B. Construction.

The **Indian Child Protection and Family Violence Prevention Act**⁹⁶ was enacted into law in 1990, after extensive reports that Native children were being physically and sexually abused in Bureau of Indian Affairs boarding schools in the 1980s. A series of hearings were held to fully investigate the reports and identify additional issues surrounding the abuse. The law

⁹⁵ Ho-Chunk Nation Code, [Title 9—Criminal Code, Section 948 Crimes Against Children \(9 HCC § 948\)](#) was located. The code begins with a definitions section (accessed Aug. 20, 2020).

⁹⁶ Public Law 101-630, the Indian Child Protection and Family Violence Prevention Act (25 U.S.C. §§ 3201-3211).

established grant programs, mandated increased coordination between law enforcement and child protections agencies serving Native children on tribal lands, required criminal background checks, and improved investigative reporting standards.⁹⁷

The act is specific in its findings, noting a series of issues including underreporting, lack of funding, lack of efficient investigations, and participation by federal employees in the abuse. Additionally, the findings state the importance of Native children and the goals of the legislation. The findings reflect what was reported and investigated through the series of congressional hearings on the topic. The findings provision situates the act within the larger issue of the federal government participating in violence committed against Native children. The purpose provision then outlines the process to address the findings. The purpose is response oriented, meaning it responds to the findings. The act's purpose is to "require," "establish," "authorize," and "provide" actions and resources for the federal government to take to attempt to rectify and prevent the issues outlined in the findings. The language is targeted to address the findings while still being broad enough to encompass other actions not specifically outlined in the act.⁹⁸ Both sections work together to inform the interpretation of the rest of the act's provisions.

⁹⁷ First Kids 1st Initiative, "[Safeguarding to the Seventh Generation: Protection and Justice for Indian Children and the Implementation of the Native American Children's Safety Act of 2016](#)," Senate Committee on Indian Affairs Oversight Field Hearing (Apr. 21, 2017).

⁹⁸ 25 U.S.C. 3201 (b)(3) and (b)(9).

Selected Codes—Findings and Purpose

Sault Ste. Marie Tribe of Chippewa

[Chapter 71: Criminal Offenses](#)

Subchapter I: Introductory Matters

71.101 Purposes.

(1) The general purposes of the provisions governing the definition of offenses are:

- (a) to forbid and deter conduct which unjustifiably and inexcusably inflicts or threatens substantial harm to individual or tribal interests; and
- (b) to give fair warning of the nature of conduct declared to constitute criminal offenses.

(2) The general purposes of the provisions governing the sentencing and treatment of offenders are:

- (a) to punish the offender for crimes against the Tribe;
- (b) to remove offenders from the tribal community when required in the interests of public protection;
- (c) to promote the correction and rehabilitation of offenders;
- (d) to deter the commission of offenses;
- (e) to pay restitution to the injured party.

Zuni Tribal Code

[Title IX Zuni Children’s Code](#)

Chapter 1. General Provisions

Section 9-1-1 Title

This Code is known as the Zuni Children’s Code

Section 9-1-2 Purpose, Construction and Severability

A. It is the purpose of this Children’s Code to:

1. Recognize that the young people are the Zuni Pueblos most important resource and that their welfare is paramount;
2. Secure for each child before the Court the care and guidance that is in the best interest of the child and consistent with the customs, cultural values and laws of the Pueblo of Zuni;
3. Whenever possible preserve and strengthen family ties and a child’s cultural and spiritual identity to help the child become a productive and well-adjusted member of the community;
4. Protect the peace, safety and security of the Pueblo of Zuni and its community members;
5. Foster cooperative intergovernmental relations between the Pueblo of Zuni and the state of New Mexico and other states and tribes, with regard to the welfare of children and families; and

6. Protect the rights of Zuni parents and the sovereign and traditional right of the Zuni Pueblo to determine the best interest of children and families.

B. Construction

This Code may be liberally interpreted to fulfill its purpose.

C. Severability

If any part or application of this code is held invalid, the remaining provisions shall not be affected.

Federal Statute

Federal Chapter 34—Indian Child Protection and Family Violence Prevention

[25 U.S.C. § 3201 - Findings and purpose](#)

(a) Findings. The Congress, after careful review of the problem of child abuse on Indian reservations and the historical and special relationship of the Federal Government with Indian people,

(1) finds that—

(A) incidents of abuse of children on Indian reservations are grossly underreported;

(B) such underreporting is often a result of the lack of a mandatory Federal reporting law;

(C) multiple incidents of sexual abuse of children on Indian reservations have been perpetrated by persons employed or funded by the Federal Government;

(D) Federal Government investigations of the background of Federal employees who care for, or teach, Indian children are often deficient;

(E) funds spent by the United States on Indian reservations or otherwise spent for the benefit of Indians who are victims of child abuse or family violence are inadequate to meet the growing needs for mental health treatment and counseling for victims of child abuse or family violence and their families; and

(F) there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and the United States has a direct interest, as trustee, in protecting Indian children who are members of, or are eligible for membership in, an Indian tribe; and

(2) declares that two major goals of the United States are to—

(A) identify the scope of incidents of abuse of children and family violence in Indian country and to reduce such incidents; and

(B) provide funds for mental health treatment for Indian victims of child abuse and family violence on Indian reservations.

(b) Purpose. The purposes of this chapter are to—

- (1)** require that reports of abused Indian children are made to the appropriate authorities in an effort to prevent further abuse;
- (2)** establish a reliable data base for statistical purposes and to authorize a study to determine the need for a central registry for reported incidents of abuse;
- (3)** authorize such other actions as are necessary to ensure effective child protection in Indian country;
- (4)** establish the Indian Child Abuse Prevention and Treatment Grant Program to provide funds for the establishment on Indian reservations of treatment programs for victims of child sexual abuse;
- (5)** provide for technical assistance and training related to the investigation and treatment of cases of child abuse and neglect;
- (6)** establish Indian Child Resource and Family Services Centers in each Bureau of Indian Affairs Area Office which will consist of multi-disciplinary teams of personnel with experience and training in the prevention, identification, investigation, and treatment of child abuse and neglect;
- (7)** provide for the treatment and prevention of incidents of family violence;
- (8)** establish tribally operated programs to protect Indian children and reduce the incidents of family violence in Indian country; and
- (9)** authorize other actions necessary to ensure effective child protection on Indian reservations.

Chapter 7: Exercise—Drafting the Findings and Purpose

Learning Objective: Identify if these provisions are needed or wanted in the tribe’s criminal code.

Reading: Revisit Exercise and Worksheet #2 and #3 from **Part I**. The answers or responses to those exercises will serve as a foundation for this exercise.

Instructions: The following questions are meant to guide you in deciding what provisions you want/need to include in your code relevant to crimes against children. Once all team members have completed their responses to the exercise questions, please proceed with an open forum discussion and have the team leader record a response for each question that achieves as much consensus as possible. The team lead should keep a record of consensus-based responses to the questions in the exercises and record those responses in the workbooks.

Team Lead Tips: Note that some of the questions may require prior preparation, so each member should be provided with a copy of relevant tribal criminal statutes to review prior to the meeting.

- **COMPILE** the information from **Part I** for easy reference.
- **REVIEW** the compiled exercises and worksheets from **Part I**.
- **DISCUSS** what customary tribal beliefs are held about children and their role in your community.
- **DISCUSS** the team’s assessment of gaps in existing tribal code. If there were no identified gaps, the team can discuss other problems or issues identified.
- **DISCUSS** what guiding tribal principles will be important for anyone reading and interpreting your future tribal code or statute.

Note: Use **Worksheet** immediately following this exercise to record your answers.

Chapter 7: Worksheet—Drafting the Findings and Purpose

FINDINGS AND PURPOSE	
<p>WHAT</p> <ul style="list-style-type: none"> - Gaps exist in your current tribal code? - Problems or issues need to be addressed? 	
<p>WHY</p> <ul style="list-style-type: none"> - Do the gaps, problems, or issues need to be addressed? 	
<p>CHILDREN</p> <ul style="list-style-type: none"> - What role do they play in your community? 	
<p>HOW</p> <ul style="list-style-type: none"> - Does your tribe plan to address the identified gaps, problems, or issues? - Can you rely on tribal custom and tradition? 	

Chapter 8: Drafting the Definitions

A definition provides us with a general understanding of a word or term. This is important when interpreting tribal laws because not all words or terms have a singular meaning. Definitions can therefore help to ensure that the word or term, as used within a tribal code, is assigned a specific meaning. For this reason, definitions are important to include in tribal codes because they help to promote consistency in the interpretation and application of tribal laws. They can also help to ensure that tribal laws will be interpreted and applied according to tribal understanding, standards, values, and customs.

What definitions will apply to guide the court in interpreting the new/amended statute?

Generally, definitions only apply to those chapters where the definitions appear unless otherwise noted in the code. In other words, the definitions that appear in your civil code chapters will usually not apply in your criminal code chapters. If terms utilized in the statute are already defined by your tribal code and you don't wish to change those definitions, the team may determine not to draft additional definitions. However, if the definitions that exist do not meet the goals of the team or if no definitions exist, the team must consider drafting definitions necessary to apply the statute. The definitions you draft must be clearly linked to the statutes the team is drafting. Remember that using the word "means" is restricting the definition to the words you draft and using the word "includes" provides the court with a broader interpretation and allows some judicial discretion.

How can we connect a definition to the statutes we are drafting?

There are multiple methods to connect a definition to a statute and the team should determine which method is best. The Summary of Selected Codes that follows provides various definitions that are linked to a particular statute or linked to an entire cluster of statutes that address a specific issue. Methods for incorporating definitions can include:

- The definitions can be included in the chapter or part where a broad grouping of similar crimes will be located. For example, place the definitions related to a sexual violence crime in the portion of the code that would address a wide variety of crimes related to sexual violence committed against both adult and minor victims. See the **Confederated Tribes of Umatilla Tribal Code** in the following text.
- The definitions can be placed in the statute. For example, the statute you are drafting would consist of the criminal elements of the crime and additionally contain a provision that defines the terms of one or more of the criminal elements in the statute. This definition will only apply to the statute you are drafting. See the **Nottawaseppi Huron Band of Potawatomi Tribal Code** in the following text.
- The definitions can address a specific crime that consists of a narrow scope of crimes such as sexual abuse. For example, the crimes listed under a sexual abuse grouping might consist of crimes like sexual abuse, aggravated sexual abuse, and sexual abuse of a minor. See the example in the **federal statute** in the following text.

Summary of Selected Codes—Drafting the Definitions

For illustrative purposes, the definitions selected focus on the sexual assault of a child. The examples provided are instructive on various ways to insert definitions into a tribal code. In one approach, the tribe has grouped some statutes that focus on the issue of sex offenses and added definitions to that grouping. In a second approach, the tribe has inserted the definition into the statute. The federal approach demonstrates adding an entire section to the statutes that address sexual assault and dedicates an entire section within that chapter to definitions that will be used when prosecuting the crimes in that chapter. The selected codes examples come from:

- **Confederated Tribes of Umatilla Tribal Code**
- **Nottawaseppi Huron Band of Potawatomi Tribal Code**
- **Federal Statute**

The **Confederated Tribes of the Umatilla Tribal Code** places statutory definitions for the grouping of a broad topic of crimes entitled “Sexual Offenses” at the beginning of the section in the code that defines crimes related to sexual offenses. Sexual offenses include a variety of crimes including rape, sexual assault, contributing to the sexual delinquency of a minor, and other crimes of a sexual nature. Interestingly, the code also sets forth definitions at the beginning of the criminal code but adds an additional set of definitions that will define terms in the broad grouping of sexual offense crimes.

This is a useful approach when the drafting team has decided to add several statutes that might be included in an entire section of the tribal code—perhaps a section on crimes committed against children—that might contain a variety of crimes tied together in commonality by the requirement that the victim be a child. When taking this approach, it would be very useful to also include a findings and purpose section. Please see **Chapter 7** for more information.

The **Nottawaseppi Huron Band of Potawatomi Tribal Code** simply adds the definition of sexual assault within the statute addressing the crime of sexual assault. Because sexual contact is an element of the crime of sexual assault, the definition of the sexual contact will be extremely useful to the tribal court. Note that this approach results in the definition applying only to the specific statute.

The **federal** example provides definitions that will apply to a single type of crime such as sexual assault that may be comprised of several types of sexual assault such as sexual assault, aggravated sexual assault, and sexual assault of a minor. The federal example demonstrates the method of connecting definitions to a specific type of crime that may include both adult and child victims.

Selected Codes—Drafting the Definitions

Confederated Tribes of the Umatilla Tribal Code

[Criminal Code](#)

CHAPTER 4. CRIMES

PART XII. SEX-RELATED CRIMES

Note that these definitions are designed by the tribe to address all the crimes listed under “Sexual Offenses” that include sexual assault, sexual exploitation, contributing to the sexual delinquency of a minor, public indecency, and other related crimes.

SECTION 4.104. DEFINITIONS RELATING TO SEXUAL OFFENSES

As used in this part, unless the context requires otherwise:

- A.** “Forcible compulsion” means to compel by physical force or threat of physical force; or a threat, express or implied, that places a person in fear of immediate physical injury to himself or another person or in fear that he or another person will immediately or in the future be kidnapped or harmed. STATUTES of the CONFEDERATED TRIBES of the UMATILLA INDIAN RESERVATION As Amended through Resolution No. 20-066 (July 13, 2020) CRIMINAL CODE PAGE 65
- B.** “Mentally defective” means that a person suffers from a mental disease or defect that renders him incapable of appraising the nature of his conduct.
- C.** “Mentally incapacitated” means that a person is rendered incapable of appraising or controlling his conduct at the time of the alleged offense because of the influence of a narcotic or other intoxicating substance administered to him without his consent or because of any other act committed upon him without his consent.
- D.** “Physically helpless” means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.
- E.** “Sexual contact” means any touching of the sexual or other intimate parts of another person or causing such person to touch the sexual or other intimate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party, or for the purpose of abusing, humiliating, harassing, or degrading the other person.
- F.** “Sexual intercourse” has its ordinary meaning and occurs upon any penetration, however slight; emission is not required.
- G.** “Place of prostitution” means any place where prostitution is practiced.

H. "Prostitute" means a person who engages in sexual contact or sexual intercourse for a fee.

I. "Prostitution enterprise" means an arrangement whereby two or more prostitutes are organized to conduct prostitution activities.

SECTION 4.105. INCAPACITY TO CONSENT, SEXUAL OFFENSES

A person is considered incapable of consenting to a sexual act if he is:

A. Under 18 years of age;

B. Mentally defective;

C. Mentally incapacitated;

D. Physically helpless; or

E. Incapacitated for any reason, including by the voluntary or involuntary use of intoxicants, medication or drugs.

Nottawaseppi Huron Band of Potawatomi Tribal Code

Title VIII: Judiciary; Law and Order

Chapter 8.6 Criminal Laws

Article XII Sex Crimes

Note that the tribe placed the definition to key statutory terms in the statute.

§ 8.6-53 Sexual assault.

A. A person commits the offense of sexual assault if he or she subjects another person to any sexual contact and he or she:

(1) Knows or reasonably should know that the sexual contact is offensive to the victim; or

(2) Has substantially impaired the victim's power to appraise or control either person's conduct by administering or employing without consent or knowledge of the victim any controlled substance, intoxicant or other means for the purpose of preventing awareness or resistance; or

(3) Knows or reasonably should know that the victim is of such a state of consciousness or of mind, or that the victim suffers from such mental disease or defect, which renders the victim incapable of recognizing the nature of either person's conduct; or

(4) Is in a position of authority over the victim and uses this authority to coerce the victim to submit; or

(5) The victim is less than 16 years of age and the defendant is over 21 years of age.

B. *"Sexual contact" as used in this section means any touching of the genitals or other intimate parts of the person with the intent of arousing or gratifying sexual desire.*

C. Sexual assault is a felony.

Federal Statute

Note: the definitions that guide the interpretation of this chapter are separately set out at the beginning of the chapter and the focus of the category is sexual abuse. Chapter 109A—Sexual Abuse contains the following crimes: § 2241. Aggravated sexual abuse, § 2242. Sexual abuse, § 2243. Sexual abuse of a minor or ward, § 2244. Abusive sexual contact, § 2245. Offenses resulting in death, § 2246. Definitions for chapter, § 2247. Repeat offenders, and § 2248. Mandatory restitution.

Federal Chapter 109A—Sexual Abuse

[18 U.S.C. § 2246](#) - Definitions for chapter

As used in this chapter—

- (1)** the term “prison” means a correctional, detention, or penal facility;
- (2)** the term “sexual act” means—
 - (A)** contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
 - (B)** contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
 - (C)** the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
 - (D)** the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;
- (3)** the term “sexual contact” means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;
- (4)** the term “serious bodily injury” means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty;

(5) the term “official detention” means—

(A) detention by a Federal officer or employee, or under the direction of a Federal officer or employee, following arrest for an offense; following surrender in lieu of arrest for an offense; following a charge or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following civil commitment in lieu of criminal proceedings or pending resumption of criminal proceedings that are being held in abeyance, or pending extradition, deportation, or exclusion; or

(B) custody by a Federal officer or employee, or under the direction of a Federal officer or employee, for purposes incident to any detention described in subparagraph (A) of this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation;
but does not include supervision or other control (other than custody during specified hours or days) after release on bail, probation, or parole, or after release following a finding of juvenile delinquency; and

(6) the term “State” means a State of the United States, the District of Columbia, and any commonwealth, possession, or territory of the United States.

Chapter 8: Exercise—Drafting the Definitions

Learning Objective: Identify if these provisions are needed or wanted in the tribe’s criminal code.

Reading: This exercise should be completed in conjunction with the team’s review of a particular provision, including reading that provision’s chapter and completing any accompanying exercises.

Instructions: The following questions are meant to guide you in deciding what provisions you want/need to include in your code relevant to crimes against children. Once all team members have completed their responses to the exercise questions, please proceed with an open forum discussion and have the team leader record a response for each question that achieves as much consensus as possible. The team lead should keep a record of consensus-based responses to the questions in the exercises and record those responses in the workbooks.

Team Lead Tips: Each member should be provided with a copy of relevant tribal criminal statutes to review prior to the meeting.

- **IDENTIFY** the statute to be drafted to determine the elements of the crime and label the elements of the crime.
- **REVIEW** the portion of the tribal code where the drafted statute will be housed to determine whether all needed definitions are present for each element of the crime.
- **DETERMINE** whether additional definitions are needed and identify needed definitions.
- **DRAFT** needed definitions utilizing a legal dictionary and/or a selected definition from another statutory source (such as another tribal or state or federal statute example).
- **DETERMINE** whether the definition(s) will be connected to a broad topic of crimes such as sexual offenses, inserted into the drafted statute, or connected to a specific grouping of crimes focusing on a specific issue such as sexual abuse.
 - **RECALL** the preceding “Selected Codes” for examples of each approach.

Note: Use **Worksheet** immediately following this exercise to record your answers.

Chapter 8: Worksheet—Drafting the Definitions

DEFINITIONS	
<p>IDENTIFY</p> <ul style="list-style-type: none"> - The statute to be drafted to determine the elements of the crime. - Label the elements of the crime. 	
<p>REVIEW</p> <ul style="list-style-type: none"> - The portion of the tribal code where the drafted statute will be housed to determine whether all needed definitions are present for each element of the crime. - Determine whether additional definitions are needed. 	
<p>DRAFT</p> <ul style="list-style-type: none"> - Needed definitions utilizing a legal dictionary, a selected definition from another statutory source (such as another tribal or state or federal statute example). 	
<p>DETERMINE</p> <ul style="list-style-type: none"> - Whether the definition(s) will be connected to a broad topic of crimes, inserted into the drafted statute, or connected to a specific grouping of crimes and its narrowed scope of related crimes (e.g., sexual abuse). 	

Chapter 9: Child Neglect and Endangerment

Neglect is the most common form of child maltreatment, which affects about 75 percent of victims.⁹⁹ Child neglect often pertains to a person who has a responsibility to the child and often stems from a failure to provide or ensure basic needs; failure to provide adequate social, emotional, medical, or educational care; or failure to provide developmentally necessary nurturing and supervision. Any of these types of neglect may cause or contribute to long-term negative consequences and permanent harm to these children.

Child abuse and neglect can also have a tremendous impact on lifelong health and well-being if left untreated. For example, exposure to violence in childhood increases the risk of injury, future violence victimization and perpetration, substance abuse, sexually transmitted infections, delayed brain development, lower educational attainment, and limited employment opportunities.¹⁰⁰

Child neglect is often addressed in child welfare proceedings, that is, in civil court. If the goal is to protect the child while providing services and support to the responsible person or to find another permanent home for the child so that future instances of neglect are prevented, civil court may be the best venue. If the case is severe, if the case involves a habitual offender, or if the child welfare agency is, for whatever reason, unable to respond, it may be appropriate to address the problem in criminal court under criminal neglect and/or endangerment statutes.

Criminal child endangerment definitions will vary from jurisdiction to jurisdiction and may include an act that places a child in danger including when a person intentionally, knowingly, or recklessly by act or omission engages in conduct that places a child in imminent danger of death, bodily injury, or physical or mental impairment. Often, endangerment can be committed by any person and is not limited to people that have a responsibility to care for the child. Examples of acts that are defined as “endangerment” might include perpetrating domestic violence in the presence or earshot of a child¹⁰¹ or manufacturing methamphetamines in the home.

When drafting criminal child endangerment codes, consider the following and remember, criminal laws usually have at least two types of elements: (1) perpetrator’s state of mind or intent and (2) perpetrator’s act or omission. Note that the tribal prosecutor will be required to prove both of those elements along with any other elements listed in the statute beyond a reasonable doubt. Native nations should also be aware of the trauma of removing children from nonoffending parents and draft codes that prevent that trauma when possible. For

⁹⁹ U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children’s Bureau, [Child Maltreatment 2019](#) (2021).

¹⁰⁰ Centers for Disease Control and Prevention, [Preventing Child Abuse and Neglect](#) (Apr. 2020).

¹⁰¹ Robert L. Listenbee Jr. et al. [Report of the Attorney General’s National Task Force on Children Exposed to Violence](#). (Washington, DC: U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention) (Dec. 2012), 72; U.S. Department of Health and Human Services Administration for Children and Families Administration on Children, Youth and Families Children’s Bureau, [Child Maltreatment 2018](#) (Jan. 2020).

example, a victim of domestic violence should not be charged with endangering their child simply because they are in an abusive intimate partner relationship and have a child who witnessed their victimization. Abuse is never the victim's fault. Domestic violence is a complex crime that should be researched whenever writing codes related to domestic violence.¹⁰²

Who does the criminal statute target?

Criminal child neglect often targets the omissions (failure to act) of a parent, guardian, or person responsible for the care and supervision of a child.

What state of mind is required by the alleged offender?

The crime of child neglect focuses on a willful failure to act where a person had a duty to act. The crime of child endangerment focuses on a willful act, or failure to perform an act, that causes a child to suffer physical, emotional, or psychological abuse.

What acts or omissions are targeted?

A crime definition may prohibit actions or omissions that addresses the following harm:

- May suffer immediate physical injuries such as cuts, bruises, or broken bones;
- May deal with emotional and psychological problems, such as impaired social-emotional skills or anxiety;
- May result in toxic stress, which can change brain development and increase the risk for problems like posttraumatic stress disorder and learning, attention, and memory difficulties;
- Hunger;
- Unmet emotional, educational, and medical needs;
- Lack of supervision which can result in both physical and emotional injury; or
- Sexual abuse death.

¹⁰² TLPI offers the following resource, [Tribal Legal Code Resource: Domestic Violence Laws Guide for Drafting or Revising Victim-Centered Tribal Laws Against Domestic Violence](#) (2015).

A. Child Neglect

Generally, neglect is the failure to meet a child's basic physical and emotional needs. These needs include housing, food, clothing, education, and access to medical care. Child neglect may be a civil matter, a criminal matter, or both depending upon the severity of the neglect. The goal of a civil action may be the provision of services and continued monitoring of the family to address the neglect. The goal of a criminal case may be to punish and hold the perpetrator accountable by levying fines or incarceration or both. A code drafting team may take two approaches for this type of code:

1. Write a separate statute or code provision on criminal child neglect; or
2. Include criminal child neglect within a larger code provision prohibiting child neglect.

Given the effect neglect can have on a child's wellness, many Native nations have chosen to address it in both the civil courts and the criminal courts. As discussed previously, child neglect is often addressed by child welfare agencies and in the civil court systems. Native nations may decide that they want most neglect cases to be handled in this manner because their goal is to protect the child while promoting healing for the whole family. Child welfare agencies may be better positioned to ensure that services and support are provided to the family and that relatives care for the child while the caregiver is given time to resolve whatever difficulties lead to the neglect in the first place. Some cases are so severe, however, or involve a habitual offender, that the Native Nation has decided that criminal sanctions are appropriate. When and how a Native Nation wants neglect to be prosecuted criminally is important information for staff to have if, for example, they do not want their criminal justice system to prosecute cases of neglect that occur because of poverty or mental health issues, guidance to that effect in a findings or purpose section of the tribal code would be appropriate. When drafting a tribal criminal code, pay close attention to the definitions section of the code.

Before drafting criminal codes to address child neglect, be sure to review the introductory section of this chapter for a discussion of important information related to scope and application of codes prohibiting the physical abuse of a child.

Summary of Selected Codes—Child Neglect

The following code examples were selected for summary in this chapter. Although not an exhaustive list, the selected codes provide examples of how a tribe might define neglect of a child under criminal laws. The code examples provided come from:

- **Swinomish Indian Tribal Community Tribal Code**
- **Fort Peck Assiniboine and Sioux Tribe Tribal Code**
- **Pueblo of Laguna Tribal Code**
- **Federal Statutes**

Swinomish has written their code so that only people who are responsible for a child can be prosecuted for criminal neglect. The statute is written broadly—specific examples of neglect are listed.

The **Fort Peck Assiniboine and Sioux Tribe** has also written their criminal neglect code so that it is only applicable to a parent or custodian. However, unlike Swinomish, they did not include a broad statement about the kinds of acts that are neglect. Instead, only failure to provide food, clothing, shelter, medical attention, hygiene, education, or supervision as the child needs for development is defined as neglect. Either the parent or custodian must have been able to provide the things the child needed for development or have refused tribal or other assistance under the statute. In addition, appropriate medical or professional persons must believe that the neglect must be likely to result in serious bodily injury and/or emotional harm to the child.

The **Pueblo of Laguna's** code section applies to parents, legal guardians, a person who has the custodial care of a child, or any other person responsible for the child's health or welfare. It also includes a broad statement of what constitutes neglect rather than relying on a specific list of actions. Failure to intervene to eliminate an unreasonable risk when the person was able to do so and had or should have had knowledge of the risk can also be charged as criminal neglect. Finally, there is nothing limiting the criminal neglect to instances in which the effects on the child were severe. If there is harm to a child's health or welfare, the act may constitute criminal neglect under this code.

Felony child abuse or neglect was added to the **Major Crimes Act (MCA)** (18 U.S.C. § 1153) in 2006 by the Adam Walsh Child Protection and Safety Act of 2006 (PL 109-248).¹⁰³ The crime is not defined in federal law. However, as provided in the **MCA** any offense “that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.”¹⁰⁴ Recall that the **MCA** specifies certain

¹⁰³ Public Law 109-248, [Adam Walsh Child Protection and Safety Act of 2006](#), Sec. 215. Abuse and Neglect of Indian Children.

¹⁰⁴ 18 U.S.C. §1153(b).

federal crimes committed by an Indian against the person or property of another Indian or other person.

For non-Indians committing the crime of felony child abuse or neglect against an Indian child in Indian Country, please note that the **General Crimes Act** (18 U.S.C. § 1152) may apply. Section 1152 paired with 18 U.S.C. § 13 sets forth federal criminal jurisdiction, and if a specific federal crime on child neglect is absent, § 1152 provides federal jurisdiction to prosecute the crime of child neglect importing state law and also utilizes state sentencing guidelines. The relevant state is the state in which the location of the crime occurred that was under federal jurisdiction.

Selected Codes—Child Neglect

Swinomish Indian Tribal Community Tribal Code

Title 8: Juveniles

[Chapter 7: Youth in Need of Care](#)

8-07.10 Youth-in-Need-of-Care (Defined).

(A) A youth in need of care is a youth who is found to be in one or more of the following states or conditions (the examples after each type of youth serve as guidelines to the Court but are not all-inclusive):

(1) Neglected - a neglected youth shall include, but is not limited to the following:

(a) A youth whose parent, guardian or custodian fails to provide such food, shelter, clothing, education, medical attention or other care necessary for his or her health, spiritual growth, morals, or well-being;

(b) A youth whose parent, guardian or custodian has refused tribal or other assistance necessary to provide for the basic needs of the youth and such refusal is likely to result in serious harm as determined by medical or professional persons;

(c) A youth who lacks “parental-type” control by reasons of the fault or habit of his or her parent, guardian, or custodian;

(d) A youth under ten (10) years of age who is left without competent supervision overnight for other than emergency reasons;

(e) A youth who is exposed to dangerous situations at home or elsewhere, as a result of negligence of his or her parent, guardian or custodian;

(f) A youth under ten (10) years of age who is left alone or unsupervised in a car while his or her parent, guardian or custodian is in a bar;

(g) A youth who is allowed to accompany his or her parent, guardian or custodian into a bar;

(h) A youth who is left with an irresponsible babysitter (e.g., babysitter is intoxicated, too young, etc.);

(i) A youth who is allowed access to alcoholic beverages and/or drugs;

(j) A youth who is fourteen (14) years of age or under and has more than five

(5) unexcused absences from school in a quarter;

- (k) A youth who is not dressed adequately for weather conditions;
 - (l) A youth whose health is threatened by exposure to alcohol, drugs or tobacco;
 - (m) A youth who is expected to provide prolonged and unsupervised babysitting services;
 - (n) A youth who has been a passenger in an automobile, boat or other motorized vehicle driven by an intoxicated person, with the knowledge or approval of the youth's parent, guardian or custodian;
 - (o) A youth who is allowed to be outside and unsupervised after curfew; or
 - (p) A youth who is not provided the proper guidance, control, and supervision that would enable him or her to attain his or her full potential and become a credit to himself or herself, his or her family, and his or her tribe.
- (Ord. 68 (12/89)).

Swinomish Indian Tribal Community Tribal Code

Title 4: Criminal Code

Chapter 7 Offenses Involving Children

4-07.030 Criminal Neglect

(A) Any person who refuses or neglects to furnish food, shelter, supervision, or care to a child for whose care he or she is responsible, or who otherwise neglects a child, as determined in the Title 8 Juvenile Code commits the crime of criminal neglect.

[Section omitted]

(C) "Care" includes sending a child to school when school attendance is legally required.

(D) The definition of "neglect" shall be interpreted broadly to protect the best interest of the child.

(Ord. 75 (4/2/91)).

Fort Peck Tribes Comprehensive Code of Justice

Title 7—Criminal Offenses

Chapter 2. Crimes against Persons

Subchapter F. CRIMES AGAINST THE FAMILY

Sec. 241. Neglect of a child

A parent or custodian who fails to provide such food, clothing, shelter, medical attention, hygiene, education, or supervision as the child needs for development, although the parent or custodian was able to furnish such needs or has refused Tribal or other assistance for furnishing such needs, and such failure is likely to result in serious bodily injury and/or emotional harm to the child as determined by appropriate medical or professional persons, is guilty of the offense of Neglect of a child.

Pueblo of Laguna Tribal Code
Title XV CRIMINAL CODE
Chapter 9 OFFENSES AGAINST THE FAMILY

Section 15-9-5. - Child neglect.

A. Offense. Child neglect occurs when a parent, legal guardian, a person who has the custodial care of a child, or any other person responsible for the child's health or welfare, harms a child's health or welfare:

- (1)** Through negligent treatment, including the failure to provide adequate food, clothing, shelter or medical care; or
- (2)** By failing to intervene to eliminate an unreasonable risk to the child's health or welfare when able to do so, and when that person has knowledge, or should have knowledge of the risk.

Federal Statutes

18 U.S.C. § 1152—General Crimes Act

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

18 U.S.C. § 1153—Major Crimes Act

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

Chapter 9: Exercise #1—Child Neglect

Learning Objective: Identify if this provision is needed or wanted in the tribe’s criminal code.

Reading: The team should consider reviewing **Part I** and should also refer to **Chapter 9** in **Part III** to help guide discussions for specifically defined crimes.

Instructions: The following questions are meant to guide you in deciding what provisions you want/need to include in your code relevant to child neglect. Please note that that child endangerment is addressed in Exercise #2 for this chapter. **Once all team members have completed their responses to the exercise questions, please proceed with an open forum discussion and have the team leader record a response for each question that achieves as much consensus as possible. The team lead should keep a record of consensus-based responses to the questions in the exercises.**

Team Lead Tips: Note that some of the questions may require prior preparation, so each member should be provided with a copy of relevant tribal criminal codes to review prior to the meeting.

- **EXAMINE** your current codes to see if there are civil and criminal child neglect statutes and whether the statutes need amending.
- **IDENTIFY** whether there are clear distinctions between civil and criminal child neglect in your current tribal code.
- **RESEARCH** and talk to tribal social services and/or the tribal prosecutor in charge of child welfare cases to determine whether there have been situations in which a criminal children’s code would have been useful to address harm to a child.
- **DISCUSS** whether a criminal neglect code fits the tribal community and court system.
- **DISCUSS** what kinds of circumstances, if any, may help mitigate the crime of child neglect and whether the code should reflect an affirmative defense (a defense that the defendant raises prior to trial that, if proven, will mitigate or negate guilt).
- **DETERMINE** whether age should factor into your statute.
- **DETERMINE** whether mental health or substance abuse issues factor into the statute, for instance as an affirmative defense.
- **DETERMINE** whether the team needs to add, update or otherwise amend your laws to better address **cases involving child neglect**.

Note: Use **Worksheet** provided at the end of **Part III** to help record your answers.

B. Child Endangerment

Generally, criminal child endangerment is a type of crime involving an act, or an omission to perform an act when under a legal duty to act that causes a child to suffer physical, emotional, or psychological abuse. The conduct must be wrongful, reckless, or intentional and likely to produce death or grievous bodily harm to another person. Criminal endangerment of a child requires a heightened level of recklessness or potential risk of harm to the child.

Child endangerment may be a civil matter, a criminal matter, or both depending upon the severity of the omission. The goals of a civil system, providing services and monitoring to address the issues of endangerment, and a criminal system, to punish and hold the perpetrator accountable by levying fines or incarceration, are different. This Guide will focus on the crime of child endangerment. A code drafting team may take two approaches for this type of code:

1. Write a separate statute or code provision on criminal child endangerment; or
2. Include criminal child endangerment within a larger code provision prohibiting child neglect.

Before creating a criminal endangerment of a child statute, it is very important to clearly differentiate from any civil child endangerment code. For example, a civil endangerment code may cover situations in which a parent, due to intoxication, oversleeps and negligently allows a toddler to leave the house unattended. However, if that behavior is repetitive it may be appropriate for a criminal court. Another example might include a parent or guardian that leaves drugs out so that a toddler ingests the drugs, which results in severe harm to the child. Such instances may warrant a criminal prosecution. Drafting the tribal statute to address certain behaviors or omissions by certain people responsible for the child and dictating certain levels of harm and/or risk to the child will guide your tribal prosecutor in making criminal charging decisions in these cases.

Summary of Selected Codes—Child Endangerment

The following code examples were selected for summary in this chapter. Although not an exhaustive list, the selected codes provide examples of how a tribe might define criminal endangerment of a child under criminal laws. The code examples provided come from:

- **Swinomish Indian Tribal Community Tribal Code**
- **Fort Peck Assiniboine and Sioux Tribe Tribal Code**
- **White Mountain Apache Tribal Code**
- **Federal Statutes**

Swinomish included child endangerment in their general definition of the crime “reckless endangerment.” The tribe includes a general definition applicable to any person.

The **Fort Peck Tribal Code** criminalizes reckless endangerment in a general way applying to both adult and child victims, but providing for harsher sentences when the victim is a child. The code goes on to add a specialized crime of endangering the welfare of children wherein a parent or guardian or any person supervising a child under eighteen years old can be held liable for this crime when they intentionally violate a duty of care, protection, or support to the child. The tribal code states that a parent or guardian or any other person who is 18 years of age or older can be charged with this crime when the perpetrator contributes to the delinquency of a minor. The code also delineates between actions taken against children under 18 years of age and children under 16 years of age.

The **White Mountain Apache Tribal Code** criminalizes recklessly exposing a person of less than eighteen years of age to significant danger or physical harm. The code also makes it a crime if a person who has a legal duty of care to willfully withhold food, water, shelter, or prescribed medicines from such a person, or by threatening to do any of these things to coerce or induce such person to act, or refrain from acting, in a manner that the person has a legal right to act or refrain from acting. The code also makes it a crime to fail to make reasonable arrangements for the direct supervision of children of certain ages.

In most state jurisdictions, child endangerment may be considered a type of child neglect. Thus, discussion of the **Major Crimes Act (MCA)** (18 U.S.C. § 1153) and the **General Crimes Act** (18 U.S.C. § 1152) in the previous section, A. Child Neglect, is relevant. The MCA and GCA codes appear in the selected code section.

Selected Codes—Child Endangerment

Swinomish Indian Tribal Community Tribal Code

Title 4: Criminal Code

Chapter 2 OFFENSES AGAINST PERSONS

4-02.070 Reckless Endangerment.

(A) Any person who recklessly engages in conduct that creates a substantial risk of death or bodily injury to a person commits the crime of reckless endangerment.

(B) [Section omitted]

(C) Reckless endangerment is a Class B offense if a child or incompetent adult is endangered or if injury to a person results.

(D) Reckless endangerment is a Class C offense when none of the circumstances making it a Class A or Class B offense are present.

Fort Peck Tribes Comprehensive Code of Justice

Title 7—Criminal Offenses

Chapter 2. Crimes against Persons

Subchapter F. Crimes against the Family

Sec. 240-B. Endangering welfare of children

(a) A parent, guardian, or other person supervising the welfare of a child less than 18 years old commits the offense of endangering the welfare of children if the parent, guardian, or other person intentionally endangers the child's welfare by violating a duty of care, protection, or support.

(b) A parent or guardian or any person who is 18 years of age or older, whether or not the parent, guardian, or other person is supervising the welfare of the child, commits the offense of endangering the welfare of children if the parent, guardian, or other person intentionally contributes to the delinquency of a child less than:

(1) 18 years old by:

(A) Supplying or encouraging the use of an intoxicating substance by the child; or

(B) Assisting, promoting, or encouraging the child to enter a place of prostitution;

or

(2) 16 years old by assisting, promoting, or encouraging the child to:

(A) Abandon the child's place of residence without the consent of the child's parents or a guardian; or

(B) Engage in sexual conduct.

(c) A parent, guardian, or other person supervising the welfare of a child less than 16 years of age may verbally or in writing request a person who is 18 years of age or older and who has no legal right of supervision or control over the child to stop contacting the child if the requester believes that the contact is not in the child's best interests. If the person continues to contact the child, the parent, guardian, or other person supervising the welfare of the child may petition or the Tribal Prosecutor may upon the person's request petition for a temporary restraining order under 8 CCOJ 401. A person who intentionally violates this temporary restraining order commits the offense of endangering the welfare of children and upon conviction shall be sentenced as provided in subsection (d).

(d) A person convicted of endangering the welfare of children commits a Class A misdemeanor for the first conviction and commits a felony for the second and subsequent convictions.

White Mountain Apache Tribal Code

[White Mountain Apache Criminal Code](#)

Chapter 2. Offenses

SECTION 2.83 ENDANGERING THE WELFARE OF A CHILD

A. A person commits this offense by committing a crime of violence against a person of less than Eighteen (18) Years of age, or by recklessly exposing a person of less than Eighteen (18) Years of age to significant danger or physical harm.

B. Endangering the health or well being of a person of less than Eighteen (18) Years of age for whom the person has a legal duty of care, by willfully withholding food, or water, or shelter or prescribed medicines from such a person, or by threatening to do any of these things in order to coerce or induce such person to act, or refrain from acting, in a manner that the person has a legal right to act or refrain from acting.

C. Failing to provide or make reasonable arrangements for the direct supervision of a person of less than Twelve (12) Years of age for whom they have a legal duty of care for a period of more than Eight (8) Consecutive Hours if the person to whom the duty of care is owed is less than Eight (8) Years of age, or more than Eighteen (18) Consecutive Hours if such person is between Eight (8) and Twelve (12) Years of age.

D. [Section omitted]

Federal Statutes

18 U.S.C. § 1152—General Crimes Act

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

18 U.S.C. § 1153—Major Crimes Act

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

Chapter 9: Exercise #2—Child Endangerment

Learning Objective: Identify if this provision is needed or wanted in the tribe’s criminal code.

Reading: The team should consider reviewing **Part I** and should also refer to **Chapter 9** in **Part III** to help guide discussions for specifically defined crimes.

Instructions: The following questions are meant to guide you in deciding what provisions you want/need to include in your code relevant to child endangerment. Once all team members have completed their responses to the exercise questions, please proceed with an open forum discussion and have the team leader record a response for each question that achieves as much consensus as possible. The team lead should keep a record of consensus-based responses to the questions in the exercises.

Team Lead Tips: Note that some of the questions may require prior preparation, so each member should be provided with a copy of relevant tribal criminal codes to review prior to the meeting.

- **EXAMINE** your current codes to see if there are civil and criminal child endangerment statutes and whether the statutes need amending.
- **RESEARCH** and talk to tribal social services and/or the tribal prosecutor in charge of child welfare cases to determine whether there have been situations in which a criminal children’s code would have been useful to address harm to a child.
- **DISCUSS** whether a criminal child endangerment statute fits the tribal community and court system.
- **DISCUSS** what kinds of circumstances, if any, may help mitigate the crime of child endangerment and whether the code should reflect an affirmative defense (a defense that the defendant raises prior to trial that, if proven, will mitigate or negate guilt).
- **DETERMINE** whether age should factor into your statute. Should minors of different ages be treated differently under the law?
- **DETERMINE** whether mental health or substance abuse issues factor into the statute, for instance as an affirmative defense.
- **DETERMINE** whether the team needs to add, update or otherwise amend your laws to better address **cases involving child endangerment**.

Note: Use **Worksheet** provided at the end of **Part III** to help record your answers.

Chapter 10: Child Abuse

Child abuse is an umbrella term that covers many types of harm; generally, it covers physical and sexual abuse, neglect, and endangerment. Child abuse perpetrated by a person responsible for the child's care may be addressed in the civil realm (children's codes or child dependency codes). Civil codes are imperative to addressing the immediate safety needs of the child as well as family reunification or adoption, whereas criminal child abuse codes seek to hold offending parties accountable for their actions toward a child. The standard/burden of proof is different for civil and criminal cases.

For cases involving egregious offenses or offenses perpetrated by persons who have no responsibility to care for the child, criminal prosecution may be warranted to deter such actions and to hold offenders accountable for their conduct. Criminal child abuse codes will enable a tribe to criminally prosecute individuals for conduct that causes physical, psychological, or emotional injury to a child. The element of intent, on the part of the alleged offender, is important and should be addressed within the language of the statute. Examples of such criminal statutes that may be used to address child abuse include, but are not limited to:

- Battery;
- Aggravated battery;
- Assault;
- Aggravated assault;
- Child abuse (may be classified as felony/misdemeanor or class 1/class 2 etc.);¹⁰⁵
- Promoting (encouraging) child abuse;
- Criminal maltreatment; and
- Physical abuse of a child.

When drafting criminal child abuse codes, consider the following and remember, criminal laws usually have at least two types of elements: (1) perpetrator's state of mind or intent; and (2) perpetrator's act or omission.

Who does the criminal statute target?

The relevant statutory provisions may be targeted at criminal prosecution of "any person," "whoever commits" a defined act, or specifically a parent, guardian, "person supervising the welfare or having immediate charge or custody of a child," or a "primary aggressor." Maximum child protection is achieved by creating criminal definitions targeted at "any person" causing described injuries. Crime definitions targeted at specific types of persons limit their applicability to those types of people.

¹⁰⁵ Please see Chapter 14 on Penalties and Sanctions for more information.

What state of mind is required by the alleged offender?

The prohibited act or omission will likely include terms related to the perpetrator's state of mind: intentional, knowing, willful, malicious, reckless, wanton, or negligent. Crime definitions requiring proof that an alleged perpetrator knew or intended that a certain outcome would happen are often very difficult to prove. Crime definitions that do not require a specific state of mind—merely requiring that the perpetrator, through intentional, willfully, malicious, reckless, wanton, or negligent act or omission, caused certain physical, psychological, or emotional injury to the child—are usually easier to prove.

What acts or omissions are targeted?

A crime definition may prohibit actions or omissions that:

- Deprive a child of basic needs such as food, clothing, or shelter;
- Permit, habitually permit, or cause the health of the child to be injured;
- Cause excessive physical or mental pain;
- Cause impairment of bodily function;
- Cause disfigurement;
- Inflict serious psychological or emotional harm, injury, or damage; and
- Allow a child to witness the commission of a forcible felony, battery, or family violence battery.

A crime may be proven by the actions or omissions of an individual coupled with evidence of injury or a substantial risk of physical injury, including serious or severe physical, psychological, or emotional injury, bodily harm, great bodily harm, permanent disability, and disfigurement.

Criminalizing physical abuse. Physical abuse generally includes the infliction of physical pain or causing of physical injury or harm to a child. Each tribal community will need to define physical abuse (hitting, kicking, etc.) to meet its specific needs. Although physical abuse may be detected by visual evidence of marking or bruises, there may be cases in which no markings are detected (internal injuries) and prosecutors will have to rely on a forensic pediatric medical evaluation.

Further discussion on physical abuse will be addressed in **Section A of this chapter**.

Criminalizing psychological and/or emotional abuse. A growing number of Native nations have found it important to define their child abuse crimes to include physical, psychological, and emotional abuse of a child. Psychological and emotional abuse can be difficult to prosecute because there is often no clear evidence of injury or harm. Generally, children who experience chronic physical abuse also suffer psychological and/or emotional abuse, often with greater long-term effects than physical abuse may cause. In addition, studies have shown that children

witnessing domestic violence also suffer psychological and emotional abuse.¹⁰⁶ These crimes may be considered separately for purposes of criminal adjudication. A wide range of behaviors and indicators, depending on age and developmental ability of a child, may be documented as evidence of psychological and/or emotional abuse. Possible long-term effects of psychological and/or emotional abuse may include:

- Difficulty with learning;
- Lack of coping skills;
- Lack of problem-solving abilities;
- Future addiction to alcohol and drugs;
- Antisocial behavior;
- Poor relationship skills; and
- Poor parenting skills.

Based upon the potential long-term impacts of child abuse, tribal code drafters may decide to include statutory provisions to assure that child victims receive services. Additionally, tribal code drafters should identify the types of evidence that may be used to support a successful prosecution of physical, psychological, and emotional abuse.

Further discussion on psychological or emotional abuse will be addressed in **Section B of this chapter**.

What are the possible penalties?

States tend to group crimes into graduated classes/degrees subjecting the offender to increasing fines and/or jail time for more serious crimes. Some tribes have done so as well. For example, the **Eastern Band of Cherokee Indians'** "child abuse in the first degree" subjects an offender to fines ranging between \$500 and \$5,000 and/or three months to one year in jail, and/or exclusion from the reservation for two to ten years. By contrast, "child abuse in the second degree"¹⁰⁷ subjects an offender to fines ranging between \$250 and \$5,000 and/or up to a year in jail.¹⁰⁸

Classifying crimes can be useful because it can provide policy makers, prosecutors, and judges with tools that can help assign appropriate consequences to crimes committed. In doing so, laws can serve to deter crimes and punish more serious crimes with harsher sentences. However, under ICRA, 25 U.S.C. § 1301 et seq., tribes are limited in their sentencing powers to a maximum of \$5,000 and/or a year in jail per offense. If, however, a tribe has opted to impose

¹⁰⁶ Remember to be aware of the trauma of removing children from nonoffending parents and draft codes that prevent that trauma when possible. For example, a victim of domestic violence should not be charged with child psychological abuse simply because they are in an abusive intimate partner relationship and have a child who witnessed their victimization. Abuse is never the victim's fault.

¹⁰⁷ Please see Chapter 14 on Penalties and Sanctions for more information.

¹⁰⁸ See Chapter 14 of this resource for a full discussion of penalties and sanctions.

enhanced sentences in accordance with the TLOA, qualifying crimes may be subject to fines of up to \$15,000 and/or three years in jail per offense.¹⁰⁹ The deterrent effect of fines and sentences under these limitations should be evaluated when deciding how to structure a code.

A. Physical Abuse

Generally, physical abuse is a type of “child abuse.” A code drafting team may take two approaches for this type of code:

1. Write a separate statute or code provision on physical abuse of a child; or
2. Include physical abuse, with its own distinct definition, within a larger law prohibiting “child abuse.”

Both approaches will work; the most important consideration is to make sure Native nations interested in exercising jurisdiction over crimes against children have a code that allows for the prosecution of physical abuse of a child. The statutory provisions used to criminally prosecute actions that constitute physical “child abuse” include a wide range of offenses in many jurisdictions. These offenses include:

- Battery;
- Aggravated battery;
- Assault;
- Aggravated assault;
- Child abuse (may be classified as felony or misdemeanor);
- Promoting (encouraging) child abuse;
- Criminal maltreatment; and
- Physical abuse of a child.

Before drafting criminal codes to address physical abuse of children, be sure to review the introductory section of this chapter for a discussion of important information related to scope and application of codes prohibiting the physical abuse of a child.

¹⁰⁹ 25 U.S.C. § 1302(b).

Summary of Selected Codes—Physical Abuse

In the following selected codes section, you will find code examples that address physical abuse of children. Although not an exhaustive list, the selected codes provide examples of how a tribe might define physical abuse of a child under criminal laws. The code examples provided come from:

- **White Mountain Apache Tribal Code**
- **Sault Ste. Marie Tribal Code**
- **Federal Statutes**

The **White Mountain Apache Tribal Code** targets “any person” who commits any of the designated acts against a child or having care or custody of the child and permits the designated acts to occur, such as acts that produce death, serious physical injury, or serious endangerment. If done intentionally or knowingly, the offense is a class 1 major offense if the victim is under fifteen years of age. If done recklessly, the offense is a class 2 major offense. If done with criminal negligence, the offense is a class 3 major offense. If only physical injury (not death or serious physical injury) is likely to occur, and if done intentionally or knowingly, the offense is a class 2 major offense. If done recklessly, the offense is a class 3 major offense. If done with criminal negligence, the offense is a class 1 minor offense.¹¹⁰

The **Sault Ste. Marie** tribal statute on child abuse targets “any person,” who knowingly, intentionally, or negligently, without justification, causes or permits a child to be placed in a situation that endangers its life or health; exposes a child to inclement weather; abandons, tortures, cruelly confines, or punishes a child; or deprives a child of necessary food, clothing, or shelter.

The Violence Against Women Reauthorization Act of 2013 made all felony assaults¹¹¹ listed in the federal assault statute¹¹² a part of the **Major Crimes Act (MCA)** (18 U.S.C. § 1153). Remember, that the statutory provisions used to criminally prosecute actions that constitute physical “child abuse” include a wide range of offenses in many jurisdictions, including assault. In 2006, the **MCA** was amended to add the offense of felony child abuse or neglect.¹¹³ The **MCA** identifies federal crimes that apply to an Indian committing a crime against the person or property of any Indian or other person in Indian country. The crime of felony child abuse or neglect is undefined in the federal criminal code. As provided in the **MCA**, any offense “that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United

¹¹⁰ The White Mountain Apache Tribal Code fleshes out a definition of class 1, class 2, and class 3 major offenses that applies to sexual offenses (Criminal Code, Chapter 4, §4.20). It is not clear if the definitions in that provision also apply to nonsexual offenses. Some crimes (e.g., §4.19) contain their own designation and punishment provisions different from §4.20.

¹¹¹ At common law an assault is an intentional act by one person that creates an apprehension in another of an imminent harmful or offensive contact. See [Free Legal Dictionary Definition of Assault](#).

¹¹² 18 U.S.C. §113.

¹¹³ 18 U.S.C. § 1135(a).

States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.”¹¹⁴

Note that a misdemeanor simple assault against an individual who has not attained the age of 16 years is punishable by a fine or imprisonment for not more than 1 year, or both and an assault resulting in substantial bodily injury to an individual who has not attained the age of 16 years can be fine, imprisoned for not more than 5 years, or both.¹¹⁵ Federal law defines “substantial bodily injury” as a temporary but substantial disfigurement; or a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty.¹¹⁶ Because this misdemeanor offense is specifically listed in the **MCA**, it is chargeable when an Indian defendant assaults an Indian child.¹¹⁷ Federal law provides additional criminal offenses that may be used depending on the relevant case facts like assault with a dangerous weapon.¹¹⁸

For non-Indians committing the crime of felony child abuse or neglect against an Indian child in Indian Country, please note that the **General Crimes Act** (18 U.S.C. § 1152) may apply. Section 1152 paired with 18 U.S.C. § 13 sets forth federal criminal jurisdiction, and if a specific federal crime on child neglect is absent, § 1152 provides federal jurisdiction to prosecute the crime of child neglect importing state law and also utilizes state sentencing guidelines. The relevant state law is the law of the state in which the crime occurred.

¹¹⁴ 18 U.S.C. § 1135(b).

¹¹⁵ 18 U.S.C. § 113(a)(7).

¹¹⁶ 18 U.S.C. § 113(b)(1).

¹¹⁷ 18 U.S.C. § 1153(a).

¹¹⁸ 18 U.S.C. § 113(a)(3).

Selected Codes—Physical Abuse

White Mountain Apache Tribal Code

[White Mountain Apache Criminal Code](#)

Chapter 4: Comprehensive Sex Crimes

Section 4.10 Child Abuse; Definitions; Classification

(A) In this section, unless the context otherwise requires:

- (1)** “Abuse” means the infliction or allowing of physical injury, impairment of bodily function or disfigurement or the infliction of or allowing another person to cause serious emotional damage as evidence by severe anxiety, depression, withdrawal or outward aggressive behavior and which emotional damage is diagnosed by a medical doctor or psychologist and which is caused by the acts or omissions of an individual having care, custody and control of a child. Abuse shall include inflicting or allowing sexual abuse pursuant to §4.4, sexual conduct with a minor; pursuant to §4.5, sexual assault; pursuant to §4.6, molestation of a child; pursuant to §4.9, commercial sexual exploitation of a minor; pursuant to §4.13, sexual exploitation of a minor; pursuant to §4.14, incest; pursuant to Chapter 2 of the White Mountain Apache Criminal Code; or child prostitution.
- (2)** “Child, youth or juvenile” means an individual who is under the age of Eighteen (18) Years of age.
- (3)** “Physical injury” the impairment of physical condition and includes but shall be limited to any skin bruising, bleeding, failure to thrive, malnutrition, burns, fracture of any bone, subdural hematoma, soft tissue swelling, injury to any internal organ or any physical condition which imperils a child's health or welfare.
- (4)** “Serious physical injury” means physical injury which creates a reasonable risk of death, or which causes serious or permanent disfigurement, or serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb.

(B) Under circumstances likely to produce death or serious physical injury, any person who causes a child to suffer physical injury or, having the care or custody of such child, causes or permits the person or health of such child to be injured or causes or permits such child to be placed in a situation where its person or health is endangered is guilty of an offense as follows:

- (1)** If done intentionally or knowingly, the offense is a class 1 major offense and if the victim is under fifteen years of age it is punishable pursuant to §4.19.
- (2)** If done recklessly, the offense is a class 2 major offense.
- (3)** If done with criminal negligence, the offense is a class 3 major offense.

(C) Under circumstances other than those likely to produce death or serious physical injury to a child, any person who causes a child to suffer physical injury or abuse except for those acts in the definition which are declared unlawful by another

section of this chapter or, having the care or custody of such child, causes or permits the person or health of such child to be injured or causes or permits such child to be placed in a situation where its person or health is endangered is guilty of an offense as follows:

- (1) If done intentionally or knowingly, the offense is a class 2 major offense.
- (2) If done recklessly, the offense is a class 3 major offense.
- (3) If done with criminal negligence, the offense is a class 1 minor offense.

Sault Ste. Marie Tribe of Chippewa Indians Tribal Code

Chapter 71: Criminal Offenses

Subchapter XIV: Offenses against the Family

71.1402 Child Abuse.

- (1) Offense. A person commits the offense of child abuse, if he knowingly, intentionally, or negligently, and without justification, causes or permits a person under the age of eighteen (18) years to be:
 - (a) placed in a situation that may endanger its life or health; or
 - (b) exposed to the inclemency of the weather; or
 - (c) abandoned, tortured, cruelly confined or cruelly punished; or
 - (d) deprived of necessary food, clothing or shelter.
- (2) Sentence. A person convicted of child abuse may be sentenced to imprisonment for a period not to exceed one (1) year, or a fine not to exceed Five Thousand Dollars (\$5,000.00), or both.

Federal Statutes

18 U.S.C. § 1152—General Crimes Act

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

18 U.S.C. § 1153—Major Crimes Act

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse

or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

B. Emotional and Psychological Abuse

As research has developed, our understanding of the lasting impact of emotional and psychological harm has expanded the definition of “child abuse” in multiple jurisdictions. The latest research has demonstrated that emotional/psychological abuse¹¹⁹ can have a severe, negative, and/or permanent impact on a child’s development, mental health, and general well-being, which may be carried into adulthood.¹²⁰ Although this type of harm may be primarily addressed through civil child dependency or welfare codes, extreme cases may warrant criminal prosecution. These generally fall into two categories:

1. The perpetrator commits the harmful act or omission intending to cause harm.
2. The act is so harmful (regardless of intent) that criminal laws are necessary to protect children.

Where emotional or psychological abuse occurs as the result of accidental or unintentional conduct and the perpetrator is the child’s caregiver, it might be better to adjudicate such cases under civil child dependency laws. Civil child dependency laws have the goals of protecting the child while attempting to provide the caregiver with the services and support they need to prevent future abuse. Factors such as poverty, substance abuse, or mental health issues oftentimes contribute to accidental or unintentional emotional or psychological abuse. Codes should allow for case-by-case determinations to be made by tribal justice system officials.

¹¹⁹ Sexual abuse also has a lasting negative impact. Sexual abuse is discussed in Chapter 12 of this resource.

¹²⁰ American Psychological Association, “[Childhood Psychological Abuse as Harmful as Sexual or Physical Abuse](#),” *Apa.org*, 2014. (“Children who are emotionally abused and neglected face similar and sometimes worse mental health problems as children who are physically or sexually abused, yet psychological abuse is rarely addressed in prevention programs or in treating victims.”).

Summary of Selected Codes—Emotional and Psychological Abuse

In the following selected codes section, you will find code examples that address psychological or emotional abuse of children. Although not an exhaustive list, the selected codes provide examples of how a tribe might define psychological or emotional abuse of a child under criminal laws. The code examples provided come from:

- **Yurok Tribal Code**
- **Ho-Chunk Nation Tribal Code**
- **Federal Statutes**

The **Yurok** tribal code on psychological maltreatment prohibits causing, or allowing to be caused, “mental injury” upon a child. The term “mental injury” has a lengthy definition that includes acts such as spurning, terrorizing, isolating, exploiting, corrupting, and denying emotional response, among others. The Yurok tribal code further states that one way to determine if mental injury has occurred is by the child exhibiting impairment related to their ability to function and behave. This function and behavior may be examined within the context of the child’s culture.

The **Ho-Chunk Nation** tribal code contains a crimes against children code. This code prohibits the causation of “mental harm” to a child through intentional actions demonstrating a substantial disregard for a child’s mental well-being. The definitions section of the code provides specific ways to demonstrate that mental harm has occurred to the child. Finally, the Ho-Chunk code further creates separate offense for individuals who cause the mental harm and those who know of mental harm being caused to a child but fail to act.

In 2006, the **Major Crimes Act (MCA)** (18 U.S.C. § 1153) was amended to add the offense of felony child abuse or neglect.¹²¹ The **MCA** identifies federal crimes that apply to an Indian committing a crime against the person or property of any Indian or other person in Indian country. The crime of felony child abuse or neglect is undefined in the federal criminal code. As provided in the **MCA**, any offense “that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.”¹²² Therefore, if the state has a crime that identifies emotional or psychological abuse as a form of criminal child abuse, the **MCA** will import that state statute and punishment.

For non-Indians committing the crime of felony child abuse or neglect against an Indian child in Indian Country, please note that the **General Crimes Act** (18 U.S.C. § 1152) may apply. Section 1152 paired with 18 U.S.C. § 13 sets forth federal criminal jurisdiction, and if a specific federal

¹²¹ 18 U.S.C. § 1153(a).

¹²² 18 U.S.C. § 1153(b).

crime on child abuse is absent, §1152 provides federal jurisdiction to prosecute the crime of child abuse importing state law and also utilizes state sentencing guidelines. The relevant state law is the law of the state in which the crime occurred.

Selected Codes—Emotional and Psychological Abuse

Yurok Tribe Ordinances

Title 12: Children's Code

Chapter 12.15 Abuse

12.15.040 Psychological Maltreatment

(a) For the purposes of this chapter, the term “psychological maltreatment” includes where a parent or caretaker inflicts, causes another to inflict, or fails to make reasonable efforts to prevent the infliction of mental injury upon a child when the parent or caretaker knows or reasonably should know that the child was in danger of psychological maltreatment.

(b) The term “mental injury” includes, but is not limited to, spurning, terrorizing, isolating, exploiting or corrupting, denying emotional response or neglecting medical care and education. Symptoms of such abuse may be evidenced by an observable and substantial impairment in his or her ability to function within a normal range of performance and behavior, with due regard to his culture.

Ho-Chunk Nation Code

Title 9—Criminal Code

Section 948—Crimes against Children

948.01 Definitions

[Section omitted]

(2) “Mental harm” means substantial harm to a child’s psychological or intellectual functioning which may be evidenced by a substantial degree of certain characteristics of the child including, but not limited to anxiety, depression, withdrawal or outward aggressive behavior. “Mental harm” may be demonstrated by substantial and observable changes in behavior, emotional response or cognition that is notwithstanding the normal range for the child’s age and stage of development.

948.04 Causing mental harm to a child.

(1) Whoever is exercising temporary or permanent control of a child and causes mental harm to that child by conduct which demonstrates substantial disregard for the mental well-being of the child is guilty of a felony.

(2) A person responsible for the child’s welfare is guilty of a felony if that person has knowledge that another person has caused, is causing or will cause mental harm to that child, is physically and emotionally capable of taking action which will prevent the harm, fails to take that action and the failure to act exposes the child to an unreasonable risk of mental harm by the other person or facilitates the mental harm to the child that is caused by the other person.

Federal Statutes

18 U.S.C. § 1152—General Crimes Act

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

18 U.S.C. § 1153—Major Crimes Act

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

Chapter 10: Exercise—Child Abuse

Learning Objective: Identify if this provision is needed or wanted in the tribe’s criminal code.

Reading: The team should consider reviewing **Part I** and should also refer to **Chapter 10** in **Part III** to help guide discussions for specifically defined crimes.

Instructions: The following questions are meant to guide you in deciding what provisions you want/need to include in your code relevant to physical, psychological, or emotional abuse of children. Once all team members have completed their responses to the exercise questions, please proceed with an open forum discussion and have the team leader record a response for each question that achieves as much consensus as possible. The team lead should keep a record of consensus-based responses to the questions.

Team Lead Tips: Note that some of the questions may require prior preparation, so each member should be provided with a copy of relevant tribal criminal codes to review prior to the meeting.

- **DETERMINE** whether the tribal criminal code contains crimes to address physical abuse of children.
- **DETERMINE** whether the tribal criminal code contains crimes that address psychological or emotional abuse of children.
- **DISCUSS** whether the current criminal statutes have proven effective in your tribal community.
- **DETERMINE** whether the team needs to add, update, or otherwise amend your criminal laws to better address **cases involving physical abuse of children**.
- **DETERMINE** whether the team needs to add, update, or otherwise amend your criminal laws to better address **cases involving psychological or emotional abuse of children**.

Note: Use **Worksheet** provided at the end of **Part III** to help record your answers.

Chapter 11: Commercial Exploitation of a Minor

Commercial exploitation of children can take on several forms including, but not limited to:

- Child trafficking; and
- Commercial sexual exploitation of a minor.

Each of these forms of commercial exploitation will be discussed in this chapter and the subject-specific subsections.

Child trafficking is an umbrella term that may include various activities such as labor trafficking, adoption trafficking, and sex trafficking. Labor trafficking activities typically involve the use of violence, threats, lies, debt bondage, or other forms of coercion to force people to work against their will.¹²³ Adoption trafficking refers to the placement and/or obtainment of children for compensation. This may include paying to adopt or gain a foster home placement and using compensation to keep children and does not include adoptions facilitated by child welfare agencies or lawful adoptions. Sex trafficking is a very specific form of child trafficking that involves the trafficking of children for the purpose of sexual exploitation.

Commercial sexual exploitation of a minor (CSE) involves crimes of a sexual nature committed against juvenile victims for financial or other economic reasons.¹²⁴ These crimes can include a range of activities including recruiting, harboring, and transporting a minor for the purpose of sexual exploitation, exploiting a minor through prostitution, exploiting a minor through survival sex,¹²⁵ and using a minor in pornography.¹²⁶

How does commercial sexual exploitation differ from child abuse or sexual abuse?

Though acts of CSE can involve child abuse and sexual abuse, CSE involves a financial or economic element. In response to such actions, a government may choose to deter both the motivation for the act and the act of abuse by creating separate crimes and penalties for abuse committed with a financial motive. Criminalizing the motivational acts associated with the sexual exploitation of children can also allow a government to adapt specific crimes, penalties, and sanctions that target all individuals who participate in the sexual exploitation of minors, whether they are traffickers and consumers. In short, CSE criminal laws can be drafted to target those participating in the “commercial market” that sexually exploits children.

¹²³ “Labor Trafficking,” Polaris Project, <https://humantraffickinghotline.org/type-trafficking/labor-trafficking> (accessed Sept. 2, 2020).

¹²⁴ Development Services Group, “[Commercial Sexual Exploitation of Children/Sex Trafficking](#)” (literature review) (Washington, DC: Office of Juvenile Justice and Delinquency Prevention, 2014).

¹²⁵ Exchanging sexual acts for something of value like money, food, or shelter.

¹²⁶ IOM (Institute of Medicine) and NRC (National Research Council), [Confronting Commercial Sexual Exploitation and Sex Trafficking of Minors in the United States](#) (Washington, DC: The National Academies Press, 2013), 2.

How can a tribe define crimes involving child trafficking and the commercial sexual exploitation of children?

While tribal laws may overlap with state and federal laws and, therefore, it may seem efficient to duplicate them word for word, Native nations may want to take a more victim-centered approach to their trafficking laws that differ from state and/or federal laws. A victim-centered approach within the context of human trafficking is defined as:

The systematic focus on the needs and concerns of a victim to ensure the compassionate and sensitive delivery of services in a nonjudgmental manner.

A victim-centered approach seeks to minimize re-traumatization associated with the criminal justice process by providing the support of victim advocates and service providers, empowering survivors as engaged participants in the process, and providing survivors an opportunity to play a role in seeing their traffickers brought to justice.¹²⁷

A victim-centered approach to tribal laws impacting Native victims/survivors must include appropriate attention to the historical, cultural, spiritual, jurisdictional, and fiscal realities of Native victims/survivors. This approach should also include attention to the victim/survivor's possible status as an urban Indian and/or their specific Native nation's historical and contemporary relationships with federal and state governments.

Tribes may want to consider developing criminal codes that define child trafficking and child sexual exploitation within the context of a comprehensive human trafficking code or they may choose to define each type of trafficking crime separately.¹²⁸

Because of the distinct nature of CSE crimes and a tribe's potential interest in punishing those acts more harshly, Native nations may want to consider drafting separate code provisions for these crimes. This can be achieved in two ways:

1. A tribe may choose to define commercial child sexual exploitation in their criminal code, including a nonexhaustive list of what activities are considered commercial child sexual exploitation; or
2. A tribe may choose to separately codify each child sexual exploitation activity as a separate criminal act (e.g., sex trafficking and child pornography would all be listed as separate and distinct crimes).

¹²⁷ "Victim-Centered Approach," Human Trafficking Task Force e-Guide, Office for Victims of Crime Training and Technical Assistance Center, <https://www.ovcttac.gov/taskforceguide/eguide/1-understanding-human-trafficking/13-victim-centered-approach/> (accessed Sept. 1, 2016).

¹²⁸ For examples of tribal trafficking laws, visit www.TribalTrafficking.org.

Note: Sexual abuse and child abuse may also be crimes that are charged in connection with cases involving the commercial sexual exploitation of minors. For more information on sexual abuse crimes see **Chapter 12**, and for more information on child abuse see **Chapter 10**.

Federal Requirements

Some Native nations may need to comply with federal trafficking laws to gain and/or maintain federal funding for certain programs. These requirements may be found in regulations and procedures, and not necessarily criminal law. They are discussed in this section because these requirements may affect how various agencies within a Native nation collaborate to create a coordinated response to trafficking. For example, Native nations receiving federal grants usually sign an agreement binding them to comply with federal law that prohibits the use of trafficked labor as a condition of receiving federal grant funds.

The **Trafficking Victims Protection Act (TVPA)**¹²⁹ was the first comprehensive federal legislation that sought to address human trafficking by creating a framework for protection of victims, enhancing federal prosecution and supporting prevention initiatives. For criminal law purposes, the TVPA amended several sections within Title 18, Chapter 77 of the U.S. Code that defines crimes relevant to child exploitation.

The TVPA and its subsequent reauthorizations—in 2003, 2005, 2008, and 2013—have several key features:

- Places sex trafficking and related criminal offense squarely in the federal realm (2000);
- Establishes the Interagency Task Force to Monitor and Combat Trafficking (2000);
- Establishes the Office to Monitor and Combat Trafficking in Persons (2000);
- Mandates an annual Trafficking in Persons (TIP) report (2000);
- Mandates victim restitution (2000);
- Establishes the T-visa (2000);¹³⁰
- Enables trafficking victims/survivors to sue their traffickers in federal civil court (2003);
- Created a system to gather and report human trafficking data (2008);
- Requires all unaccompanied children who are undocumented to be screened as potential trafficking victims (2008);
- Strengthens collaboration with state and local law enforcement to increase trafficking prosecutions (2013); and
- Establishes policies critical of child marriage to reduce potential trafficking (2013).

Although the U.S. Attorneys within the Offices of the U.S. Attorneys are responsible for enforcing federal crimes relevant to commercial child exploitation arising out of in Indian

¹²⁹ Trafficking Victims Protection Act and amendments, <https://www.justice.gov/humantrafficking/key-legislation> (accessed Sept. 2, 2020).

¹³⁰ The T-visa allows victims of human trafficking and their families to gain temporary U.S. residency that can, upon approval, be changed to permanent U.S. residency after three years.

country, tribes may also choose to take an active role in prosecutions. Tribes may choose to define crimes relevant to commercial exploitation of children within tribal codes and adjudicate those offenses within their own tribal courts, or, should tribes want to be more involved in federal prosecutions, they may opt to do so through the Special Assistant U.S. Attorneys (SAUSA) program. The SAUSA program authorizes U.S. Attorneys to appoint qualified tribal prosecutors to work in the same capacity as other U.S. Attorneys for the prosecution of specific crimes in Indian country.¹³¹ Of course, tribes may decide that both approaches are necessary to ensure that they are able to actively participate in both tribal and federal prosecutions of these kinds of crimes.

¹³¹ See §213(13)(d) of the TLOA, which amended federal law to include extra provisions related to Indian country and tribal liaisons.

A. Labor Trafficking

Currently, there is no data highlighting or examining labor trafficking of Native children, so it is difficult to understand the scope of the problem. Despite the lack of data relevant to labor trafficking in Native communities, your code development team may want to consider including provisions to address this issue as you develop or revise codes addressing crimes against children to ensure you have the necessary laws in place should an incident of labor trafficking be reported. This is particularly true if Native nations decide to follow the federal and state approaches criminalizing “human trafficking,” which covers both sex trafficking and labor trafficking. As discussed in **Section B of this chapter**, Native nations may also decide to include adoption trafficking under an umbrella “human trafficking” law.¹³²

Federal Laws against Child Labor Trafficking

As stated in the introduction to this chapter, the **Trafficking Victims Protection Act (TVPA)** is the first federal legislation that sought to address human trafficking in a comprehensive way. Relevant to criminal labor trafficking, the TVPA amended 18 U.S.C. §§ 1589-1590, defining crimes that are applicable to criminal labor trafficking activities involving children as well as adults.

¹³² Please see Section B. Adoption Trafficking of this chapter for more information on adoption trafficking.

Summary of Selected Codes—Labor Trafficking

In the following selected codes section, you will find code examples that address child labor trafficking. Although not an exhaustive list, the selected codes provide examples of how a tribe might define labor trafficking under criminal laws and further prohibit certain conduct with respect to child labor trafficking. The code examples provided come from:

- **Three Affiliated Tribes (MHA Nation) Tribal Code [Loren’s Law]**
- **Federal Statutes**

The Labor Trafficking of a Minor section of **Loren’s Law** from the **MHA Nation** begins with a definition of labor trafficking, then lists the three ways a person can be found guilty of labor trafficking:

1. Benefitting—receiving anything of value—from the knowing participation in the labor trafficking of a minor;
2. Encouraging or supporting the labor trafficking of a minor; and
3. Attempting or conspiring to do anything listed in Subsection 1.

There is no statute of limitations for this crime, and the code allows a prosecutor to file criminal charges, even if the perpetrator’s identity is unknown at the time charges are brought.

There are several crucial definitions for interpreting the Labor Trafficking of a Minor section, definitions that only apply to the trafficking statute.

As stated in the introduction to this chapter, the **TVPA** is the first federal legislation that sought to address human trafficking in a comprehensive way. Relevant to criminal labor trafficking, the TVPA amended 18 U.S.C. §§ 1589-1590, defining crimes that are applicable to criminal labor trafficking activities involving children as well as adults.

Selected Codes—Labor Trafficking

Three Affiliated Tribes (Mandan, Hidatsa, and Arikara Nation) Tribal Code

Loren's Law

Definitions

[Sections Omitted]

- a. Human Trafficking is defined as either sex or labor trafficking
- b. Debt bondage is defined as the status or condition of a debtor arising from a pledge by the debtor of the debtor's personal services or those of a person under the debtors control as a security for a debt, if the value of those services as a [*sic*] reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.
- c. Forced labor or services is defined as labor or services that are performed or provided by another individual and are obtained or maintained through any one or more of the following:
 - 1. Threat, either implicit or explicit, scheme, plan, or pattern, or other action intended to cause the victim to believe that if they did not perform or provide the labor or services, that the victim or another individual would suffer bodily harm or physical restraint; that any fact tending or alleged fact tending to cause shame or to subject any person to hatred, contempt, or ridicule would be exposed.
 - 2. Physically restraining or threatening to physically restrain a person;
 - 3. Abuse or threatened abuse of the legal process;
 - 4. Knowingly destroying, concealing, confiscating, removing or possessing any actual or purported passport or other immigration document;
 - 5. Knowingly destroying, concealing, confiscating, removing, or possessing any actual or purported domestic documents such as a driver's license, social security card, birth certificate, or legal documents proving identity or citizenship
 - 6. Use of blackmail
- d. Slavery is defined as controlling a person through force, fraud, or coercion to exploit said person.

Labor Trafficking of a Minor

Labor trafficking of a minor includes the recruitment, transportation, transfer, harboring, enticement, provision, obtaining, or receipt of a person under the age of 18 by any means (including electronic/telephonic), for the purpose of debt bondage, forced labor, or services, slavery or practices similar to slavery. A person is guilty of labor trafficking of a minor if the individual commits or benefits from one or more of the following.

Benefits financially or receives anything of value from knowing participation in the labor trafficking of a minor, knowing or having reason to know it is derived from an act of labor trafficking of a minor.

Promotes, recruits, entices, harbors, transports, provides or obtains by any means another person under the age of 18, knowing that person will be subjected to labor trafficking.

Attempts or conspires, or has the intent to promote, recruit, entice, harbor, transport, provide or obtain by any means another person under the age of 18, knowing that person may be subjected to labor trafficking.

There is no limitation on the time in which a charge may be filed or prosecution may commence for any offense under Loren’s Law involving a victim who is under 18 years of age at the time of alleged offense.

The Tribe shall file a criminal complaint against a “John/Jane Doe” [sic] where there is physical evidence (forensic interview/examination, DNA, fingerprints, false name given, etc.) that a child is a victim of a human trafficking crime but where the perpetrator is unknown.

Federal Statutes

18 U.S.C. § 1589 Forced Labor

(a)Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means—

- (1)** by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
- (2)** by means of serious harm or threats of serious harm to that person or another person;
- (3)** by means of the abuse or threatened abuse of law or legal process; or

(4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint, shall be punished as provided under subsection(d).

(b) Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a), knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means, shall be punished as provided in subsection (d).

(c) In this section:

(1)The term “abuse or threatened abuse of law or legal process” means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

(2)The term “serious harm” means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.

(d) Whoever violates this section shall be fined under this title, imprisoned not more than 20 years, or both. If death results from a violation of this section, or if the violation includes kidnaping, an attempt to kidnap, aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title, imprisoned for any term of years or life, or both.

18 U.S.C. § 1590 Trafficking with respect to peonage, slavery, involuntary servitude or labor

(a) Whoever knowingly recruits, harbors, transports, provides, or obtains by any means, any person for labor or services in violation of this chapter shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse, or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.

(b) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be subject to the penalties under subsection (a).

Chapter 11: Exercise #1—Commercial Exploitation of a Minor: Labor Trafficking

Learning Objective: Identify if this provision is needed or wanted in the tribe’s criminal code.

Reading: The team should consider reviewing **Part I** and should also refer to **Chapter 11** in **Part III** to help guide discussions for specifically defined crimes.

Instructions: The following discussion questions are meant to guide you in deciding what provisions you want/need to include in your code relevant to commercial exploitation of children, specifically labor trafficking of children. Once all team members have completed their responses to the exercise questions, please proceed with an open forum discussion and have the team leader record a response for each question that achieves as much consensus as possible. The team lead should keep a record of consensus-based responses to the questions in the exercises.

Team Lead Tips: Note that some of the questions may require prior preparation, so each member should be provided with a copy of relevant tribal criminal codes to review prior to the meeting.

- **REVIEW** the current tribal code to determine if labor trafficking of children is adequately addressed.
- **DISCUSS** whether situations or conditions make labor trafficking of children more likely in your community.
- **DISCUSS** whether the tribe may have a cultural or traditional practice that may conflict with modern definitions of labor trafficking.
- **DISCUSS** the benefits or disadvantages to drafting/amending a labor trafficking of children statute if labor trafficking is not currently an issue in the relevant tribal community.
- **DETERMINE** whether the team needs to add, update, or otherwise amend your criminal laws to address **cases involving the commercial exploitation of children through labor trafficking**.

Note: Use **Worksheet** provided at the end of **Part III** to help record your answers.

B. Adoption Trafficking

Adoption trafficking should be viewed as a form of child trafficking that does not occur for the purpose of labor or sex trafficking, but rather is a crime that focuses on the illegal placement and/or obtainment of children for compensation. This type of crime should not include actions of authorized child welfare agencies or private adoption agencies who may facilitate adoptions in exchange for lawful fees or other forms of compensation. For this reason, it is recommended that tribes carefully define adoption trafficking statutes in a manner that exempts lawful placement and adoptive procedures. Adoption trafficking is a particular concern for Native communities because, historically, Native children have been targeted for removal, adoption, and placement away from their families and communities.

Some examples of the types of activities that an adoption trafficking statute might seek to prohibit would include, but not be limited to:

- Paying or using other forms of compensation to adopt or gain a foster home placement;
- Paying or using compensation to keep children who should be reunified with their biological family; or
- Obtaining children from parents or legal guardians through fraud, deception, coercion, duress, or even kidnapping, to later place those children for adoption.

This section will examine how tribal codes can be developed or revised to prohibit people from buying children or using compensation to keep children. Although this provision may rarely be used in your community, if there is no specific law prohibiting the trafficking of children there will be no method by which to legally hold the perpetrator(s) accountable.

While other tribal codes may be a useful starting point, it is crucial to modify language to fit the tribal community's needs. A Native nation should not incorporate a state or federal code without serious discussions to ensure that the code is consistent with their customs and beliefs.

Note: The adoption trafficking tribal codes researched for this publication were all identical.¹³³ As a result, only one tribal code example will be highlighted in the next section. Including this example should not be taken as an endorsement of “model code” to address adoption trafficking.

¹³³ Examples: Winnebago Tribe of Nebraska tribal code, [Title 3. Criminal Code](#), Article 7: Crimes against Public Health, Safety and Welfare, 3-718 Trafficking in children; penalty, and Prairie Band of Potawatomi tribal code, Title 15. Criminal Offenses [Chapter 15-5 Crimes against Public Health, Safety, and Welfare](#), §15-5- 68: Trafficking In Children.

Summary of Selected Codes—Adoption Trafficking

In the following selected codes section, you will find a code example that addresses adoption trafficking. For the purposes of this publication, adoption trafficking encompasses adoption of tribal children by illegal placement and/or by compensation in violation of the Indian Child Welfare Act.¹³⁴ The selected code provides an example of how a tribe might define adoption trafficking under criminal laws and further prohibit certain conduct with respect to adoption trafficking. The code example is from:

- **Absentee-Shawnee Tribal Code**

The adoption trafficking or trafficking in children code highlighted in this section makes it unlawful to accept anything of value for services or purported services from anyone, other than an attorney or advocate in lawful adoption proceedings or social workers or government workers paid for their work in placing children, attempting to:

- Adopt a child;
- Place a child for adoption; and/or
- Place a child in permanent care or foster home.

The code also makes it illegal to induce any woman to enter a place for maternity care or for the delivery of a child by offering to place (or advertise to place) a child for adoption or for care in a foster home.

It is important to note that adoption trafficking is not a specifically enumerated **federal** offense.

¹³⁴ 25 U.S.C. §§1901 et seq.

Selected Codes—Adoption Trafficking

Absentee-Shawnee Tribal Code

[Criminal Code](#)

Chapter 5 Crimes against Public Health, Safety, and Welfare

§568 Trafficking in Children

(a) It shall be unlawful to:

(1) Accept any compensation, in money, property or other thing of value, at any time, from the person or persons adopting a child, for services of any kind performed or rendered, or purported to be performed or rendered, in connection with such adoption; or

(2) Accept any compensation, in money, property or other thing of value, from any other person, in return for placing, assisting to place, or attempting to place a child for adoption or for permanent care in a foster home; or

(3) Offer to place, or advertise to place, a child for adoption or for care in a foster home, as an inducement to any woman to enter an institution or home or other place for maternity care or for the delivery of a child.

(b) “Child” means an unmarried or unemancipated person under the age of eighteen years.

(c) This section does not apply to attorneys or advocates licensed by the Tribal Courts receiving reasonable fees for legal services actually rendered in the course of lawful adoption proceedings, nor shall subparagraphs (a) (1) or (a) (2) apply to any bona fide social worker or government employee receiving their normal salary and making such placements as a part of their official duties.

(d) Trafficking in children shall be punishable by a fine not to exceed two hundred fifty dollars (\$250.00), or by a term of imprisonment in the Tribal jail not to exceed three months, or both.

Chapter 11: Exercise #2—Commercial Exploitation of a Minor: Adoption Trafficking

Learning Objective: Identify if this provision is needed or wanted in the tribe’s criminal code.

Reading: The team should consider reviewing **Part I** and should also refer to **Chapter 11** in **Part III** to help guide discussions for specifically defined crimes.

Instructions: The following discussion questions are meant to guide you in deciding what provisions you want/need to include in your code relevant to commercial exploitation of children by adoption trafficking. Once all team members have completed their responses to the exercise questions, please proceed with an open forum discussion and have the team leader record a response for each question that achieves as much consensus as possible. The team lead should keep a record of consensus-based responses to the questions in the exercises.

Team Lead Tips: Note that some of the questions may require prior preparation, so each member should be provided with a copy of relevant tribal criminal codes to review prior to the meeting.

- **REVIEW** whether the tribe has a statute designed to address adoption trafficking.
- **DISCUSS** whether the tribal community has experienced “shady” adoptions—historically or presently—and determine whether the tribal criminal code defines this activity as a crime.
- **DESCRIBE** what acts should be a crime when it comes to adoptions and/or placements of tribal children.
- **RESEARCH** whether there is a particular custom or tradition that should be considered.
- **DETERMINE** whether the team needs to add, update, or otherwise amend your criminal laws to address **cases involving the commercial exploitation of children through adoption trafficking**.

Note: Use **Worksheet** provided at the end of **Part III** to help record your answers.

C. Child Pornography

Child pornography is a form of sexual exploitation and these cases can involve several different defined crimes. Generally, these laws aim to prohibit the production, possession, distribution, or sale of pornographic material involving a minor child. When drafting tribal statutes, code development teams may want to consider creating separate crimes relevant to the production of child pornography as well as crimes relevant to the possession, sale, or distribution of child pornography.

It will also be important to define or otherwise specify what will constitute pornographic material within criminal statutes. Pornographic material involving minor children is commonly defined as any photo, video, visual depiction,¹³⁵ or other material depicting children in a sexually explicit manner.

Sexually exploiting a child for personal viewing or for profit is generally illegal and may include:

- The creation or production of the sexual materials involving sexual performance, which could include activities by a defendant, includes:
 - Enticing, soliciting, employing, or forcing a minor to perform a sexually explicit act;
 - Financing anything involved in the creation of the material; and
 - Participating in the development of the sexually explicit material.
- The distribution of or assisting with the distribution of the child pornography, whether for profit or free exchange, which could include such activities as:
 - Advertising and promotion;
 - Disseminating the material in any fashion; and
 - Providing financing for distribution of material.
- The possession of child pornography for personal viewing or for sale, which could include such activities as:
 - Crossing the reservation boundary with child pornography in your possession;
 - Accessing child pornography on the internet; and
 - Possessing materials for sale to others.

¹³⁵ Federal laws define *child pornography* as any visual depiction of sexually explicit conduct involving a minor. 18 U.S.C. § 2256.

Summary of Selected Codes—Child Pornography

In the following selected codes section, you will find code examples that address child pornography. Although not an exhaustive list the selected codes provide examples of how a tribe might define child pornography under criminal laws, and further prohibit certain conduct with respect to child pornography such as production, distribution, or possession. The code examples provided come from:

- **Tulalip Tribal Code**
- **Pascua Yaqui Tribal Code**
- **Federal Statutes**

The four **Tulalip** tribal code provisions provided in the selected codes section of this unit deal with different types of child pornography crimes. Please note that the Tulalip code does not use the term “child pornography,” rather it criminalizes behaviors related to sexually exploiting a minor in developing sexually explicit materials and live performances or to the “depictions of minor[s] engaged in sexually explicit conduct.”

- The first **Tulalip** tribal code listed (3.20.034) focuses on sexually exploiting children and other vulnerable people with the purpose of using them in a live performance or photograph. A person who threatens, forces, aids, employs, or procures a child, developmentally delayed adults, or a vulnerable adult as defined in Chapter 4.30 in the Tulalip code for sexually explicit conduct is guilty of this crime. A parent, guardian, or custodian who permits a child to participate in such sexual activity knowing it will be photographed or performed live is also guilty of the crime.
- **Tulalip** tribal code 3.20.036 criminalizes “possessing depictions of a minor engaged in sexually explicit conduct.” The code covers more than mere possession, stating that a person can be convicted for *knowingly* participating in the activities in 3.20.036(1): possessing, creating, developing, duplicating, publishing, printing, disseminating, exchanging, financing, or selling. 3.20.036(2) classifies the conduct as a Class F offense. 3.20.036(3) notes that each visual or printed material in violation of this code constitutes a separate offense.
- **Tulalip** tribal code 3.20.038 criminalizes *knowingly* “sending or bringing” child pornography or causing child pornography to be sent or brought “into Tulalip” for the purposes of sale or distribution. The crime is a Class F offense. Each visual or printed depiction is considered a separate crime.
- **Tulalip** tribal code 3.20.040 criminalizes the intentional viewing of a minor engaged in sexually explicit conduct over the Internet. Each Internet session may

be considered a separate crime. The code also lays out the burden of proof for intentionality and defines “Internet session.”

The four **Pascua Yaqui** tribal codes provided in the selected codes section of this unit deal with different types of child pornography crimes. Like Tulalip, **Pascua Yaqui** criminalizes behaviors related to the “sexual exploitation of a minor” instead of using the term “child pornography.”

The **Pascua Yaqui** code (4 PYTC § 2-130) deals with the commercial sexual exploitation of a minor. It prohibits any person from knowingly participating in the following actions:

- Engaging a minor in sexual conduct for purposes related to producing any visual, print medium, or live act—this section essentially prohibits the use of children in the creation of pornography.
- Enticing, using, employing persuading, and so forth, a minor to expose genitals, anus, areola, or (female) nipple for financial or commercial gain.
- Allowing a minor in their custody to engage in sexually explicit behavior for the purpose of producing any visual or print medium or a live act.
- Transporting or financing the transportation of minors through or across the Pascua Yaqui Reservation for purposes of creating child pornography.

This is a class 2 major offense¹³⁶ and the penalty is more severe if the minor is under fifteen years of age.

The **Pascua Yaqui** code (4 PYTC § 2-140) deals with sexual exploitation of a minor, with no requirement of financial exchange or profit. This outlaws the creation, duplication, distribution, transportation, exhibition, receiving, selling, purchasing, possessing, or exchanging of child pornography. This is a class 2 major offense¹³⁷ and the penalty is more severe if the minor is under fifteen years of age.

Pascua Yaqui code (4 PYTC § 2-150) deals with the creation of pornography or live act involving sexual conduct where any person depicted is masquerading as a minor. Under Section 150 the person “masquerading” as a minor is subject to prosecution. Additionally, any person involved in the commercial creation/distribution of such pornography can be prosecuted as well. This crime is listed as a class 1 minor offense.¹³⁸

¹³⁶ Title 4, Chapter 4, §100(B)(2) Class 2 major offense: A person found guilty of a class 2 major offense may be sentenced to imprisonment for a period not to exceed eight months and to pay a fine not to exceed \$2,000.

¹³⁷ Ibid.

¹³⁸ Title 4, Chapter 4, §100(C)(1) Class 1 minor offense: A person found guilty of a class 1 minor offense may be sentenced to imprisonment for a period not to exceed sixty days and pay a fine not to exceed \$200.

Pascua Yaqui code (4 PYTC § 2-160) is related to permissible inferences during the prosecution of their crimes of sexual exploitation of a child. If a participant in the visual or print media or live act, through its text or visual representation, depicts a minor, the trier of fact may infer he or she is a minor.

Federal law defines child pornography as any visual depiction of sexually explicit conduct involving a minor and prohibits the production, distribution, reception, possession, or importation of any image of child pornography.¹³⁹ The federal laws defining the crimes related to child pornography can be found at:

- 18 U.S.C. § 2256: Definitions for chapter
- 18 U.S.C. § 2251: Sexual exploitation of children
- 18 U.S.C. § 2251A: Selling or buying of children
- 18 U.S.C. § 2252: Certain activities relating to material involving the sexual exploitation of minors
- 18 U.S.C. § 2252A: Certain activities relating to material constituting or containing child pornography

¹³⁹ “Child Pornography,” Child Exploitation and Obscenity Section (CEOS) Subject Areas, Department of Justice, <https://www.justice.gov/criminal-ceos/child-pornography> (accessed Mar. 5, 2021).

Selected Codes—Child Pornography

Tulalip Tribal Code

Title III. Criminal Offenses and Infractions

Chapter 3.20 Sex Crimes

3.20.034 Sexual exploitation of a minor, developmentally delayed adult or vulnerable adult.

(1) A person is guilty of sexual exploitation of a minor, developmentally delayed adult, or vulnerable adult if the person:

(a) Compels a person covered by this section by threat or force to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance;

(b) Aids, invites, employs, authorizes, or causes a person covered by this section to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance; or

(c) Being a parent, legal guardian, or person having custody or control of a person covered by this section, permits the person to engage in sexually explicit conduct, knowing that the conduct will be photographed or part of a live performance.

(2) Persons covered by this section include:

(a) Persons under the age of 18;

(b) Developmentally delayed adults; or

(c) A person who has been adjudicated a vulnerable adult under

Chapter 4.30 TTC.

(3) Violation of this section is a Class E offense. [Res. 2018-444; Res. 2012-445 § 47].

3.20.036 Dealing in depictions of minor engaged in sexually explicit conduct.

(1) A person commits the crime of possessing depictions of a minor engaged in sexually explicit conduct when he or she knowingly possesses, creates, develops, duplicates, publishes, prints, disseminates, exchanges, finances, or sells a visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct.

(2) Possessing depictions of a minor engaged in sexually explicit conduct is a Class F offense.

(3) Each visual or printed matter that violates this section constitutes a separate offense. [Res. 2018-444; Res. 2012-445 § 47].

3.20.038 Sending or bringing depictions of minor engaged in sexually explicit conduct.

(1) A person commits the crime of sending or bringing into Tulalip depictions of a minor engaged in sexually explicit conduct when he or she knowingly sends or causes to be sent, or brings or causes to be brought onto the Tulalip Reservation for sale or distribution, a visual or printed matter that depicts a minor engaged in sexually explicit conduct.

(2) Sending or bringing depictions of a minor engaged in sexually explicit conduct is a Class F offense.

(3) Each visual or printed matter that violates this section constitutes a separate offense. [Res. 2018-444; Res. 2012-445 § 47].

3.20.040 Viewing depictions of a minor engaged in sexually explicit conduct.

(1) A person who intentionally views over the Internet visual or printed matter depicting a minor engaged in sexually explicit conduct is guilty of viewing depictions of a minor engaged in sexually explicit conduct.

(2) Viewing depictions of a minor engaged in sexually explicit conduct is a Class E offense.

(3) For the purposes of determining whether a person intentionally viewed over the Internet a visual or printed matter depicting a minor engaged in sexually explicit conduct, the trier of fact shall consider the title, text, and content of the visual or printed matter, as well as the Internet history, search terms, thumbnail images, downloading activity, expert computer forensic testimony, number of visual or printed matter depicting minors engaged in sexually explicit conduct, defendant's access to and control over the electronic device and its contents upon which the visual or printed matter was found, or any other relevant evidence. The prosecuting authority must prove beyond a reasonable doubt that the viewing was initiated by the user of the computer where the viewing occurred.

(4) For the purposes of this section, each separate Internet session of intentionally viewing over the Internet visual or printed matter depicting a minor engaged in sexually explicit conduct constitutes a separate offense.

(5) An "Internet session" means a period of time during which an Internet user, using a specific Internet protocol address, visits or is logged into an Internet site for an uninterrupted period of time. [Res. 2018-444; Res. 2012-445 § 47].

Pascua Yaqui Tribal Code
Title 4. Criminal Code
Chapter 2—Sex Offenses
Subchapter A General Provisions

Section 130 Commercial Sexual Exploitation of a Minor; Classification (4 PYTC § 2-130)

- (A) A person commits commercial sexual exploitation of a minor by knowingly:
- (1) Using, employing, persuading, enticing, inducing or coercing a minor to engage in or assist others to engage in sexual conduct for the purpose of producing any visual or print medium or live act depicting such conduct.
 - (2) Using, employing, persuading, enticing, inducing or coercing a minor to expose the genitals or anus or the areola or nipple of the female breast for financial or commercial gain.
 - (3) Permitting a minor under such person’s custody or control to engage in or assist others to engage in sexual conduct for the purpose of producing any visual or print medium or live act depicting such conduct.
 - (4) Transporting or financing the transportation of any minor through or across this Reservation with the intent that such minor engage in prostitution or sexual conduct for the purpose of producing a visual or print medium or live act depicting such conduct.
- (B) Commercial sexual exploitation of a minor is a class 2 major offense and if the minor is under 15 years of age, it is punishable pursuant to 4 PYTC § 1-130

Section 140 Sexual Exploitation of a Minor; Classification (4 PYTC § 2-140)

- (A) A person commits sexual exploitation of a minor by knowingly:
- (1) Recording, filming, photographing, developing or duplicating any visual or print medium in which minors are engaged in sexual conduct.
 - (2) Distributing, transporting, exhibiting, receiving, selling, purchasing, possessing or exchanging any visual or print medium in which minors are engaged in sexual conduct.
 - (3) Sexual exploitation of a minor is a class 2 major offense and if the minor is under 15 years of age, it is punishable pursuant to 4 PYTC § 1-130.

Section 150 Portraying Adult as Minor; Classification (4 PYTC § 2-150)

- (A) It is unlawful for any person depicted in a visual or print medium or live act as a participant in sexual conduct to masquerade as a minor.
- (B) It is unlawful for any person knowingly to produce, record, film, photograph, develop, duplicate, distribute, transport, exhibit, sell, purchase or exchange any visual or print medium whose text, title or visual representation depicts a participant in sexual conduct as a minor even though any such participant is an adult.
- (C) Any person who violates this section is guilty of a class 1 minor offense.

Section 160 Permissible Inferences (4 PYTC § 2-160)

In prosecution relating to the sexual exploitation of children, the trier of fact may draw the inference that a participant is a minor if the visual or print medium or live act through its title, text or visual representation depicts the participant as a minor.

Federal Statutes

18 U.S.C. § 2256 Definitions for chapter

For the purposes of this chapter, the term—

(1) “minor” means any person under the age of eighteen years;

(2)

(A) Except as provided in subparagraph (B), “sexually explicit conduct” means actual or simulated—

(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(ii) bestiality;

(iii) masturbation;

(iv) sadistic or masochistic abuse; or

(v) lascivious exhibition of the anus, genitals, or pubic area of any person;

(B) For purposes of subsection 8(B) [1] of this section, “sexually explicit conduct” means—

(i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;

(ii) graphic or lascivious simulated;

(I) bestiality;

(II) masturbation; or

(III) sadistic or masochistic abuse; or

(iii) graphic or simulated lascivious exhibition of the anus, genitals, or pubic area of any person;

(3) “producing” means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) “organization” means a person other than an individual;

(5) “visual depiction” includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format;

(6) “computer” has the meaning given that term in section 1030 of this title;

- (7) “custody or control” includes temporary supervision over or responsibility for a minor whether legally or illegally obtained;
- (8) “child pornography” means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—
- (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
 - (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or
 - (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.
- (9) “identifiable minor”—
- (A) means a person—
 - (i)
 - (I) who was a minor at the time the visual depiction was created, adapted, or modified; or
 - (II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and
 - (ii) who is recognizable as an actual person by the person’s face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and
 - (B) shall not be construed to require proof of the actual identity of the identifiable minor.
- (10) “graphic,” when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted; and
- (11) the term “indistinguishable” used with respect to a depiction, means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.

18 U.S.C. § 2251 Sexual Exploitation of children

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or

has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct shall be punished as provided under subsection (e) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

(c)

(1) Any person who, in a circumstance described in paragraph (2), employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct outside of the United States, its territories or possessions, for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e).

(2) The circumstance referred to in paragraph (1) is that—

(A) the person intends such visual depiction to be transported to the United States, its territories or possessions, by any means, including by using any means or facility of interstate or foreign commerce or mail; or

(B) the person transports such visual depiction to the United States, its territories or possessions, by any means, including by using any means or facility of interstate or foreign commerce or mail.

(d)

(1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering—

(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

(B) participation in any act of sexually explicit conduct by or with

any minor for the purpose of producing a visual depiction of such conduct; shall be punished as provided under subsection (e).

(2) The circumstance referred to in paragraph (1) is that—

(A) such person knows or has reason to know that such notice or advertisement will be transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed; or

(B) such notice or advertisement is transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed.

[omitted]

18 U.S.C. § 2251A Selling or buying of children

(a) Any parent, legal guardian, or other person having custody or control of a minor who sells or otherwise transfers custody or control of such minor, or offers to sell or otherwise transfer custody of such minor either—

(1) with knowledge that, as a consequence of the sale or transfer, the minor will be portrayed in a visual depiction engaging in, or assisting another person to engage in, sexually explicit conduct; or

(2) with intent to promote either—

(A) the engaging in of sexually explicit conduct by such minor for the purpose of producing any visual depiction of such conduct; or

(B) the rendering of assistance by the minor to any other person to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct; shall be punished by imprisonment for not less than 30 years or for life and by a fine under this title, if any of the circumstances described in subsection (c) of this section exist.

(b) Whoever purchases or otherwise obtains custody or control of a minor, or offers to purchase or otherwise obtain custody or control of a minor either—

(1) with knowledge that, as a consequence of the purchase or obtaining of custody, the minor will be portrayed in a visual depiction engaging in, or assisting another person to engage in, sexually explicit conduct; or

(2) with intent to promote either—

(A) the engaging in of sexually explicit conduct by such minor for the purpose of producing any visual depiction of such conduct; or

(B) the rendering of assistance by the minor to any other person to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct; shall be punished by imprisonment for not less than 30 years or for life and by a fine under this title, if any of the circumstances described in subsection (c) of this section exist.

(c) The circumstances referred to in subsections (a) and (b) are that—

(1) in the course of the conduct described in such subsections the minor or the actor traveled in or was transported in or affecting interstate or foreign commerce;

- (2) any offer described in such subsections was communicated or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mail; or
- (3) the conduct described in such subsections took place in any territory or possession of the United States.

18 U.S.C. § 2252 Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who—

(1) knowingly transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(3) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly sells or possesses with intent to sell any visual depiction; or

(B) knowingly sells or possesses with intent to sell any visual depiction that has been mailed, shipped, or transported using any means or facility of interstate or foreign commerce, or has been shipped or transported in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported using any means or facility of interstate or foreign commerce, including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct; or

(4) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction; or

(B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct shall be punished as provided in subsection (b) of this section.

[(b) omitted]

(c) AFFIRMATIVE DEFENSE.—It shall be an affirmative defense to a charge of violating paragraph (4) of subsection (a) that the defendant—

(1) possessed less than three matters containing any visual depiction proscribed by that paragraph; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any visual depiction or copy thereof—

(A) took reasonable steps to destroy each such visual depiction; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

18 U.S.C. § 2252A Certain activities relating to material constituting or containing child pornography

(a) Any person who—

(1) knowingly mails, or transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any child pornography;

(2) knowingly receives or distributes—

(A) any child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

(3) knowingly—

(A) reproduces any child pornography for distribution through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer; or

(B) advertises, promotes, presents, distributes, or solicits through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

(ii) a visual depiction of an actual minor engaging in sexually explicit conduct;

(4) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly sells or possesses with the intent to sell any child pornography; or

(B) knowingly sells or possesses with the intent to sell any child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

(5) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or

(B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

(6) knowingly distributes, offers, sends, or provides to a minor any visual depiction, including any photograph, film, video, picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct—

(A) that has been mailed, shipped, or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer;

(B) that was produced using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer; or

(C) which distribution, offer, sending, or provision is accomplished using the mails or any means or facility of interstate or foreign commerce, for purposes of inducing or persuading a minor to participate in any activity that is illegal; or

(7) knowingly produces with intent to distribute, or distributes, by any means, including a computer, in or affecting interstate or foreign commerce, child pornography that is an adapted or modified depiction of an identifiable minor.[1]
shall be punished as provided in subsection (b).

[(b)-(f) omitted]

(g) CHILD EXPLOITATION ENTERPRISES.—

(1) Whoever engages in a child exploitation enterprise shall be fined under this title and imprisoned for any term of years not less than 20 or for life.

(2) A person engages in a child exploitation enterprise for the purposes of this section if the person violates section 1591, section 1201 if the victim is a minor, or chapter 109A (involving a minor victim), 110 (except for sections 2257 and 2257A), or 117 (involving a minor victim), as a part of a series of felony violations constituting three or more separate incidents and involving more than one victim, and commits those offenses in concert with three or more other persons.

Chapter 11: Exercise #3—Commercial Exploitation of a Minor: Child Pornography

Learning Objective: Identify if this provision is needed or wanted in the tribe’s criminal code.

Reading: The team should consider reviewing **Part I** and should also refer to **Chapter 11** in **Part III** to help guide discussions for specifically defined crimes.

Instructions: The following discussion questions are meant to guide you in deciding what provisions you want/need to include in your code relevant to commercial exploitation of children by child pornography. Once all team members have completed their responses to the exercise questions, please proceed with an open forum discussion and have the team leader record a response for each question that achieves as much consensus as possible. The team lead should keep a record of consensus-based responses to the questions in the exercises.

Team Lead Tips: Note that some of the questions may require prior preparation, so each member should be provided with a copy of relevant tribal criminal codes to review prior to the meeting.

- **REVIEW** the tribal criminal code to determine whether the crime of child pornography is addressed. (*Note:* You may want to review any tribal code criminal sections on prostitution to ensure that child victims are considered.)
- **DISCUSS** whether the current criminal statutes have proven effective in your tribal community.
- **DETERMINE** whether the criminal statute addresses adults or juveniles or both.
- **DISCUSS** whether children in the tribal community are being used in pornography in live performances, photographs, publications, or on the computer (or in some other form).
- **DETERMINE** what acts related to child pornography should be criminalized such as creation, distribution, and/or possession of child pornography.
- **DETERMINE** whether there is a concern about non-Indian or nonmembers offending.
- **DETERMINE** whether the team needs to add, update, or otherwise amend your criminal laws to address **cases involving the commercial exploitation of children through child pornography.**

Note: Use **Worksheet** provided at the end of **Part III** to help record your answers.

D. Sex Trafficking

Sex trafficking is generally defined as an act of force, fraud, or coercion that causes another person to engage in a commercial sex act. If the person is younger than eighteen years of age, there is no need to prove force, fraud, or coercion. This definition comes from federal law, but many states have followed this trend and the few Native nations with sex trafficking codes have also used this as a legal definition. Frequently, jurisdictions eliminate the “force, fraud, or coercion” language when minors are involved. In many jurisdictions, simply aiding or benefiting from the commercial sex act of a minor is enough to be convicted of sex trafficking.

Like statutory rape laws, a minor/victim cannot consent to being trafficked. In situations in which the trafficker and victim are both minors, it may be appropriate to treat the minor perpetrator differently than an adult perpetrator considering such factors as age, levels of violence, and/or coercion tactics. Importantly, Native nations should consider whether to adopt criminal laws that prohibit victims who are minors from being prosecuted for activities related to child sexual trafficking. Alternatively, if tribal criminal laws will authorize the prosecution of minors who participate in activities associated with child sex trafficking, what factors should be considered.¹⁴⁰

Before your team develops child sex trafficking laws, it is important to understand that child sex trafficking does not require a victim be kidnapped or taken across state or international lines nor must it involve any exchange of money. Instead, compensation for the sex act can be things anything of value like food, clothing, drugs, alcohol or shelter. To alleviate concerns that tribal laws may discourage victims from reporting, tribes may also want to consider drafting Safe Harbor laws as discussed in the following text.

Safe Harbor for Victims of Child Sex Trafficking

If Native nations criminalize sex trafficking of children, enacting Safe Harbor laws recognizing that children who have been trafficked are victims of exploitation, rather than criminals who are guilty of prostitution, is important.¹⁴¹ Native nations interested in developing or revising laws against child sex trafficking are generally not limited by federal and state trafficking laws. However, federal and state laws are useful for illustrative purposes and can be a helpful starting point for discussion before developing a tribal code.

¹⁴⁰ See [Sex Trafficking in Indian Country: Advocacy Curriculum](#) for more information.

¹⁴¹ Tribal Law and Policy institute, *Sex Trafficking in Indian Country*, 52.

What federal laws are applicable to child sex trafficking?

Sex trafficking of children is defined in 18 U.S.C. § 1591. Any sex trafficking of a minor children is treated as a severe form of trafficking and results in a harsher sentencing.¹⁴² The penalties are even more severe if the child is under age fourteen, which results in a mandatory minimum sentence of fifteen years to life in prison.¹⁴³

¹⁴² See 18 U.S.C. § 1591(b) (mandating that people convicted of sex trafficking children ages fourteen to seventeen face a mandatory minimum sentence of ten years to life in prison).

¹⁴³ 18 U.S.C. § 1591.

Summary of Selected Codes—Sex Trafficking

In the following selected codes section, you will find code examples that address child sex trafficking. Although not an exhaustive list, the selected codes provide examples of how a tribe might define child sex trafficking under criminal laws, and further prohibit certain conduct with respect to child sex trafficking. The code examples provided come from:

- **Snoqualmie Tribal Code**
- **Three Affiliated Tribes (MHA Nation) Tribal Code [Loren’s Law]**
- **Federal Statutes**

Sex trafficking under the **Snoqualmie Tribal Code** §7.21(a) covers situations in which a trafficker’s alleged victim is under eighteen years of age. There is no element requiring the prosecution prove that the victim was induced by force, fraud, or coercion. This age distinction is very similar to statutory rape laws, where age of the victim is a determining factor. The age requirement is important because it clearly rejects the idea of a “child prostitute” and treats all persons under eighteen as victims, even if their trafficker does not induce participation by force, fraud, or coercion. This also reduces the chances of trafficked persons under age eighteen being prosecuted for prostitution or related crimes.

The **Snoqualmie** sex trafficking code is quite broad on its face; however, the definitions of the words used will impact who may be subject to prosecution. Specifically, the legal definitions of knowingly, force, and coercion are important to a successful prosecution.

Loren’s Law, from the MHA Nation tribal code, starts with a brief definition of sex trafficking and then lists the three ways one can be found guilty of sex trafficking. This code is more expansive than §7.21 of the **Snoqualmie Tribe Criminal Code** because it adds the language “or practices similar to prostitution.” Like the **Snoqualmie Sex Trafficking Code**, **Loren’s Law** must be read with the specific tribal code definitions in mind. Here, prostitution, sexual intercourse, and sexual contact are critical definitions.

Under **federal law**, 18 U.S.C. §§ 1589-1591 criminalizes the exploitation of a person for labor, services, or commercial sex. Generally various types of trafficking are prohibited such as:

- Commercial sex trafficking (sex act in exchange for anything of value);
- Slavery (people considered personal property);
- Involuntary servitude (labor obligation situation in which victim believes they will suffer harm, abuse, or other negative consequences);
- Peonage (involuntary servitude base on a real or alleged indebtedness);
- Debt bondage (involves a debt that can seemingly never be paid).

In accordance with 18 U.S.C. § 1591, any sex trafficking of children is automatically treated as a severe form of trafficking and results in harsher sentencing for convicted traffickers of children.¹⁴⁴ The penalties are even more severe if the child is under age fourteen, which results in a mandatory minimum sentence of fifteen years to life in prison.¹⁴⁵

¹⁴⁴ Under 18 U.S.C. § 1591, people convicted of trafficking children ages fourteen to seventeen face a mandatory minimum sentence of ten years to life in prison.

¹⁴⁵ 18 U.S.C. § 1591.

Selected Codes—Sex Trafficking

Snoqualmie Indian Tribe Tribal Code

[Title 7, Chapter 1](#)

Section 7 Offenses of Sexual Nature

§7.21 Sex Trafficking:

(a) A person is guilty of sex trafficking when they are knowingly involved in the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act, in which the commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age.

(b) The buying or selling of children for any reason.

(c) Sex Trafficking is a Class A Offense.

§4.0 Definitions

Knowingly means acting with the awareness of a fact, circumstance or result that constitutes a crime under this Chapter. A person acts knowingly with respect to the result of conduct described by the statute defining offense when the person is aware that it is highly probable that the result will be caused by the person's conduct. When knowledge of the existence of a particular fact is an element of an offense, knowledge is established if a person is aware of a high probability of its existence. Equivalent terms, such as "knowing" or "with knowledge" have the same meaning as "knowingly."

Force means the infliction, attempted infliction, or threatened infliction of bodily harm by a person, or the commission or threat of any other crime by a person against the complainant or another which causes the complainant to reasonably believe that the person has the present ability to execute the threat, thereby causing the complainant to submit.

Coercion means the use of a threat to compel or induce another person to engage in conduct which the person has a legal right to abstain from or engaging in.

Three Affiliated Tribes Tribal Code

Loren's Law

Sex Trafficking of a Minor

[Sections Omitted]

The recruitment, transportation, transfer, harboring, enticement, providing, obtaining, or receipt of any sexual act (sexual intercourse or contact) from a person under the age of 18 by any means (including electronic/telephonic), for the purpose of prostitution or practices similar to prostitution. A person is guilty of sex trafficking if the individual commits or benefits from any one or more of the following:

- 1)** Benefits financially or receives anything of value from knowing participation in the sex trafficking of a person under the age of 18, knowing or having reason to know it is derived from an act of sex trafficking.
- 2)** Promotes, recruits, entices, harbors, transports, provides or obtains by any mean another person under the age of 18, knowing that person may be subjected to sex trafficking.
- 3)** Attempts or conspires, or has the intent to promote, recruit, entice, harbor, transport, provide or obtain by any means another person of under the age of 18, knowing that person will be subjected to sex trafficking.

Definitions

[Sections Omitted]

f. Prostitution is defined as the performance for hire, or offering or agreeing to perform for hire, where there is an exchange of anything of value, or an offer to exchange anything of value for any of the following acts

1. Sexual intercourse; or

2. Sexual contact

g. Sexual intercourse is defined as vaginal intercourse, anal intercourse, fellatio or cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal intercourse, anal intercourse or fellatio and does not require emission of semen. Penetration may be committed by an object manipulated by the actor into the genital or anal opening of the complainant's body.

h. Sexual contact is the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

Federal Statutes

18 U.S.C. § 1591—Sex Trafficking of children or by force, fraud or coercion

(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).

(b) The punishment for an offense under subsection (a) is—

(1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or

(2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.

(c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.

(d) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned for a term not to exceed 25 years, or both.

(e) In this section:

(1) The term “abuse or threatened abuse of law or legal process” means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to

exert pressure on another person to cause that person to take some action or refrain from taking some action.

(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.

(3) The term “commercial sex act” means any sex act, on account of which anything of value is given to or received by any person.

(4) The term “participation in a venture” means knowingly assisting, supporting, or facilitating a violation of subsection (a)(1).

(5) The term “serious harm” means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.

(6) The term “venture” means any group of two or more individuals associated in fact, whether or not a legal entity.

18 U.S.C. § 2251A—Selling or buying of children

(a) Any parent, legal guardian, or other person having custody or control of a minor who sells or otherwise transfers custody or control of such minor, or offers to sell or otherwise transfer custody of such minor either—

(1) with knowledge that, as a consequence of the sale or transfer, the minor will be portrayed in a visual depiction engaging in, or assisting another person to engage in, sexually explicit conduct; or

(2) with intent to promote either—

(A) the engaging in of sexually explicit conduct by such minor for the purpose of producing any visual depiction of such conduct; or

(B) the rendering of assistance by the minor to any other person to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct; shall be punished by imprisonment for not less than 30 years or for life and by a fine under this title, if any of the circumstances described in subsection (c) of this section exist.

(b) Whoever purchases or otherwise obtains custody or control of a minor, or offers to purchase or otherwise obtain custody or control of a minor either—

(1) with knowledge that, as a consequence of the purchase or obtaining of custody, the minor will be portrayed in a visual depiction engaging in, or assisting another person to engage in, sexually explicit conduct; or

(2) with intent to promote either—

(A) the engaging in of sexually explicit conduct by such minor for the

purpose of producing any visual depiction of such conduct; or
(B) the rendering of assistance by the minor to any other person to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct; shall be punished by imprisonment for not less than 30 years or for life and by a fine under this title, if any of the circumstances described in subsection (c) of this section exist.

(c) The circumstances referred to in subsections (a) and (b) are that—

- (1)** in the course of the conduct described in such subsections the minor or the actor traveled in or was transported in or affecting interstate or foreign commerce;
- (2)** any offer described in such subsections was communicated or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mail; or
- (3)** the conduct described in such subsections took place in any territory or possession of the United States.

Chapter 11: Exercise #4—Commercial Exploitation of a Minor: Sex Trafficking

Learning Objective: Identify if this provision is needed or wanted in the tribe’s criminal code.

Reading: The team should consider reviewing **Part I** and should also refer to **Chapter 11** in **Part III** to help guide discussions for specifically defined crimes.

Instructions: The following discussion questions are meant to guide you in deciding what provisions you want/need to include in your code relevant to commercial exploitation of children by sex trafficking. Once all team members have completed their responses to the exercise questions, please proceed with an open forum discussion and have the team leader record a response for each question that achieves as much consensus as possible. The team lead should keep a record of consensus-based responses to the questions in the exercises.

Team Lead Tips: Note that some of the questions may require prior preparation, so each member should be provided with a copy of relevant tribal criminal codes to review prior to the meeting.

- **REVIEW** whether the tribe has a statute designed to address sex trafficking of a minor/child.
- **IDENTIFY** whether your current law addresses trafficking and solicitation of children.
- **IDENTIFY** who does your current law target (adults/juveniles).
- **IDENTIFY** what acts or omissions are targeted in your current law.
- **DISCUSS** whether the tribal community has experienced sex trafficking.
- **DISCUSS** whether there are mechanisms in place to protect children and minors from being prosecuted for “trafficking” themselves under the current or planned child trafficking code. Please refer to **Section D of Chapter 11** for information on Safe Harbor laws.
- **DISCUSS** whether juvenile traffickers should be treated different from adult traffickers (i.e., juveniles that are trafficking their dating partner) under a criminal statute.
- **DISCUSS** whether juveniles working in commercial sex industries together, without a “pimp,” should be treated differently. Will they be vulnerable to prosecution for “trafficking” each other?
- **DETERMINE** whether the team needs to add, update, or otherwise amend your criminal laws to address **cases involving the commercial exploitation of children through sex trafficking of a minor.**

Note: Use the **Worksheet** provided at the end of **Part III** to help record your answers.

Chapter 12: Sexual Abuse of a Child

This chapter focuses on sexual assault laws as they relate to children, although many of the statutes used as examples may also apply to adult victims.¹⁴⁶ The crimes addressed in this chapter concern the physical sexual abuse of a child. Related crimes of a sexual nature, including trafficking of children and sexual exploitation of children, are addressed in **Chapter 11**.

Sexual abuse can have a devastating impact on a child, and sexual abuse places children at high risk for serious and often chronic problems with health, PTSD and other mental health disorders, suicidality, eating disorders, sleep disorders, substance abuse, and distortions concerning sexuality and appropriate sexual behavior. Sexually abused children may become hypervigilant about future sexual violation and experience a sense of betrayal that compromises the trust they feel for adults who should care for and protect them.

Who does the criminal statute target?

Child sexual abuse statutes target the perpetrators who prey on children for sexual gratification. Some codes break the statute down into age groups of children with sex acts committed against younger children receiving the harshest punishment.

What state of mind is required by the alleged offender?

The state of mind may vary but may include general intent, knowing or a reckless disregard for the safety of the child.

What acts or omissions are targeted?

Rape or sexual assault of a child usually requires a sex act although the definition of a sex act can include a wide range of acts, from those involving no physical contact—for example, an adult talks to a child in a sexual manner or has a child look at their genitals or pornography to inappropriate touching, or to forced penetration or child rape. Code drafting teams must include a definitions section that includes the term sex act. In some criminal codes, crimes against children may be separated from crimes against adults and in others they may be a section of the crime of sexual assault. It is important to consider each crime described, but there are many ways to describe the crimes.

¹⁴⁶ Issues relative to sexual assault crimes such as degrees of force required, consent, and special evidence laws related to sexual assault and many others are discussed in the Tribal Law and Policy Institute's resource: [Tribal Legal Code Resource: Sexual Assault and Stalking Laws](#) (2017).

Criminalizing Offender Acts. It is important to investigate the past failures to prosecute child sex crimes at the federal, state (when the state has concurrent jurisdiction), and tribal levels to determine the most strategic definitions and classifications of crimes for prosecution under tribal law. This chapter will examine tribal laws related to sex crimes and federal law but if the state punishes crimes against children in your Native nation, you should take the time to examine your state law to understand its effectiveness and discuss how you can improve accountability when drafting your tribal criminal law.

This chapter will focus on the rape or sexual assault of a child and sexual assault of a child by relative or person in a position of trust committed in Indian country.

A. Sexual Assault of a Child

Generally, the crime of sexual assault focuses on the sex act required for a crime involving a child and the age at which the community believes a child can legally consent to sex. Before reaching the age of consent, intercourse or touching of a child is criminal, regardless of the willingness of the child. A code drafting team may take two approaches for this type of code:

1. Write a separate statute or code provision on rape of a child, or
2. Include rape of a child, with its own distinct definition, within a larger code on sexual assault of a child.

Child sexual abuse crimes may be referred to with many different words: “molestation,” “rape,” “sexual assault,” “sexual abuse,” and “incest.” The definitions of these crimes vary widely by jurisdiction. Some jurisdictions define “rape” differently than “sexual assault” and others use the term “sexual assault” to cover everything from unlawful sexual intercourse to inappropriate sexual touching. An age of consent and definitions section in the tribal code is extremely important, although forcing someone to have sexual intercourse against their will or rape is a crime irrespective of age of consent.

The most serious level of a sex crime may be called “aggravated sexual abuse,” “first-degree sexual assault,” “rape,” “statutory rape,” or other term depending upon the jurisdiction. The federal government uses the terms “aggravated sexual abuse” for what it considers the most serious level of sex crime and “sexual abuse” for the lesser level crime. Some jurisdictions use the term “first-degree sexual assault” and the term “second-degree sexual assault” for the crime with lesser sanctions. The terms vary but generally there is some type of gradation for the seriousness of sexual offenses.¹⁴⁷

¹⁴⁷ The [Tribal Legal Code Resource: Sexual Assault and Stalking Laws](#) provides a thorough discussion of criminal sexual assault statutes as they relate to adult victims. Because most jurisdictions include provisions that relate to a child victim in their rape or sexual assault criminal statute, the sexual assault resource may be helpful. It also has useful information relating to sexual assault generally, which would

Summary of Selected Codes—Sexual Assault of a Child

In the following selected codes section, you will find code examples that address rape or sexual assault of a child. Although not an exhaustive list, the selected codes provide examples of how a tribe might define rape or sexual assault of a child under criminal laws, and further prohibit certain conduct with respect to rape or sexual assault of a child. The code examples provided come from:

- **Eastern Band of Cherokee Tribal Code**
- **Swinomish Indian Tribal Community (Swinomish) Tribal Code**
- **Confederated Tribes of the Umatilla Indian Reservation (Umatilla) Tribal Code**
- **Federal Statutes**

Eastern Band of Cherokee (EBC) closely modeled their sexual abuse statute after the federal statute. One difference is that the EBC uses the age thirteen, rather than the age of twelve used in the federal law. The EBC statute states that any sexual act with a child under the age of thirteen is aggravated sexual abuse, while the federal statute says under the age of twelve.

EBC Sec. 14-20.4. – “Sexual abuse of minor or a ward requires engaging in a sexual act with another person who has attained the age of thirteen but has not attained the age of sixteen (16) and the perpetrator is at least four years older.” The requirement that the perpetrator must be at least four years older is intended to avoid charging teenagers close in age for engaging in consensual peer sex.

“Sexual acts” are defined by the EBC statutes as in the federal statute to include intercourse, oral sex, or anal sex, as well as intentional touching not through clothing of the genitalia of another person who has not obtained the age of sixteen with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. Penetration, however slight of the anal or genital opening of another with a finger or other object may also meet the definition of a sexual act.

The **Swinomish** have created specific statutes for rape of a child and child molestation, rather than incorporating these crimes into their other sexual assault criminal statutes. Rape of a child includes the following:

- A person has sexual intercourse with a child under twelve years of age and the perpetrator is at least twenty-four months older.

apply to children as well as adults. Very few jurisdictions have criminal laws in comprehensive crimes committed against children.

- A person has sexual intercourse with a child at least twelve years of age, but less than fourteen, not married to the child, and at least thirty-six months older.
- A perpetrator has sexual intercourse with another who is at least fourteen years old, but less than sixteen, not married to the person, and the person is at least forty-eight months older than the child.

The **Swinomish** consider the age of the child, as well as the difference in ages between the perpetrator and the victim. This would not criminalize sexual activity between children that are close in age to each other.

The **Swinomish** child molestation statute criminalizes the following activity:

- Knowingly engages in or causes another person under the age of eighteen to engage in sexual touching with another who is less than twelve years old, not married to the actor, and at least thirty-six months older than the victim.
- Knowingly engages in or causes another person under the age of eighteen to engage in sexual touching with another who is at least twelve, but less than fourteen years old, not married to perpetrator, and at least thirty-six months older than the victim.
- Knowingly engages in or causes another person under the age of eighteen to engage in sexual touching with another who is at least fourteen, but less than sixteen years of age.

The **Swinomish** statute considers both the age of the victim and age of perpetrator and the differences in ages in establishing the child molestation statute. They also consider the perpetrator who causes another person to engage in sexual touching of a child victim.

The **Umatilla** tribal statute distinguishes between rape and a sexual assault. Rape in their criminal code includes intercourse, and a sexual assault refers to sexual contact or other sexual offensive conduct. Anyone having intercourse with a child under the age of fourteen has committed rape. A child under the age of fourteen cannot legally consent to sex. A person is guilty of sexual assault if they have sexual contact with a child under fourteen years of age or the victim is under sixteen and the actor is at least four years older.

The **federal** sexual assault laws distinguish between types of sexual abuse based on the degree of force or threat of force. Federal law has four main categories of sexual assault: aggravated sexual abuse, sexual abuse, sexual abuse of a minor or ward, and abusive sexual conduct. Some sections apply to victims of all ages and some specifically focus on children.

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

- It is aggravated sexual abuse for a person to knowingly engage in a sexual act using force (violence) or threats of serious physical harm, regardless of victim's age.
- It is aggravated sexual abuse to commit a sexual assault by administering a drug or similar substance that substantially impairs the ability of the other to appraise or control conduct. Knowingly administering the drug through force, through threat of force, or without the knowledge or permission of another person is required.
- Any sexual act with a child under the age of twelve is aggravated sexual abuse. A child under the age of twelve can never agree or consent to sexual behavior. The government is not required to prove the perpetrator knew the child was under twelve years of age.
- If a child is between the ages of twelve and fifteen, and the perpetrator is more than four years older than the child, it is aggravated sexual abuse to use force, threats, or drugs/alcohol to commit sexual assault and results in a minimum imprisonment of thirty years. The mandatory minimum sentence is imposed due to the age of the victim.

Sexual abuse ([18 U.S.C. § 2242](#)) The victims could be adult or children. Sexual abuse carries a maximum term of twenty years of imprisonment.

- It is sexual abuse to cause someone to engage in a sexual act by threatening or placing the other person in fear, but not fear of serious bodily injury, kidnapping, or death (as is required in aggravated sexual abuse).
- It is sexual abuse when one engages in a sexual act with another who is incapable of understanding the conduct or is physically incapable of declining participation.

Sexual abuse of a minor or ward ([18 U.S.C. § 2243](#)) makes it illegal for anyone to engage in a sexual act with a child between the ages of twelve and fifteen, if the person engaging is at least four years older. This does not require force or threat of force, as required in aggravated sexual abuse. The federal conviction carries a maximum penalty of fifteen years in prison. Likewise, if someone engages in a sexual act with another person who is in detention and under the custodial authority of the person so engaging, it is sexual abuse of a ward. A defendant may use the defense that the defendant reasonably believed that the other person was sixteen or older. Marriage is also a defense. The government need not prove that the defendant knew the victim's age or that the requisite age difference existed.

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

Definitions for “sexual act” and “sexual contact” are required to understand the federal laws, as is “serious bodily injury.” Be aware that your definitions section is extremely important.

Selected Codes—Sexual Assault of a Child

Eastern Band of Cherokee Tribal Code

[Chapter 14—Criminal Law](#)

ARTICLE V. - SEXUAL ASSAULT

Sec. 14-20. - Reserved.

Sec. 14-20.1. - Reserved.

Sec. 14-20.2. - Aggravated sexual abuse.

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

(1) Knowingly causes another person to engage in a sexual act by using force against that other person; or

(2) Knowingly causes another person to engage in a sexual act by threatening or placing that other person in fear that any person will be subject to death, serious bodily injury, or kidnapping; or

(3) Knowingly renders another person unconscious and thereby engages in a sexual act with that other person; or

(4) Knowingly administers to another person by force or threat of force or without the knowledge or permission of that person a drug, intoxicant or other similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct and engages in a sexual act with that other person; or

(5) Engages in a sexual act with another person who has not attained the age of 13 years.

Sec. 14-20.3. - Sexual abuse.

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

(1) Knowingly causes another person to engage in a sexual act by threatening or placing that other person in fear; or

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

(Ord. No. 117, 3-3-2000)

Sec. 14-20.4. - Sexual abuse of minor or a ward.

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

(1) Engages in a sexual act with another person who has attained the age of 13 years but has not attained the age of 16 and who is at least four years younger than the person so engaging; or

(2) Knowingly engages in a sexual act with another person who is in official detention and under the custodial, supervisory or disciplinary authority of the person so engaging. (Ord. No. 117, 3-3-2000; Ord. No. 705, 6-3-2011)

Sec. 14-20.8. - Abusive sexual contact.

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

(1) Engages in or causes sexual contact with or by another person, if to do so would violate section 14-20.2, 14-20.3 or 14-20.4, above, had the sexual contact been a sexual act; or

(2) Knowingly engages in sexual contact with another person without that other person's permission.

(Ord. No. 705, 6-3-2011)

Sec. 14-20.9. - Definitions.

The following definitions apply to this article:

(1) The term "sexual act" means:

a. Contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

b. Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

c. The penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

d. The intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(2) The term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(3) The term "serious bodily injury" means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(4) The term "official detention" means:

a. Detention by a Tribal, Federal or State officer or employee, or under the direction of a Tribal, Federal or State officer or employee, following arrest for an offense; following

surrender in lieu of arrest for an offense; following a charge or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following civil commitment in lieu of criminal proceedings or pending resumption of criminal proceedings that are being held in abeyance, or pending extradition, deportation, or exclusion; or

b. Custody by a Tribal, Federal or State officer or employee, or under the direction of a Tribal, Federal or State officer or employee, for purposes incident to any detention described in subparagraph a. of this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation; but does not include supervision or other control (other than custody during specified hours or days) after release on bail, probation, or parole, or after release following a finding of juvenile delinquency; and

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

(Ord. No. 705, 6-3-2011)

Swinomish Indian Tribal Community Tribal Code

Title 4—Criminal Code

[Chapter 3 Sexual Offenses](#)

4-03.090 Rape of a Child.

(A) A person is guilty of rape of a child when the person has sexual intercourse, as defined in Section 4-01.040, with another who is less than twelve (12) years old and not married to the perpetrator and the perpetrator is at least twenty-four (24) months older than the victim;

(B) A person is guilty of rape of a child when the person has sexual intercourse, as defined in Section 4-01.040, with another who is at least twelve (12) years old but less than fourteen (14) years old and not married to the perpetrator and the perpetrator is at least thirty-six (36) months older than the victim; or

(C) A person is guilty of rape of a child when the person has sexual intercourse, as defined in Section 4-01.040, with another who is at least fourteen (14) years old but less than sixteen (16) years old and not married to the perpetrator and the perpetrator is at least forty-eight (48) months older than the victim.

(D) Rape of a child is a Class A offense. [History] Ord. 245 (4/7/06)

4-03.100 Child Molestation.

(A) A person is guilty of child molestation when the person engages in, or knowingly causes another person under the age of eighteen (18) to engage in, sexual touching, as defined in Section 4-01.040, with another who is less than twelve (12) years old and not married to the perpetrator and the perpetrator is at least thirty-six (36) months older than the victim.

(B) A person is guilty of child molestation when the person engages in, or knowingly causes another person under the age of eighteen (18) to engage in, sexual touching as

defined in Section 4-01.040, with another who is at least twelve (12) years old but less than fourteen (14) years old and not married to the perpetrator and the perpetrator is at least thirty-six (36) months older than the victim.

(C) A person is guilty of child molestation when the person engages in, or knowingly causes another person under the age of eighteen (18) to engage in, sexual touching as defined in Section 4-01.040, with another who is at least fourteen (14) years old but less than sixteen (16) years old and not married to the perpetrator and the perpetrator is at least forty-eight (48) months older than the victim.

(D) Child molestation is a Class A offense.

Confederated Tribes of the Umatilla Indian Reservation Tribal Code

Criminal Code

Chapter 4 Crimes

Part XII. Sex-Related Crimes

SECTION 4.108. RAPE

A. A person who has sexual intercourse with another commits the crime of rape if:

1. The victim is subjected to forcible compulsion by the actor;
2. The victim is incapable of consent by reason of mental defect, mental incapacitation or physical helplessness;
3. The victim is incapacitated; or
4. The victim is under 16 years of age.

B. Rape is a felony

SECTION 4.109. SEXUAL ASSAULT

A. A person who has sexual contact with another person or causes such other person to have sexual contact with him or her, is guilty of sexual assault if:

1. He or she knows the conduct is offensive to the other person;
2. He or she knows that the other person suffers from mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct;
3. He or she knows that the other person is unaware that a sexual act is being committed;
4. The other person is less than fourteen years old;
5. He or she has substantially impaired the other person's power to appraise or control his or her conduct by administering or employing drugs, intoxicants or other means for the purpose of preventing resistance;
6. The other person is less than 16 years old and the actor is at least four years older than the other person;
7. The other person is less than 21 years old and the actor is his or her guardian or otherwise responsible for the general supervision of his or her welfare; or
8. The other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over him or her.

B. Sexual Assault is a felony

Federal Statutes

Federal Chapter 109A Sexual Abuse

[18 U.S.C. § 2241](#)

§ 2241. Aggravated sexual abuse

(a) [Section omitted]

(b) [Section omitted]

(c) WITH CHILDREN.—

Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging), or attempts to do so, shall be fined under this title and imprisoned for not less than 30 years or for life. If the defendant has previously been convicted of another Federal offense under this subsection, or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.

(d) STATE OF MIND PROOF REQUIREMENT.—

In a prosecution under subsection (c) of this section, the Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years. (Dec. 2007)

[18 U.S.C. § 2242](#) Sexual Abuse

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly—

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or

(2) engages in a sexual act with another person if that other person is—

(A) incapable of appraising the nature of the conduct; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;

or attempts to do so, shall be fined under this title and imprisoned for any term of years or for life. (Dec. 2007)

[18 U.S.C. § 2243](#) Sexual Abuse of a Minor or Ward of a minor.

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who--has attained the age of 12 years but has not attained the age of 16 years; and is at least four years younger than the person so engaging; or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

Of a ward. Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who is--in official detention; and under the custodial, supervisory, or disciplinary authority of the person so engaging; or attempts to do so, shall be fined under this title, imprisoned not more than 15 years or both.

Defenses.

In a prosecution under subsection (a) of this section, it is a defense, which the defendant must establish by a preponderance of the evidence that the defendant reasonably believed that the other person had attained the age of 16 years.

In a prosecution under this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the persons engaging in the sexual act were at that time married to each other.

State of mind proof requirement. In a prosecution under subsection (a) of this section, the Government need not prove that the defendant knew--the age of the other person engaging in the sexual act; or that the requisite age difference existed between the persons so engaging.

18 U.S.C. § 2244 Abusive Sexual Contact

(a) SEXUAL CONDUCT IN CIRCUMSTANCES WHERE SEXUAL ACTS ARE PUNISHED BY THIS CHAPTER.—

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in or causes sexual contact with or by another person, if so to do would violate—

- (1)** subsection (a) or (b) of section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than ten years, or both;
- (2)** section 2242 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than three years, or both;
- (3)** subsection (a) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both;
- (4)** subsection (b) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both; or
- (5)** subsection (c) of section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title and imprisoned for any term of years or for life.

(b) IN OTHER CIRCUMSTANCES-

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in sexual contact with another person without that other person's permission shall be fined under this title, imprisoned not more than two years, or both.

(c) OFFENSES INVOLVING YOUNG CHILDREN. —

If the sexual contact that violates this section (other than subsection (a)(5)) is with an individual who has not attained the age of 12 years, the maximum term of imprisonment that may be imposed for the offense shall be twice that otherwise provided in this section.

18 U.S.C. § 2246. Definitions for Chapter

As used in this chapter [18 U.S.C. §§ 2241 *et seq.*]-

(1) [Section omitted]

(2) the term "sexual act" means—

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(1) the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(2) the term "serious bodily injury" means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty;

(3)

[Sections omitted]

B. Sexual Assault of a Child by Relative or Person in a Position of Trust

This section focuses on tribal codes that are specific to crimes involving children sexually assaulted by family members or people in positions of trust. Most child victims know their perpetrator. Of sexual abuse cases reported to law enforcement:

- 93 percent of juvenile victims knew the perpetrator;
- 59 percent were acquaintances;
- 34 percent were family members; and
- 7 percent were strangers to the victim.¹⁴⁸

Generally, this crime requires a sex act by a person in a position of trust and responsibility against a child and may include the age the community believes a child can consent to sex. Before reaching the age of consent, intercourse or touching is considered a crime, regardless of the willingness of the child. A code drafting team may take two approaches in their code:

1. Write a separate statute or code provision on sexual assault of a child by a relative or person in a position of trust; or
2. Include sexual assault of a child by a relative or person in a position of trust, with its own distinct definition including relevant markers on the age of the child, within a larger code on sexual assault of a child.

Incest

Incest with a child commonly refers to sexual contact between a child and another when they are related by blood or adoption to the child. Blood relations generally include children/grandchildren/siblings, cousins, and others. Incest provision should be tailored to the customs and traditions of the Native nation. Some Native nations prohibit marriage within clans and may want to incorporate prohibiting sexual activity within clans and so forth into criminal laws. Other tribes may frown upon marriage within a clan but not criminalize it. Also, the tribe's definition of "adoption" should be considered when defining the crime of incest. Ultimately, the code development team must work within the community standards when creating codes.

Persons in a Position of Trust

Your community should consider those professions or positions in the community that have regular contact with children and are in positions of authority or trust. When these professionals use their positions to sexually assault children, a harsher punishment may be appropriate. Professions such as teacher, day care provider, coach, medicine person, spiritual advisors, clergy, doctors, nurses, foster care families, or other similar positions should be considered. Because these positions are "positions of trust," a higher standard of behavior may be expected to preserve the trusting relationship. Positions of trust may vary from one community to another.

¹⁴⁸ Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, [National Crime Victimization Survey, 2010–2014](#) (2015).

Summary of Selected Codes—Sexual Assault of a Child by Relative or Person in a Position of Trust

In the following selected codes section, you will find tribal code examples that address sexual assault of a child by a relative or person in a position of trust. Although not an exhaustive list, the selected codes provide examples of how a tribe might approach sentencing or penalties under criminal laws. The code examples provided are from:

- **Swinomish Tribal Code**
- **Tulalip Tribal Code**
- **Federal Statutes**

The **Swinomish** Tribal Code makes it a Class A offense,¹⁴⁹ the most serious criminal offense, for a person to use their position of trust over another to either take advantage of another resulting in sexual intercourse or sexual touching. This includes children but could also apply to adult victims. Additionally, sex with an ancestor, descendant, sibling, or another in a familial relationship, as defined by tribal custom as one in which sexual intercourse is prohibited, is a serious Class A offense.¹⁵⁰ Consent of the victim is not a defense to the crime.

The **Tulalip** have a separate incest statute, which makes it a Class F offense,¹⁵¹ the most severe criminal offense to have sexual contact or sexual intercourse with a lineal or collateral ancestor or descendant of the fourth degree of the whole or half-blood, a brother or sister of whole or half-blood, a stepson or stepdaughter, or adopted son or daughter. The statute allows consent as a defense with or upon a stepchild, adopted child, or a child that has a legal guardian, but consent is ineffective if that victim is less than eighteen years of age.

Please note that the **federal** statutes in the previous section are also used to charge relatives or persons in a position of trust who sexually abuse children. The **Major Crimes Act (MCA)** (18 U.S.C. § 1153) also includes the crime of incest. Incest is not defined in the United States Code; therefore, federal prosecutors will assimilate their state's incest law to include the sentencing options. Recall that the **MCA** specifies certain federal crimes committed by an Indian against the person or property of another Indian or other person.

For non-Indians committing the crime of incest against an Indian child in Indian Country, please note that the **General Crimes Act** (18 U.S.C. § 1152) may apply. Section 1152 paired with 18 U.S.C. § 13 sets forth federal criminal jurisdiction, and if a specific federal crime on incest is

¹⁴⁹ Title 4, Chapter 12, §4-12.020(A) Any person convicted of a Class A offense shall be subject to a sentence of up to one (1) year in jail and/or a fine up to \$5,000.00 and/or community service.

¹⁵⁰ Ibid.

¹⁵¹ Title 3, Chapter 3.05, §3.05.090(1)(f): (1) A person convicted of an offense may be sentenced as follows: (f) For conviction of a Class F offense, the offender may be sentenced to imprisonment for a period not to exceed three years, a fine not to exceed \$15,000, or both, unless another sentence is specified by statute; §3.05.090(2). (2) Crimes punishable as a Class F offense are designated felony crimes.

absent, §1152 provides federal jurisdiction to prosecute the crime of incest importing state law and also utilizes state sentencing guidelines. The relevant state law is the law of the state in which the crime occurred.

Selected Codes—Sexual Assault of a Child by Relative or Person in a Position of Trust

Swinomish Indian Tribal Community Tribal Code

Title 4—Criminal Code

[Chapter 3 Sexual Offenses](#)

4-03.010 Abusive Sexual Intercourse (Rape).

A. Any person who knowingly engages in, causes, or attempts to cause, another person (including a child) to engage in sexual intercourse, as defined in Section 4-01.040, in any one of the following circumstances commits the crime of abusive sexual intercourse **(1)-(3)** [Sections omitted];

(4) when the defendant is in a position of trust or authority with respect to the other person, and takes advantage of that position to cause sexual intercourse;

(5) when the defendant is related to the victim as an ancestor, descendant, or sibling;

(6) when the defendant is related to the victim in a familial relationship defined by tribal custom as one in which sexual intercourse is prohibited;

(7) [Section omitted]

(8) [Section omitted].

(Ord. 75 (4/2/91)).

4-03.020 Abusive Sexual Touching.

(A) Any person who knowingly engages in, causes or attempts sexual touching, as defined in Section 4-01.040, with or by another person in any one of the following circumstances commits

the crime of abusive sexual touching:

(1)-(3) [Section omitted];

(4) when the defendant is in a position of trust or authority with respect to the other person, and takes advantage of that position to cause sexual touching; or

(5) when the defendant is related to the victim as an ancestor, descendant, or sibling.

(Ord. 75 (4/2/91))

Tulalip Tribal Code

Title 3—Criminal Offenses and Infractions

[Chapter 3.20 Sex Crimes](#)

3.20.050 Incest.

(1) A person commits the offense of incest if he or she has sexual contact or sexual intercourse with:

(a) A lineal or collateral ancestor or descendant of the fourth degree of the whole or half blood;

(b) A brother or sister of the whole or half blood;

(c) Any stepson or stepdaughter; or

(d) Adopted son or daughter.

(2) For the purpose of determining the degree of a relationship, it shall be determined by counting “upward” from one of the persons in the sexual relationship, and then “downward” to the other participant, counting one degree for each generation in the ascending as well as descending line.

(3) Consent is a defense under this section to incest with or upon a stepchild, adopted child, or a child that has legal guardian, but consent is ineffective if the victim is less than 18 years old.

[Res. 2018-444; Res. 2012-445 § 51; Ord. 49 § 6.6.5, 1-8-2010 (Res. 2010-10)].

Federal Statutes

18 U.S.C. § 1152—General Crimes Act

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

18 U.S.C. § 1153—Major Crimes Act

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

Chapter 12: Exercise—Sexual Abuse of a Child

Learning Objective: Identify if this provision is needed or wanted in the tribe’s criminal code.

Reading: The team should consider reviewing **Part I** and should also refer to **Chapter 12** in **Part III** to help guide discussions for specifically defined crimes.

Instructions: The following discussion questions are meant to guide you in deciding what provisions you want/need to include in your code relevant to sexual abuse of a child. Once all team members have completed their responses to the exercise questions, please proceed with an open forum discussion and have the team leader record a response for each question that achieves as much consensus as possible. The team lead should keep a record of consensus-based responses to the questions in the exercises.

Team Lead Tips: Note that some of the questions may require prior preparation, so each member should be provided with a copy of relevant tribal criminal codes to review prior to the meeting.

- **EXAMINE** your rape/sexual assault/sexual abuse statutes to determine how they address a child victim.
- **DISCUSS** whether the current statutes have been adequate in meeting the needs of child victim.
- **REVIEW** what the tribal code states is the current age at which a child may consent to sexual activity and whether the age needs to be amended.
- **DISCUSS** whether the tribal community needs a statute that separates rape and sexual assault of children from the general crime of rape or sexual assault (or is it your preference to integrate the crimes against children into your general rape or sexual assault statute?).
- **DISCUSS** how to handle consensual sexual activity between children close in age. Is there an age difference between sexual participants, where there is great concern about manipulation due to the older actor’s age or experience?
- **DISCUSS** whether this law should apply to juvenile perpetrators? Why or why not?
- **DETERMINE** whether you have laws relating to sexual activities between family members or relating to sexual abuse by people in trusted position.
- **DISCUSS** what changes, if any, are needed to provide the maximum punishment allowed for individuals who use their position of trust to take advantage of a child sexually.
- **DETERMINE** whether the team needs to add, update, or otherwise amend your criminal laws to address **cases involving the commercial exploitation of children through sex trafficking of a minor**.

Note: Use **Worksheet** provided at the end of **Part III** to help record your answers.

Chapter 13: Contributing to the Delinquency of a Minor

Many Native nations have codes prohibiting actions that contribute to the delinquency of a minor. Delinquency is a term used to describe the wrongdoing or violation of a law by minors. Delinquent acts may be considered crimes if perpetrated by adults, however juveniles or minors are often treated differently under laws due in part to cognitive development.

What should crimes of contributing to the delinquency of a minor focus on?

Contributing to the delinquency of a minor codes focus on the actions or omissions of adults that ultimately contribute to the delinquent acts of a minor. For example, if the tribe has a code provision prohibiting contributing to the delinquency of a minor, individuals eighteen years of age or older, may be charged with a crime for actions such as providing access to controlled substances, pornography, adult-only businesses, and other materials that the local community deems inappropriate for a minor. More expansive contributing to the delinquency of a minor laws are aimed at limiting adults from assisting minors with any action that is a violation of juvenile-specific offenses, such as breaking curfew and truancy.

How can a tribal code incorporate offenses relevant to contributing to the delinquency of a minor?

Generally, there are two common approaches to a drafting and implementing a contributing to the delinquency of a minor code:

1. The code can be written to create a general prohibition against contributing to the delinquency or unlawful conduct of a minor.
2. The code can be written to create a prohibition against specific acts that are listed within the code or other sections of the nation's criminal code.

For those taking the first approach, be sure to have all terms clearly defined within the code. See **Chapter 8** for drafting definitions. For those taking the second approach, it may be a good idea to have a general catchall statement that covers situations not specifically listed.

Summary of Selected Codes—Contributing to the Delinquency of a Minor

In the following selected codes section, you will find contributing to the delinquency of a minor code examples. Although not an exhaustive list, the selected codes provide examples of how a tribe might define contributing to the delinquency of a minor under criminal laws. The code examples provided come from:

- **Fort Peck Assiniboine and Sioux Tribe (Fort Peck) Tribal Code**
- **Pascua Yaqui Tribal Code**
- **White Mountain Apache Tribal Code**
- **Winnebago Tribe of Nebraska Tribal Code**

The **Fort Peck Tribal Code (§ 460)** takes a general approach, prohibiting *any person* from aiding a minor in committing a delinquent act (acts committed by a juvenile that if committed by an adult would be a crime) or status offense. Delinquent youth is defined in Title 9 of the tribal code and status offenses (crimes that can only be committed by youth) such as curfew are defined in Title 7 of the tribal code.

Similarly, the **Pascua Yaqui Tribal Code (4 PYTC § 1-80)** takes a general approach, prohibiting any person from causing, encouraging, or contributing to the delinquency of a child. The **Pascua Yaqui Tribal Code** further states that contributory delinquency can be prosecuted, and that people may be prosecuted under the law even if the child in question has not been proven to be delinquent.

The **White Mountain Apache Criminal Code (§ 220)** also takes a general approach. However, it is unique because it prohibits causing, encouraging, or assisting a minor to be delinquent or “in need of supervision” as defined by the White Mountain Apache Juvenile Code.

The **Winnebago Tribe of Nebraska** has a more specific code (§ 3-715) that prohibits contributing to the delinquency of a child and procuring alcohol for a minor. Here, § 3-715 is defined as a Class III offense.¹⁵² The code specifically prohibits encouraging, causing, or contributing to the delinquency or need for supervision of a child under eighteen years of age. Subsection 3 of the code prohibits giving, selling, or otherwise provided alcoholic liquor to a person under the age of twenty-one, expanding the definition of *minor* for purposes of Subsection 3. Subsection 3 also comes with a mandatory minimum of thirty days imprisonment *and* a \$500 fine.

It is important to note that contributing to the delinquency of a minor is not a specifically enumerated **federal** offense.

¹⁵² Title 1B, Article 7, Rule 1B-705 Designation of offenses: 1. Offenses are designated as Class I offenses, Class II offenses, and Class III offenses. 2. An offense for which no penalty or sentence is specifically designated as a certain class of offense shall be treated for purposes of bail, sentencing, and punishment as a Class III offense.

Selected Codes—Contributing to the Delinquency of a Minor

Fort Peck Tribes Comprehensive Code of Justice

Title 7—Criminal Offenses

Chapter 4. Crimes against the Public Order

Subchapter F. Exploitations of minors and others

Sec. 460. Contributing to the delinquency of a minor.

Any person, including any parent or other person with lawful custody of a minor, who intentionally, negligently, or recklessly causes, encourages, contributes to or aids a minor in committing a delinquent act or status offense, shall be guilty of a Class A misdemeanor.

Pascua Yaqui Tribal Code

Title 4. Criminal Code

Chapter 1 Offenses

Subchapter B Crimes against Children and Elders

Section 80 Contributing to the Delinquency of a Minor (4 PYTC § 1-80)

(A) A person who by any act causes, encourages or contributes to the delinquency of a child, or who for any cause is responsible therefore may be found guilty of such offense.

(B) The procedure and prosecution shall be the same as in other criminal cases.

(C) When the charge concerns the delinquency of a child or children, the offense for convenience may be termed contributory delinquency.

(D) to find a person guilty of violating the provisions of this section, it is not necessary to prove that the child has become delinquent if it appears from evidence that through any act, neglect or omission of duty or by any improper act or conduct on the part of such person, the delinquency of a child has been caused or encouraged.

White Mountain Apache Tribal Code

White Mountain Apache Criminal Code

Chapter 2. Offenses

SECTION 2.20 CONTRIBUTING TO THE DELINQUENCY OF A MINOR

A. An adult person is guilty of an offense who:

1. Knowingly causes, encourages, or advises a minor to commit an offense as defined under the provisions of this Code; or

2. Knowingly causes, encourages or assists a minor to be delinquent or in need of supervision as defined under the provisions of the Juvenile Code.

B. A person found guilty under this Section may be sentenced to imprisonment for a period not to exceed Three Hundred Sixty-Five (365) Days or pay a fine not to exceed Five Thousand Dollars (\$5,000.00), or both.

SECTION 2.62 SALES OF TOXIC SUBSTANCES TO MINORS

A. Any person is guilty of an offense who sells, permits the sale of, attempts to sell, conspires to sell, trades, gives, or transfers any toxic substance or tobacco product to any person under the age of Eighteen (18) Years of age.

1. As used in this Section the term “toxic substance” shall include glue, cement or other substance containing one or more of the following chemical compounds: acetone and acetate, benzene, butyl-alcohol, ethyl-alcohol, menthyl alcohol, methyl ethyl ketone, pentachlorophenol, petroleum ether, or other chemical substance capable of causing a condition of intoxication, inebriation, excitement, stupefaction, or of the dulling of the brain or nervous system as a result of the inhalation of the fumes or vapors of such chemical substance.

B. A person found guilty under this Section may be sentenced to imprisonment for a period not to exceed One Hundred Eighty (180) Days and to pay a fine not to exceed Five Hundred Dollars (\$500.00) or both.

Winnebago Tribe of Nebraska Code

Title 3. Criminal Code

Article 7. Crimes against Public Health, Safety and Welfare

3-715 Contributing to the delinquency of a child; definitions; procuring alcohol for a minor; penalties.

1. Any person who, by any act, encourages, causes, or contributes to the delinquency or need for supervision of a child under eighteen years of age, so that such child becomes, or will tend to become, a delinquent child, or a child in need of supervision, commits the offense of contributing to the delinquency of a child.

2. The following definitions shall be applicable to this Section:

A. “Delinquent child” shall mean any child under the age of eighteen years who has violated any law of the Tribe, of the state, or any city or village ordinance; and

B. “Child in need of supervision” shall mean any child under the age of eighteen years
(i) who, by reason of being wayward or habitually disobedient, is uncontrolled by his/her parent, guardian, or custodian,
(ii) who is habitually truant from school or home; or
(iii) who departs him/herself so as to injure or endanger seriously the morals or health of him/herself or others.

3. Any person who gives, sells or otherwise provides alcoholic liquor to a person under the age of twenty-one commits the offense of procuring alcohol for a minor.

4. Contributing to the delinquency of a child is a Class III offense.

5. Procuring alcohol for a minor is a Class II offense and shall be subject to a mandatory minimum penalty of thirty (30) days imprisonment and a five hundred dollar (\$500.00) fine.

Chapter 13: Exercise—Contributing to the Delinquency of a Minor

Learning Objective: Identify if this provision is needed or wanted in the tribe’s criminal code.

Reading: The team should consider reviewing **Part I** and should also refer to **Chapter 13** in **Part III** to help guide discussions for specifically defined crimes.

Instructions: The following questions are meant to guide you in deciding what provisions you want/need to include in your code relevant to contributing to the delinquency of a minor. Once all team members have completed their responses to the exercise questions, please proceed with an open forum discussion and have the team leader record a response for each question that achieves as much consensus as possible. The team lead should keep a record of consensus-based responses to the questions in the exercises.

Team Lead Tips: Note that some of the questions may require prior preparation, so each member should be provided with a copy of relevant tribal criminal codes to review prior to the meeting.

- **WHAT** kind of activities, paraphernalia, or substances should minors be prohibited from?
- **DETERMINE** whether adults will be criminally prosecuted for helping minors overcome all these prohibitions.
- **IDENTIFY** any codes that formally define “delinquency.”
- **DISCUSS** whether the tribal is particularly concerned with, or apathetic toward, specific delinquent actions of minors and ways the statutes might reflect community values.
- **DISCUSS** whether a law against contributing to the delinquency of a minor should interact with the current juvenile justice or status offense codes.
- **DETERMINE** whether all adults be treated equally under the code, or should parent(s)/guardian(s) receive different treatment?
- **DETERMINE** whether the team needs to add, update, or otherwise amend your laws to better address **cases involving contributing to the delinquency of a minor**.

Note: Use **Worksheet** provided at the end of **Part III** to help record your answers.

Chapter 14: Penalties and Sanctions

It is important to consider sentencing options when developing criminal laws. There is no mandate placed upon tribes in terms of sentencing alternatives that must be imposed by the tribal court, however tribal sentencing laws provide important guidance and mandates during the post-conviction phase of criminal proceedings. Sentencing approaches and options may vary greatly from tribe to tribe and might include punitive measures such as penalties and sanctions, or restorative measures such as community service, restitution, mental health services, addiction counseling, or forms of culturally relevant services and opportunities.

Most tribal criminal codes incorporate some forms of punitive sentencing options in their criminal statutes. Penalties or sanctions provide a means for tribal courts to hold offenders accountable for prohibited acts while also serving to deter future crime.

Why is it important to consider sentencing options?

Regardless of the approach to sentencing your tribe chooses to incorporate into your criminal laws, it is important to address sentencing as part of your code development process to ensure that tribal judges are provided with some form of sentencing guidance and so that defendants know the maximum possible punishment that they are facing. This is important to ensure consistency in the implementation of your criminal laws and allows some mitigation factors to be considered when allowed by tribal law.

What factors should be considered when developing sentencing options in your tribal code?

When developing sentencing options within your tribal codes, it is important that your code development team consider the nature of the crime (violent with child victim vs. victimless crimes) and the goal of the sentence (i.e., to punish, deter, or rehabilitate). It is also possible that the code development team will identify multiple sentencing goals for specified crimes and if that is the case, incorporating sentencing options that factor in judicial discretion to assign a sentence appropriate to the nature of the crime, the facts involved in a particular case, and the history of the defendant might be a good option. Alternatively, it may be determined that consistency in sentencing is a primary goal, hence minimum mandatory sentences and/or graduated sentencing/sentencing guidelines may be deemed more appropriate.

The tribal code development team may choose to discuss the primary purposes of punishment from the tribal community's perspective. Discussing the following questions will help to illuminate the most appropriate sentencing approach for your tribal community:

- What is/are the primary goal(s) of sanctions? Punishment, safety, and/or rehabilitation?
- How can sanctions ensure the safety of victims?
- How can sanctions serve to rehabilitate the perpetrator?

- Do you want to increase sanctions for sexual assaults that involve firearms or other weapons?
- What sanctions fit our traditions?

Also important to the sentencing review and development process is to conduct a preliminary assessment of available justice system and other system resources that might be available for defendants. This may include a discussion about access to detention facilities, postadjudication services such as probation, mental health services, alcohol and substance abuse services, cultural mentorship programs, or other similar programming that may foster the intended results or goals of assigned sentences.

What are some of the federal laws that impact tribal court sentencing?

The ICRA and TLOA may both impact tribal court sentencing.

If a tribe is sentencing a defendant in a criminal case to a total term of imprisonment of more than one year, the Indian tribe shall:

1. provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
2. at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;
3. require that the judge presiding over the criminal proceeding—
 - (A) has sufficient legal training to preside over criminal proceedings; and
 - (B) is licensed to practice law by any jurisdiction in the United States;
4. prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and
5. maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.¹⁵³

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

See also [Tribal Law and Order Act Enhanced Sentencing Authority: Tribal Code Development Considerations Quick Reference Overview & Checklist](#).

¹⁵³ 25 U.S.C. § 1302(b)-(c).

When considering sentencing options applicable to crimes committed against child victims, it is worthwhile to discuss whether the tribe currently exercises enhanced sentencing authority and, if the tribe does not, whether enhanced sentences should apply to some of these crimes. Enhanced sentencing under TLOA will only apply if the defendant is a person accused of a criminal offense who:

1. Has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or
2. Is being prosecuted for any offense comparable to an offense that would be punishable by more than one year of imprisonment if prosecuted by the United States or any of the states.¹⁵⁴

Why might classification of offenses be important to consider?

Assigning “degrees” or “classes” to specific crimes based upon aggravating circumstances or number of offenses is a way of assigning a level of severity among or within crimes. For example, some sexual assaults crimes are deemed, by various jurisdictions, to be more egregious or dangerous than other sexual assaults. For instance, when a sexual assault involves the use of a weapon or where the victims are particularly vulnerable, such as children, such forms of sexual assault may be assigned a specific degree or classification to ensure that the defendant, if convicted, will be subject to a harsher penalty. Because Native nations’ sanctions for incarceration and fines have been limited by the ICRA, assigning degrees or classes to crimes may seem insignificant. However, designating a degree or class within your tribal criminal code can send an important message as to severity of the crime and can also have postadjudication implications or collateral consequences such as sex offender registration and community notification requirements.

For example, whether a person is involved in the creation,¹⁵⁵ distribution,¹⁵⁶ and/or possession of child pornography, the punishment should reflect the circumstances. Even though Native nations are somewhat limited in the length of jail time or amount of fines they can impose, they may still desire to provide some gradation in penalties or mandatory sentencing. When discussing whether to grade or classify an offense given the foregoing example, the code team may want to discuss:

- **Is the defendant a registered sex offender?**
Federal law allows for harsher penalties for sex offenders with prior convictions. Is this an example to follow?
- **What type of child pornography does the defendant possess?**
Federal law creates harsher sentences for “aggravated situations” such as

¹⁵⁴ 25 U.S.C. § 1302 (b).

¹⁵⁵ A first-time offender convicted of producing child pornography under 18 U.S.C. § 2251 face fines and a statutory minimum of fifteen years to thirty years maximum in prison.

¹⁵⁶ A first-time offender convicted of transporting child pornography in interstate or foreign commerce under 18 U.S.C. § 2252 faces fines and a statutory minimum of five years to twenty years maximum in prison.

“[v]iolent, sadistic, or masochistic images” and sexual abuse of the minor depicted.¹⁵⁷
Is a harsher punishment or mandatory sentence appropriate for your nation?

These scenarios should be discussed so the code can include appropriate sanctions, perhaps creating a sentencing scale. The federal sentencing laws highlighted in this section are merely for illustrative purposes; each tribal community will need to create a sentencing structure that is tailored to its circumstances and resources.

What are some special sentencing considerations for your tribal code development team?

Sex offender registration and notification:¹⁵⁸ Activities related to commercial sexual exploitation of minors or sexual assault of a minor may have farther-reaching consequences for offenders than fines and/or jail time. For example, a tribe may have existing laws that apply to convicted sex offenders. If that is the case, it is important that the code development team become familiar with any sex offender registration laws and requirements to ensure consistency within the code.

Civil forfeiture:¹⁵⁹ Tribes may wish to use civil forfeiture to gain any proceeds from an offender convicted of creation and/or distribution of pornography. The tribe may consider drafting statutes that address civil forfeiture and/or criminal asset forfeiture. Generally, the rules governing tribal civil jurisdiction and/or criminal jurisdiction will govern the tribe’s authority in these matters but civil forfeiture often is not dependent on a crime being committed with a lower standard of proof. Conversely, criminal forfeiture may only be obtained following a conviction and usually is sought during criminal sentencing.

Firearm restrictions:¹⁶⁰ If considered a felony, federal firearms laws may prohibit a convicted offender from possessing a firearm. Examples might include qualifying crimes of domestic violence,¹⁶¹ those subject to qualifying orders of protection, as well as certain convictions for crimes against children.¹⁶²

¹⁵⁷ Child Exploitation and Obscenity Section, Department of Justice, “[Citizen’s Guide to U.S. Federal Child Exploitation and Obscenity Laws](https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-child-exploitation-and-obscenity-laws),” <https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-child-exploitation-and-obscenity-laws> (accessed Nov. 12, 2020).

¹⁵⁸ For more information see the federal Office on Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), <https://smart.ojp.gov> (accessed Dec. 4, 2020).

¹⁵⁹ For useful information on civil and criminal forfeiture (not tribal specific) that addresses civil and criminal forfeiture targeting crime of sex trafficking, please see Charlene Whitman, “Hitting Them Where It Hurts: Strategies for Seizing Assets in Human Trafficking Cases,” <https://aequitasresource.org/wp-content/uploads/2018/09/Hitting-Them-Where-it-Hurts-Strategies-for-Seizing-Assets-in-Human-Trafficking-Cases.pdf> (accessed Dec. 4, 2020).

¹⁶⁰ Note that states may have laws addressing firearms and tribes may possess treaty rights and have tribal laws that address possession of firearms after a criminal conviction. For more information on federal firearms laws, see “Criminal Resource Manual 112. Firearms Charges,” <https://www.justice.gov/jm/criminal-resource-manual-112-firearms-charges> (accessed Dec. 4, 2020).

¹⁶¹ 18 U.S.C. § 922(g)(9) (amending the Federal Gun Control Act of 1968 by banning possession of firearms by individuals convicted of a misdemeanor crime of domestic violence).

¹⁶² 18 U.S.C. § 922(g).

Summary of Selected Codes—Penalties and Sanctions

In the following selected codes section, you will find code examples that address penalties and sanctions for cases involving crimes against children. Although not an exhaustive list, the selected codes provide examples of how a tribe might approach sentencing or penalties under criminal laws. The code examples provided are from:

- **Eastern Band of Cherokee Tribal Code**
- **Hopi Tribal Code**
- **Federal Statutes**

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

The following paragraphs describe the major requirements or differences between each sexual assault crime of the **Eastern Cherokee** sexual assault code. The definitions section contains important definitions including such words as sexual act, sexual contact, and serious bodily injury. Note the importance of providing definitions and the varying degrees of the crime of sexual abuse. For information on drafting definitions, please see **Chapter 8**.

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

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

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

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

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

The **Hopi Code** has three sexual assault offenses: "enticement of a minor," "sexual assault," and "sexual contact with a minor." All three offenses are considered "dangerous offenses" and carry the potential of up to three years and up to a \$15,000 fine. The **Hopi Code** categorizes all criminal offenses as a "dangerous offense," "serious offense," "offense," or a "petty offense." Each category carries a specific maximum penalty with the dangerous offense carrying the most serious penalty. The tribal judge is not compelled to deliver a required period of incarceration or fine, as in the case of **Eastern Cherokee**, but rather must evaluate each case and has discretion to determine the appropriate sanctions. A judge has discretion to sentence a repetitive offender of the same or comparable offense to one degree higher than the sentence imposed. Other penalties may be ordered as well, such as restitution, diversion from criminal prosecution, community service, treatment, probation, parole, or suspension of a sentence, unless a provision of the criminal code prohibits such a penalty for the specified crime.

Federal sentencing considerations are codified at 18 U.S.C. § 3553—Imposition of a sentence.¹⁶³ The federal sentencing guidelines provide nonbinding rules intended to promote a uniform sentencing policy.¹⁶⁴ The guidelines provide guidance in terms of the factors that a judge must take into account when determining a sentence, however, federal judges do have some discretion to depart from sentencing guidelines. When departing from the guidelines, the judge must explain the reasons for the departure on the record. Tribes may consider establishing sentencing guidelines within their own codes if they determine that doing so will be a good approach to sentencing and align with sentencing approaches.

¹⁶³ 18 U.S.C. § 3553.

¹⁶⁴ "2021 Guidelines Manual Annotated," U.S. Sentencing Commission, <https://www.ussc.gov/guidelines> (accessed November 3, 2021).

Selected Codes—Penalties and Sanctions

Eastern Band of Cherokee Indians Code of Ordinances

Part II Code of Ordinances

Chapter 14 Criminal Law

ARTICLE V. - SEXUAL ASSAULT

Sec. 14-20.4.—Sexual abuse of minor or a ward.

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

(1) Engages in a sexual act with another person who has attained the age of 13 years but has not attained the age of 16 and who is at least four years younger than the person so engaging; or

(2) Knowingly engages in a sexual act with another person who is in official detention and under the custodial, supervisory or disciplinary authority of the person so engaging.

Sec. 14-20.10.—Punishment.

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

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

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

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

Hopi Code

Title III: Criminal Code

Chapter 4. Penalties

3.4.1 IMPRISONMENT AND FINES.

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

1. A maximum of three years in custody and/or a fine of up to \$15,000.00 upon conviction for an offense which is defined in this Code as a “dangerous offense;”

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

3.4.2 REPETITIVE OFFENDERS.

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

3.4.3 CONSECUTIVE TERMS OF IMPRISONMENT.

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

3.4.4 OTHER CRIMINAL PENALTIES.

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

Federal Statutes

18 U.S.C. § 3553—Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1)** the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2)** the need for the sentence imposed—
 - (A)** to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B)** to afford adequate deterrence to criminal conduct;

sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) CHILD CRIMES AND SEXUAL OFFENSES.—

(A) [2] Sentencing.—In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless—

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements. If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court’s statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, [3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) PRESENTENCE PROCEDURE FOR AN ORDER OF NOTICE.—Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) LIMITED AUTHORITY TO IMPOSE A SENTENCE BELOW A STATUTORY MINIMUM.—

Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) LIMITATION ON APPLICABILITY OF STATUTORY MINIMUMS IN CERTAIN CASES.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846), section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), or section 70503 or 70506 of title 46, the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have—

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.

(g) DEFINITION OF VIOLENT OFFENSE.—

As used in this section, the term “violent offense” means a crime of violence, as defined in section 16, that is punishable by imprisonment.

Chapter 14: Exercise—Penalties and Sanctions

Learning Objective: Identify provisions that a tribe wants or needs to include in their criminal code relevant to the penalties or sanctions that will be assessed when individuals commit crimes against children.

Reading: The team should consider reviewing **Part I** and should also refer to **Chapter 14** in **Part III** to help guide discussions for specifically defined crimes.

Instructions: The following discussion questions are meant to guide you in deciding what provisions you want/need to include in your code-relevant criminal penalties and sanctions. Once all team members have completed their responses to the exercise questions, please proceed with an open forum discussion and have the team leader record a response for each question that achieves as much consensus as possible. The team lead should keep a record of consensus-based responses to the questions in the exercises.

Team Lead Tips: Some of the questions may require prior preparation, so each member should be provided with a copy of relevant tribal criminal codes to review prior to the meeting.

- **IDENTIFY** the purpose of sentencing to include punishment, community safety, victim safety, restitution, rehabilitation, or all these.
- **DISCUSS** how people were held accountable in your community under your customary laws if they committed a particular act or crime.
- **DISCUSS** what sentencing provisions fit or align with your customs and traditions.
- **DISCUSS** how sentencing provision ensure the safety of victims.
- **DISCUSS** how sentencing provisions serve to rehabilitate the perpetrator.
- **DISCUSS** whether the team will develop sentencing guidelines similar to federal guidelines or whether team will be providing sentencing options applicable to specific crimes or classes, degrees, or categories of crimes against children.
- **IDENTIFY** any classes, degrees, or categories that exist in codes on crimes against children and discuss if that design needs to be amended.
- **DISCUSS** sentencing options available for use in addition to incarceration and fines such as restitution (money or other forms) to the victim and/or the victim’s family; mandatory counseling (reeducation, drug/substance abuse treatment, parenting classes, etc.) for convictions; traditional remedies or services; and seizure of weapons or other measures.
- **DETERMINE**, by reviewing the criminal code, whether the tribe is exercising TLOA enhanced sentencing authority.
- **DISCUSS** whether the team wants to recommend increased sanctions for crimes of violence or crimes that involve firearms or other weapons.
- **IDENTIFY** what, if any, crimes will require minimum mandatory periods of incarceration (jail time) for a conviction.

Note: Use **Worksheet** provided at the end of **Part III** to help record your answers.

Part III: Worksheet

This worksheet is designed to allow the team to select any of the relevant exercises in the preceding text and utilize information from those exercises to prepare to draft statutes in **Part IV**. The following questions will assist the team in preparing to complete the worksheet:

- Who should be targeted in the future in your criminal law?
- What acts and/or omissions and injuries should be criminally prosecuted?
- Discuss sentencing:
 - Would severe penalties and sanctions deter this kind of crime?
 - If so, is your community willing to have high penalties and sanctions?
 - Are there reasons why high penalties might not work in your community?
 - Would traditional or customary sentencing options be appropriate?

IDENTIFYING NECESSARY CODE PROVISION(S)			
We have decided that our team will focus on:	<input type="checkbox"/> Drafting a comprehensive code to address the problems/issues identified in Part I and Part II.		
	<input type="checkbox"/> Drafting/amending specific criminal statutes within our existing code to address the problems/issues identified in Part I and Part II.		
We have decided that our team will include: (see Part III, Chapters 7–8)	<input type="checkbox"/> Findings and purpose as part of a comprehensive crimes against children code.		
	<input type="checkbox"/> Findings and purpose in our existing criminal code that will be revised to reflect crimes against children. <input type="checkbox"/> Definitions.		
CODE PROVISION(S)	Current Status of Tribal Code	Necessary Tribal Code Provisions to Draft/Amend	Penalty/Sanctions <input type="checkbox"/> Exercising TLOA Enhanced Sentencing Authority <input type="checkbox"/> Exercising SDVCJ over non-Indians (see Chapter 4)
Child Neglect	<input type="checkbox"/> We have code <input type="checkbox"/> We do not have code	<input type="checkbox"/> Need to add this crime <input type="checkbox"/> Need to amend existing code <input type="checkbox"/> Need to add definitions <input type="checkbox"/> Need to add or amend sentencing provisions	<input type="checkbox"/> Range of fines/incarceration that increases with each subsequent offense <input type="checkbox"/> Other sentencing options traditional sentencing (restitution, mandatory counseling, shaming or other) <input type="checkbox"/> Mandatory incarceration
Child Endangerment	<input type="checkbox"/> We have code <input type="checkbox"/> We do not have code	<input type="checkbox"/> Need to add this crime <input type="checkbox"/> Need to amend existing code <input type="checkbox"/> Need to add definitions <input type="checkbox"/> Need to add or amend sentencing provisions	<input type="checkbox"/> Range of fines/incarceration that increases with each subsequent offense <input type="checkbox"/> Other sentencing options (traditional sentencing, restitution, mandatory counseling, shaming, or other) <input type="checkbox"/> Mandatory incarceration
Child Abuse	<input type="checkbox"/> We have code <input type="checkbox"/> We do not have code	<input type="checkbox"/> Need to add this crime <input type="checkbox"/> Need to amend existing code <input type="checkbox"/> Need to add definitions <input type="checkbox"/> Need to add or amend sentencing provisions	<input type="checkbox"/> Range of fines/incarceration that increases with each subsequent offense <input type="checkbox"/> Other sentencing options (traditional sentencing, restitution, mandatory counseling, shaming, or other) <input type="checkbox"/> Mandatory incarceration
Commercial Exploitation of a Minor: Labor Trafficking	<input type="checkbox"/> We have code <input type="checkbox"/> We do not have code	<input type="checkbox"/> Need to add this crime <input type="checkbox"/> Need to amend existing code <input type="checkbox"/> Need to add definitions <input type="checkbox"/> Need to add or amend sentencing provisions	<input type="checkbox"/> Range of fines/incarceration that increases with each subsequent offense <input type="checkbox"/> Other sentencing options (traditional sentencing, restitution, mandatory counseling, shaming, or other) <input type="checkbox"/> Mandatory incarceration

CODE PROVISION(S)	Current Status of Tribal Code	Necessary Tribal Code Provisions to Draft/Amend	Penalty/Sanctions
Commercial Exploitation of a Minor: Adoption Trafficking	<input type="checkbox"/> We have code <input type="checkbox"/> We do not have code	<input type="checkbox"/> Need to add this crime <input type="checkbox"/> Need to amend existing code <input type="checkbox"/> Need to add definitions <input type="checkbox"/> Need to add or amend sentencing provisions	<input type="checkbox"/> Range of fines/incarceration that increases with each subsequent offense <input type="checkbox"/> Other sentencing options (traditional sentencing, restitution, mandatory counseling, shaming, or other) <input type="checkbox"/> Mandatory incarceration
Commercial Exploitation of a Minor: Child Pornography	<input type="checkbox"/> We have code <input type="checkbox"/> We do not have code	<input type="checkbox"/> Need to add this crime <input type="checkbox"/> Need to amend existing code <input type="checkbox"/> Need to add definitions <input type="checkbox"/> Need to add or amend sentencing provisions	<input type="checkbox"/> Range of fines/incarceration that increases with each subsequent offense <input type="checkbox"/> Other sentencing options (traditional sentencing, restitution, mandatory counseling, shaming, or other) <input type="checkbox"/> Mandatory incarceration
Commercial Exploitation of a Minor: Sex Trafficking	<input type="checkbox"/> We have code <input type="checkbox"/> We do not have code	<input type="checkbox"/> Need to add this crime <input type="checkbox"/> Need to amend existing code <input type="checkbox"/> Need to add definitions <input type="checkbox"/> Need to add or amend sentencing provisions	<input type="checkbox"/> Range of fines/incarceration that increases with each subsequent offense <input type="checkbox"/> Other sentencing options (traditional sentencing, restitution, mandatory counseling, shaming, or other) <input type="checkbox"/> Mandatory incarceration
Sexual Abuse	<input type="checkbox"/> We have code <input type="checkbox"/> We do not have code	<input type="checkbox"/> Need to add this crime <input type="checkbox"/> Need to amend existing code <input type="checkbox"/> Need to add definitions <input type="checkbox"/> Need to add or amend sentencing provisions	<input type="checkbox"/> Range of fines/incarceration that increases with each subsequent offense <input type="checkbox"/> Other sentencing options traditional sentencing (restitution, mandatory counseling, shaming, or other) <input type="checkbox"/> Mandatory incarceration
Contributing to the Delinquency of a Minor	<input type="checkbox"/> We have code <input type="checkbox"/> We do not have code	<input type="checkbox"/> Need to add this crime <input type="checkbox"/> Need to amend existing code <input type="checkbox"/> Need to add definitions <input type="checkbox"/> Need to add or amend sentencing provisions	<input type="checkbox"/> Range of fines/incarceration that increases with each subsequent offense <input type="checkbox"/> Other sentencing options (traditional sentencing, restitution, mandatory counseling, shaming, or other) <input type="checkbox"/> Mandatory incarceration

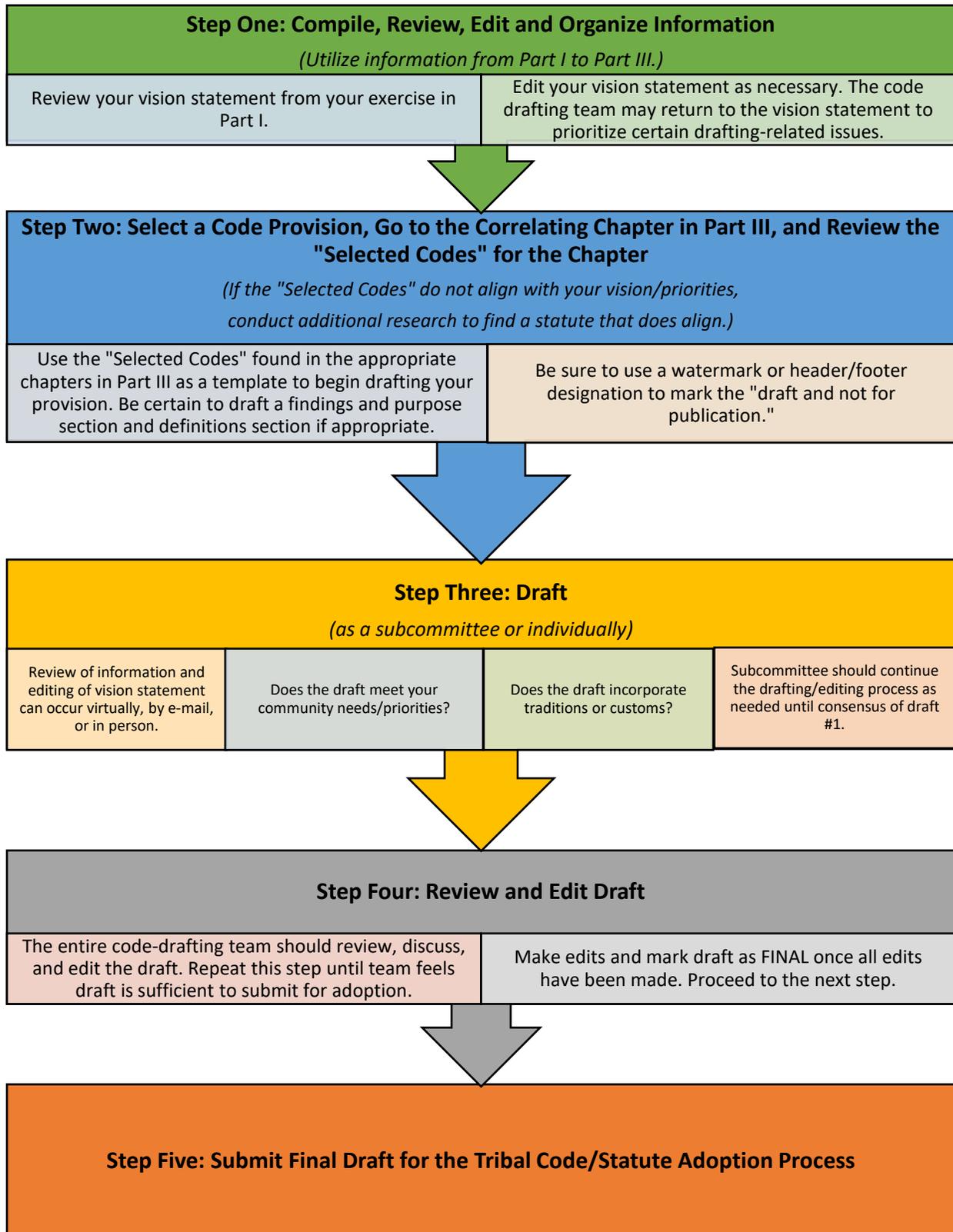
Part IV: Drafting the Code

Part IV of this Guide homes in on the drafting process. The final chapter provides tips on organizing the code drafting team, facilitating subcommittee and team meetings, and navigating the tribal code adoption process.

As mentioned in preceding sections, tribes have options in their approach to drafting criminal statutes targeting crimes against children or when drafting an entire crimes committed against children code. However, the process of drafting and the consideration of drafting foundational aspects of your code is arguably universal to each team. Remember, in this Guide code provision/statute is used interchangeably and refers to singular provisions in your tribal code. Code or comprehensive code refers to the team's choice to develop a comprehensive, stand-alone code on crimes committed against children.

In each of the preceding parts, exercises were provided to guide the drafters through key considerations for the team's review. Previous exercise responses, that can be recorded in the accompanying worksheets, will become a building block for new tribal code provisions or code. **Part IV** exercises and worksheets will tie together all the previous exercise responses to underscore priorities and decisions made along the journey. Immediately following this introductory material is a flowsheet that suggests a five-step process for the team to sit down and draft tribal provisions or code using this Guide.

Part IV: Flowsheet



Chapter 15: The Process of Drafting a Tribal Code

This chapter dives into the actual practice of drafting tribal ordinances or codes. The code drafting team should dive into this chapter after a thorough reading of and working through the exercises in **Part I through Part III**. The exercises provided in these parts will set your team up for drafting a new or amended statute or code.

What are the benefits for preparing to draft a tribal code or statute?

As mentioned early on and throughout the Guide, drafting of tribal codes or statute is usually a lengthy process requiring teamwork and collaboration with various subcommittees. Being prepared to draft utilizing the steps that follow leads to a more efficient use of time and a collaborative focus.

How do we prepare to draft?

Use this Guide! The sections in this chapter provide tips for getting organized to draft, creating ways to maximize the team effort in the drafting process, staying organized, exploring, and assessing tribal statutes that might be used as a template for drafting, staying focused and accountable through time and task meetings, and mapping out the tribal ordinance adoption process in your tribe.

A. Getting Organized to Draft

Assembling existing tribal documents or other written resources that will be needed for quick reference during draft is very helpful. Examples of existing documents or other written resources that the team or working group should be provided with include, but are not necessarily limited to, the following:

- Tribal constitution and tribal code;
- Any existing controlling or impacting tribal/federal/state codes;
- Copies of any tribal court opinions related or relevant crimes against children in the community;
- Any written values and vision statements the Native nation may have relevant to protecting children;
- Indian Civil Rights Act found at 25 U.S.C. § 1301 *et seq.*;
- A dictionary; and
- This Guide.

As your team sits down together to begin the process of drafting tribal codes, consider reviewing your goals and objectives from **Part I: Exercise #3—Drafting a Vision Statement**.

B. Subcommittees and the Victim’s Voice

This Guide stresses the importance of the teamwork approach to drafting your tribal code whether the team is drafting a single code provision, a cluster of code provisions targeting a specific type of crime such as sexual assault, or an entire comprehensive tribal code targeting crimes committed against children. For a thorough review of the teamwork approach, be sure to review **Chapter 3: Teamwork**.

Tips for tribal code drafting teamwork include:¹⁶⁵

1. The work, to include time and task meetings discussed in the following text, should be completed in a setting of mutual respect. The setting should be a safe environment in which the group can share, learn, exchange concepts, discuss freely, and explore. It is okay to acknowledge differences of opinion, but not in a stereotypical or judgmental manner. The safety of children and batterer accountability that reflects the customs/traditions/beliefs of the tribal community should always remain at the forefront.
2. Depending upon the size of the team, the team lead should consider creating subcommittees to draft particular segments of the code provisions and scheduling time and task meetings (discussed in the following text) when drafts are ready for the entire drafting team to review and provide comment.
3. The team members should be willing to share the burden by sharing resources, training, and technical assistance (TA).
4. The team should consider traditional/culturally appropriate strategies that could be included in the drafts. Try to incorporate tradition/culture and community priorities into the drafts whenever possible—this should be a tribal code/ordinance that reflects the uniqueness of the tribal community.
5. All team members should be allowed input into discussions before final drafts of code provisions are complete.

If the drafting team is large enough, drafting subcommittees may be very efficient to accomplish various tasks in the drafting process. For instance, if the team selects a particular statute from Part III, the team lead can break the drafting team up into smaller subcommittees and assign each subcommittee a drafting task such as a findings and purpose segment, definitions segment, and drafting of the criminal child abuse segment. Additional subcommittees might be formed for any additional research needed such as locating additional tribal code examples of a specific crime that is more in line with what the team has identified

¹⁶⁵ For additional tips on teamwork, please see Part I, Chapter 3.

for this tribal community. Another subcommittee might be created that focuses on the child victim's safety and health and well-being that might warrant the drafting of victim right's provisions along with a subcommittee on keeping the statute harmonious with the customs/traditions of the tribe. Depending on the size of the code drafting team, some individuals may need to serve on several subcommittees, but it is the subcommittee's focus and report backs to the entire drafting team during the time and task meetings that prevents these important issues from being lost or omitted during the drafting process.

To illustrate the use of the various subcommittees, the drafting team might decide to draft a criminal child abuse statute. Team lead would appoint Subcommittee A to review the tribal and federal statutes provided in the Guide in the **Chapter 10** on child abuse. Subcommittee A would review the child abuse–affiliated exercises and worksheets to refresh their memory and glean some great pointers for criminal elements that the drafting team wanted in the statute. If Subcommittee A finds none of the statutes in the Guide are close to what the drafting team envisioned, then team lead would appoint Subcommittee B to perform additional research to locate tribal, state, or federal statutes that reflect what the drafting team is wanting in a criminal child abuse statute and provide the research to the Subcommittee A. If additional information is needed on how the tribe historically addressed an issue or needs more information on how the tribe's cultural/traditional beliefs interplay with the issue, team lead can assign Subcommittee C to investigate and possibly set up a meeting with the tribal leaders or elders to gather information to be reported back to Subcommittee A. Team lead can also appoint a subcommittee to explore and gather information on victim's rights particularly as those rights would apply to a child victim going through the criminal process. Be certain to have a victim's voice among your team members or at a minimum as a secondary team member. The survivor voice in the process, whether a domestic violence survivor or a child victim of crime survivor, will be instrumental in capturing the protections necessary to reduce trauma when children are being pushed through the criminal justice system.

C. Assessing Tribal Code Examples and Drafting Tips

Tribal codes are drafted partly through instruction and partly from experience. Often times, existing tribal laws may have originated from the laws of another tribe, state, or federal system. Take the time to go through and review your current codes relevant to crimes committed against children for relevance to your particular tribal community. Review the tribal and federal statutes provided in the Guide. When customs or beliefs are being discussed, the team should consider bringing in elders or others wise in these ways to educate and guide the drafting team on any current statutes that conflict with these concepts and how to incorporate concepts into the tribal code. The following tips for drafting tribal statutes might be helpful.

Tips for drafting tribal statutes:¹⁶⁶

¹⁶⁶ Adapted and taken in part from Deborah Beth Medows, "[A Beginner's Guide to Legislation Drafting](#)," *Harvard Journal on Legislation* 58, no. 1 (2016).

1. Write simply and carefully. Be deliberate intentional and clear. Punctuation matters and effects statutory interpretation.
2. Write purposefully. Word choice can be critical and powerful. For example, the words “may” and “shall” will have very different meanings in law.
3. Research efficiently. Familiarize yourself with a basic understanding of the topic.
4. Tribal custom/tradition. Familiarize yourself with a basic understanding of relevant tribal customs and traditions that may be woven into your tribal statute or code.
5. Do not rush to recreate the wheel. Utilize examples of other tribal codes and/or federal laws that reach your intended target population and have the result you are seeking.
6. Masterful legislation requires teamwork.
7. Develop your drafting style. Review other drafts of statutes that you feel are well written and work well.
8. Be patient. Drafting can be tedious and frustrating. Reach out to team members or team lead when needed.
9. Draft the statute first then move to the sentencing language.
10. Be mindful of sentencing considerations and ICRA’s limitations on a tribe’s criminal sentencing authority. See **Chapter 14**.
11. Be sure to include a date or event that the statute will take effect. For instance, on a certain date like August 20, 2020, or “such as upon the signing the resolution approving the statute by the tribal council.”

Be mindful to add a savings clause/severability clause to ensure that if any provisions in the code are deemed unconstitutional (according to your tribal constitution) or vague then the remaining statutes will still be valid. An example of a **Savings Clause** appears at the back of this Guide at **Appendix C**.

D. Time and Task Meetings

Typically, writing a statute will undergo many reviews, edits, and redrafts. Once a draft of a statute has been completed, it is necessary for the team lead to schedule a time and task meeting for the entire drafting team to provide input on the draft. The meeting can occur virtually, in person, or by e-mail. Ideally, each assignment to the drafting team (subcommittee) should have a deadline for the draft to be completed. As all our schedules are hectic, team lead should be professional and understanding when a member(s) of a subcommittee might need additional time to complete a task. However, each extension should be accompanied by a deadline to keep the process moving along.

Be sure to invite at least one victim representative whether a survivor of domestic violence or a survivor of a crime committed against a child to also be at the meeting. These voices are of paramount importance to the process. All drafting team members should be allowed input into discussions before final drafts of code provisions are complete. Once various drafts have gone through the process, the draft is finalized, spell-checked, and assembled for the process of adoption by the tribal government.

E. The Tribal Code Adoption Process

Although tribes have had their own codes of conduct, values, and beliefs since time immemorial, it was not until 1934, with the passage of the Indian Reorganization Act, that tribes were encouraged by the federal government to enact their own laws and to establish their own justice systems. Many tribes, however, did not adopt their own codes at that time, but rather operated under provisions of the Code of Federal Regulations (CFR). Due to lack of financial resources, many smaller tribes could not afford to operate their own tribal courts and retained the CFR courts operated by the Bureau of Indian Affairs. The federal regulations for CFR courts require approval of any tribally drafted codes to be approved by the Bureau of Indian Affairs Director or a designee.¹⁶⁷ There are around thirty-six tribes still utilizing five CFR courts today.¹⁶⁸ For the remaining tribes, the best place to gather information on the tribal statute/code approval process is to refer to the tribal constitution or tribal code on the topic.

A tribe may have a preliminary review process for code to undergo prior to being offered for adoption. Some tribes may have committees that have been established for the purpose of preliminarily reviewing tribal codes prior to being submitted for adoption. Other tribes may require the tribal attorney to do a preliminary review of a tribal statute/code. Some tribes will require a tribal resolution prior to being adoption, while other tribes may require a review by the tribal governing body and then will require a review from a designated person at the Bureau of Indian Affairs. Be sure to map out the path a tribal statute/code must travel to be adopted for use by the tribal court.

The drafting team should be able to identify what your tribe requires in the way of the adoption process. Look to your tribal constitution, tribal codes, and other policies and procedures to identify the process. Be sure to map the process out and list names of individuals that must approve the code in this process. A checklist has been provided in the exercises and worksheets following this chapter for your convenience. It might be helpful to create a subcommittee to keep tabs on the adoption process and to avoid the documents falling through cracks along the way. Once a tribal statute/code has completed the pathway to adoption that your tribe requires, monitor the statute/code being placed in the tribal code for use by the tribal court. Then, your task is complete for now.

Don't forget that some statutes in every jurisdiction may have unintended consequences. Should that be the case for a statute/code you have drafted, simply target the unintended consequence and go back to the drafting board to make some edits that avoid the consequence. Remember, drafting tribal statutes/codes is difficult and it is impossible to

¹⁶⁷ 25 CFR § 11.108 *How are tribal ordinances affected by this part?*

¹⁶⁸ "Court of Indian Offenses," U.S. Department of Interior, Indian Affairs, <https://www.bia.gov/CFRCourts> (accessed Aug. 30, 2020).

imagine every single scenario to which the statute might apply. Editing and redrafting a tribal statute/code to adjust the statute to meet the needs of a tribal community is always an option.

Part IV: Exercises

Part IV: Exercise #1—Compile, Review, Edit, and Organize Information

Learning Objective: Identify provisions that a tribe wants/needs that are relevant to crimes against children and whether the changes made will involve a comprehensive code development process or statute specific process.

Reading: At this stage, you will have completed *all exercises* included in this Guide. The answers or responses to those exercises will serve as a foundation for this exercise.

Instructions: The following questions are meant to guide you in deciding what provisions you want/need to include in your code relevant to crimes against children. Once all team members have completed their responses to the exercise questions, please proceed with an open forum discussion and have the team leader record a response for each question that achieves as much consensus as possible. The team lead should keep a record of consensus-based responses to the questions in the exercises.

Team Lead Tips: Some of the questions may require prior preparation, so each member should be provided with a copy of relevant tribal criminal statutes to review prior to the meeting.

- **COMPILE** the information from **all exercises in the Guide** for easy reference.
- **REVIEW and EDIT** your vision statement to guide any criminal statute that the team might draft.
- **REVIEW** what customs and traditions might be relevant.
- **REVIEW** the team's position on sentencing to include whether the team supports a range of fines/incarceration that increases upon subsequent factors such as similar convictions or severity of injury to victim, other types of penalties (traditional, restitution, mandatory counseling), and/or mandatory terms of incarceration.

Part IV: Exercise #2—Drafting and Editing

Learning Objective: Identify provisions that a tribe wants/needs that are relevant to crimes against children and whether the changes made will involve a comprehensive statute development process or statute specific process.

Reading: At this stage, you will have completed all exercises included in this Guide. The answers or responses to those exercises will serve as a foundation for drafting of a comprehensive code or specific code provisions.

Instructions: The following questions are meant to guide you in deciding what provisions you want/need to include in your code relevant to crimes against children. Once all team members have completed their responses to the exercise questions, please proceed with an open forum discussion and have the team leader record a response for each question that achieves as much consensus as possible. The team lead should keep a record of consensus-based responses to the questions in the exercises

Team Lead Tips: Some of the questions may require prior preparation, so each member should be provided with a copy of relevant tribal criminal statutes to review prior to the meeting.

- **IDENTIFY and SELECT** a statute example from the appropriate chapter in **Part III**.
- **DISCUSS** whether examples reflect priorities in your vision statement. If not, please assign additional research for the team or a subcommittee to collect additional examples.
- **DISCUSS** whether the selected statute aligns with your existing tribal justice system infrastructure.
- **DISCUSS** whether the sample aligns with important customs or traditions of tribe.
- **DRAFT** as an entire team or as a subcommittee. Revisit the questions above for each draft.
- **FINALIZE** the code provision/statute as a code drafting team.
- **OUTLINE and FOLLOW** the code provision/statute adoption process for your tribe.

Part IV: Worksheets

Part IV: Worksheet #1—Compile, Review, Edit, and Organize Information

Drafting Tribal Code/Statutes		
Code Drafting Team will focus on:	<input type="checkbox"/> Drafting a comprehensive code to address the problems/issues identified	<input type="checkbox"/> Have you included or considered including findings and purpose provisions?
	<input type="checkbox"/> Drafting/amending specific criminal statutes within our existing code to address the problems/issues identified	<input type="checkbox"/> Have you included or considered including definitions?

Jurisdictional Provisions		
		YES/NO
Jurisdiction	Does your code clarify the jurisdictional authority of your tribal court?	
	Does your code clarify the person(s) who will be subject to that jurisdictional authority?	
Criminal Jurisdiction	Does your tribal jurisdiction extend to all crimes committed in your territory?	
	Does your tribal code include provisions relevant to special domestic violence criminal jurisdiction?	

Evidentiary Provisions		
		YES/NO
Victim's Rights	Does your statute allow an advocate to accompany the child victim to tribal court?	
	Does your statute allow for the appointment of a dedicated attorney for the child victim?	
	Does your statute provide a means to accommodate the child victim while they testify in tribal court (i.e., closed-circuit TV, closed courtroom, screens, limitations on cross-examination)?	
	Does your statute allow the child access to a support person or animal while testifying?	
Evidence	Do your rules of evidence contain provisions specific to child victims?	
	Do your rules include important hearsay provisions and exceptions for child victims?	
	Do your rules include hearsay exceptions relevant to statements and testimony of child victims?	
Statute of Limitations	Do you have a statute of limitations that applies to crimes against children?	
	Does your statute of limitations provision include language that extends or eliminates the statute of limitations for crimes committed against children?	

Victim's Rights Provisions		
		YES/NO
Child Victims Rights Statute	Does your statute address a child's right to privacy?	
	Does your statute address specific rights for the child before and after the trial?	
	Does your statute address specific rights for children during the trial process?	
	Does your statute include provisions that support the protection of the child victim?	
	Does your statute include enforcement provisions?	

Criminal Provisions		
Crime(s)	Checklist	YES/NO
Child Neglect	Does your statute include a definitions section for key terms?	
	Does your statute target specific individuals (adults, juveniles, non-Indians, adults with trust or supervisory relationship to the child)?	
	Does your statute target specific acts or omissions?	
	Does your statute break down the elements of the crime?	
	Does your statute include or need to include a class or degree for the offense?	
	Does your statute include sentencing provisions?	
Child Endangerment	Does your statute include a definitions section for key terms?	
	Does your statute target specific individuals (adults, juveniles, non-Indians, adults with trust or supervisory relationship to the child)?	
	Does your statute target specific acts or omissions?	
	Does your statute break down the elements of the crime?	
	Does your statute include or need to include a class or degree for the offense?	
	Does your statute include sentencing provisions?	
Child Abuse—Physical	Does your statute include a definitions section for key terms?	
	Does your statute target specific individuals (adults, juveniles, non-Indians, adults with trust or supervisory relationship to the child)?	
	Does your statute target specific acts or omissions?	
	Does your statute break down the elements of the crime?	
	Does your statute include or need to include a class or degree for the offense?	
	Does your statute include sentencing provisions?	
Child Abuse—Emotional and Psychological	Does your statute include a definitions section for key terms?	
	Does your statute target specific individuals (adults, juveniles, non-Indians, adults with trust or supervisory relationship to the child)?	

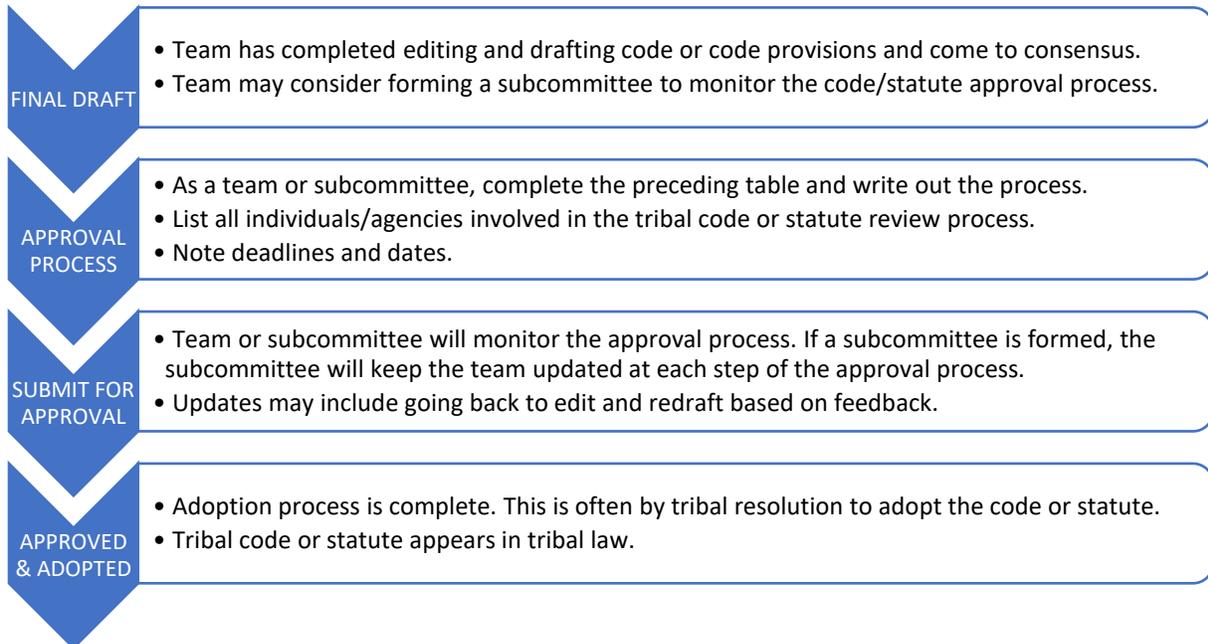
	Does your statute target specific acts or omissions?	
	Does your statute break down the elements of the crime?	
	Does your statute include or need to include a class or degree for the offense?	
	Does your statute include sentencing provisions?	
Commercial Exploitation of a Minor: Labor Trafficking	Does your statute include a definitions section for key terms?	
	Does your statute target specific individuals (adults, juveniles, non-Indians, adults with trust or supervisory relationship to the child)?	
	Does your statute target specific acts or omissions?	
	Does your statute break down the elements of the crime?	
	Does your statute include or need to include a class or degree for the offense?	
	Does your statute include sentencing provisions?	
Commercial Exploitation of a Minor: Adoption Trafficking	Does your statute include a definitions section for key terms?	
	Does your statute target specific individuals (adults, juveniles, non-Indians, adults with trust or supervisory relationship to the child)?	
	Does your statute target specific acts or omissions?	
	Does your statute break down the elements of the crime?	
	Does your statute include or need to include a class or degree for the offense?	
	Does your statute include sentencing provisions?	
Commercial Exploitation of a Minor: Child Pornography	Does your statute include a definitions section for key terms?	
	Does your statute target specific individuals (adults, juveniles, non-Indians, adults with trust or supervisory relationship to the child)?	
	Does your statute target specific acts or omissions?	
	Does your statute break down the elements of the crime?	
	Does your statute include or need to include a class or degree for the offense?	
	Does your statute include sentencing provisions?	
Commercial Exploitation of a Minor: Sex Trafficking	Does your statute include a definitions section for key terms?	
	Does your statute target specific individuals (adults, juveniles, non-Indians, adults with trust or supervisory relationship to the child)?	
	Does your statute target specific acts or omissions?	
	Does your statute break down the elements of the crime?	
	Does your statute include or need to include a class or degree for the offense?	
	Does your statute include sentencing provisions?	
Sexual Abuse	Does your statute include a definitions section for key terms?	

	Does your statute target specific individuals (adults, juveniles, non-Indians, adults with trust or supervisory relationship to the child)?	
	Does your statute target specific acts or omissions?	
	Does your statute break down the elements of the crime?	
	Does your statute include or need to include a class or degree for the offense?	
	Does your statute include sentencing provisions?	
Contributing to the Delinquency of a Minor	Does your statute include a definitions section for key terms?	
	Does your statute target specific individuals (adults, juveniles, non-Indians, adults with trust or supervisory relationship to the child)?	
	Does your statute target specific acts or omissions?	
	Does your statute break down the elements of the crime?	
	Does your statute include or need to include a class or degree for the offense?	
	Does your statute include sentencing provisions?	
NOTE TO CODE DRAFTING TEAM		
<ol style="list-style-type: none"> 1. Once the final draft of a statute is complete, repeat the process outlined in the Part IV flowsheet for each code provision you are drafting or amending until all statutes are completed. 2. Final drafts should be submitted to appropriate tribal governmental entity for review and to begin the legislative approval process. 3. As a code drafting team, consider prioritizing final code or statute submission of importance, immediate needs, or the order in which the new codes will be placed in the tribal code. 4. Follow the progress of the legislative review and approval process until you know that it has been formally approved by the tribal government. <p><i>Note:</i> it is possible that the tribal government will request changes prior to formal approval, so be prepared to edit should your team receive feedback.</p>		

Part IV: Worksheet #2—Drafting and Editing

Please use the following table to list the name/agency of all individuals relevant to the adoption of tribal codes/statutes in your tribal community. Be sure to list any relevant dates or timelines applicable to the review process. Please list the name of the team lead responsible for monitoring the process in the heading.

LIST OF INDIVIDUALS/AGENCIES IN TRIBAL CODE/STATUTE ADOPTION PROCESS			
Team Lead _____			
NAME/AGENCY	E-MAIL	PHONE	DATES/DEADLINES



Appendix A: Glossary and Acronyms

The definitions in this glossary are meant to provide a general definition in common language to legal terms. Many of the definitions have been tailored for specific relevance to this Guide. Not all terms are found in this Guide but are listed here as a useful resource when reviewing tribal codes. Legal definitions may vary from one jurisdiction to another.

Action: Term in usual legal sense means lawsuit.

Affidavit: A written statement of facts, made voluntarily and confirmed by the oath of the person making the affidavit before a person authorized to administer an oath, such as a notary public.

Affirmative Defense: A fact or set of facts asserted by the defendant that, if proven, defeats or mitigates a defendant's otherwise unlawful conduct.

Arraignment: The procedure in which an accused is brought before a judge to hear criminal charges against him and to enter a plea.

Assault: An intentional attempt or threat to inflict injury upon another, when coupled with an apparent ability and any intentional display of force that could reasonably make a person feel in danger of harmful physical contact.

Banishment: Requiring a convicted offender to leave a reservation or country.

Batterer: The offender or perpetrator of domestic violence.

Battery: An intentional, unconsented-to, physical contact by one person (or an object controlled by that person) with another person that results in some injury or offensive touching.

Burden of Proof: In evidence law it refers to the duty or obligation of a person, who is a party to the lawsuit, to prove a particular fact or issue through evidence.

Civil Action: A lawsuit brought to enforce, compensate a party for a loss, or protect private rights. All types of legal actions are not considered criminal. Actions for divorce, to recover damages for injury, or for a protection order are a few examples of civil actions.

Civil Contempt: A civil contempt action is generally brought when a person fails to obey a court order, such as a violation of a protection order or injunction. Contempt of court is the deliberate failure to comply with an order of the court. Punishment for civil contempt may be a fine or imprisonment, the purpose of such punishment is to compel compliance with the order of the court.

Civil Jurisdiction: The power of a court to hear and decide civil actions.

Civil Law: Body of law that governs private or civil rights providing redress for wrongs by compensating or providing other civil relief to the person or entity that has been wronged, as opposed to criminally punishing the wrongdoer.

Civil Regulatory Authority: The authority to enact all appropriate legislation (including licensing requirements) to control conduct, or to foster, protect, control, or restrain particular activities for the public good. This may include activities such as hunting, fishing, and environmental activities.

Code: A collection of laws, rules, or regulations organized in a particular manner, usually by subject.

Codification: The process of collecting and arranging a government's statutes usually covering a particular area or subject of law, for example, U.S. Code, Turtle Mountain Tribal Code, and California Criminal Code.

Comity: When one government follows another's judicial decisions or laws, not because they are required to, but out of respect, courtesy, and goodwill.

Concurrent Jurisdiction: When two or more courts or legislative or administrative officers have the same authority to deal with a particular subject matter within the same territory.

Continuance: The postponement of a court proceeding to a later time.

Core Values: Deeply held beliefs, highest priorities, and fundamental forces that drive actions and decisions.

Crime: An act committed in violation of a law that recommends a particular punishment; considered an offense against the state, tribe, or United States. Crimes are generally divided into misdemeanors and felonies.

Criminal Action: A proceeding by which a person charged with a crime is brought to trial and either found guilty or not guilty.

Criminal Contempt: A crime that obstructs a judicial duty generally resulting in an act done in the presence of the court, for example: insulting a judge, disrupting a court proceeding, or refusing to answer questions.

Criminal Jurisdiction: Power of a court to hear and dispose of criminal cases.

Declarant: A person or party who makes a formal declaration.

Deferred Prosecution: Prosecution is delayed, while offender is obligated to comply with certain conditions. If offender complies the charges are dismissed.

Deferred Sentencing: The offender is obligated to comply with certain conditions before he or she is sentenced in the case. The sentence is postponed.

Delinquency: The wrongdoing or violation of a law by minors.

Diversions Program: A program in which the offender is ordered to participate in a work or educational program as part of probation.

Divest: Deprive or take away a right.

Docket: A formal record briefly entered of the proceedings in a court. A trial docket refers to the list of cases set to be tried before a court.

Domestic Violence: The definition of *domestic violence* varies between federal, tribal, and state jurisdictions. *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, or psychological actions or threats of actions that influence another person.

Due Process: The U.S. Constitution and ICRA require that no person be deprived of liberty or property without the due process of the law. There are two aspects: *procedural due process*, in which a person is guaranteed fair procedures, generally referring to a person's right to notice and an opportunity to present his or her side in a legal dispute; and *substantive due process*, which protects a person's property from unfair governmental interference or taking, requiring the laws to be fair and reasonable in content as well as application.

Dynamics of Domestic Violence: Refers to the power and control dynamics present in most cases involving domestic or sexual violence including intimidation, emotional abuse, isolation, minimizing/denying/blaming, using children, economic abuse, male privilege, and/or coercion by threats.

Elements: A basic part of a crime or civil action that must be proven. For example, some elements of a cause of action for battery are intentional, unwanted, physical contact. Each part, "intentional," "unwanted," and so forth is one element.

Enhanced Penalties: Statute allows or requires that the punishment be increased due to the circumstances of the crime or repeating the crime.

Ex Parte Petition: A written request that the court take some action immediately for the petitioner, without hearing the respondent's side, as in an ex parte petition for a restraining order. A court generally has certain criteria that must be met before responding to an ex parte

petition with an ex parte order. Any order would be temporary out of concern for the respondent's due process rights.

Ex Parte Proceeding: Court proceeding in which only the petitioner participates, as in the case of an ex parte temporary restraining order.

Felony: A crime of a more serious nature than a misdemeanor. Under many state statutes it is punishable by more than a year in prison or even death.

Forfeiture: Loss of some right or property as a penalty for some illegal act.

Harassment: Words, gestures, and actions that tend to annoy, alarm, or abuse another person. Civil and criminal definitions of harassment vary. Criminal laws prohibiting harassment may list specific acts of harassment and increase the penalties based on the level of harassment.

Hearsay: A term applied to testimony given by a witness who relates, not what he or she knows personally, but what others have told him or her, or what he or she has heard said by others.

Historical Trauma: The cumulative emotional harm of an individual or generation caused by a traumatic experience or event.

Immunity: An exemption from a duty legally required of others, freedom from a duty or a penalty, for example, sovereign immunity (government's freedom from being sued) or immunity from prosecution (will not be charged with a crime, due to testimony against others).

In Camera Hearing: A private hearing in the judge's chambers or in which others are excluded.

Indian Country: 18 U.S.C. § 1151 (a) all land within the limits of any Indian reservation under the jurisdiction of the U.S. government, notwithstanding the issuance of a 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.

Injunction: A court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury.

Joint Custody: There is joint legal custody and joint physical custody. Joint legal custody involves parents jointly sharing responsibility and authority to make important decisions relative to their children. Joint physical custody means sharing the time with the child.

Jurisdiction: The geographical area within which a court has the right and power to operate. The persons about whom and the types of cases a court has the right and power to make binding decisions.

Jurisprudence: The philosophy of law and the study of legal principles on which legal rules are based.

Legislative Body: The branch of government whose appropriate function is the making of laws.

Misdemeanors: Any offense lower than a felony and generally punishable by fine, penalty, forfeiture, or imprisonment otherwise than in a penitentiary. Often misdemeanors are punishable by less than one year in imprisonment. There may be various classes of misdemeanors.

Multidisciplinary Planning Team (Planning Team): A term that, as defined here, refers to a group of people from different disciplines, bound by a common purpose to reduce domestic violence in a tribal community by focusing on victim safety, victim services, and batterer accountability. A team that is working through this guide meets regularly to communicate, collaborate, and consolidate knowledge from which decisions are made, plans are designed, and future decisions are influenced.

Mutual Protection Order: A protection order that restrains both parties.

Nolo Contendere: Latin phrase that means, “I will not contest it.” Has a similar effect in a criminal case as pleading guilty, but it is not an admission of guilt.

Notice: Means information or written warning intended to tell a person of some proceeding in which his or her interests are involved, or inform him or her of some fact that it is his or her right to know and the duty of the notifying person to communicate.

Perpetrator: The offender of a crime.

Petition: A written request or application to a court that it takes a particular action, for example, a petition for a protection order.

Petitioner: One who presents a petition to a court.

Plea Agreement: The agreement between the offender and the prosecutor in a criminal case about the punishment.

Presentence Investigation: An investigation into the offender’s background used by the judge in determining an appropriate sentence for the offender.

Pretrial Proceeding/Hearing/Conference: Court proceeding before trial to have the judge listen to issues or motions that affect the upcoming trial.

Privileged Communications: Those statements made by certain persons within a protected relationship, such as husband-wife and attorney-client that the law protects from forced disclosure on the witness stand.

Pro Se: For one's own behalf; in person. Appearing for oneself, as in the case of one who does not retain a lawyer and appears for himself or herself in court.

Probable Cause: Reasonable cause; having more evidence for than against.

Probation: A sentence of a convicted offender, whereby he or she is released into the community under the supervision of a probation officer.

Prosecution: A criminal action; a proceeding instituted and carried on according to the law before a court, for the purpose of determining the guilt or innocence of a person charged with a crime.

Protection Order: Protection orders may be known by a variety of names to include injunctions, restraining orders, civil restraining order, or victim protection order just to name a few. A protection order is a legal document that is available to victims of domestic violence in most jurisdictions. A protection order is a legal order issued by a court to protect a certain person from abuse. Protection orders can be either civil or criminal, and protection order remedies may vary from jurisdiction to jurisdiction depending upon the law of the issuing jurisdiction. Enforcement of violations of a protection order may also be civil and/or criminal in nature.

There are generally two types of civil protection orders available to victims of abuse. *Ex parte* orders are available in most jurisdictions in emergency situations. *Ex parte* orders are issued without a full hearing if the victim can demonstrate immediate danger. Permanent orders can be issued after the defendant has been provided with notice and an opportunity to be heard.

Protocol: The rules of correct or appropriate behavior for a particular group of people in a particular situation. For example, the hospital or police have a protocol for the handling of sexual assault cases.

Provision: A general term for a section in a statute, contract, or other legal instrument.

Rebuttable Presumption: In the law of evidence, a conclusion that will be drawn unless evidence is presented that counters it.

Relief: Remedy asked for in a petition.

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

Restitution: The act of restoring something to its rightful owner or giving an equivalent for any loss, damage, or injury.

Sanction: A penalty or punishment attached to a law so that it is obeyed.

Sentencing: The phase of a criminal proceeding after the offender has been found guilty, when the punishment is imposed.

Sovereign Immunity: A judicial doctrine that prevents the government from being sued, without its consent.

Sovereignty: The supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority.

Stalking: Stalking is a pattern of repeated, unwanted attention, harassment, and contact. It is a course of conduct that can include a wide variety of activities that are usually specified in criminal law, including such things as following someone, threatening to harm the victim or her/his relatives, harassment through the Internet, and many other activities.

Statutes: A law; it can mean a single act of a legislature or a body of acts that are collected and arranged according to a scheme or legislative session.

***Sua Sponte*:** Latin phrase meaning on his or her or its own motion. This refers to a judge making an order on his or her own without a request from the parties to the case.

Transcript: A written record of a court proceeding made by the court reporter.

Trespass: An unauthorized entry or intrusion on private property or land of another.

Tribal Coalitions: The Tribal Coalitions Program refers to the U.S. Department of Justice, Office on Violence Against Women Tribal Domestic Violence and Sexual Assault Coalitions Grant Program. The program aims to build the capacity of survivors, advocates, Indian women's organizations, and victim service providers to form nonprofit, nongovernmental tribal domestic violence and sexual assault coalitions to end violence against American Indian and Alaska Native women.

Vacate: To nullify or cancel.

Victim: A person who suffers physical, mental, emotional, and/or spiritual harm due to the behavior of other(s). We realize that words carry a great deal of power and their meanings can be interpreted in different ways. Some of the people we are working with may be offended by the use of the term "victim." Still others may feel the term "victim" is an accurate depiction.

Victim Advocate: Victim advocates are professionals trained to support victims of crime. Advocates offer victims information, emotional support, and help finding resources and filling out paperwork. Sometimes, advocates go to court with victims. Advocates may also contact organizations, such as criminal justice or social service agencies, to get help or information for victims. Some advocates staff crisis hotlines, run support groups, or provide in-person counseling. Victim advocates may also be called victim service providers, victim/witness coordinators, or victim/witness specialists.

Victim Centered: The systematic focus on the needs and concerns of a domestic violence victim to ensure the compassionate and sensitive delivery of services in a nonjudgmental manner. This term also denotes that the victim may accept or reject services and recognizes that the victim may be the decision maker regarding services and some legal options.

Victim Impact Statement: Statement generally read or given to a court at sentencing of an offender, which describes the harm and impact of the crime on the victim.

Victim's Rights: Legal rights afforded to victims of crime. These rights may include a right to victim advocate services; treatment with dignity, respect, and sensitivity; be informed; protection and safety; compensation for out-of-pocket expenses that resulted from crime; restitution from the offender; have property promptly returned; a speedy trial; and enforcement of all victims' rights.

Vision Statement: An aspirational statement of policy and priorities that should be used as a guide in implementation or design.

Acronyms

AI/AN: American Indian/Alaska Native

ICRA: Indian Civil Rights Act (25 U.S.C. § 1301 *et seq.*)

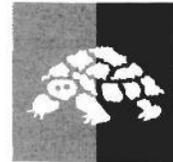
P.L. 280: Public Law 83- 280; Act of August 15, 1953, ch. 505, 67 Stat. 588 (codified as 18 U.S.C. § 1162, 28 U.S.C. § 1360, and other scattered sections in 18 and 28 U.S.C.)

SDVCJ: Special Domestic Violence Criminal Jurisdiction (Authorized in VAWA 2013, 18 U.S.C. § 1304)

TLOA: Tribal Law and Order Act (Pub. L. No. 111-211) (codified in scattered sections of 25 U.S.C. and 18 U.S.C.)

VAWA 2013: Violence Against Women Act of 2013 (Pub. L. No. 113-4, 127 Stat. 54)

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.

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 Venetic Tribal Government could assert criminal jurisdiction. Those lands had once been part of the Neets’aii Gwich’in Indians’ reservation surrounding the Village of Venetic, 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 Venetic 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,

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).

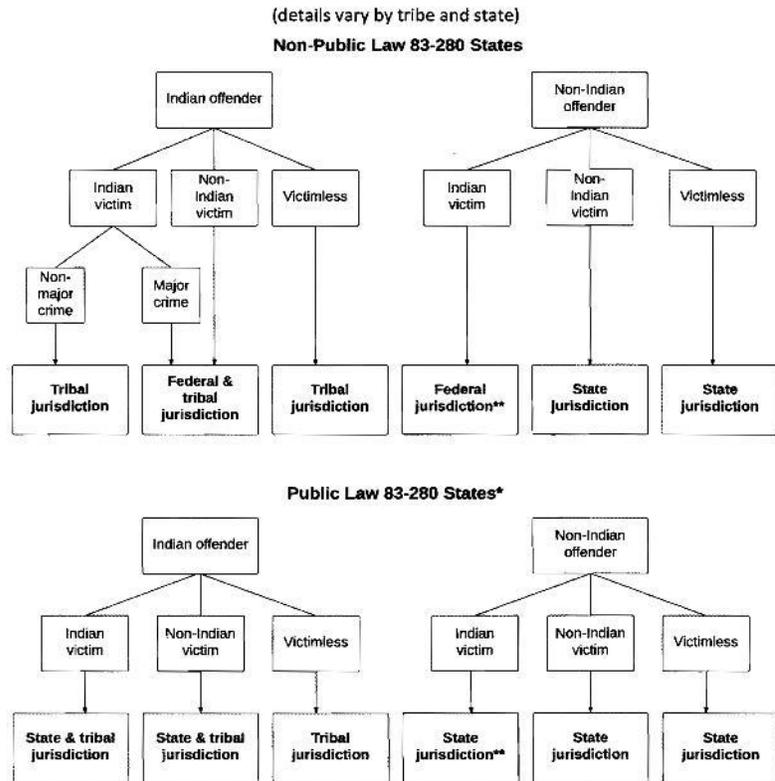
One wonders whether the Court understood that it was “the red man’s revenge” that preserved Crow Dog’s life while “the white man’s morality” wanted to kill him, but the law spoken seems plainly correct. If Indian nations were not separate sovereigns in the sense of criminal law, then it is unclear how 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

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

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).

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>).

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

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,

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

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?

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).

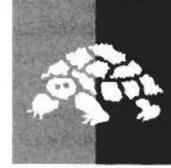
Sam Ennis, *Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of Oliphant*, 57 UCLA Law Review 553 (2009).

- 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).



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.

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

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 Narraganset 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—

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

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.”³³ 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

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

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

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.⁵

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

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 A 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.versuslaw.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

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]hrough 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

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

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).

- 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 Carciere 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: Savings Clause

The following are examples of a savings or severability clause. This clause helps ensure that if any provisions in the code are deemed vague or unconstitutional in accordance with your tribal constitution, then the remaining provisions/statutes will remain valid. Essentially, the clause is “saving” those provisions/statutes that are not vague or unconstitutional.

Much like the development of a crimes against children’s code, there are different methods to approach the placement of a savings clause. Some may choose to place multiple savings clauses in the applicable sections throughout a code, while others may choose to write one savings clause to cover an entire code.

Selected Codes

Saginaw Chippewa

[Ordinance 13 Tribal Clerk](#)

SECTION 9. Severability.

If any Section, subsection paragraph sentence, phrase or portion of this Ordinance is, for any reason, held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions thereof.

Rincon Band of Luiseno Indians

[Limited Waiver of Sovereign Immunity Ordinance](#)

§ 2.110 SEVERABILITY

If any provision of this ordinance shall be held unconstitutional or invalid by the Rincon Tribal Court, only the invalid provision or language shall be severed and the remaining provision and language of this ordinance shall remain in full force and effect.

Appendix D: Additional Resources

Adams, William, and Abigail Flynn. [*Federal Prosecution of Commercial Sexual Exploitation of Children Cases 2004–2013*](#). Urban Institute, October 2017.

This report analyzes data on commercial sexual exploitation of children cases prosecuted in the federal criminal justice system. Commercial sexual exploitation of children includes offenses such as child pornography production and possession. The report found that most defendants charged for these types of offenses were male, white, U.S. citizens, and had no prior felony convictions.

American Psychological Association. [*Childhood Psychological Abuse as Harmful as Sexual or Physical Abuse*](#), October 8, 2014.

This press release announces the release of a study, “Unseen Wounds: The Contribution of Psychological Maltreatment to Child and Adolescent Mental Health and Risk Outcomes,” that found that childhood psychological abuse can be just as harmful, if not more harmful, to child victims as sexual or physical abuse. The study found that psychological abuse was strongly associated with depression, general anxiety disorder, social anxiety disorder, and substance abuse.

Attorney General’s Advisory Committee on American Indian/Alaska Native Children Exposed to Violence. [*Ending Violence So Children Can Thrive*](#), November 2014.

This report presents the policy recommendations of the Attorney General’s Advisory Committee on American Indian/Alaska Native Children Exposed to Violence to the Attorney General. The Advisory Committee convened four public hearings and multiple listening sessions. The policy recommendations are organized into five chapters: “Building a Strong Foundation,” “Promoting Well-Being for American Indian and Alaska Native Children in the Home,” “Promoting Well-Being for American Indian and Alaska Native Children in the Community,” “Creating a Juvenile Justice System That Focuses on Prevention, Treatment, and Healing,” and “Empowering Alaska Tribes.”

Casey Family Programs. [*Addressing Child Sex Trafficking from a Child Welfare Perspective*](#). Washington, DC: Casey Family Programs, 2014.

This report presents the results of a national survey of child welfare leaders conducted in March and April 2014. Respondents noted the biggest challenges agencies face in providing services to child sex trafficking victims were lack of appropriate resources, identifying trafficking victims, and having safe placement options for victims.

Center for Native American Youth. [*“Drawing Strength from Our Cultures: The State of Native Youth 2016.”*](#) State of Native Youth Report. Washington, DC: Center for Native American Youth at The Aspen Institute, December 2016.

This resource produced by the Center for Native American Youth presents the results of a series of youth engagement roundtables, meetings, and new online survey regarding issues Native

youth face in their communities and strategies employed to address those issues. Information in this resource could be used to help frame a findings or purposes section.

Child Exploitation and Obscenity Section, Department of Justice. "[Citizen's Guide to U.S. Federal Child Exploitation and Obscenity Laws](#)." Justice.gov (accessed Aug. 20, 2020).

This webpage offers summaries of federal laws that pertain to child exploitation and obscenity laws. The summaries are broken down by subject areas, including a page on child pornography.

Child Exploitation and Obscenity Section, Department of Justice. "[Citizen's Guide to U.S. Federal Law on Child Sexual Abuse](#)." Justice.gov

(last modified July 6, 2015; accessed Oct. 31, 2017).

This webpage provides a short summary of the applicability of federal law to child sexual abuse matters, including citations to relevant sections of the U.S. Code.

Child Welfare Information Gateway. [Definitions of Child Abuse and Neglect](#). Washington, DC: U.S. Department of Health and Human Services, Children's Bureau, 2016.

This resource reviews types of abuse, reporting standards, and exceptions to those reporting laws. Though not presenting criminal child abuse and neglect statutes, this resource does list state civil definitions of child abuse and neglect that determine whether a state child protection agency reports and/or intervenes.

Child Welfare Information Gateway. [What Is Child Abuse and Neglect? Recognizing the Signs and SYMPTOMS](#). Washington, DC: U.S. Department of Health and Human Services, Children's Bureau, 2013.

This resource is a factsheet that outlines the legal federal definition of child abuse and neglect, notes its different forms, and discusses the signs and symptoms of abuse.

Cooper, Randall. "[Children's Advocacy Centers and Indian Country](#)," *UPDATE 24(2)*, National District Attorneys Association, National Center for Prosecution of Child Abuse, 2014.

This resource contains information on rates of child maltreatment and sexual abuse in Indian country, the lack of child advocacy services, and how tribes administer a Children's Advocacy Center or partner with a nearby Children's Advocacy Center to serve their community. Some successful tribal programs are highlighted.

Cordero, Kori, and Kelly Stoner. [Sex Trafficking in Indian Country: Victim/Survivor Resource Book](#). West Hollywood, CA: Tribal Law and Policy Institute, September 2016.

This resource is a directory of victim/survivor services organized by state prepared by the Tribal Law and Policy Institute to assist the work of tribal coalitions and tribal advocates.

Crimes against Children Research Center. "[Internet—Papers](#)" (accessed Dec. 1, 2017). Janis Wolak, David Finkelhor, and Kimberly Mitchell. "Child-Pornography Possessors Arrested in Internet-Related Crimes: Findings from the National Juvenile Online Victimization Study." Alexandria, VA: National Center for Missing and Exploited Children, 2005.

This webpage maintained by the Crimes Against Children Research Center at the University of New Hampshire provides access to recent papers regarding Internet crimes against children. The page is organized by topic area, including publications on the National Juvenile Online Victimization Study.

Development Services Group. "[Child Labor Trafficking](#)." Literature review. Washington, DC: Office of Juvenile Justice and Delinquency Prevention, 2013. Prepared by Development Services Group under cooperative agreement number 2013–JF–FX–K002, 2016.

This resource discusses the definition of labor trafficking in the TVPA, the difference between child labor trafficking and child sex trafficking, the scope of labor trafficking, and characteristics of child labor trafficking victims. The resource also identifies antitrafficking legislation (federal, state, and international).

EchoHawk, Larry. "[Child Sexual Abuse in Indian Country: Is the Guardian Keeping in Mind the Seventh Generation](#)." *N.Y.U. Journal of Legislation and Public Policy* 5 (2001): 83–127.

This article addresses child sexual abuse in Indian country by first presenting the status of child sexual abuse in the United States generally and then discussing its impact in Indian country. The latter part of the article focuses on the federal government's role and responsibility to combat the occurrence of child sexual abuse in Indian country given the federal government's trust relationship.

Estey and Bomberger, LLP. "[Child Molestation Laws by State](#)." *Childmolestationvictims.com* (accessed Oct. 31, 2017).

This webpage offers users the ability to search child abuse and molestation laws by state. It also highlights child safety laws such as the Adam Walsh Child Protections and Safety Act and Child Abuse Prevention and Treatment Act.

Greenfeld, Lawrence, and Steven K. Smith. [American Indians and Crime](#), February 1999.

This report presents an accumulation of American Indians and crime data from a five-year period: 1992 to 1996. Information on the rates at which American Indians experience violent victimization and the perpetrators of violent crime could be useful to review when drafting a findings or purposes section.

Gulasekaram, Pratheepan, and Emily Buss. "[Contributing to the Delinquency of Minors—Bibliography, Cases](#)." *Law.jrank.org* (accessed Nov. 28, 2017).

This webpage contains a post on the history and background of the crime of contributing to the delinquency of a minor. The website is a free law and legal reference library and is managed by Net Industries.

Indian Law and Order Commission. [A Roadmap for Making Native American Safer](#), November 2013.

This report by the Indian Law and Order Commission offers recommendations to improve public safety and the administration of justice in Indian country. The recommendations were informed by hearings, meetings, and conversations the commission had with tribal, state, and

federal leaders, nonprofit organization representatives, and other stakeholders. The report also assesses the TLOA of 2010.

Listenbee, Robert L., Jr., et al. [Report of the Attorney General's National Task Force on Children Exposed to Violence](#). Washington, DC: U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, December 2012.

This report was created by the Attorney General's National Task Force on Children Exposed to Violence as part the Defending Childhood Initiative founded by former Attorney General Eric H. Holder Jr. One of the recommendations of this report included calling for the creation of a federal task force to examine the needs of AI/AN children exposed to violation.

National Center for Missing and Exploited Children. [Missing and Abducted Children: A Law-Enforcement Guide to Case Investigation and Program Management](#). 4th ed., 2011.

This resource is targeted to assist law enforcement in better investigating cases of child abduction. Though, certain sections could be of benefit to all readers. Particularly, the historical overview of developments in child protection against abduction.

National Center for Victims of Crime. "[Child Trafficking Resources](#)." [Victimsofcrime.org](#) (accessed Oct. 25, 2017).

This webpage maintained by the National Center for Victims of Crime offers a list of resources for serving victims of child trafficking. Resources include a guide produced by the American Bar Association on meeting the legal needs of child trafficking victims, and a directory of training and technical assistance resources for anti-human trafficking task forces.

National Congress of American Indians Policy Research Center. [Human and Sex Trafficking: Trends and Responses across Indian Country](#). Tribal Insights Brief. Washington, DC: National Congress of American Indians, Spring 2016.

This resource provides historical context of trafficking in American Indian and Alaska Native communities, data on the prevalence and impact of trafficking, and sample tribal codes.

National Criminal Justice Training Center at Fox Valley Technical College. "[Endangered, Missing, and Abducted Children Trainings](#)." [Ncjtc.fvtc.edu](#) (accessed Aug. 20, 2020).

This resource is a list of trainings available from the National Criminal Justice Training Center at Fox Valley Technical College. One category of trainings is devoted to missing and abducted children.

National Criminal Justice Training Center Fox Valley Technical College. [The AMBER Advocate: AMBER Alert in Indian Country](#) 10 (3), Summer 2017.

This resource is a regular newsletter on AMBER alert programs. This particular issue recaps the 2017 AMBER Alert Symposium, which included a discussion on AMBER Alert programs in Indian country.

National District Attorneys Association. [Child Endangerment/Failure to Protect Laws](#) (accessed Aug. 20, 2020).

This resource, prepared by the National District Attorneys Association, is a statutory compilation of state, territorial, and federal child endangerment and failure to protect laws as of August 2014. Some failure to protect laws include contributing to the delinquency of a minor.

National District Attorneys Association. [Child Endangerment/Failure to Protect Laws](#) (accessed Oct. 30, 2017).

This resource, prepared by the National District Attorneys Association, is a statutory compilation of state, territorial, and federal child endangerment and failure to protect laws as of August 2014.

National District Attorneys Association. [Child Neglect and Abandonment State Statutes](#) (accessed Oct. 30, 2017).

This resource, prepared by the National District Attorneys Association, is a statutory compilation of child neglect and abandonment state laws. The association makes note that often neglect and abandonment criminalization occurs under the offenses “child abuse” or “child endangerment.”

National District Attorneys Association. [NDAA Parental Kidnapping Compilation](#) (accessed Oct. 30, 2017).

This resource is a compilation by the National District Attorneys Association of the state parental kidnapping laws.

National District Attorneys Association. [Statutory Compilation: Physical Child Abuse Penalties](#) (accessed Aug. 20, 2020).

This resource, prepared by the National District Attorneys Association, is a statutory compilation of state physical child abuse penalties as of April 2013.

National Indian Justice Center. [Bitter Earth: Child Sexual Abuse in Indian Country Discussion Guide](#). Washington, DC: Department of Justice, Office of Justice Programs, Office for Victims of Crime, revised 1999.

This educational resource developed by the National Indian Justice Center works to increase community awareness of child sexual abuse in Indian country. The guide contains discussion questions to prompt dialogue after the viewing of an educational video that includes information on the signs and symptoms of child sexual abuse.

Office of Juvenile Justice and Delinquency Prevention. [Child Abduction Response Team Certification Manual—Agency Guide](#). AMBER Alert Training and Technical Assistance Program, December 2012.

This resource presents information on best practices in child protection and recovery and outlines criteria that can be used to assess a Child Abduction Response Team (CART). Though targeted to the CART Certification Program, this resource, particularly Section 8, Section 10, and

Section 12, could provide valuable insight into what services are needed for communities/families and what policies can be included in a tribal code should a tribe have a CART program.

Office for Victims of Crime Training and Technical Assistance Center. “[Victim-Centered Approach](#).” [Ovcttac.gov](#) (accessed Aug. 20, 2020).

This webpage takes you to the section of the Human Trafficking Task Force e-Guide that discusses a “victim-centered approach.” The e-Guide was developed in partnership by the U.S. Department of Justice Office for Victims of Crime and the Bureau of Justice Assistance.

Perry, Steven W. [American Indians and Crime: A BJS Statistical Profile, 1992–2002](#), December 2004.

This report is an updated statistical profile of American Indians and crime data that analyzes data that spans an eleven-year period: 1992 to 2002. Information on the rates at which American Indians experience violent victimization and the perpetrators of violent crime could be useful to review when drafting a findings or purposes section.

Polaris. “[Labor Trafficking](#).” [Polarisproject.org](#) (accessed Aug. 20, 2020).

This webpage gives a general overview of labor trafficking, including key statistics about the severity of the problem.

Rosay, Jr., Andre. “Violence against American Indian and Alaska Native Women and Men: 2010 Findings from the National Intimate Partner and Sexual Violence Survey,” May 2016, National Institute of Justice. <https://www.ncjrs.gov/pdffiles1/nij/249736.pdf>

Tribal Law and Policy Institute. “[Tribal Sex Trafficking Resources](#).”

This website contains information about sex trafficking in Indian country. It contains resources such as a list of tribal coalitions, a victim services directory, a collection of trafficking articles and reports, and a blog with the latest media, news, training, funding, and policy updates related to sex trafficking in Indian country.

Truman, Jennifer L., and Lynn Langton. [Criminal Victimization, 2014](#). Washington, DC: Bureau of Justice Statistics, August 27, 2015.

This resource presents 2014 data on the rates and levels of criminal victimization in the United States. It provides statistics on the occurrence and prevalence of violent crime across race, age, sex, and region. A key takeaway of this resource is that in 2014, 1.1 percent of all person age twelve or older (three million persons) experienced at least one violent victimization.

U.S. Department of Justice. [A Report to Congress: The National Strategy for Child Exploitation Prevention and Interdiction](#), April 2016 (accessed Aug. 20, 2020).

This report is an updated National Strategy for Child Exploitation Prevention and Interdiction. The first strategy was published in 2010 as directed by the PROTECT Our Children Act of 2008. Section 6 is devoted entirely to child exploitation in Indian country.

U.S. Government Accountability Office. [Human Trafficking: Action Needed to Identify the Number of Native American Victims Receiving Federally-funded Services](#). GAO-17-325. Washington, DC: GAO, March 2017 (accessed Aug. 20, 2020).

This report was generated by the U.S. Government Accountability Office (GAO) at the request of the members of the Senate Committee on Indian Affairs. The GAO focused on examining federal efforts to collect data and to make federal grant programs available to address human trafficking in Indian country or of Native Americans.

U.S. Government Accountability Office. [Human Trafficking: Information on Cases in Indian Country or That Involved Native Americans](#). GAO-17-624. Washington, DC: GAO, July 2017 (accessed Aug. 20, 2020).

This report was generated by the U.S. Government Accountability Office to address the extent to which law enforcement agencies have encountered human trafficking in Indian country or of Native Americans; factors affecting the ability of law enforcement agencies to identify and investigate human trafficking; and the availability of services to trafficking victims.

U.S. Sentencing Commission. [Report to Congress: Federal Child Pornography Offenses](#), December 2012 (accessed Aug. 20, 2020).

This report focuses on the federal guideline for nonproduction offenses (e.g., possession, transportation, distribution), USSG Section 2G2.2. It is part of congressional efforts and stakeholder interest in assessing how federal child pornography offenders are prosecuted, sentenced, incarcerated, and supervised on reentry.

U.S. Department of State. [Trafficking in Persons Report](#). Washington, DC, June 2017 (accessed Aug. 20, 2020).

This resource, the *Trafficking in Persons Report*, is a tool used by the U.S. government to engage with other countries on antitrafficking efforts. Each country included in the report is ranked based on the country's efforts to comply with "minimum standards for the elimination of trafficking" outlined in the TVPA Section 108.

Vernon, Irene S., and Roe Bubar. "[Child Sexual Abuse and HIV/AIDS in Indian Country](#)." *wicazo sa review: A Journal of Native American Studies* 16 (1) (Spring 2001): 47–631.

This article examines the relationships between child sexual abuse and HIV/AIDS in Indian country. The author's note that child victims are at risk for HIV/AIDS in at least two critical ways: Victims/survivors tend to exhibit high-risk HIV behaviors like the use of intravenous drugs and having unprotected sex, and victims/survivors tend to exhibit high rates of sexually transmitted diseases that make them more vulnerable for infection.

White Eagle, Maureen, Bonnie Clairmont, and Lonna Hunter. [Responses to the Co-Occurrence of Child Maltreatment and Domestic Violence in Indian Country](#). West Hollywood, CA: Tribal Law and Policy Institute, 2011.

This resource investigates the issues of co-occurrence of domestic violence and child maltreatment in Indian country. The identified challenges could provide insight when developing a philosophical framework for a tribal criminal children's code.

White Eagle, Maureen, and Sarah Deer. [*Tribal Legal Code Resource: Sexual Assault and Stalking Laws Guide for Drafting or Revising Victim-Centered Tribal Laws against Sexual Assault and Stalking*](#). West Hollywood, CA: Tribal Law and Policy Institute, April 2017.

This resource expands more on general issues relative to sexual assault crimes such as degrees of force required, consent, and special evidence laws related to sexual assault.