

Creative **Civil Legal Remedies** Against Non-Indian Perpetrators of Sexual Violence Against Native Women

Southwest Center for Law and Policy
Presented by: Hallie Bongar White &
The Honorable Montie Deer
Special Thanks to Victim Rights Law Center

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Criminal Justice System Response **Nationally**

- Only 16% of rape victims report the crime.
- 98% of rape victims will never see their assailant apprehended, convicted and incarcerated.
- 54% of rape prosecutions result in either a dismissal or an acquittal.
- Approximately 1 in 10 rapes reported to the police result in time served in prison;
- 1 in 100 rapes (including those that are unreported) result in a sentence of more than one year in prison.
- A rape prosecution is more than twice as likely as a murder prosecution to be dismissed.

* Violence Against Women: *The Response to Rape: Detours on the Road to Equal Justice*, Report Majority Staff of the United States Senate Judiciary Committee, 103 Congress, May 1993.

* For general review of this issue, see also David P. Bryden and Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. Crim. L. & Criminology 1194 (1997).

Chart of Criminal Jurisdiction

Race of Defendant	Race of Victim	Crime	Jurisdiction
■ Indian	□ Indian	<ul style="list-style-type: none"> □ Major Crimes Act Gen.Cr. Act □ All Other □ Fed Crimes of General Applicability 	<ul style="list-style-type: none"> Federal (Tribal Concurrent) Tribal (Fed if no prosecution) Tribal (Exclusive) Federal
■ Indian	□ Non-Indian	<ul style="list-style-type: none"> □ Major Crimes Act □ Other Crimes 	<ul style="list-style-type: none"> Federal (Tribal Concurrent) Tribal (federal if unpunished)
■ Indian	□ No Victim	<ul style="list-style-type: none"> □ Victimless 	<ul style="list-style-type: none"> Tribal Exclusive

Chart of Criminal Jurisdiction

Race of Defendant	Race of Victim	Crime	Jurisdiction
□ Non-Indian	■ Indian	<ul style="list-style-type: none"> □ Major Crimes Act & Crimes of General Federal Applicability 	<ul style="list-style-type: none"> Federal
□ Non-Indian	■ Non-Indian	<ul style="list-style-type: none"> □ All 	<ul style="list-style-type: none"> State Exclusive
□ Non-Indian		<ul style="list-style-type: none"> □ Victimless 	<ul style="list-style-type: none"> State Exclusive

Challenges: **Non-Indian** Perpetrators

Tribes do not have **criminal** jurisdiction over
non-Indians

+

High Federal Declination Rate (TLOA)

= “jurisdictional void” and
non-Indian perpetrators can suffer zero
consequences

**What effect (if any) might this have on
Native communities?**

Challenges: **Indian** Perpetrators

Maximum penalty = up to 1 year jail (if
code & other changes = 3 years)

+

Maximum fine = up to \$5000 (\$15,000 if
code & other changes)

+

Serious shortage of tribal jails

= Weak penalties for serious crimes

**CREATIVE CIVIL
REMEDIES
AGAINST
NON-INDIAN
OFFENDERS IN
INDIAN
COUNTRY**



**Southwest
Center for Law
and Policy**

**2008 Roundtable Participants On Creative Civil Remedies For Non-Indian
Offenders In Indian Country**

**The Honorable Steve Aycok
The Honorable Montie Deer (Mvskogee Creek)
The Honorable Stacy Leeds (Cherokee)
Michelle Paquin Johnson (Red Lake Band of Chippewa
Indians)
Michelle Rivard-Parks (University of North Dakota)
Dorma Sahneya (Hopi)
Kelly Gaines Stoner (Oklahoma City University)
The Honorable. Melvin Stoof (Lakota Sicangu)
Hallie Bongar White
The Honorable James G. White (Citizen Potawatomi
Nation)**

The participants and organizers wish to extend
their deep and sincere appreciation for the assistance of the **Hon. William C.
Canby, Jr.** who served as an invaluable legal resource during the meeting.

CREATIVE CIVIL REMEDIES AGAINST NON-INDIAN

OFFENDERS IN INDIAN COUNTRY*

Hallie Bongar White**

Kelly Gaines Stoner***

The Honorable James G. White****

I. INTRODUCTION

Indian¹ women suffer the highest rates of domestic violence, stalking, and sexual assault of any population in the United States.² The majority of perpetrators of these crimes are non-Indian males.³ Paradoxically, tribal courts may not currently exercise criminal jurisdiction over non-Indians who commit these crimes in Indian Country.⁴ The mantle of tribal sovereignty weighs heavily with the responsibility to protect all persons located on tribal lands. Lack of criminal jurisdiction over non-Indians often dictates that Tribes must look to new and innovative civil legal strategies to address safety and security for their citizens and members, residents, and visitors.

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Civil To The Rescue!

- Difference between civil & criminal law = criminal involves potential loss of liberty triggering additional protections
- **Many Native women are turning to civil law to provide *some* justice and/or protection**
- Tribal Courts are “Pro Se” friendly
- Open to imposing creative civil remedies
- Use of custom & tradition in justice systems
- More “advanced” than state courts

Common Unmet Civil Legal Needs of Native Sexual Assault Survivors

- Restraining or Protection Orders
- Education
- Employment
- Privacy/Safety
- Immigration
- Public Benefits
- Housing
- Financial
- Family Law
- Torts
- Criminal Justice Advocacy (Victim Rights)¹¹

Civil Claims

- **Torts** (Personal Injury) = Civil. BUT, very **rare** in state or tribal courts (Remember OJ?) & legal services can't represent
- **Protection Orders** (aka Restraining Orders) = civil & are **common in DV crimes**.
- **BUT, can you get a protection order against a non-intimate partner after you've been raped?** Most statutes say No.

Most Common: Protection Orders & Injunctions

- Protection orders can be issued in both civil & criminal cases
- Issued against Indian and non-Indian defendants in civil cases
- ALL valid **Protection Orders** are entitled to **Full Faith & Credit**
- Injunctions against Harassment (non-intimate partner) & possibly NO FFC .

Civil Protection Orders

- Violence Against Women Act clearly recognizes the power of tribal courts to **issue and enforce** domestic violence civil protection orders against non-Indian defendants.
- However, **tribes must still make a showing that the court possessed both subject matter and personal jurisdiction** over the parties when both issuing and enforcing these orders
See: 18 USC § 2265
- **BUT: Civil jurisdiction is even more complicated than criminal jurisdiction**

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Exclusive Civil Jurisdiction Of Tribal Courts

- Tribes have exclusive jurisdiction over **any civil case involving an Indian defendant when the underlying claim arose in Indian Country**
- This includes **civil actions brought by non-Indian plaintiffs against Indian defendants.**
Williams v. Lee, 358 U.S. 217 (1959), *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).
- Unclear whether the exclusive civil jurisdiction of tribal courts also extends to Indian defendants who are citizens/members of other tribes. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

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Civil Jurisdiction In Indian Country: The First Hurdles

- Must have **subject matter jurisdiction and personal jurisdiction**
- **Personal jurisdiction:** court's power over the rapist/defendant. Usually presence on tribal lands is sufficient as minimum contacts.
- **Subject matter jurisdiction:** court's power to hear the topic underlying the litigation. Must look to tribal codes and to federal case law to determine subject matter jurisdiction.

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PERSONAL JURISDICTION

Montana v. United States, 450 U.S. 544 (1981)

- Tribal court must have **personal jurisdiction** over the **defendant**:
 - a.) the defendant has “**minimum contacts**” with the tribe (e.g. committed SA on tribal lands, is present on tribal lands, is doing business on tribal lands, etc.)
- OR**
- b.) the defendant has **consented to the jurisdiction** of the court **or waived** any objections to the exercise of personal jurisdiction in this matter by:
 - 1.) voluntarily appearing before the tribal court **or**
 - 2.) filing a motion, response, answer, or pleading in tribal court

SUBJECT MATTER JURISDICTION

(can't be “waived”)

- Tribal court must also have **subject matter jurisdiction**
- 1.) Act giving rise to the issue (SA) occurred within the territorial jurisdiction of the tribal court **and either**:
 - a.) defendant is a member of **the** tribe or eligible for membership with that tribe

OR

Subject Matter Jurisdiction cont'd

- b.) defendant is a member of another tribe **OR** is a non-Indian

AND

1) the defendant had entered into a **consensual relationship with the tribe or its members** through commercial dealing, contracts, leases or “other arrangements” (e.g. is married to a tribal member, has a child in common with a tribal member, is employed by the tribe, etc.) **OR**

2) the alleged conduct or violation threatens or has some **direct effect on the political integrity, the economic security, or the health or welfare of the tribe**

Wow, That's Complicated! See U.S. District Court case Martinez

- Victim is non-member Indian (from Alaska) seeking DV protection order
- Defendant is non-Indian & not married to victim, 0 kids
- DV occurred on Tribal “fee land” within the reservation in Washington where parties resided
- Neither party is employed by the tribe or has any other contractual, consensual relationship with tribe
- No pleading or order or facts in evidence that dv has a **direct effect on the political integrity, the economic security, or the health or welfare of the tribe.**
- Result?

CURE?

- Have a witness (Advocate? Law enforcement? Elder?) testify that sexual violence has a **direct effect on the political integrity, the economic security, or the health or welfare of the tribe** **AND**

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Tribal Civil Orders Should Directly Address...

- whether the Due Process requirements of the Indian Civil Rights Act 25 U.S.C Sec. 1301 et seq. of notice and opportunity to be heard have been complied with; **and**
- whether the defendant is a citizen/member of the tribe, a non-Indian, or a citizen/member of another tribe; **and**
- whether the incident giving rise to the civil litigation occurred on tribal land, on fee land, or on non-tribal rights-of-way ; **and**

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Tribal Civil Orders cont'd

- whether the parties had entered into a consensual relationship with the tribe or its members through commercial dealing, leases, or “other arrangements,” *or*
- whether the conduct in question threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

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Screening Issues

- ALL civil legal practitioners should screen for Native women and ask these questions:
 - Is victim and/or perpetrator and/or kid(s) a member (or eligible for membership) in a federally recognized tribe?
 - Anyone w/significant connection to tribal lands?
 - Where did crime take place? Federal, state, or “Indian Country”?

Tribal Civil Remedies

- Tribal courts and legal practitioners can be creative in civil remedies
- Can look to **custom and tradition**: what civil-like consequences did they traditionally impose when someone was sexually assaulted?
- Example: Navajo Nation Code §203 (G) recognizes the importance of inclusion of elders, medicine people, and teachers of traditional laws, values, and principles in guiding the courts in their imposition of remedies and in providing a framework for the administration of justice.

Restitution – Be Creative

- Tribal courts can order defendant in a variety of civil cases to pay for victim's missed work, torn clothes, medical expenses, gas to travel to court, etc.
- High unemployment in Indian Country =What is the ability of the defendant to pay the victim?
- How could there be a substitution of labor, goods, or services?
 - Examples: defendant may be ordered to replace the meat or fish the injured victim would've provided to the family for X amount of time.
 - defendant ordered to allow the victim to use heavy equipment or large freezer for X number of seasons.

“Traditional” Restitution- Custom & Tradition

- Common for victim who has undergone traumatic event to undergo ceremony & courts can compensate victims for these costs
- **State** crime victim compensation funds can pay “ordinary” and traditional losses for victims including ceremonies, medicine people, etc. (reporting within X amount of time)
- Need to explain to federal and state courts these costs and why appropriate

Community Service

- Can be the usual: pick up trash along highway, shelve books at library, or could be more meaningful or traditional work that benefits the community and shows remorse.
- Hunt and provide meat for elderly
- Chop wood or clear grounds for ceremonies, etc.

Other Civil Remedies In Tribal Court For Indian And Non-Indians

- **Fines:** no \$5000 (\$15,000 under TLOA) limit as in criminal cases but fines can't be *excessive* (but what is excessive?) under ICRA
- **Shame** Example: Wear a sign that says "I am a rapist."
- **Divorce/Child Custody/Support Orders:** SA as factor determining property distribution, support, visitation, etc.

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Other Civil Remedies

- **Injunctions** Examples: stay away from victim & work place, tribal governmental offices and businesses, etc. Need not be intimate partner
- **Forfeiture:** property was used to commit a crime. Once the government makes showing of probable cause, burden shifts to owner to show that the property was not used to commit a crime. Can include vehicles, mobile homes, trailers, etc. where sexual assault committed.
- **Exclusion or banishment**

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Civil Regulatory Powers of Tribes

- removing the name of a rapist from the lease of a tribal housing property or reassigning the lease to the victim
- restricting access or rescinding a business license with the tribe
- limiting a person's access to tribally funded benefits (such as barring small business loans or limiting access to the tribally funded gym)
- restricting or rescinding hunting or fishing licenses or privileges
- Disenrollment (for Indian perpetrators)

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Civil Regulatory cont'd

- rescinding future per capita disbursements (Tribal member)
- restricting access to tribal employment or to certain types of tribal employment (such as positions working with youth, the elderly, or other vulnerable persons)
- Residency Codes: require all non-tribal members residing on tribal lands to sign contract submitting to civil jurisdiction of the court and other provisions

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Tribal Firearms Codes- No 2nd Amendment Right in ICRA

- Tribes are free to adopt civil and firearms codes to protect their citizens. Examples:
 - Prohibiting possession by certain enumerated individuals (e.g. persons with d.v. convictions, minors, non-residents, etc.)
 - Prohibiting possession of all or certain types of firearms or ammunition (e.g. semi-automatic, etc.)
 - Mandatory licensing to carry firearms on tribal lands

Tribal Court Powers cont'd

- Mandatory registration of all privately held firearms on tribal lands
- Restrict possession of firearms and ammunition by parties in **custody and visitation proceedings**
- Restrict firearms and ammo in **mental health proceedings**
- Restrict firearms and ammo possession in other civil proceedings (e.g. guardianships, etc.)

Other Civil Remedies

- Posting of a **Peace Bond**
- **Civil Commitment**
- **Treatment and classes**
- **Civil Arrest:** Tribal courts can issue civil arrest orders against any person for failing to comply with a court's previously issued order =.person apprehended and detained by tribal law enforcement for a reasonable amount of time until the court can convene an evidentiary hearing to determine whether a violation has occurred.

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Victim Rights In Indian Country Criminal Cases

- **Crime Victim Rights Act** = federal law providing enumerated victim rights, including the right to counsel in criminal matters.
- Most states have crime victim rights laws
- Few tribes have crime victim rights codes
- You will be a trailblazer and will have to explain to the court why you should be allowed to **represent the victim in criminal proceedings as her attorney**

Precedent And Custom & Tradition

- When filing a notice of appearance (aka entry of appearance) in tribal court as a victim rights attorney in a criminal case you can argue: federal CVRA , state victim rights, and other tribes allow representation of victims.
- Tribal custom and tradition: **most tribes did not have a victim stand alone during dispute resolution mechanisms.**
- Similarly, in civil cases you can argue custom & tradition for restitution orders, expulsion, etc.
- Locating “expert witness” to testify on custom and tradition

Contempt of Court – Tribal Courts

- All courts have the inherent power to punish those persons who have shown disrespect to the individual judge or to the judicial system or
- to those who have engaged in behaviors which are intended to disrupt the administration of justice.
- Courts also have the power to take actions to encourage persons to comply with orders previously issued by the court.
- 3 types of contempt: criminal, summary and civil

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Criminal Contempt of Court

- Criminal contempt = acts intended to show disrespect to the court and/or to obstruct the administration of justice.
- Also for willfully disobeying a lawful court order
- Punitive in nature and can result in incarceration, a fine, or both.
- Intended to **punish past conduct** and are usually initiated by the tribal prosecutor.
- Contemnor entitled to tribal and ICRA protections
- The burden of proof on the tribal prosecutor.
- tribal courts **can't not hold non-Indians in criminal contempt of court**

Summary Contempt

- Also called “direct contempt.”
- Used to maintain the orderly administration of justice, e.g. to suppress acts of violence or disrespect that occur in open court.
- Example: shouting expletives inside the courtroom while the court is in session or physically attacking (or threatening to physically attack) court personnel in the courtroom while the court is in session.
- Court can **summarily detain a non-Indian contemnor to preserve the safety, integrity,** ⁴¹ **and order of the court.**

Civil Contempt

- Purpose is to **encourage prospective, future compliance** with a previously issued court order issued for the benefit of another party.
- Remedial in nature and **can't be used to punish.**
- Generally, initiated by “show cause” hearing with burden of proof, typically by a preponderance of the evidence, on the contemnor to demonstrate that 1.) the alleged contemptuous behavior was not **willful or intentional** and 2.) he did not have the **ability to comply** with the court's order. ⁴²

Civil Contempt

- Tribal courts may hold non-Indians, non-citizen/member Indians, and citizens/members in civil contempt of court.
- Although civil contempt may result in detention, the proceedings are civil in nature and do not trigger the same right to counsel or due process safeguards as in criminal contempt proceedings.
- **Before any civil contemnor may be held in detention, the court must make a finding that the contemnor willingly or intentionally violated the court's order and that he had the ability to comply with the order.**

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Civil Contempt cont'd



- Civil contempt can result in the imposition of fines and/or in the detention of the contemnor.
- **Detention cannot be ordered as punishment.** It can only be ordered as a means to force compliance with a court's previously issued order.
- The contemnor "holds the keys to the jail" and can earn his freedom by compliance with the previously issued court order.

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