

A Victim-Centered Approach to Crimes Against American Indian & Alaska Native Children

RESOURCE GUIDE AND WORKBOOK FOR DRAFTING NEW OR AMENDED TRIBAL LAWS ON CRIMES AGAINST CHILDREN

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We are grateful to the members of the Advisory Committee for their vision and guidance, and for giving countless hours to discussion, outlining, research, drafting, and review. We are also grateful to the law students who contributed many hours of research in evaluating more than 90 tribal codes in search of model provisions that could be shared here.

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FORWARD

AMERICAN INDIAN TRIBES CONSIDER THEIR CHILDREN SACRED BEINGS. That sacredness is stripped away when those children are the victims of crimes or abuse and neglect and the present and future generations of children suffer as a result. Sadly, even the American legal system, in its attempt to promote the “best interest” 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.

In order 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.

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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.

In order 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 doing so in a manner that the typical tribal member can understand the purpose and goal of the law. State and federal laws are typically written for lawyers to digest, while tribal laws 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, and sometimes state, criminal laws designed to protect Indian children, Tribes cannot assume that the existence of law always means that those laws will be enforced by the federal government. Tribes have the inherent authority to enact codes and enforces those codes even when they overlap with federal authority to prosecute under the Major Crimes Act, 18 USC §1153, or the Indian Country Crimes Act, frequently referred to as the General Crimes Act, 18 USC §1152. For example, a recent amendment to the Major Crimes Act includes 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. The crime itself, however, is defined by reference to state law, an anomaly since state law does not apply to Indian reservations covered by the Major Crimes Act. Apparently, reference was made to state law because of a perceived inadequacy in tribal written law defining such terms. Tribes must step forth to protect their children with written criminal laws to avoid future repeats of efforts to apply state laws to Indians on reservations.

Second, for Indian tribes covered by Public Law 280, where state criminal jurisdiction may lie, Tribes must remain vigilant in enacting appropriate criminal laws and sanctions. It is now settled that Tribes in Public Law 280 states have concurrent criminal jurisdiction over crimes committed by Indians in their communities. Just as federal prosecutions are oftentimes lacking, states do not always prosecute crimes against native children and without appropriate criminal codes, offenders may go without punishment. The recent enactment of federal law demanding that Indian tribes create sex offender registries within their communities as part of the Adam Walsh Act, 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. Difficult questions regarding children testifying against their perpetrators in criminal trials must be resolved by Indian tribes in their codes in manners that assure compliance with the Indian Civil Rights Act. That law is to be interpreted in a manner that is consistent with tribal notions of due process, however, so Indian tribes may have more latitude in designing criminal justice systems that protect children from the stresses related to procuring convictions of perpetrators than state and federal courts who are bound by court precedents that typically elevate the rights of perpetrators above those of victims.

This “Crimes Against American Indian/Alaska Native Children Resource Guide” (hereinafter referred to as “Guide”) that follows is the best model yet of how Indian children can be protected by Indian tribes in a manner that achieves both the goal of protecting the sacredness of children while assuring due process protections for those accused of committing crimes against children. It is much more than a model code. 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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INTRODUCTION

THE CHILDREN'S JUSTICE ACT PARTNERSHIPS FOR INDIAN COMMUNITIES GRANTS have been awarded to selected tribes and tribal organizations through the U.S. Department of Justice, Office for Victims of Crime to improve the capacity of tribal justice systems to handle serious cases of child abuse and to reduce the trauma experienced by Native child victims. With these grants, many tribal governments have enhanced their justice systems to improve the reporting, investigation, prosecution, and processing of child abuse cases as well as successfully limiting additional trauma to Native children by these systems.

To understand and contextualize contemporary violence against Native children it is critical to understand the legacy and history of violence that Native peoples have experienced through continued colonization in North America.

This book represents an approach for tribes to consider how different nations and states create laws to address crimes against children. We look both to our past and contemporary peoples to understand the collective wisdom for a victim-centered approach to protect our children.

-Roe Bubar, J.D.

Today, increased capacity to provide for child protection in American Indian and Alaska Native communities is often dependent upon a process of tribal law development and reform with the careful selection of imported laws and practices tailored to tribal needs and values. While federal and state child abuse investigations, interventions, and prosecutions continue to occur in Indian Country and within Alaska Native communities, the limitations in those systems increasingly compel tribal governments to consider stepping up their involvement in these cases. Federal prosecutors still decline to prosecute a majority of child abuse cases while most states lack criminal jurisdiction over Native offenders in Indian Country. Simultaneously and sometimes as a result of these limited responses, tribal governments are increasingly committed to exercising their inherent governmental powers to combat child abuse. A growing number of tribes are asserting concurrent criminal jurisdiction with both the federal and state governments in child abuse cases. They do so by applying tribal laws and practices and by borrowing researched and tested child protection innovations from the federal and state systems. Imported innovations are necessarily modified to work effectively to meet tribal needs and to further tribal values.

This "Crimes Against American Indian/Alaska Native Children Resource Guide" (hereinafter referred to as "Guide") has been developed in response to multiple tribal requests for assistance and support in development of tribal law to address serious child abuse. This Guide is designed to be used while drafting new or amended tribal statutory provisions. These provisions may be set out in various parts of the tribal code, but are likely to be found in the criminal code, rules of court and/or the rules of evidence. This is in contrast to civil provisions found in the dependency and/or delinquency codes (also known as "children's codes").

This Guide is essentially an overview of the comparative laws and the underlying policies impacting the well-being of children from two

perspectives: (1) federal anti-violence and victim assistance legislation; and (2) tribal law, including customs, traditions, and generally accepted practices, promoting the well-being of children. There are a number of key assumptions, requirements, and incentives coming from the federal anti-violence and victim assistance legislation that underlies many of the federal and state provisions included in the Guide.

These include:

- ❖ The assumption that a correlation exists between domestic violence and child abuse;
- ❖ The assumption that "hard" criminal justice interventions work best to curb domestic violence and child abuse (for example: creation of new crimes, mandatory arrests, longer prison sentences, tougher sentencing rules, mandatory restitution, offender registry and other zero-tolerance policies);

- ❖ The requirement of mandatory background checks for persons working with or around children;
- ❖ The requirement of mandatory reporting of suspected child abuse;
- ❖ The requirement of protections for child victims to reduce trauma in the criminal justice process;
- ❖ The provision of resources to locate missing and exploited children;
- ❖ The provision of resources to provide increased and ongoing services for victims; and
- ❖ The provision of resources for identifying, tracking, and sharing information about offenders.

There are also a number of important commitments and preferred processes that underlie many of the tribal provisions included in the Guide. Tribal law reflects a combination of community values, ways of doing, and policy choices, as well as legal standards and processes borrowed from the federal and state systems. The development of tribal law involves careful consideration of both the needs and values of the tribal community and researched and tested innovations in the federal and state law. The following is a generalization of what may be important to tribes:

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

WHAT THE GUIDE DOES

This Guide is intended to give the legal drafting committees of tribal governments an overview of comparative federal, tribal, and state statutory provisions for the drafting of new or amended tribal “child protection” laws. These include what are generally known as criminal laws, rules of court, and rules of evidence (also known as “law and order codes” in Indian Country). The Guide also includes illustrative examples and commentary. In most cases the language is a composite taken from numerous sources. The language in the example has been crafted to maximize child protection and services with consideration of the needs and values of the tribal community. The commentary defines terms, raises issues, and in some cases cites to the source of the language where the bulk of the language is taken from one place.

Finally, the Guide includes exercises at the end of each section to be used by the drafting committees. In creating code provisions to address child abuse, it may be important to include a variety of community individuals on the drafting committee such as representatives of government branches and/or agencies and representatives from the community, including elders and cultural consultants. The exercises are designed to assist the drafters in teasing out the key policies and rationales underlying the language in the examples and the comparative federal, tribal and state provisions set out in each section. The language in the examples provided in the Guide is not intended to be “model” language. Rather, it is provided as a starting point for discussion and for tailoring imported provisions to meet the needs, values, and/or policy choices of the given tribal sovereign.

WHAT THE GUIDE DOES NOT DO

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

The Guide does not address civil child dependency issues or provisions (also known as “civil children’s codes”). Because the Guide is specifically designed for criminal justice system enhancements, issues of child dependency, delinquency, adoption, parental rights, and other related civil matters are not covered here. The Tribal Law and Policy Institute has also developed a “Tribal Civil Children’s Code Resource Guide” to assist in law reforms furthering a civil response to child abuse and neglect.

The Guide is not a replacement for tribal agency or law enforcement protocol development or training. The Guide is designed specifically for tribal law drafting committees and legislative bodies to assist them in drafting and enacting criminal legislation that addresses child protection and child victims. It is also essential that Tribal employees and others who come into contact with victimized children receive special training on the appropriate practices and responses for working with child victims.

The use of a multi-disciplinary team is also recommended as part of a comprehensive criminal child abuse response system. It will also be important for tribes to develop system coordination tools including protocols to implement tribal statutes and to improve practice after the tribal code is completed. The Child Abuse Protocol Development Guide developed by the Tribal Law and Policy Institute is available as a resource for this purpose and can be found at <http://www.tlpi.org>.

ROAD MAP TO THE GUIDE

The following is a description of the different components of the Guide.

Overview	The overview provides a basic introduction to the topics of the chapter and an overview of its contents.
Illustrative Examples	Examples of statutory language are included in each section. In most cases the language is a composite constructed from numerous sources. The language in the illustrative example should not be adopted as-is without discussion and evaluation of a tribe’s unique needs.
Commentary	The commentary defines terms, raises issues, and in some cases cites to the source of the language in the example where the bulk of the language is taken from one place.
Existing Law Examples	Wherever possible, examples of existing laws from the federal, tribal and state governments are included for comparison. The example provisions are not intended as best or model provisions and should not be adopted wholesale without comparative analysis and discussion.
Exercises	Exercises are included at the end of each sub-chapter. The exercises are designed to facilitate discussion at the tribal government level, specifically in working with drafting committees, regarding the needs, resources, and values of the particular tribe.
Resources	A list of additional articles and resources is provided at the end of each chapter. Wherever possible, the additional resources are specific to tribal governments. Some of the resources listed include law review articles examining federal or state law. These are provided for general information only.

HOW TO USE THE GUIDE

It is helpful to work through this guide with a copy of the tribe’s existing laws in hand. Crimes against children, crimes against “persons,” and other related provisions may be located in different places throughout the tribal code. Look for relevant provisions in: the law and order code (criminal code), the children’s code (dependency and/or delinquency code, or these provisions may be found within the domestic relations code or family law code), the judicial or court establishment code (rules of court and/or rules of evidence), or as standalone child protection laws. It may also be helpful to have a list of legal definitions as the drafting committee works through the exercises.

If a given tribe does not currently have laws pertaining to crimes committed against children and related provisions, the resource guide may serve as a tool to begin drafting such laws.

It is important to keep the following tips in mind in working with the exercises:

1. The **Adoption and Safe Families Act (ASFA)**¹ is a federal statute that requires all states and some tribes to provide for the termination parental rights in some instances. For example, if a parent is convicted in criminal court of abandoning a child under six months of age, that parent’s rights must be terminated in a civil proceeding absent special showings and findings. Because this issue raises important considerations for tribal governments, we have made special note in the Guide of any example provisions that may trigger the application of ASFA.
2. The order of provisions in the Guide may not necessarily be the order in which a tribe arranges provisions in that tribe’s code. For example, it is important to include a definitions section to have a useful and enforceable code. Here we have included the definitions alongside the example criminal provisions. However, many tribal governments find it helpful to put all legal definitions in alphabetical order at the beginning of their criminal code.
3. A tribal code may already include criminal laws and definitions pertaining to crimes such as assault, battery or rape. As each drafting committee works through the exercises, it should note whether the proposed child protection law contradicts already existing criminal provisions. Alternatively, the committee may decide that existing laws and definitions need to be revised.
4. The drafting committee should discuss whether the criminal code should be applicable only to adult defendants, or whether it should also include juvenile offenders. Juvenile offenders are usually treated differently than adults for a number of important reasons. It may be helpful to have a separate discussion about how to draft laws dealing with juveniles who offend against children. The Guide assumes that the defendants committing the crimes are adults.

¹ The Adoption and Safe Families Act of 1997 (Public Law 105-89), Titles IV-B and IV-E, Section 403(b), Section 453, and Section 1130(a) of the Social Security Act.

FINDINGS

MOST TRIBAL CODES include an initial section describing the existing problems that the code will address. This section is often referred to as “findings” and provides the context and philosophy for the entire code. One of the first steps to developing an effective, victim-centered code is to assess and describe the problems. What problems exist and what problems are going to be addressed by the code? What is the current nature and rate of criminal child abuse and neglect in the community? What victim rights should be protected and what services should be provided? Answers to these questions should be included in the “findings” section. The legal provisions that follow will then be interpreted in light of these findings.

ILLUSTRATIVE EXAMPLE

CHAPTER X.

SECTION X. FINDINGS

The Tribe, after careful review of crimes against children, makes the following findings:

- (A) There is no resource that is more vital to the continued existence and integrity of our Nation than our children;
- (B) As a sovereign nation, we have a responsibility and duty to honor and protect our children;
- (C) Child maltreatment presents unique challenges and issues. Criminal cases involving child victims present complex psychological and sociological dynamics. Most often, the offender is a close and trusted family member or friend. Children are often burdened, pressured, and blamed by family and community members for breaking up families and the resulting disruption of the community. The burden that the child victims experience as a result of victimization is compounded by the response from the family and other community members;
- (D) Child maltreatment is a serious and critical concern for all tribal nations. The national victimization rate for native children is 20 victims per 1000 children as compared to a rate of 10.6 for white children. There is one substantiated report of child abuse for every 30 native children, a rate double the national rate;
- (E) Incidents of abuse and neglect of native children are underreported;
- (F) Investigations of the background of persons who care for or teach Indian children are often deficient;
- (G) Cases of child maltreatment are under-prosecuted in the federal/state court system; and
- (H) The multi-disciplinary team approach to the investigation, prosecution and intervention in child abuse cases can decrease trauma to child victims and their families.

COMMENTARY

The language in the above example has been taken from the findings of federal laws and national statistics.² See the “Additional Resources” section below. While national statistics can be useful in policy and lawmaking with respect to a problem, the findings provided in the example may not reflect the realities of every tribal community. Tribes should carefully identify local problems and statistics and draft specific findings that reflect these realities. If available, tribes should include the total number of cases where formal tribal and/or federal crimes were reported, charges filed, and/or crimes prosecuted, and the date range for these numbers.

It is important for both non-Natives working with tribal communities and community members to understand the historical policies and events that have impacted Native children in tribal communities. Forced boarding school policies in the late 1880’s separated Native children from their families and communities and placed them at great risk in unfamiliar institutional settings. As a result many of these children were victims of child physical, sexual, torture, and/or emotional abuse. Cut off from their families and communities many Native children were removed at very young ages and did not return to their tribal homelands until later in their lives. Child abuse victims from the forced boarding school era were largely left untreated and many were at risk for poor parenting, drug and alcohol abuse, mental health issues, relationship and health challenges.

Non-Native teachers were hired regularly to staff boarding schools in tribal areas. During the 1980’s there were several successfully prosecuted multi-victim child sexual abuse cases originating in tribal communities. The offenders were primarily non-Natives employed in the school system as teachers and several of these cases involved hundreds of child victims. An understanding of the history both nationally and locally is critical in responding effectively to crimes against Native children today. For example, in specific cases it may be important to consider the childhood experiences of the parents and grandparents (and even great-grandparents).

² There are problems with using the statistical data relating to child abuse, child sexual abuse and missing children in Indian Country. Most sources do not specifically identify Native American children except by percentages of the population overall. In 2003 the Administration on Children and Families (“ACF”) reported that Native American children were abused at a rate of 21.3 per 1,000 compared with 20.4 for African Americans, 11.0 for white children, and 9.9 for Hispanic children. There is a lack of comprehensive national and regional data collection to identify the number of Native children who are victimized or who die as a result of abuse and/or neglect. In 2000, according to the U.S. Department of Health and Human Services, an estimated 879,000 children in the United States were victims of abuse and neglect, out of about 3 million referrals for suspected maltreatment. The highest victimization rate - 15.7 victims per 1,000 children - was for children aged 0-3. Of those child abuse and neglect reports that were confirmed, 62.8 percent suffered neglect, 19.3 percent were physically abused, 10.1 percent were sexually abused and 7.7 percent were psychologically maltreated. More than half of all victims were white (50.6%); a quarter (24.7%) were African-American; a sixth (14.2%) were Hispanic; Native Americans accounted for 1.6% of victims; and Asian-Pacific Islanders were 1.4% of victims. In 1997 the Indian Child Welfare Association estimated that 90% of neglect cases and 60% of abuse cases involve families in which drinking or drug abuse is a major problem.

SELECTED FEDERAL CODES

TITLE 25. INDIANS

CHAPTER 21. INDIAN CHILD WELFARE

25 USCS 1901

§ 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds--

- (1) that clause 3, section 8, article I of the United States Constitution [USC Constitution, Art. I, § 8, cl 3] provides that “The Congress shall have Power . . . To regulate Commerce . . . with Indian tribes [Tribes]” and, through this and other constitutional authority, Congress has plenary power over Indian affairs;
- (2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;
- (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that 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;
- (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
- (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

TITLE 25. INDIANS

CHAPTER 34. INDIAN CHILD PROTECTION AND FAMILY VIOLENCE PREVENTION

25 USCS 3201

§ 3201. Findings

- (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.

EXERCISES

1. Describe the reasons you are working to develop a criminal children’s code. List the problems faced by child victims in your community.

2. What do you know about the incidence or numbers of child abuse cases in your tribe? Has there been any research done? Is data available from law enforcement? List possible sources of statistics for your tribe.

3. What was the total number of child-victim crimes charged by tribal and federal law enforcement last year? How many of these cases were prosecuted by tribal and/or federal prosecutors last year? What were the final outcomes?

4. Discuss whether the federal response to child abuse and neglect in your community is sufficient and whether a statement about this issue should be included in your draft findings.

5. Using the language in the example and the information collected above to draft a “findings” section for your tribal code.

6. Test your draft provision using the **OUHE** test. Is your draft provision **O**verinclusive - can you think of a person or situation that it might apply to that you did not intend? Is your draft provision **U**nderinclusive - can you think of a person or situation that you meant for it to apply to, but when you read your language it appears not to apply? Is your draft provision likely to be **H**ard to enforce? Does your provision (or another provision) include an **E**nforcement process and will it work? Discuss any difficulties you encounter and brainstorm ways of changing the language to fix them.

ADDITIONAL RESOURCES

1. D. Subia Bigfoot, *History of Victimization in Native Communities* (2000).
2. Kathleen A. Earle, *Child Abuse and Neglect: An Examination of American Indian Data* (2000).
3. Kathleen A. Earle, & A. Cross, *Child abuse and Neglect Among American Indian/Alaska Native Children: An Analysis of Existing Data* (2001).
4. Stephanie Hamarman, Kayla H. Pope & Sally J. Czaja, *Emotional Abuse in Children: Variations in Legal Definitions and Rates Across the United States*, 7 *Child Maltreatment* 303 (2002).
5. Center on Child Abuse and Neglect. University of Oklahoma, Health Sciences Center. 2005, available at <http://w3.uokhsc.edu/ccan/>, visited 3 April 2008.
6. Centers for Disease Control and Prevention. *Preventing Child Sexual Abuse: A National Resource Directory and Handbook*, National Sexual Violence Resource Center. 2005.
7. Child Welfare League of America. CWLA. 2005, available at <http://www.cwla.org>, visited 3 May 2008.
8. *Child Abuse and Neglect in America: What the Data Say*. American Humane Fact Sheet. 2004, available at http://www.americanhumane.org/site/PageServer?pagename=nr_fact_sheets_childabusedata, visited 3 June 2008.
9. The Children's Bureau. U.S. Department of Health and Human Services, Administration for Children and Families, available at <http://www.acf.hhs.gov/programs/cb/index.htm>, visited 12 April 2008.
10. The Child Trauma Academy, available at <http://www.ChildTrauma.org>, visited 3 May 2008.
11. *Confronting Child Sexual Abuse with Courage. Darkness To Light*. July 22, 2005, available at <http://www.darkness2light.org>, visited 16 April 2008.
12. Connelly, Helen. *Children Exposed to Violence: Criminal Justice Resource*. Office for Victims of Crime Bulletin. U.S. Department of Justice, Office of Justice Programs, June 1999.
13. Dias, Mark S., et.al. *Preventing Abusive Head Trauma Among Infants and Young Children: A Hospital-Based, Parent Education Program*. *Pediatrics* Vol. 115 No. 4 April 2005, pp. e470-e477, available at <http://pediatrics.aappublications.org/cgi/content/full/115/4/e470>, visited 24 May 2008.

PURPOSES

MANY TRIBAL CODES include a preliminary section, following the “findings” section, setting out the purposes of the code. Like the “findings” section, the “purposes” section will set the guiding principles for the code and will be used by judges to inform how other provisions should be read and applied in real cases. The purposes section will also set 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 purposes section may state that the code will define crimes and set harsher sentences for such crimes.

In Indian Country there is also a commitment to custom, tradition, and/or generally accepted local practices and ways of doing things. If applicable, the purposes section should state this and describe the processes (such as traditional or alternative dispute resolution, or therapeutic alternatives like traditional healing and/or drug or wellness courts).

ILLUSTRATIVE EXAMPLE

CHAPTER X.

SECTION X. PURPOSES

This Criminal Code shall be interpreted and construed to fulfill the following purposes:

- ❖ To provide for the welfare, safety and protection of all children and families in the tribal community, including protections for child victims of domestic violence;
- ❖ To supplement or even supplant state/county interventions where it is in the best interest of the child to do so;
- ❖ To take such actions as may be necessary and feasible to prevent the criminal abuse and neglect of children, including the use of criminal justice interventions such as the definition of new crimes, increased prosecution of such crimes, graduated and increased sentences, and victim restitution;
- ❖ To establish a list of mandatory reporters of child abuse;
- ❖ To minimize secondary trauma caused by the system response in child abuse investigations and prosecutions;
- ❖ To provide resources for increased and ongoing services for child victims;
- ❖ To provide resources for identifying, tracking, and sharing information about persons convicted of committing a crime against a child;
- ❖ To authorize such other actions as are necessary to ensure effective protections for the rights of child

victims; and

- ❖ To integrate controlling tribal law, custom, tradition, and practices and federal legislation in a comprehensive fashion, consistent with holding offenders accountable.

COMMENTARY

The language in the example is not taken from any one source. Rather, it adopts general themes from federal anti-violence and victim assistance legislation and tribal law promoting the well-being of children.

SELECTED FEDERAL CODES

TITLE 25. INDIANS

CHAPTER 21. INDIAN CHILD WELFARE

25 USC§ 1902

§ 1902. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

TITLE 25. INDIANS

CHAPTER 34. INDIAN CHILD PROTECTION AND FAMILY VIOLENCE PREVENTION

25 USC§ 3201

(b) **Purpose.** The purposes of this title 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.

42 USC CHAPTER 132 - VICTIMS OF CHILD ABUSE ACT 01/06/03

SUBCHAPTER I - IMPROVING INVESTIGATION AND PROSECUTION OF CHILD ABUSE CASES

Sec. 13001. Findings

The Congress finds that -

- (1) over 2,000,000 reports of suspected child abuse and neglect are made each year, and drug abuse is associated with a significant portion of these;
- (2) the investigation and prosecution of child abuse cases is extremely complex, involving numerous agencies and dozens of personnel;
- (3) traditionally, community agencies and professionals have different roles in the prevention, investigation, and intervention process;
- (4) in such cases, too often the system does not pay sufficient attention to the needs and welfare of the child victim, aggravating the trauma that the child victim has already experienced;
- (5) there is a national need to enhance coordination among community agencies and professionals involved in the intervention system;
- (6) multidisciplinary child abuse investigation and prosecution programs have been developed that increase the reporting of child abuse cases, reduce the trauma to the child victim, and increase the successful prosecution of child abuse offenders; and
- (7) such programs have proven effective, and with targeted Federal assistance, could be duplicated in many jurisdictions throughout the country.

EXERCISES

1. Brainstorm a list of ways that your tribe might address criminal child abuse (discuss the continuum from prevention of abuse to responses to actions and harmful conduct to the needs of a child victim) below:

2. Compare your list above with the list in the illustrative example. Are there any purposes listed in the language in the example that are not included in your list? If so, discuss whether or not they should be included in your tribal code.

3. Are there tribal customs, traditions and/or values or current practices that dictate how the tribe should combat criminal child abuse or handle victim's needs?

4. Draft a purposes section for your tribal code below:

5. Test your draft provision using the **OUHE** test. Is your draft provision **O**verinclusive - can you think of a person or situation that it might apply to that you did not intend? Is your draft provision **U**nderinclusive - can you think of a person or situation that you meant for it to apply to, but when you read your language it appears not to apply? Is your draft provision likely to be **H**ard to enforce? Does your provision (or another provision) include an **E**nforcement process and will it work? Discuss any difficulties you encounter and brainstorm ways of changing the language to fix them.

ADDITIONAL RESOURCES

1. F. Chris Austin, *Missing Tools in the Federal Prosecution of Child Abuse and Neglect*, 8 B.Y.U. J. Pub. L. 209 (1993).
2. Stevan E. Hobfall et al, *The Impact of Perceived Child Physical and Sexual Abuse History on Native American Women's Psychological Well-Being and AIDS Risk*, 70 J. of Consulting & Clinical Psych. 252 (2002).
3. Mary P. Koss et al, *Adverse Childhood Exposures and Alcohol Dependence Among Seven Native American Tribes*, 25 Am. J. of Preventive Med. 238 (2003).
4. William W. Patton, *Child Abuse: The Irreconcilable Differences Between Criminal Prosecution and Informal Dependency Court Mediation*, 31 U. Louisville J. Fam. L. 31 (1992).

NOTES

CRIMINAL JURISDICTION

THE TERM “JURISDICTION” refers to court power or authority over a particular person, thing, or subject matter. Tribal legislatures may choose to provide their courts with broader grants of jurisdiction to ensure that all kinds of child abuse may be handled by the court. However, it is important that new jurisdiction provisions are drafted that do not conflict with provisions in existing tribal codes.

There are four types of “jurisdiction.” These include “federal limitations of tribal powers,” “subject matter,” “personal,” and “territorial” jurisdiction.

FEDERAL LIMITATIONS OF TRIBAL POWERS. The U.S. federal government, over time, has limited certain tribal sovereign powers, such as the power to criminally prosecute non-Indians. The U.S. government’s prohibition of tribal prosecutions of non-Indians, effectively reduces the recognized subject matter jurisdiction of a tribe and its courts. There are numerous limitations that make up much of the body of federal Indian law. This chapter will cover the relevant limitations. See tables below. Note that external limitations of tribal subject matter jurisdiction are different from the internal divvying up of powers between the tribal legislature and its court systems.

SUBJECT MATTER JURISDICTION. In most tribes, this is the power given to the tribal court by its legislature (tribal council) usually through a statute to hear a particular type of action (e.g. criminal cases). In tribal courts of limited subject matter jurisdiction, the court has only those powers given to it in tribal statutes. In tribal courts of general jurisdiction (usually stated in a tribal statute), the court may hear any type of civil (non-criminal) case.

Some tribes have a constitutional separation of powers, a separate article or section in their constitution that vests the judicial power in a third, judicial branch of government. Where the constitution vest the judiciary with powers in both “law and equity” or to hear cases under both tribal statutes and custom and tradition, the tribal court has broad subject-matter jurisdiction to hear almost any type of civil case.

In the criminal context a tribal legislature must set out the tribal court’s “criminal subject matter jurisdiction.” This is usually done via a criminal code, by defining the territory in which crimes are committed, the type of perpetrator, and the types of crimes to be prosecuted in tribal court.

PERSONAL JURISDICTION. This is the power of a court to hear cases involving a non-consenting person. Whether a court has “personal jurisdiction” turns on whether it is fair (or realistically possible) to pull a person into tribal court when that person may not reside on tribal land, physically come on tribal land, or own property on tribal land.

TERRITORIAL JURISDICTION. This is the power of a court over a bounded area of land (usually all reservation and/or trust lands, but may include other lands as well) and all persons and property that reside within it. There is usually a territorial jurisdiction provision in the tribal governing document.

The following tables summarize the relevant federal limits on tribal jurisdiction. Key statutes and court opinions include:

THE MAJOR CRIMES ACT (18 U.S.C. §1153). The Major Crimes Act grants jurisdiction to federal courts over Indians who commit any of the listed major offenses in Indian Country. The Major Crimes Act was enacted in response to *Ex Parte Crow Dog* (109 U.S. 556 (1883)), which held that tribes possessed complete, inherent and exclusive criminal jurisdiction over crimes committed by Indians in Indian Country. Tribes may choose to exercise concurrent jurisdiction where the tribal law defines similar crimes.

The offenses set out in the Major Crimes Act include the following which may be committed against a child: murder, manslaughter, kidnapping, maiming, aggravated sexual abuse, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, an assault against an individual who has not attained the age of 16 years, and felony child abuse or neglect. The Federal Sentencing Guidelines set out minimum sentences and enhancements for convictions of murder, manslaughter, various forms of assault, various forms of criminal sexual abuse, and kidnapping.³ Three of the offenses listed with applicable minimum/enhanced sentencing include minor assault (6-18 months depending on the criminal history of the perpetrator and then degree of victim injury), criminal sexual abuse of a minor under the age of sixteen years (27-63 months depending on the criminal history of the perpetrator, whether the perpetrator had custody, care or control of the victim, the misrepresentation of identity or use of an interactive computer service to engage the victim in prohibited sexual conduct), and criminal sexual abuse of a ward (15-33 months depending on the criminal history of the perpetrator, the misrepresentation of identity or use of an interactive computer service to engage the victim in prohibited sexual conduct). In 2003 Congress enacted the Feeney Amendment to the Sentencing Reform Act to reduce the authority of federal judges to depart from the sentencing guidelines in child abduction and sex offense cases.

THE GENERAL CRIMES ACT (18 U.S.C. §1152). The General Crimes Act often serves as the basis for federal prosecution of non-Indians who commit crimes against Indian children in Indian Country. It also preempts state court jurisdiction over such non-Indians. Under the General Crimes Act the federal courts have jurisdiction over crimes that occur between Indians and non-Indians in Indian Country and as defined by federal law. If the defendant is a non-Indian and the victim is an Indian, or vice versa, the General Crimes Act provides the federal courts jurisdiction to prosecute. Tribal governments retain concurrent jurisdiction when the defendant is Indian. The General Crimes Act does not extend to offenses committed by one Indian against another Indian, offenses already punished by a tribal government, or any case where a treaty stipulates that the tribe has exclusive jurisdiction.

³ 18 U.S.C.A. §3551(a) (applies the Sentencing Guidelines to the Major Crimes Act); 18 USC Appx §§ 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.2, 2A3.3, 2A3.4, and 2A4.1.

THE ASSIMILATIVE CRIMES ACT (18 U.S.C. §13). The Assimilative Crimes Act also serves as the basis for federal prosecution of non-Indians who commit crimes against Indian children in Indian Country - but for lesser crimes not defined by federal law (for example the crime of indecent exposure). The effect of the Assimilative Crimes act is to borrow state criminal law and to apply it through federal law to Indian Country. A violator is charged with a federal offense and is tried in federal court, but the crime is defined and the sentence prescribed by state law. The Assimilative Crimes Act is extended to Indian Country via the General Crimes Act.

PUBLIC LAW 280. Under a series of federal statutes beginning with 18 U.S.C. §1162 (1953), Congress authorized states to exercise criminal jurisdiction over any person for crimes committed in Indian Country (the law originally applied whether a tribe consented or not but was later amended to require tribal approval). Public Law 280 also limited the special federal criminal jurisdiction in these states. See Table 3.4 below for current states' status.

UNITED STATES V. WHEELER (435 U.S. 313 (1978)). The U.S. Supreme Court held that a defendant may be charged with the same crime in tribal court and federal court without violating the U.S. Constitutional provision prohibiting double jeopardy.

OLIPHANT V. SUQUAMISH (435 U.S. 191 (1978)). The U.S. Supreme Court held that tribes lack criminal jurisdiction over non-Indians. Tribes may only criminally prosecute members of federally-recognized tribes.

UNITED STATES V. LARA (541 U.S. 193(2004)). The U.S. Supreme Court held that tribes have criminal jurisdiction over all members of federally recognized tribes, whether or not they are members of that particular tribe.

DEFINITION OF "INDIAN." "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under the Major Crimes Act. 25 USC § 1301(4).⁴ This includes tribal members, non-members with some degree of Indian blood, and those considered by the community to be Indian.

⁴ See for example, *Duro v. Reina*, 851 F.2d 1136, 1144 (9th Cir. 1987) ("Federal courts identify Indians by reference to an individual's degree of Indian blood and his tribal or governmental recognition as an Indian. *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir.), cert. denied, 444 U.S. 859, 100 S. Ct. 123, 62 L. Ed. 2d 80 (1979). Members of terminated tribes do not qualify as Indians, regardless of their race. *United States v. Heath*, 509 F.2d 16, 19 (9th Cir. 1974). Enrolled members of tribes qualify as Indians if there is some other evidence of affiliation, such as residence on a reservation and association with other enrolled members. *United States v. Indian Boy X*, 565 F.2d 585, 594 (9th Cir. 1977), cert. denied, 439 U.S. 841, 99 S. Ct. 131, 58 L. Ed. 2d 139 (1978). A person of mixed blood [**22] who is enrolled in a recognized tribe or otherwise affiliated with it may be treated as an Indian. *Ex parte Pero*, 99 F.2d 28, 31 (7th Cir. 1938), cert. denied, 306 U.S. 643, 59 S. Ct. 581, 83 L. Ed. 1043 (1939); R. Flowers, *Criminal Jurisdiction Allocation in Indian Country* 6 (1983). For the purpose of federal jurisdiction, Indian status is "based on a totality of circumstances, including genealogy, group identification, and lifestyle, in which no one factor is dispositive." Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz.L.Rev. 503, 518 (1976). Tribal courts may define their criminal jurisdiction according to a similarly complex notion of who is an Indian.")

TABLE 3.1 FEDERAL CRIMINAL JURISDICTION IN INDIAN COUNTRY
(IN NON-PUBLIC LAW 280 STATES)

Persons Involved	Federal Jurisdiction
Indian Offender and Indian Victim	Under the Major Crimes Act, 18 U.S.C. §1153, the U.S. can prosecute 15 listed (major) offenses. Among these, burglary and incest are defined by state law. All others are defined by federal statute.
Indian Offender and Non-Indian Victim	The U.S. can prosecute the 15 listed offenses as described above. Additionally, the U.S. can prosecute “interracial crimes” under the General Crimes Act, 18 U.S.C. §1152, as defined by federal law, unless the offender has been punished by the tribe or a treaty provides for exclusive tribal jurisdiction. Federal prosecution may also occur using a substantive offense defined by state law and incorporated via the Assimilative Crimes Act, 18 U.S.C. §13.
Indian Offender (Victimless Crimes)	The U.S. may be able to prosecute under the General Crimes Act, 18 U.S.C. §1152, or the Assimilative Crimes Act, 18 U.S.C. §13, unless already punished by the tribe.
Non-Indian Offender and Indian Victim	The U.S. may prosecute under the General Crimes Act, 18 U.S.C. §1152, using offenses defined under federal law or an offense defined by state law via the Assimilative Crimes Act, 18 U.S.C. §13.
Non-Indian Offender and Non-Indian Victim	There is no federal jurisdiction to prosecute except for distinctly federal offenses [<i>United States v. McBratney</i> , 104 U.S. 621 (1881); <i>Draper v. United States</i> , 164 U.S. 240 (1896); <i>United States v. Wheeler</i> , 435 U.S. 313 (1978)].
Non-Indian Offender (Victimless Crimes)	The U.S. may prosecute under the General Crimes Act, 18 U.S.C. §1152, using crimes defined under federal law, or using crimes defined by state law via the Assimilative Crimes Act, 18 U.S.C. §13. The Assimilative Crimes Act alone may provide a jurisdictional base [See <i>United States v. Chapman</i> , 321 F. Supp. 767 (E.D. Va. 1970)]. The federal “Petite” policy would discourage federal prosecution after a state has already prosecuted. ⁵ Also, under 18 U.S.C. §1165, the U.S. may prosecute non-Indians who trespass on Indian land to hunt, fish, or trap game.

⁵ See Judith Resnik, *Tribes, Wars, and the Federal Courts: Applying the Myths and the Methods of Marbury v. Madison to Tribal Courts' Criminal Jurisdiction*, 36 Ariz. St. L.J. 77, footnote 266 (Spring 2004) (“That the federal government can prosecute does not require it to do so. Many years ago, the Department of Justice created a policy, popularly known as the “Petite Policy” (after *Petite v. United States*, 361 U.S. 529 (1960)), providing rules about sequential prosecutions. That policy does not give a defendant enforceable rights. See *Rinaldi v. United States*, 434 U.S. 22 (1977); “Dual and Successive Prosecution Policy” in III Department of Justice Manual at 9-2.031 (2d ed. 2002-Supp) (noting that Congress has, in some statutes, prohibited a second prosecution following a state judgment of conviction or an acquittal on the merits). The Manual sets forth three requirements for a second federal prosecution: that the matter involves “a substantial federal interest;” that the federal interest has not been vindicated, and that the government believes that an “unbiased trier of fact” would convict the defendant. *Id.* Also detailed are the types of prosecutions covered and the stages of prosecution to which the policy applies. Prosecutions in tribal courts are not mentioned.”).

TABLE 3.2 TRIBAL CRIMINAL JURISDICTION IN INDIAN COUNTRY

Persons Involved	Tribal Jurisdiction
Indian Offender and Indian Victim	Tribes may choose to assert concurrent jurisdiction over those crimes listed in the Major Crimes Act, 18 U.S.C. §1153. For all other offenses, tribes have exclusive jurisdiction (except where a federal statute specifically provides otherwise – such as in a “Public Law 280” state).
Indian Offender and Non-Indian Victim	Tribes may choose to assert concurrent jurisdiction over those crimes listed in the Major Crimes Act, 18 U.S.C. §1153. Tribes also have concurrent jurisdiction over those offenses which can be prosecuted by the U.S. under the General Crimes Act, 18 U.S.C. §1152. Except for major crimes, tribes may preempt federal prosecution by trying and punishing the offender in tribal court. For any other offenses (as defined in tribal codes) tribal courts have exclusive jurisdiction.
Indian Offender (Victimless Crimes)	Same as above.
Non-Indian Offender and Indian Victim	Tribes have no jurisdiction to prosecute non-Indians, unless Congress delegates such power to them [<i>Oliphant v. Suquamish Indian Tribe</i> (1978), 435 U.S. 313].
Non-Indian Offender and Non-Indian Victim	Same as above.
Non-Indian Offender (Victimless Crimes)	Same as above.

TABLE 3.3 STATE CRIMINAL JURISDICTION IN INDIAN COUNTRY

Persons Involved	State Jurisdiction
Indian Offender and Indian Victim	No state has jurisdiction, except for the “Public Law 280” states, or by other federal statute, or by tribal vote pursuant to 25 U.S.C. §1321 [<i>United States v. John</i> , 437 U.S. 634]. In “Public Law 280” states the tribe retains concurrent jurisdiction [see <i>Walker v. Rushing</i> , 898 F.2d 672 (8 th Cir. 1990); Solicitor’s Opinion, dated November 14, 1978, 6 Ind. Law Rprt. H-1 (1979)].
Indian Offender and Non-Indian Victim	Same as above.
Indian Offender (Victimless Crimes)	Same as above.
Non-Indian Offender and Indian Victim	No state has jurisdiction except under “Public Law 280” or with tribal consent pursuant to 25 U.S.C. §1321.
Non-Indian Offender and Non-Indian Victim	State courts have jurisdiction over all offenses defined by state law and involving only non-Indians [<i>United States v. McBratney</i> , 104 U.S. 621 (U.S. 1881)].
Non-Indian Offender (Victimless Crimes)	State courts are likely to have jurisdiction concurrent with the federal government but the law is unclear. [see <i>United States v. Billadeau</i> , 275 F.3d 692 (8 th Cir. 2001)].

TABLE 3.4 “PUBLIC LAW 280” STATES

Category	State <small>*check for retrocession below</small>	Exceptions/Limitations
Original States	California	
	Minnesota*	Except Red Lake
	Nebraska*	
	Oregon*	Except Warm Springs
	Wisconsin*	
Partial States	Alaska (added later)	Except Metlakatla
	Arizona	See Arizona Revised Statutes Annotated, Sections 36-1801, 36-1856 (air and water pollution)
	Florida	See Florida Statutes Annotated, Section 285.16
	Idaho	See Idaho Code, Sections 67-5101-5103
	Iowa	See Iowa Code Annotated, Sections 1.12-14
	Montana	See Montana Revised Code Annotated, Section 83-802
	Nevada	See Nevada Revised Statute, Section 41.430
	North Dakota	See North Dakota Cent. Code, Section 27-19-02 (subject to tribal consent)
	South Dakota	See South Dakota Compiled Laws Annotated, Sections 1-1-17, 1-2-21 (Civil and criminal on highways only)
	Washington	See Washington Revised Code, Section 37.12.010
State Retrocessions	Utah	See Utah Code Annotated, Sections 63-36-9 to 63-36-21
	Full or partial retrocessions have been accepted for more than 25 reservations (see Federal Register for respective years)	Tulalip (2000)
		Salish-Kootenai (1995)
		Confederated Tribes of the Chehalis Reservation, Quileute Reservation, and the Swinomish Tribal Community (1989)
		Ely Colony (1988)
		Colville (1987)
		Winnebago (1986)
		Pascua Yaqui Reservation (1985)
		Umatilla Reservation (1981)
		Menominee Reservation (1976)
		Fifteen Nevada Reservations (1975)
		Nett Lake Reservation (1975)
		Port Madison Reservation (1972)
		Omaha Reservation (1970)
		Quinalt Reservation (1969)

ILLUSTRATIVE EXAMPLE

CHAPTER X.

SECTION 1. CRIMINAL JURISDICTION

The court shall have criminal jurisdiction over:

- (A) All actions or conduct that constitutes a violation of any provision of the tribal code when such actions or conduct occur within the territorial jurisdiction of the court. Nothing in this code shall be construed as limiting the jurisdiction of the Tribe over non-Indians or non-members except for express limitations imposed by the laws and treaties of the Tribe.
- (B) Conduct which occurs outside the reservation or territorial jurisdiction of the Tribe which constitutes an attempt, solicitation or conspiracy to commit an offense within the reservation or territorial jurisdiction of the Tribe, and an act in furtherance of the attempt or conspiracy occurs within the reservation or territorial jurisdiction of the Tribe.
- (C) Conduct which occurs within the reservation or territorial jurisdiction of the Tribe and constitutes an attempt, solicitation, or conspiracy to commit in another jurisdiction an offense prohibited by the tribal code and is also prohibited in the other jurisdiction.
- (D) Any person who transacts, conducts, or performs any business or activity within the Reservation, either in person or by an agent or representative, for any act expressly prohibited by this code.
- (E) Any person who owns, uses or possesses any property within the Reservation, for any charge of criminal offense prohibited by this code arising from such ownership, use or possession.
- (F) Nothing in this code shall prevent the imposition of civil penalties upon any person, including those over whom the Tribe lacks criminal jurisdiction.

CHAPTER X.

SECTION 2. ORIGINAL AND EXCLUSIVE JURISDICTION

- (A) Where the federal government asserts jurisdiction:

The tribal court shall have original and exclusive jurisdiction over all criminal offenses committed within the Tribe's territorial jurisdiction, except to the extent that the Major Crimes Act or other federal laws provide for concurrent federal jurisdiction. In that event, the jurisdiction shall be concurrent with the United States government.

- (B) Where the state government asserts jurisdiction:

The tribal court shall have concurrent jurisdiction with the state of X over all criminal offenses committed within the territorial jurisdiction of the Tribe.

COMMENTARY

The language in the example was taken and modified from the Poarch Band of Creek Indians Code, Section 4-1-5, Original and Exclusive Jurisdiction. See below.

SELECTED TRIBAL CODES

POARCH BAND OF CREEK INDIANS

§4-1-5 ORIGINAL AND EXCLUSIVE JURISDICTION

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

WHITE MOUNTAIN APACHE CRIMINAL CODE §1.2 (2000)

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

TULALIP TRIBES OF WASHINGTON CODES AND REGULATIONS

AMENDED: 2004

ORDINANCE 49 - LAW & ORDER CODE TITLES 1-2

Title 1 -Tribal Court

Title 2 -Criminal and Traffic Procedure

Part 1 - General Preliminary Provisions

Part 2 - Investigative Procedures

Part 3 - Commencing Prosecution

Part 4 - Arrest and Related Procedures

Part 5 - Initial Appearance, Presence of Defendant, and Right to Counsel

Part 6 - Bail

Part 7 - Arraignment of the Defendant

Part 8 - Pretrial Motions and Discovery

Part 9 - Trial

Part 10 - Juries

Part 11 - Sentence and Judgment

Part 12 - Traffic Infraction Procedures

TITLE I Tribal Court

1.1 Establishment of Court

There is hereby established for the Tulalip Reservation in Washington a court to be known as the Tulalip Tribal Court, hereafter referred to as the Tribal Court.

1.2.1 The jurisdiction of the Tulalip Tribal Courts shall extend, except as limited by federal or Tulalip tribal law, to (a) all persons natural and legal of any kind and to (b) all subject matters which, now and in the future, are permitted to be within the jurisdiction of any tribal court of a sovereign Indian tribe or nation recognized by the United States of America; and tribal territorial jurisdiction shall extend, except as limited by federal law or Tulalip tribal law, to all lands and waters, in trust or fee, within the Tulalip Indian Reservation and outside the Tulalip Reservation to lands and waters reserved or obtained by the Tribes and its people for their use by any treaty or law or in any other manner, including, but not limited to, court decision, purchase, established right of use, or gift.

The Courts of the Tulalip Tribes shall have jurisdiction to hear and decide all causes of action arising from activities within the boundaries of the Consolidated Borough of Quil Ceda Village and shall hear and decide all matters arising under the duly adopted ordinances and regulations of the Consolidated Borough of Quil Ceda Village.

EXERCISES

1. Refer to your existing governing document (constitution, articles of association, etc.), court establishment or judicial code, and any criminal code (law and order code). Find your territorial, personal, and subject matter jurisdiction provisions. Under these provisions, does your tribal court have the power to prosecute criminals for crimes committed against children? Does this include non-member Indians? For what types of crimes?

2. Test your existing provisions using the **OUHE** test. Is the provision **O**verinclusive - can you think of a person or situation that it might apply to that you did not intend? Is your draft provision **U**nderinclusive - can you think of a person or situation that the drafters meant for it to apply to, but when you read the language it appears not to apply? Is the provision likely to be **H**ard to enforce? Does the provision (or another provision) include an **E**nforcement process and will it work? Discuss any difficulties encountered and brainstorm ways of changing the language to fix them.

3. Does your tribe's law provide for criminal prosecution concurrent with the federal government?

ADDITIONAL RESOURCES

1. Christopher B. Chaney, *The effect of the United States Supreme Court's Decisions During the Last Quarter of the Nineteenth Century on Tribal Criminal Jurisdiction*, 14 B.Y.U. J. of Pub. L. 173 (2000).
2. Robert N. Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 AZ L. Review 951 (1975).
3. Ada P. Melton & Jerry Gardner, *Public Law 280: Issues and Concerns* (2000).
4. Jon M. Sands, *Indian Crimes and Federal Courts*, 11 Fed. Sent. Rep.153 (1998).
5. Vanessa J. Jimenez and Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. Rev. 1627 (1998)

JURISDICTION OVER NON-INDIANS

THIS CHAPTER EXPLORES various possible means for extending tribal jurisdiction (power) over non-Indians who work for the tribe or who use tribal resources, such as game, fish, or timber. Requiring non-Indians to accept or acquiesce to tribal jurisdiction prior to working for the tribe or using tribal resources can protect the community from individuals who may cause harm.

Tribes do not have criminal jurisdiction over non-Indians. In *United States v. McBratney*, the U.S. Supreme Court held that state jurisdiction took the place of federal jurisdiction over the murder of a white man by another white man on a Colorado Indian reservation.⁶ The rationale was that the tribe would not have any interest in such a crime. Post *McBratney*, the Court has made it clear that tribes do not have criminal jurisdiction over non-Indian who commit crimes in Indian Country.⁷

Tribes, however, may have civil jurisdiction over non-Indians even over non-Indian actions that occur on fee land under the so-called “*Montana test*,” that is, where the non-Indian either (1) enters into consensual relations with the tribe or its members (through commercial dealings, contracts, leases, or other arrangements) or (2) where the non-Indian conduct threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe.⁸ Many tribes exercise this jurisdiction by enacting civil provisions that apply fine and seizure schemes to offenses that would otherwise be criminal in nature. Moreover, where the tribal court has jurisdiction over an Indian child, any non-Indian relative who wants to have an impact on what happens to the Indian child has an incentive to consent to tribal jurisdiction either formally or informally.

It is important to note that the U. S. Supreme Court has repeatedly interpreted the “*Montana test*” very narrowly.⁹ The U. S. Supreme Court has rarely found that non-Indian actions meet the “*Montana test*” even in a civil context especially when the non-Indian action took place on fee land.

⁶ *United States v. McBratney*, 104 U.S. 621 (U.S. 1882).

⁷ *Oliphant v. Suquamish*, 435 U.S. 191 (1978). A tribal assertion of criminal jurisdiction over non-Indians would be challenged. See 55 Interior, Dec. 14 (1934). Tribal courts do have criminal contempt power over non-Indians who may be involved in civil cases before the forum.

⁸ *Montana v. United States*, 450 U.S. 544 (U.S. 1981).

⁹ For example – see *Strate v. A-1 Contractors Montana v. United States*, 520 U.S. 438 (U.S. 1997) and most recently *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc., et al.* 554 U.S. ____ (U.S. 2008).

ILLUSTRATIVE EXAMPLE

CHAPTER X.

SECTION X. CIVIL JURISDICTION OVER NON-INDIANS;

- (A) Any person may accept or acquiesce to tribal jurisdiction through written or verbal statements.
- (B) “License,” as used in this section, shall also mean any permit, lease or agreement.
- (C) “Non-Indian,” as used in this section, includes any corporation, partnership, trust or other entity owned or controlled by non-Indians.
- (D) “Agreement,” as used in this section, includes any contract, whether oral or written.
- (E) Whenever the Tribe has the authority to approve a license, the application for the license shall require the applicant to execute an acknowledgment that acceptance of the license by the applicant constitutes the applicant’s formal acquiescence to the criminal and civil jurisdiction of the Tribe.
- (F) In return, the Tribe agrees to do business with the applicant.
- (G) This acknowledgement shall be stated **In Bold Face And With Each Letter Of Each Word Capitalized**.
- (H) Each license issued by the Tribe shall also contain a statement that in accordance with the licensee’s application, the licensee had formally acquiesced to the criminal and civil jurisdiction of the Tribe.
- (I) In the exercise of criminal and civil jurisdiction over a non-Indian, such person shall be afforded the protections of the Indian Civil Rights Act.
- (J) Notwithstanding the lack of any formal acquiescence by a non-Indian to the Tribe’s criminal and/or civil jurisdiction, law enforcement officers of the Tribe shall have authority to arrest a non-Indian who commits any offense defined in this code or in the laws of the United States or the state of X and detain such non-Indian pending the transfer of such non-Indian to the custody of a law enforcement officer of a jurisdiction having authority to prosecute such non-Indian for the commission of the offense.
- (K) Any contraband or other property used in commission of an offense shall be forfeited to the Tribe.
- (L) Notwithstanding the lack of any formal acquiescence by a non-Indian to the Tribe's criminal and/or civil jurisdiction, the tribal court retains the power to find such person in civil contempt for failure to abide by sanctions, including, among others, fines and community service.

COMMENTARY

The language in the example has been taken and modified from the Sisseton-Wahpeton Sioux Tribe, Sections 20-02-01 to 20-02-08 below. The U.S. Supreme Court has yet to rule on the legality of non-Indian acquiescence to tribal criminal jurisdiction. Until the Court does so, some tribes have been attempting to assert criminal jurisdiction over consenting non-Indians. However, most tribes use a more conservative civil law approach in dealing with non-Indian misconduct. The language in the example also includes the requirement of non-Indian acquiescence to the civil jurisdiction of the tribe in exchange for doing business on the reservation.

SELECTED TRIBAL CODES

SISSETON-WAHPETON SIOUX TRIBE

20-02-01 CRIMINAL JURISDICTION

20-02-03 The Tribe shall exercise criminal jurisdiction over all non-Indians who commit an offense defined in this Code within the Indian country within the exterior boundaries of the Lake Traverse Indian Reservation whenever such nonmember formally acquiesces to such jurisdiction in return for the Tribe's agreement not to exercise its power to exclude the offender from such Indian country.

20-02-04 Whenever the Tribe or any political subdivision, agency or entity of the Tribe has the authority to approve a license, permit, lease or agreement, each application for such license, permit, lease or agreement shall require the applicant to execute an acknowledgment that acceptance of such license, permit, lease or agreement by the applicant constitutes the applicant's formal acquiescence to the criminal jurisdiction of the Tribe in return for the Tribe's agreement that whenever such criminal jurisdiction is to be exercised, the Tribe will not exercise its power to exclude the offender from the Indian country subject to the Tribe's jurisdiction. The acknowledgment shall be stated in bold face and with each letter of each word capitalized.

20-02-05 Each license, permit, lease or agreement issued by the Tribe or any political subdivision, agency or entity of the Tribe shall also contain a statement that in accordance with the licensee's, permittee's, lessee's or contractor's application, the licensee, permittee, lessee or contractor has formally acquiesced to the criminal jurisdiction of the Tribe.

20-02-06 In the exercise of criminal jurisdiction over a non-Indian offender, such offender shall be afforded the protections of the Bill of Rights of the Constitution of the United States, except that such offender, if indigent, shall not have the right to counsel appointed by the Tribal Court.

20-02-07 Notwithstanding the lack of any formal acquiescence by a non-Indian to the Tribe's criminal jurisdiction, law enforcement officers of the Tribe shall have the authority to arrest a non-Indian who commits any offense defined in this Code or in the laws of the United States or the State of South Dakota or the State of North Dakota and detain such non-Indian pending the transfer of such non-Indian to the custody of a law enforcement officer of a jurisdiction having authority to prosecute such non-Indian for the commission of the offense.

20-02-08 The term "non-Indian" as used in this section includes a corporation, partnership, trust or other entity owned or controlled by non-Indians. The term "agreement" as used in this section includes any contract, whether oral or written.

TULALIP TRIBES OF WASHINGTON CODES AND REGULATIONS

AMENDED: 2004

ORDINANCE 49 - LAW & ORDER CODE TITLES 1-2

§2.1.3 Criminal jurisdiction.

1. An Indian defendant is subject to prosecution in Tribal Court for any offense enumerated in Title III of this Ordinance or another Tribal ordinance, which, is committed totally or partially within the exterior boundaries of the Tulalip Reservation, or is committed on lands and waters outside the Tulalip Reservation reserved or

obtained by the Tribes and its people for their use by any treaty or law or in any other manner, except where such exercise of criminal jurisdiction is limited by federal or tribal law.

2. An offense is committed partially within the Tulalip Reservation or within other Tribal lands as described above, if either the conduct which is an element of the offense or the result which is an element occurs within the exterior boundaries of the Tulalip Reservation or other Tribal lands.
3. An offense based on an omission to perform a duty imposed by Tribal law is committed within the exterior boundaries of the Tulalip Reservation, regardless of the location of the defendant at the time of the omission.

SWINOMISH TRIBE CODE 2004

TITLE 4 CRIMINAL CODE

§4-01.050 Tribal Criminal Jurisdiction.

(A) The Tribal Court shall have criminal jurisdiction on the Reservation over:

1. All tribal members; and
2. All other Indians in accordance with applicable Federal laws.

(B) The Tribal Court shall have criminal jurisdiction outside the Reservation over all tribal members with respect to the exercise of fishing, hunting and gathering rights on all usual and accustomed fishing grounds and stations of the Tribe, on all open and unclaimed lands reserved by treaty for hunting or gathering and on such other lands and waters as are necessary for access to these fishing, hunting and gathering sites.

[History] Ord. 184 (9/30/03); Ord. 154 (6/4/02); Ord. 75 (4/2/91).

NAVAJO NATION CRIMINAL CODE REVISED

TITLE 17 CHAPTER 2

§204. Civil Prosecutions of non-Indians

- (A) Any non-Indian alleged to have committed any offense enumerated in this Title may be civilly prosecuted by the Office of the Prosecutor. In no event shall such a civil prosecution permit incarceration of a non-Indian or permit the imposition of a criminal fine against a non-Indian.
- (B) Procedure. Civil prosecutions under this section shall be conducted in accordance with the Navajo Rules of Criminal Procedure, and the non-Indian civil defendant shall be afforded all the heightened protections available to a criminal defendant under those rules including, but not limited to, the more stringent burden of proof beyond a reasonable doubt.
- (C) Nothing in this section shall be deemed to preclude exercise of criminal jurisdiction over any person who, by reason of assuming tribal relations with the Navajo people or being an “in-law” (or hadane) or relative as defined by Navajo common law, custom, or tradition, submits himself or herself to the criminal jurisdiction of the Navajo Nation.
- (D) Civil Penalties. Upon finding that a non-Indian has committed any of the offenses enumerated in this Title, the Court may impose any of the following civil penalties in any combination deemed appropriate by the Court:
1. A civil fine (fines listed for offenses under Title 17 may serve as a guideline for the calculation of a civil fine, but the criminal fines are not binding upon the calculation of a civil fine):
 2. Any civil forfeiture made appropriate by the penalty sections of Title 17:
 3. Restitution, or nalyeeh, consistent with the traditional principles of nalyeeh:
 4. Exclusion from all lands subject to the territorial jurisdiction of the Navajo Nation courts.

§205. Time Limitations

A prosecution for embezzlement of Navajo Nation monies or falsification of Navajo Nation records or vouchers may be commenced at any time within five years after discovery of the offense.

EXERCISES

1. Does your existing tribal code include language requiring non-Indian acquiescence to tribal jurisdiction in either a civil or a criminal manner?

2. Test your existing provision using the **OUHE** test. Is your existing provision **O**verinclusive - can you think of a person or situation that it might apply to that the drafters did not intend? Is the provision **U**nderinclusive - can you think of a person or situation that it should apply to, but when you read your existing language it appears not to apply? Is the provision likely to be **H**ard to enforce? Does the provision (or another provision) include an **E**nforcement process and will it work? Discuss any difficulties you encounter and brainstorm ways of changing the language to fix them.

3. List the reasons that a non-Indian person may be living and/or working on the reservation with or near children. Discuss whether such a person should be subject to tribal court jurisdiction if they were to harm a child. What are the pros and cons of using a criminal versus a civil approach?

ADDITIONAL RESOURCES

1. Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 AZ L. Rev. 503 (1976).
2. Jamelle King, *Tribal Court General Civil Jurisdiction Over Actions Between Non-Indian Plaintiffs and Defendants: Strate v. A-1 Contractors*, 22 Am. Indian L. Rev. 191 (1997).
3. Laurie Reynolds, *"Jurisdiction" in Federal Indian Law: Confusion, Contradiction, and Supreme Court Precedent*, 27 NM L. (1997).

NOTES

STATUTES OF LIMITATION

FEDERAL AND STATE LAWS often limit the ability of a prosecutor to bring charges after a certain length of time. These laws are referred to as “statutes of limitation.” This should not be confused with the right of a defendant to have a speedy trial which applies after a person has been arrested for a crime. A tribal statute of limitations would limit the length of time that a tribal prosecutor would have to prosecute a person who has committed a crime. If the tribal police and prosecutor could not make a case against a person, once the time period ran out, the person could no longer be charged with the crime. Recent trends in federal and state law extend or eliminate statutes of limitation for certain types of child-victimizing crimes.

The rationale for having statutes of limitation is to assure fair treatment of criminal defendants. Over time memories of witnesses can be impacted, evidence may get lost and people may change. However, we also know that disclosure of child sexual abuse is more of a process and less of an event. Children and adolescents may disclose the abuse years later or may decide to come forward years after their abuse to pursue criminal prosecution of the abuser. If the tribal code drafting committee does not have experience with the way children disclose sexual abuse or other serious abuses, it may be important to consult with specialist who work with sexually abused children to better comprehend the issues in delayed disclosures, memory and evidence in these situations.

Statutes of limitation may be “tolled” (extended) or eliminated all together. 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 of time where a federal or state agency is investigating a crime - and where the tribal authorities are hampered in their efforts to investigate the crime.

ILLUSTRATIVE EXAMPLE

OPTION A

CHAPTER X.

SECTION X. NO STATUTE OF LIMITATION FOR CRIMES AGAINST CHILDREN

There is no limitation on the time in which a prosecution may be commenced for any offense involving a victim who was under 18 years of age at the time of the offense.

OPTION B

CHAPTER X.

SECTION X. TOLLING OF STATUTE OF LIMITATIONS FOR CRIMES AGAINST CHILDREN

The applicable time period for commencing prosecution for crimes under the criminal code shall not commence

to run for an alleged violation until the victim attains the age of 18 or the violation is reported to law enforcement, whichever occurs first. Upon the victim turning 18 or a report to law enforcement, the prosecution must be commenced within 7 years.

Section X. Tribe Authorized to File John Doe Complaint

- (A) The Tribe is authorized to file a criminal complaint against a “John Doe” where there is physical evidence that a child is a victim of a crime but where the perpetrator is unknown.
- (B) The date of the filing of the “John Doe Complaint” under subsection (a) qualifies as a “commencement of the prosecution.”

COMMENTARY

The language in the two options above is a composite of numerous sources. The language in Option B would authorize the tribe to file “John Doe Complaints.” This provision would authorize the tribal prosecutor to file a complaint against an unknown perpetrator as a way of preserving the complaint. This provision is targeted at cases where the prosecutor has good reason to believe that a child has been the victim of a crime given the presence of physical evidence, but where the identity of the perpetrator is of yet unknown.

The primary consideration for tribes in providing for either the outright elimination of a statute of limitation, tolling provisions, or the authorization of “John Doe Complaints” is whether the tribal court is likely to find the provision to violate the Indian Civil Rights Act (“ICRA”). ICRA provides that “No Indian tribe in exercising powers of self government shall ... (8) deprive any person of liberty or property without due process of the law.”¹⁰

¹⁰ 25 U.S.C. §1302 (6) & (8).

SELECTED TRIBAL CODES

NISQUALLY TRIBAL CODE, § 10.0205 (2003)

TIME FOR BRINGING AN ACTION

All action under this Title shall be initiated within 2 years from the date the crime is discovered, or through reasonable diligence should have been discovered, except that in actions involving the sexual abuse of a minor an action may be initiated within 2 years from the date the victim reveals facts giving rise to a cause of action under this Title.

TULALIP TRIBES OF WASHINGTON CODES AND REGULATIONS

AMENDED: 2004

ORDINANCE 49 - LAW & ORDER CODE TITLE 3

3.1.8 Time limitations.

- (1) Unless otherwise specified by statute:
 - (a) prosecution for any Class A or Class B offense must be commenced within one year after the alleged offense is committed;
 - (b) prosecution for any Class C or Class D offense must be commenced within two years after the alleged offense is committed;
 - (c) prosecution for any Class E offense must be commenced within three years after the alleged offense is committed;
 - (d) if 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.
- (2) The period of limitation does not run under the following conditions:
 - (a) during any period in which the offender is not usually and publicly residing within this Reservation or is beyond the jurisdiction of the Tribal Court;
 - (b) during any period in which the offender is a public officer and the offense charged is theft of public funds while in public office; or
 - (c) during a prosecution pending against the offender for the same conduct even if the prosecution is dismissed.
- (3) An offense is committed either when every element occurs or, if the offense is based upon a continuing course of conduct, when the course of conduct is terminated. The time starts to run on the day after the offense is committed.
- (4) A prosecution is commenced when a complaint is filed.

EXERCISES

1. Review your tribal criminal code to determine whether you have a statute of limitations. Does the statute of limitations toll or not apply if a child is victimized?

2. Test your existing provision using the **OUHE** test. Is your provision **O**verinclusive - can you think of a person or situation that it might apply to that the drafters did not intend? Is your provision **U**nderinclusive - can you think of a person or situation that the drafters meant for it to apply to, but when you read your language it appears not to apply? Is the provision likely to be **H**ard to enforce? Does the provision (or another provision) include an **E**nforcement process and will it work? Discuss any difficulties you encounter and brainstorm ways of changing the language to fix them.

3. Discuss reasons why it may take a child victim a significant period of time to report or for his or her parents to choose to pursue prosecution of the perpetrator. For how long should a statute of limitations be tolled? Should it be eliminated altogether in some cases?

4. How can we ensure fairness for criminal defendants who may or may not have committed the alleged crime?

ADDITIONAL RESOURCES

1. Durga M. Bharam, *Statute of Limitations for Child Sexual Abuse Offenses: A Time for Reform Utilizing the Discovery Rule*, 5 J. of Criminal Law and Criminology 842 (1989).
2. Jodi Leibowitz, *Criminal Statutes of Limitation: An Obstacle to the Prosecution and Punishment of Child Abuse*, 25 Cardozo L. Rev. 907 (2003).
3. Elizabeth E. Loftus, M. Garry, & J. Feldman, *Forgetting Sexual Trauma: What Does it Mean when 38% Forget?* 62 J. of Consulting and Clinical Psychology 1182 (1994).
4. Brian L. Porto, *New Hampshire's New Statute of Limitations for Child Sexual Assault: Is it Constitutional and is it Good Public Policy?* 26 New England L. Rev. 151 (1991).
5. Susan K. Smith, *State-by-State Survey of Statutes of Limitation Applicable to Civil Claims of Childhood Sexual Abuse*, (1997-2007), available at <http://www.smith-lawfirm.com/statutetable.html>, visited 6 June 2008.
6. Linda M. Williams, *What Does it Mean to Forget Child Sexual Abuse: A Reply to Loftus, Garry, and Feldman*, 62 J. of Consulting and Clinical Psychology 1177 (1994).
7. American Prosecutors Research Institute. *Investigation and Prosecution of Child Abuse*. Arthur T. Pomponio. Third Edition. U.S.A., United Kingdom, New Delhi: Sage Publications, 2004.

NOTES

CRIMES AGAINST CHILDREN: PHYSICAL ABUSE

IN CONTRAST WITH CIVIL CHILDREN’S CODES (dependency codes), 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 generic battery, aggravated battery, assault, aggravated assault, and felonies when perpetrated against a child, “dangerous crimes against a child,” “promoting (encouraging) child abuse,” “criminal mistreatment in the 1st. degree,” “physical abuse of a child,” “child abuse that involves intentional causation of bodily harm,” and in some jurisdictions there is a separate definition of “child abuse” in the criminal code.¹¹ When drafting criminal child physical abuse codes consideration should be given to the questions below where scope and application of specific laws are considered.

Who is the crime targeted at? 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.” The prohibited act or omission may include intentional, knowing, willful, malicious, reckless, wanton, or negligent behavior, or merely causing a child some defined injury. 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 particular people. Further, crime definitions requiring proof that an alleged perpetrator knew or intended that a certain outcome would happen, will be difficult to apply.

What acts or omissions are targeted? A crime definition may prohibit the act or omission of “depriving a child of food, clothing or shelter,” “habitually permitting or causing the health of the child to be injured,” “causing excessive physical or mental pain,” causing “impairment of bodily function,” “disfigurement,” or “inflicting serious emotional damage,” “endangering the life or health of a child,” or “allowing a child to witness the commission of a forcible felony, battery, or family violence battery.” Alternatively, a crime definition’s prohibited act or omission may be proven by evidence of physical injury, serious or severe physical injury, or a substantial risk of physical injury (including serious or severe) (or alternatively, bodily harm and great bodily harm or permanent disability or disfigurement). It will be easier to prove abuse by requiring evidence of actual injuries than it will be to prove that a person intended, caused or permitted an act or omission. However, removing requirements to show intent or causation may increase the risk of wrongful convictions. The more types of acts and omissions included within the crime definition, the greater the protections for children.

What are the possible penalties? States tend to group crimes into classes 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 \$500-\$5,000 in fines and/or 3 months to 1 year in jail, and/or exclusion from the reservation for 2-10 years. (See selected tribal codes section below.) By contrast, “child abuse in the second degree” subjects an offender to \$250-\$5,000 and/or up to a year in jail.

¹¹ See Statutes of Limitations for Offenses Against Children: Summary of State Laws (August 2005); Child Welfare Information Gateway.

Classification provides policymakers and judges with tools for attempting to deter and punish more serious crimes with harsher sentences. However, under the Indian Civil Rights Act, 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. The deterrent effect of fines and sentences under this limit should be evaluated (note Georgia scheme below – “cruelty to children in the first degree” 5-20 years and “cruelty to children in the second degree,” 1-10 years).

Tribes criminalizing emotional abuse. A growing number of tribes have found it important to define their child abuse crimes to include physical and emotional abuse of a child. Physical abuse generally includes the infliction or causing of harm to a child. Each tribal community will need to define physical abuse (hitting, kicking, etc.) to meet its specific needs. Although physical abuse can usually be detected by marking or bruises, there may be cases where no markings are detected (internal injuries) and prosecutors will have to rely on a forensic pediatric medical evaluations. Similarly, emotional abuse is difficult to prosecute because there is often no clear evidence of abuse. Children who experience chronic physical abuse also suffer emotional abuse, often with greater long-term effects than physical abuse may cause. In addition, studies have shown that children subjected to witnessing domestic violence also suffer emotional abuse and this may be considered a crime. A wide range of behaviors and indicators, depending on age and developmental ability of a child, may be documented as evidence of emotional abuse. Included in the possible long term effects of emotional abuse are difficulty with learning, lack of coping skills and problem solving abilities, and, as an adult, addiction to alcohol and drugs, anti-social behavior, poor relationship skills and poor parenting skills. Tribal code drafters may need to craft special statutory provisions to assure that these child victims receive services and to identify the documentation needed to aid in successful prosecution.

A more detailed discussion of sentencing will be covered in its own chapter of the Guide.

ILLUSTRATIVE EXAMPLE

CHAPTER X.

SECTION X. PHYSICAL ABUSE OF A CHILD;

GENERAL DEFINITIONS

- (A) Physical injury means the impairment of physical condition and includes, but shall not be limited to, any skin bruising, pressure sores, bleeding, failure to thrive, malnutrition, dehydration, burns, fracture of any bone, subdural hematoma, soft tissue swelling, injury to any internal organ or any physical condition which imperils health or welfare of a child, including the presence of sexually transmitted diseases.
- (B) Severe physical injury or severe physical abuse means brain damage, skull or bone fracture, subdural hematoma, dislocation, sprains, internal injuries, poisoning, burns, scalds, severe cuts, or any other physical injury that seriously impairs the health, development, physical or emotional well-being of a child.

SECTION X. PHYSICAL ABUSE OF A CHILD;

CHILD ABUSE, AGGRAVATED CHILD ABUSE,

AND AFFIRMATIVE DEFENSES

- (A) **Child Abuse.** A person is guilty of child abuse if he or she intentionally, recklessly, or negligently, under circumstances likely to produce physical injury:
 - (1) Causes a child to suffer physical injury or abuse; or
 - (2) Causes a child to suffer emotional abuse; or
 - (3) Causes or permits the person or health of the child to be injured; or
 - (4) Causes or permits the child to be placed in a situation where the person or health of the child is endangered; or
 - (5) When he or she is the primary aggressor, intentionally allows a child to witness the commission of a family

violence battery; or

- (6) When he or she is the primary aggressor, having knowledge that a child is present and can see or hear the act, commits a family violence battery.

(B) **Aggravated Child Abuse.** A person is guilty of aggravated child abuse if he or she intentionally, recklessly, or negligently, under circumstances likely to produce death or severe physical injury:

- (1) Causes a child to suffer severe physical injury or abuse; or
- (2) Causes a child to suffer severe emotional abuse; or
- (3) Causes or permits the person or health of the child to be injured; or
- (4) Causes or permits the child to be placed in a situation where the person or health of the child is endangered.

(C) **Affirmative Defenses.** The use of physical force upon a child, which would otherwise constitute an offense, is justifiable and not criminal under the following circumstances:

- (1) A parent or guardian may use reasonable and appropriate physical force upon the child, to the extent reasonably necessary and appropriate, to maintain discipline or to protect the child from injuring him or herself or others;
- (2) A teacher, or other person entrusted with the care and supervision of a child, may use reasonable and appropriate physical force upon the child, to the extent reasonably necessary and appropriate, to maintain discipline, or to protect the child from injuring him or herself or others, where he or she has been expressly authorized by a parent or legal guardian to do so.
- (3) A parent, guardian, teacher, or other person entrusted with the care and supervision of a child, may use reasonable force for self-defense or in defense of another, against a child, where the use of the force is objectively reasonable.

COMMENTARY

In order to maximize child protection the language in the example has been crafted based upon multiple example codes and is specifically designed to apply to “any person” in most cases, and “primary aggressors” in cases of domestic violence. Evidence of physical injury may be proven by evidence of actual injuries. If there is a desire to classify crimes for increased sentencing, the language in the example may be divided into “intentional crimes,” “crimes of recklessness,” “negligence,” and “primary aggressor crimes” categories. Note the inclusion of defenses for reasonable and appropriate discipline, self-defense, and to protect the child or others from injury.

SELECTED TRIBAL CODES

EASTERN BAND OF CHEROKEE INDIANS

Sec. 14-30.5. Child abuse in the first degree.

- (a) It shall be unlawful for any person to:
- (1) Intentionally inflict any serious physical injury upon or to any child under 18 or intentionally commit an assault upon the child which results in any serious physical injury; or
 - (2) Commit, permit, or encourage any act of prostitution with or by any child under 18; or
 - (3) Commit, permit, or encourage any sexual act with or by any child under 18.
- (b) Child abuse in the first degree is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies.
- (c) Child abuse in the first degree shall be punishable by a fine of not less than \$500.00 and not more than \$5,000.00, by imprisonment for not less than three months nor more than one year, by exclusion for a period of not less than two years nor more than ten years, or by any combination of them. Should the commission of the offense result in the death or serious bodily injury to any person, a sentence of exclusion may be imposed for any period not exceeding life in addition to the punishment authorized above.

(Ord. No. 117, 3-3-2000; Ord. No. 369, 8-9-2000)

14-30.6. Child abuse in the second degree.

- (a) It shall be unlawful for any person to inflict physical injury, or to allow physical injury to be inflicted, or to create or allow to be created a substantial risk of physical injury, upon or to any child under 18 by other than accidental means.
- (b) Child abuse in the second degree is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies.
- (c) Child abuse in the second degree shall be punishable by a fine of not less than \$250.00 not more than \$5,000.00, by imprisonment for not more than one year, or both.

(Ord. No. 117, 3-3-2000; Ord. No. 369, 8-9-2000)

WHITE MOUNTAIN APACHE TRIBE CRIMINAL CODE

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) “Physical injury” means the impairment of physical condition and includes but shall not 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.

- (3) "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.

BAY MILLS TRIBAL CODE

CHAPTER VI - BAY MILLS LAW AND ORDER CODE

PART 1, SEC. 631

CHILD ABUSE OR NEGLECT. Any parent or guardian or person under whose protection any child may be, who cruelly or unlawfully punishes, or willfully or negligently deprives any child of necessary food, clothing or shelter, or who willfully abandons a child under 18 years, or who habitually permits or causes the health of such child to be injured, or his life endangered by exposure, want, or injury to his/her person, is guilty of child abuse and may be sentenced to imprisonment of not more than 1 year, payment of a fine not to exceed \$5,000, or both.

TRIBAL CODE - SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS

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.

SELECTED STATE CODES

GEORGIA

O.C.G.A. § 16-5-70 (2006)

§ 16-5-70. Cruelty to children

- a) A parent, guardian, or other person supervising the welfare of or having immediate charge or custody of a child under the age of 18 commits the offense of cruelty to children in the first degree when such person willfully deprives the child of necessary sustenance to the extent that the child's health or well-being is jeopardized.
- b) Any person commits the offense of cruelty to children in the first degree when such person maliciously causes a child under the age of 18 cruel or excessive physical or mental pain.
- c) Any person commits the offense of cruelty to children in the second degree when such person with criminal negligence causes a child under the age of 18 cruel or excessive physical or mental pain.
- d) Any person commits the offense of cruelty to children in the third degree when:
- (1) Such person, who is the primary aggressor, intentionally allows a child under the age of 18 to witness the commission of a forcible felony, battery, or family violence battery; or
 - (2) Such person, who is the primary aggressor, having knowledge that a child under the age of 18 is present and sees or hears the act, commits a forcible felony, battery, or family violence battery.
- e) (1) A person convicted of the offense of cruelty to children in the first degree as provided in this Code section shall be punished by imprisonment for not less than five nor more than 20 years.
- (2) A person convicted of the offense of cruelty to children in the second degree shall be punished by imprisonment for not less than one nor more than ten years.
- (3) A person convicted of the offense of cruelty to children in the third degree shall be punished as for a misdemeanor upon the first or second conviction. Upon conviction of a third or subsequent offense of cruelty to children in the third degree, the defendant shall be guilty of a felony and shall be sentenced to a fine not less than \$1,000.00 nor more than \$5,000.00 or imprisonment for not less than one year nor more than three years or shall be sentenced to both fine and imprisonment.

ILLINOIS COMPILED STATUTES ANNOTATED

CHAPTER 720. CRIMINAL OFFENSES

CRIMINAL CODE

CRIMINAL CODE OF 1961

TITLE III. SPECIFIC OFFENSES

PART B. OFFENSES DIRECTED AGAINST THE PERSON

ARTICLE 12. BODILY HARM

720 ILCS 5/12-4.3 (2006)

§ 720 ILCS 5/12-4.3. AGGRAVATED BATTERY OF A CHILD

Sec. 12-4.3. Aggravated battery of a child.

- (a) Any person of the age 18 years and upwards who intentionally or knowingly, and without legal justification and by any means, causes great bodily harm or permanent disability or disfigurement to any child under the age of 13 years or to any severely or profoundly mentally retarded person, commits the offense of aggravated battery of a child.

- (b) Aggravated battery of a child is a Class X felony, except that:
- (1) if the person committed the offense while armed with a firearm, 15 years shall be added to the term of imprisonment imposed by the court;
 - (2) if, during the commission of the offense, the person personally discharged a firearm, 20 years shall be added to the term of imprisonment imposed by the court;
 - (3) if, during the commission of the offense, the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person, 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court.

MASSACHUSETTS

PART IV CRIMES, PUNISHMENTS AND PROCEEDINGS IN CRIMINAL CASES

TITLE I CRIMES AND PUNISHMENTS

CHAPTER 265 CRIMES AGAINST THE PERSON

ALM GL CH. 265, § 13J (2006)

§ 13J. Assault and Battery Upon Child Causing Bodily Injury; Penalty.

- (a) For the purposes of this section, the following words shall, unless the context indicates otherwise, have the following meanings:-
- “Bodily injury,” substantial impairment of the physical condition including any burn, fracture of any bone, subdural hematoma, injury to any internal organ, any injury which occurs as the result of repeated harm to any bodily function or organ including human skin or any physical condition which substantially imperils a child's health or welfare.
 - “Child,” any person under fourteen years of age.
 - “Person having care and custody,” a parent, guardian, employee of a home or institution or any other person with equivalent supervision or care of a child, whether the supervision is temporary or permanent.
 - “Substantial bodily injury,” bodily injury which creates a permanent disfigurement, protracted loss or impairment of a function of a body member, limb or organ, or substantial risk of death.
- (b) Whoever commits an assault and battery upon a child and by such assault and battery causes bodily injury shall be punished by imprisonment in the state prison for not more than five years or imprisonment in the house of correction for not more than two and one-half years.

Whoever commits an assault and battery upon a child and by such assault and battery causes substantial bodily injury shall be punished by imprisonment in the state prison for not more than fifteen years or imprisonment in the house of correction for not more than two and one-half years.

Whoever, having care and custody of a child, wantonly or recklessly permits bodily injury to such child or wantonly or recklessly permits another to commit an assault and battery upon such child, which assault and battery causes bodily injury, shall be punished by imprisonment for not more than two and one-half years in the house of correction.

Whoever, having care and custody of a child, wantonly or recklessly permits substantial bodily injury to such child or wantonly or recklessly permits another to commit an assault and battery upon such child, which assault and battery causes substantial bodily injury, shall be punished by imprisonment in the state prison for not more than five years, or by imprisonment in a jail or house of correction for not more than two and one-half years.

NEBRASKA REVISED STATUTES ANNOTATED
CHAPTER 28. CRIMES AND PUNISHMENTS
ARTICLE 7. OFFENSES INVOLVING THE FAMILY RELATION
R.R.S. NEB. § 28-707 (2006)

§ 28-707. Child abuse; Privileges not available; Penalties

- (1) A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be:
 - i. Placed in a situation that endangers his or her life or physical or mental health;
 - ii. Cruelly confined or cruelly punished;
 - iii. Deprived of necessary food, clothing, shelter, or care;
 - iv. Placed in a situation to be sexually exploited by allowing, encouraging, or forcing such minor child to solicit for or engage in prostitution, debauchery, public indecency, or obscene or pornographic photography, films, or depictions; or
 - v. Placed in a situation to be sexually abused as defined in section 28-319, 28-319.01, or 28-320.01.
- (2) The statutory privilege between patient and physician, between client and professional counselor, and between husband and wife shall not be available for excluding or refusing testimony in any prosecution for a violation of this section.
- (3) Child abuse is a Class I misdemeanor if the offense is committed negligently.
- (4) Child abuse is a Class IIIA felony if the offense is committed knowingly and intentionally and does not result in serious bodily injury as defined in section 28-109.
- (5) Child abuse is a Class III felony if the offense is committed knowingly and intentionally and results in serious bodily injury as defined in such section.
- (6) Child abuse is a Class IB felony if the offense is committed knowingly and intentionally and results in the death of such child.

WISCONSIN ANNOTATED STATUTES
CRIMINAL CODE
CHAPTER 948. CRIMES AGAINST CHILDREN
WIS. STAT. § 948.03 (2006)

948.03. Physical abuse of a child.

(1) Definitions.

In this section, “recklessly” means conduct which creates a situation of unreasonable risk of harm to and demonstrates a conscious disregard for the safety of the child.

(2) Intentional Causation of Bodily Harm.

- (a) Whoever intentionally causes great bodily harm to a child is guilty of a Class E felony.
- (b) Whoever intentionally causes bodily harm to a child is guilty of a Class H felony.
- (c) Whoever intentionally causes bodily harm to a child by conduct which creates a high probability of great bodily harm is guilty of a Class F felony.

(3) Reckless Causation of Bodily Harm.

- (a) Whoever recklessly causes great bodily harm to a child is guilty of a Class G felony.
- (b) Whoever recklessly causes bodily harm to a child is guilty of a Class I felony.
- (c) Whoever recklessly causes bodily harm to a child by conduct which creates a high probability of great bodily harm is guilty of a Class H felony.

(4) Failing to Act to Prevent Bodily Harm.

- (a) A person responsible for the child’s welfare is guilty of a Class F felony if that person has knowledge that another person intends to cause, is causing or has intentionally or recklessly caused great bodily harm to the child and is physically and emotionally capable of taking action which will prevent the bodily harm from occurring or being repeated, fails to take that action and the failure to act exposes the child to an unreasonable risk of great bodily harm by the other person or facilitates the great bodily harm to the child that is caused by the other person.
- (b) A person responsible for the child’s welfare is guilty of a Class H felony if that person has knowledge that another person intends to cause, is causing or has intentionally or recklessly caused bodily harm to the child and is physically and emotionally capable of taking action which will prevent the bodily harm from occurring or being repeated, fails to take that action and the failure to act exposes the child to an unreasonable risk of bodily harm by the other person or facilitates the bodily harm to the child that is caused by the other person.

(5) Treatment Through Prayer.

A person is not guilty of an offense under this section solely because he or she provides a child with treatment by spiritual means through prayer alone for healing in accordance with the religious method of healing permitted under s. 48.981 (3) (c) 4. or 448.03 (6) in lieu of medical or surgical treatment.

EXERCISES

1. Brainstorm a list of physical actions towards children which should be illegal in your tribal community (examples: hitting, biting, burning, pushing, skin bruising etc). Write your thoughts in the space below.

2. What is your definition of emotional abuse? List examples of acts that may cause emotional abuse to a child and discuss whether these should have criminal consequences.

3. Are either of the following crimes currently missing from your tribal laws?

_____ Child Physical Abuse

_____ Aggravated Child Physical Abuse

If either of these crimes are missing from your laws, discuss whether you wish to include them. One of the advantages of including two levels of crimes for physical abuse is that it provides the tribal prosecutor with an additional tool to address the severity of a particular offense.

4. Review your existing tribal laws against child physical abuse, and compare them to examples above. What needs to be changed/improved in your current laws?

5. Test your draft provision using the **OUHE** test. Is your draft provision **O**verinclusive - can you think of a person or situation that it might apply to that you did not intend? Is your draft provision **U**nderinclusive - can you think of a person or situation that you meant for it to apply to, but when you read your language it appears not to apply? Is your draft provision likely to be **H**ard to enforce? Does your provision (or another provision) include an **E**nforcement process and will it work? Discuss any difficulties you encounter and brainstorm ways of changing the language to fix them.

ADDITIONAL RESOURCES

1. American Medical Association, *Diagnostic and Treatment Guidelines on Child Physical Abuse and Neglect* (1992).
2. Angelo P. Giardino, MD, PhD, *Child Abuse & Neglect: Physical Abuse*, Emedicine.com, available at <http://www.emedicine.com/ped/topic2648.htm>, visited 23 May 2008.
3. David J. Kolko, *Child Physical Abuse*, in *The APSAC Handbook on Child Maltreatment Second Edition*, 21 Sage Publications 2002).
4. Perry, B.D., Mann, D., Palker-Corell, A., Ludy-Dobson, C. & Schick, S., *Child Physical Abuse in Encyclopedia of Crime and Punishment*, 197 (David Levinson, ed., Sage Publications 2002).
5. Pressel, M.D., Ph.D., *Evaluation of Physical Abuse in Children*, *American Family Physician*, Vol. 61, N. 10 (May 15, 2000).
6. Formerly the National Clearinghouse on Child Abuse and Neglect Information and the National Adoption Information Clearinghouse, Child Welfare Information Gateway provides access to information and resources to help protect children and strengthen families, *Statutes of Limitations for Offenses Against Children: Summary of State Laws*, available at <http://www.childwelfare.gov>, visited 12 May 2008.
7. Robert M. Reece, *Treatment of Child Abuse: Common Ground for Mental Health, Medical and Legal Practitioners* (2000).
8. George B. Stevenson, *Federal Antiviolence and Abuse Legislation: Toward Elimination of Disparate Justice for Women and Children*, 33 *Willamette L. Rev.* 848 (Fall, 1997).
9. Davidson, Scott A., *When is Parental Discipline Child Abuse? – The Vagueness of Child Abuse Laws*, 34 *U. of Louisville J. of Fam. L.* 403 (Spring, 1995/1996).
10. Eidell Wasserman, *Understanding the Effects of Childhood Trauma on Brain Development in Native Children*, Tribal Law & Policy Institute, under the Children's Justice Act Training And Technical Assistance Project, Office for Victims of Crime, U.S. Department of Justice (January 2005), available at <http://www.tribal-institute.org/lists/child.html>, visited 10 June 2008

NOTES

CRIMES AGAINST CHILDREN: NEGLECT AND ENDANGERMENT

EACH YEAR, the substantiated reports of child neglect is always greater than the substantiated reports of physical or sexual abuse. Neglect includes a range of omissions such as adequate social, emotional, medical and educational care, witnessing violence, being deprived of developmentally necessary nurturing and supervision, and/or the lack of basic guidance and providing for basic needs. Any of these types of neglect may cause or contribute to long-term negative consequences and permanent harm to these children.

Neglect includes negligent treatment or maltreatment of a child by a person, including a person responsible for the child's welfare, such that the child's health or welfare is or maybe harmed or threatened from such treatment. Although originally not included in the Indian Child Protection and Family Violence Prevention Act, PL 101-630, neglect is included below as a type of child maltreatment that has to be reported by mandatory reporters.

Whether the tribe chooses to criminalize child neglect at all is an important discussion. Child neglect may be best handled in a civil proceeding (such as in a child dependency hearing) in which the tribal court may order and supervise reunification services for a parent and child. Note that where a person is criminally prosecuted, he or she may have a right *not* to cooperate with the tribe and its service providers until the case is concluded. This may delay any desired reunification efforts. However, there may be cases where it is warranted to charge a person with criminal child neglect, for instance, when neglect results in permanent damage – such as malnutrition resulting in cognitive or physical disabilities, or blindness; or where lack of supervision results in loss of a limb or capacity; or where the neglect results in child sexual abuse or death.

In addition to criminal neglect, child endangerment is another crime that could be included in the code. Endangerment might include the act of conducting dangerous activities in the presence of the child, such as manufacturing methamphetamines in the home, whether or not the child is actually harmed by the activity. Alternatively, it might include more general wording.

ILLUSTRATIVE EXAMPLE

CHAPTER X. SECTION X. CRIMINAL CHILD NEGLECT AND CHILD ENDANGERMENT

(A) Definitions.

- (1) “**Person charged with the care of the child**” means a parent, legal guardian, or other person charged by law, including custom and tradition, with the care of the child.

- (2) “**Neglect**” includes repeated conduct and a single act or omission that results in, or could reasonably be expected to result in, serious physical or mental injury or substantial risk of death to a child.
- (B) **Criminal Neglect** - A person charged with the care of the child is guilty of criminal child neglect if he or she fails to provide the child with the care, supervision, and services necessary to maintain the child’s physical and mental health, including but not limited to, food, nutrition, clothing, shelter, supervision, education, medicine, and medical services that a prudent person would consider essential for the well-being of the child.
- (C) **Endangering the Welfare of a Child** - A person charged with the care of the child is guilty of endangering the welfare of the child if he or she:
 - (1) Leaves the child with another person knowing that the person is registered or required to register as a sex offender under the laws of the tribe or other jurisdiction, or has been charged in any jurisdiction with a sex offense involving a child, and the child is subsequently harmed by that person;
 - (2) Leaves the child with another person knowing that the person has previously abused or is suspected to have abused a child, and the child is subsequently harmed by that person;
 - (3) Knowingly causes or permits the child to be present where any person is selling, manufacturing, or possessing a controlled substance; or
 - (4) Knowingly causes or permits the child to be placed in a situation likely to substantially harm the child’s physical, mental, or emotional health.

COMMENTARY

The language in the example has been taken and modified from numerous tribal and state sources. The child endangerment provision addresses situations where a child’s parent, guardian or caregiver has a history of abuse or has been suspected of abuse, and where the child is left in that person’s care and is harmed. The effect of this provision is to make the other parent, guardian, or caregiver criminally liable for leaving the child with the abuser. The distinction between abuse and neglect is often understood in terms of “acts of commission” and “acts of omission.” Criminal child neglect may be defined to exist where a person fails to protect a child or where a person takes peripheral actions that result in harm to a child.

The Adoption and Safe Families Act may interact with a criminal child neglect or endangerment provision to deny a family reunification services and/or to speed up permanent removal of a child from his or her parent(s) in the civil children’s court (dependency court). For example, if a parent is convicted of a felony, (child abuse, child neglect, spousal abuse, a crime against a child, or crimes of violence) the conviction may mandate termination of parental rights. Under certain circumstances, the states and tribes must petition to terminate parental rights to continue to receive funding for basic family and foster parent support programs and services.¹² Also, potential foster parents convicted of criminal child abuse or child endangerment may be barred from becoming a foster parent.

¹² The Adoption and Safe Families Act mandates that under certain circumstances the states (and consequently tribes in Title IV-E agreements with the states) must either file or join, if another party files, a petition to “terminate the parental rights of the child’s parents.” There are several circumstances under which required action must be taken: a) The child has been in foster care for 15 of the most recent 22 months; b) The parent has committed murder of another child of the parent; c) The parent committed voluntary manslaughter of another child of the parent; d) The parent aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter upon a child of the parent; e) The parent committed a felony assault upon the child or another child of the parent that results in “seriously bodily injury;” f) The court with jurisdiction determines the child is an “abandoned infant.” 42 U.S.C. 675(5)(E).

SELECTED TRIBAL CODES

YANKTON SIOUX TRIBAL CODE

TITLE III - YANKTON SIOUX TRIBE CRIMINAL CODE

CHAPTER XXXI. NEGLECT OF CHILDREN

Sec. 3-31-1 Purpose

It is the policy of the Yankton Sioux Tribe to provide for the protection of children who have suffered abuse, and who, in the absence of appropriate reports concerning their condition and circumstances, may be further threatened by the conduct of those responsible for their care and protection.

Sec. 3-31-2 Neglect of Child

Any person who willfully, recklessly, negligently, or unnecessarily neglects, exposes, tortures or cruelly punishes any child under the age of eighteen (18), or deprives such child of necessary and adequate supervision, food, clothing, shelter, or medical attention shall be guilty of a Class A Misdemeanor.

Sec. 3-31-3 Corporal Punishment

Any person who willfully inflicts upon a child cruel or inhuman corporal punishment resulting in physical or emotional injury shall be guilty of a Class A Misdemeanor.

Sec. 3-31-4 Civil Violations

Nothing in this section shall preclude the Yankton Sioux Tribe from concurrently charging alleged violators of this chapter with civil violations under Title V of the Yankton Sioux Tribe Law and Order Code. Such separate civil charges do not constitute double jeopardy, and may be maintained in simultaneous actions, so long as the defendants in such actions are not compelled to testify against themselves in a civil action, if a criminal proceeding is pending at the time of the civil proceeding. If at all possible, the Court shall adjudicate criminal child abuse or neglect charges under this Chapter before adjudicating civil violations, except that the Court may make temporary placements of endangered children and hold periodic review hearings, if such is in the best interests of the children, during the pendency of a criminal proceeding.

SWINOMISH TRIBE CODE

TITLE 4 - CRIMINAL CODE

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.
- (B) Criminal neglect is:
- (1) a Class A offense if the neglect is life-threatening;
 - (2) a Class B offense if the neglect risks or causes serious injury or illness; or
 - (3) a Class C offense whenever none of the circumstances making it a class A or B offense as defined above are present.
- (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.

[History] Ord. 184 (9/30/03); Ord. 75 (4/2/91).

THE EASTERN BAND OF CHEROKEE INDIANS
THE CHEROKEE CODE: PUBLISHED BY ORDER OF THE
TRIBAL COUNCIL OF THE EASTERN BAND OF CHEROKEE INDIANS
CHAPTER 14 - CRIMINAL LAW, ARTICLES 1-8*
ARTICLE VII. CRIMES AGAINST CHILDREN

Sec. 14.30.1. Contributing to the delinquency, undiscipline, neglect, or abuse of minors.

- (a) Any person shall be guilty of contributing to the delinquency, undiscipline, neglect, or abuse of a minor who knowingly or willfully causes, encourages, or aids any juvenile to be in a place or condition, or to commit an act whereby the juvenile could be:
- (1) Adjudicated “delinquent” or “undisciplined” (as defined by chapter 7A of the Tribal Code); or
 - (2) Determined to be “abused” (as defined by NCGS 7B-101 and any amendments, until such time as the Tribe adopts its own code to deal with abuse). North Carolina law currently defines an abused juvenile to be any juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker:
 - a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means;
 - b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means;
 - c. Uses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior;
 - d. Commits, permits, or encourages the commission of a violation of the following by, with, or upon the juvenile: first-degree rape; second degree rape; first-degree sexual offense; sexual act by a custodian; crime against nature; incest; preparation of obscene photographs, slides, or motion pictures of the juvenile; employing or permitting the juvenile to assist in a violation of obscenity laws; dissemination of obscene material to the juvenile; displaying of disseminating material harmful to the juvenile; first and second degree sexual exploitation of the juvenile; promoting the prostitution of the juvenile; taking indecent liberties with the juvenile, regardless of the age of the parties;
 - e. Creates or allows to be created serious emotional damage to the juvenile; serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others; or
 - f. Encourages, directs or approves of delinquent acts involving moral turpitude committed by the juvenile; or
 - (3) Determined to be “neglected” (as defined by NCGS 7B-101 and any amendments until such time as the Tribe adopts its own code to deal with neglect issues). North Carolina law currently defines a neglected juvenile to be a juvenile who:
 - a. Does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or
 - b. Who has been abandoned; or
 - c. Who is not provided necessary medical care; or
 - d. Who is not provided necessary remedial care; or
 - e. Who lives in an environment injurious to the juvenile's welfare; or

- f. Who has been placed for care or adoption in violation of law; or
 - (4) In violation of any Tribal, federal or North Carolina criminal law.
- (b) Violation of this section shall be punishable by a fine not to exceed \$5,000.00, by a term of imprisonment not to exceed one year, or both.
- (Ord. No. 117, 3-3-2000; Ord. No. 369, 8-9-2000)

Sec. 14-30.2. Selling cigarettes to minors.

If any person shall sell, give away or otherwise dispose of, directly or indirectly, cigarettes or tobacco in the form of cigarettes, or cut tobacco in any form which may be used or intended to be used as a substitute for cigarettes, whether such cigarettes or tobacco are real, simulated, fake or novelties, to any minor under the age of 18 years, or if any person shall aid, assist or abet any other person in selling such articles or novelties to any minor, he or she shall be punished by a fine of not more than \$500.00, or imprisonment for not more than one year, or both.

(Ord. No. 117, 3-3-2000; Ord. No. 369, 8-9-2000)

SELECTED STATE CODES

IOWA CODE, SEC. 124.401C

124.401 Manufacturing methamphetamine in presence of minors.

1. In addition to any other penalties provided in this chapter, a person who is eighteen years of age or older and who either directly or by extraction from natural substances, or independently by means of chemical processes, or both, unlawfully manufactures methamphetamine, its salts, isomers, and salts of its isomers in the presence of a minor shall be sentenced up to an additional term of confinement of five years. However, the additional term of confinement shall not be imposed on a person who has been convicted and sentenced for a child endangerment offense under section 726.6, subsection 1, paragraph “g,” arising from the same facts.
2. For purposes of this section, the term “in the presence of a minor” shall mean, but is not limited to, any of the following:
 - a. When a minor is physically present during the activity.
 - b. When the activity is conducted in the residence of a minor.
 - c. When the activity is conducted in a building where minors can reasonably be expected to be present.
 - d. When the activity is conducted in a room offered to the public for overnight accommodation.
 - e. When the activity is conducted in any multiple-unit residential building.

97 acts, ch 126, §1; 2004 Acts, ch 1151. §1, Subsection 1 amended.

IOWA CODE SEC. 726.6

CHILD ENDANGERMENT.

1. A person who is the parent, guardian, or person having custody or control over a child or a minor under the age of eighteen with a mental or physical disability, or a person who is a member of the household in which a child or such a minor resides, commits child endangerment when the person does any of the following:
 - a. Knowingly acts in a manner that creates a substantial risk to a child or minor's physical, mental or emotional health or safety.
 - b. By an intentional act or series of intentional acts, uses unreasonable force, torture or cruelty that results in bodily injury, or that is intended to cause serious injury.
 - c. By an intentional act or series of intentional acts, evidences unreasonable force, torture or cruelty which causes substantial mental or emotional harm to a child or minor.
 - d. Willfully deprives a child or minor of necessary food, clothing, shelter, health care or supervision appropriate to the child or minor's age, when the person is reasonably able to make the necessary provisions and which deprivation substantially harms the child or minor's physical, mental or emotional health. For purposes of this paragraph, the failure to provide specific medical treatment shall not for that reason alone be considered willful deprivation of health care if the person can show that such treatment would conflict with the tenets and practice of a recognized religious denomination of which the person is an adherent or member. This exception does not in any manner restrict the right of an interested party to petition the court on behalf of the best interest of the child or minor.
 - e. Knowingly permits the continuing physical or sexual abuse of a child or minor. However, it is an affirmative defense to this subsection if the person had a reasonable apprehension that any action to stop the continuing abuse would result in substantial bodily harm to the person or the child or minor.
 - f. Abandons the child or minor to fend for the child or minor's self, knowing that the child or minor is unable to do so.
 - g. Knowingly permits a child or minor to be present at a location where amphetamine, its salts, isomers, or salts of isomers, or methamphetamine, its salts, isomers, or salts of isomers, is manufactured in violation of section 124.401, subsection 1, or where a product is possessed in violation of section 124.401, subsection 4.
 - h. Cohabits with a person after knowing the person is required to register or is on the sex offender registry as a sex offender under chapter 692A. However, this paragraph does not apply to a person who is a parent, guardian, or a person having custody or control over a child or a minor who is required to register as a sex offender, or to a person who is married to and living with a person required to register as a sex offender.
2. A parent or person authorized by the parent shall not be prosecuted for a violation of subsection 1, paragraph "f," relating to abandonment, if the parent or person authorized by the parent has voluntarily released custody of a newborn infant in accordance with section 233.2.
3. For the purposes of subsection 1, "person having control over a child or a minor" means any of the following:
 - a. A person who has accepted, undertaken, or assumed supervision of a child or such a minor from the parent or guardian of the child or minor.
 - b. A person who has undertaken or assumed temporary supervision of a child or such a minor without explicit consent from the parent or guardian of the child or minor.

- c. A person who operates a motor vehicle with a child or such a minor present in the vehicle.
- 4. A person who commits child endangerment resulting in the death of a child or minor is guilty of a class “B” felony. Notwithstanding section 902.9, subsection 2, a person convicted of a violation of this subsection shall be confined for no more than fifty years.
- 5. A person who commits child endangerment resulting in serious injury to a child or minor is guilty of a class “C” felony.
- 6. A person who commits child endangerment resulting in bodily injury to a child or minor or child endangerment in violation of subsection 1, paragraph “g,” that does not result in a serious injury, is guilty of a class “D” felony.
- 7. A person who commits child endangerment that is not subject to penalty under subsection 5 or 6 is guilty of an aggravated misdemeanor.

MINNESOTA STATUTE 609.378
NEGLECT OR ENDANGERMENT OF A CHILD.

Subdivision 1. Persons guilty of neglect or endangerment.

(a) **Neglect.**

- (1) A parent, legal guardian, or caretaker who willfully deprives a child of necessary food, clothing, shelter, health care, or supervision appropriate to the child's age, when the parent, guardian, or caretaker is reasonably able to make the necessary provisions and the deprivation harms or is likely to substantially harm the child's physical, mental, or emotional health is guilty of neglect of a child and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both. If the deprivation results in substantial harm to the child's physical, mental, or emotional health, the person may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$10,000, or both. If a parent, guardian, or caretaker responsible for the child's care in good faith selects and depends upon spiritual means or prayer for treatment or care of disease or remedial care of the child, this treatment or care is “health care,” for purposes of this clause.
- (2) A parent, legal guardian, or caretaker who knowingly permits the continuing physical or sexual abuse of a child is guilty of neglect of a child and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both.

(b) **Endangerment.** A parent, legal guardian, or caretaker who endangers the child's person or health by:

- (1) intentionally or recklessly causing or permitting a child to be placed in a situation likely to substantially harm the child's physical, mental, or emotional health or cause the child's death; or
- (2) knowingly causing or permitting the child to be present where any person is selling, manufacturing, possessing immediate precursors or chemical substances with intent to manufacture, or possessing a controlled substance, as defined in section 152.01, subdivision 4, in violation of section 152.021, 152.022, 152.023, 152.024, or 152.0262; is guilty of child endangerment and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both.

If the endangerment results in substantial harm to the child's physical, mental, or emotional health, the person may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$10,000, or both.

This paragraph does not prevent a parent, legal guardian, or caretaker from causing or permitting a child to engage in activities that are appropriate to the child's age, stage of development, and experience, or from selecting health care as defined in subdivision 1, paragraph (a).

- (c) **Endangerment by firearm access.** A person who intentionally or recklessly causes a child under 14 years of age to be placed in a situation likely to substantially harm the child's physical health or cause the child's death as a result of the child's access to a loaded firearm is guilty of child endangerment and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both.

If the endangerment results in substantial harm to the child's physical health, the person may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$10,000, or both.

Subd. 2. Defenses. It is a defense to a prosecution under subdivision 1, paragraph (a), clause (2), or paragraph (b), that at the time of the neglect or endangerment there was a reasonable apprehension in the mind of the defendant that acting to stop or prevent the neglect or endangerment would result in substantial bodily harm to the defendant or the child in retaliation.

HIST: 1983 c 217 s 5; 1984 c 628 art 3 s 11; 1989 c 282 art 2 s 199; 1992 c 571 art 4 s 11; 1993 c 326 art 4 s 22; 2002 c 314 s 6; 2005 c 136 art 7 s 21

EXERCISES

1. List any extreme cases of child neglect that you can think of here. Should cases like these be criminally prosecuted?

2. Do you have a crime of child neglect in your existing laws? If not, how would you amend your current criminal laws?

3. Test your draft provision using the **OUHE** test. Is your draft provision **O**verinclusive - can you think of a person or situation that it might apply to that you did not intend? Is your draft provision **U**nderinclusive - can you think of a person or situation that you meant for it to apply to, but when you read your language it appears not to apply? Is your draft provision likely to be **H**ard to enforce? Does your provision (or another provision) include an **E**nforcement process and will it work? Discuss any difficulties you encounter and brainstorm ways of changing the language to fix them.

ADDITIONAL RESOURCES

1. Adam M. Tomison, *Spotlight on Child Neglect*, Issues in Child Abuse Prevention, Number 4 Winter 1995, available at <http://www.aifs.org.au/nch/issues4.html>, visited 10 April 2008.
2. National Clearinghouse on Child Abuse and Neglect Information, *Acts of Omission: An Overview of Child Neglect*, April 2001, available at <http://www.calib.com/nccanch/pubs/focus/actsneg.pdf>, visited 3 June 2008.
3. Stephanie Hamarman, Kayla H. Pope & Sally J. Czaga, *Emotional Abuse in Children: Variations in Legal Definitions and Rates Across the United States*, 7 Child Maltreatment 303 (2002).
4. Bryan A. Liang & Wendy L. Macfarlane, *Murder by Omission: Child Abuse and the Passive Parent*, 36 Harv. J. on Legis. 397 (1999).
5. Mary Margaret Oliver & Willie Levi Crossley, *Survey of Child Endangerment Statutes Nationally*, 7 Georgia Bar Journal 8 (2001), available at http://www.childwelfare.net/activities/legislative2002/endangerment_gbj.html, visited 3 June 2008.
6. Michael T. Flannery et al., *The Use of Hair Analysis to Test Children for Exposure to Methamphetamine*, 10 Mich. St. J. Med. & Law 143 (2006).
7. Rizwan Z. Shaw, M.D, FAAP, *Impact of Methamphetamine Abuse on Children and Families*, Blank Hospital for Children, Des Moines, Iowa.
8. Kathleen Horner, *Methamphetamine abuse among women on Navajo*, Maternal and Child Health, OB/GYN Chief Clinical Coordinator's Corner, parts 1 – 4, available at <http://www.ihs.gov/MedicalPrograms/MCH/M/index.cfm>, visited 23 April 2008.

CRIMES AGAINST CHILDREN: SEXUAL ABUSE

THE CRIMES ADDRESSED IN THIS CHAPTER concern the physical sexual abuse of a child. Related crimes of a sexual nature, including child exploitation, pornography, and prostitution, are addressed in later chapters (child exploitation is also addressed here). Sexual abuse of a child may include a wide range of acts, from those involving no physical contact - for example where an adult talks to a child in a sexual manner or has a child look at his or her genitals or pornography - to inappropriate touching, to forced penetration or child rape. Law drafting teams will need to work with their communities to identify those subsets of acts that should be defined and punished as crimes in the tribal law. There are also a number of cutting-edge and/or controversial issues that should be addressed in crafting the tribal law including questions of whether and when the criminal provisions should extend to juvenile perpetrators; the types of non-contact acts and “touching” (both the nature of it and who does it to whom) that should qualify as criminal; and whether and how the “grooming or sexualization of a child” may or should be criminalized.

It may be important to investigate the past failures to prosecute child sex crimes at the federal and tribal levels to determine the most strategic definitions and classifications of crimes for prosecution under tribal law. Child sexual abuse is one of the crimes that may be prosecuted by the federal government under the Major Crimes Act where an Indian is alleged to be the perpetrator.¹³ While the Major Crimes Act *does not* strip tribes of criminal jurisdiction to prosecute such offenses, many tribal leaders have assumed that tribal governments lack the authority to do so; that federal law enforcement, prosecutors and courts would handle the matter; and/or that the tribes simply lack the resources to effectively handle such crimes. However, tribes can and should make an independent decision whether to prosecute tribally defined child sex crimes keeping the following in mind:

- ❖ The specific provisions and elements in the tribal criminal code may be very different from the federal child sexual abuse statutes;
- ❖ The tribal prosecutor may be able to charge the defendant with lesser included offenses (such as assault and battery) that are not available in the federal system;
- ❖ The tribal prosecutor may attach a higher priority to child sexual abuse cases and may be more willing to risk losing the case;
- ❖ The rules of evidence in tribal court may be different – thereby allowing evidence to be introduced in tribal court that might not be admissible in federal court;
- ❖ The tribal statute of limitations may be different;

¹³ 18 U.S.C. 1153.

- ❖ The victims and/or witnesses may be more willing to cooperate with tribal prosecution due to more comfortable setting/personnel, less traveling distance, etc.; and
- ❖ The perpetrator may still be in the home and the tribe will be able to respond more quickly to the situation (the federal authorities may still be investigating).

There are several “classic child sexual abuse crimes” that are often referred to: molestation, rape or sexual assault, and incest. The definitions of these crimes vary widely by jurisdiction. Contrast these with the State of Wisconsin that has a comprehensive approach to defining crimes against children (see full statutory provisions below): First-Degree Sexual Assault of a Child, Second-Degree Sexual Assault of a Child, Repeated Acts of Sexual Assault of the Same Child, Sexual Exploitation of a Child, Causing a Child to View or Listen to Sexual Activity, Incest with a Child, Child Enticement, Use of a Computer to Facilitate a Child Sex Crime, Soliciting a Child for Prostitution, Sexual Assault of a Child Placed in Substitute Care, Sexual Intercourse with a Child Age 16 or Older, Sexual Assault of a child by a School Staff Person or a Person Who Works of Volunteers with Children, Exposing Genitals or Pubic Area to a Child, Exposing a Child to Harmful Material or Harmful Descriptions or Narrations, Possession of Child Pornography, Child Sex Offender Working with Children, and Registered Sex Offender Photographing Minors. The State of Wisconsin, as well as other state and federal jurisdictions, also classify these crimes so that they may vary and increase the applicable penalties. The following language and tribal, state and federal example provisions are provided for tribal drafting teams to compare and contrast in considering what wrongful conduct should be included in the tribal criminal code to combat child sexual abuse.

ILLUSTRATIVE EXAMPLE

CHAPTER X.

SECTION X. DEFINITIONS

- (A) **Child:** a person who has not attained 16 (or 18) years of age and is not married.
- (B) **Penetration:** The insertion of any object or body part into a vagina or rectum, except when done as part of a recognized medical procedure. Any insertion, however slight, is penetration.
- (C) **Position of authority:** An employer, youth leader, scout leader, coach, teacher, counselor, school administrator, religious leader, doctor, nurse, psychologist, guardian ad litem, babysitter or a substantially similar position, and a police officer or a probation officer.
- (D) **Sadomasochistic abuse:** The infliction of force, pain or violence upon a person for the purpose of sexual gratification.
- (E) **Sexual contact:** The intentional touching, for purposes of sexual gratification, whether directly, or indirectly through clothing or some other barrier, of the victim’s or person’s sexual or intimate parts, including breast, buttocks, or genitals. Other barriers include but are not limited to diapers, blankets, or any traditional cradleboard materials.
- (F) **Sexual conduct:** The engaging in or the commission of actual or simulated sexual intercourse, oral-genital contact, genital-breast contact, the touching of the sexual organ(s), pubic region, anus, buttock or female breast of a person to arouse or gratify the sexual desire of another person.
- (G) **Sexually explicit conduct:** Includes sexual conduct, bestiality, masturbation, sadomasochistic abuse including but not limited to flagellation, torture or bondage, or lewd exhibition of the genitals or pubic area.
- (H) **Sexual gratification:** a behavior or act committed to stimulate the sexual interest or desire of the actor.
- (I) **Sexual intercourse:** Means genital stimulation of one person with or by another and includes genital-genital,

oral-genital, anal-genital or oral-anal contact, whether between person of the same or opposite sex.

- (J) **Simulated:** any depictions of the genitals or rectal area or actions that gives the appearance of sexual conduct or incipient sexual conduct or foreplay.

CHAPTER X. SECTION X. SEXUAL ABUSE OF A CHILD

A person is guilty of sexual abuse of a child if he or she willfully –

- (A) engages in any sexual contact with a child; or
- (B) persuades, entices, counsels, or procures a child to engage in sexual contact, actual or simulated.

CHAPTER X. SECTION X. AGGRAVATED SEXUAL ABUSE OF A CHILD

A person is guilty of aggravated sexual abuse of a child if he or she willfully -

- (A) engages in any sexual contact with a child OR persuades, entices, counsels, or procures a child to engage in sexual contact, actual or simulated, with the person or another person; and
- (B) the person is in a position of trust, authority or supervision with the victim; or
- (C) after having substantially impaired the child's ability to appraise or control his or her conduct by administering drugs, intoxicants, or other means for the purpose of preventing resistance.

CHAPTER X. SECTION X. ASSAULT WITH INTENT TO COMMIT RAPE OF A CHILD

A person is guilty of assault with intent to commit rape of a child if he or she –

- (A) willfully uses threats, force or violence upon the person of a child, with intent to induce, coerce, or force such child to submit to sexual intercourse; or
- (B) willfully administers to a child by force or threat of force drugs, intoxicants, or other means for the purpose of preventing resistance.

CHAPTER X. SECTION X. RAPE OF A CHILD

A person is guilty of rape of a child if he or she willfully engages in sexual intercourse or oral sexual contact with a child.

CHAPTER X. SECTION X. CONTINUOUS SEXUAL ABUSE OF A CHILD

- (A) A person is guilty of continuous sexual abuse if he or she willfully, over a period of three months or more, engages in three or more acts of sexual contact, conduct or intercourse with a child.
- (B) Any other sexual offense involving the victim shall not be charged in the same proceeding with a charge under this section unless the other charged sexual offense occurred outside the time period charged under this section or the other sexual offense is charged in the alternative. A person may be charged with only one count under this section unless more than one victim is involved. If more than one victim is involved, a separate count may be charged for each victim.
- (C) To convict under this section, the trier of fact, need unanimously agree only that the requisite number of acts have occurred - the jury need not agree on which acts constitute the requisite number.

**CHAPTER X. SECTION X.
SEXUAL EXPLOITATION OF A CHILD**

A person is guilty of sexual exploitation of a child if he or she does any of the following with knowledge of the character and content of the sexually explicit conduct involving the child:

- (A) Employs, uses, persuades, induces, entices or coerces any child to engage in sexually explicit conduct for the purpose of his or her sexual gratification; or
- (B) Photographs, films, videotapes, records the sounds of or displays in any way a child engaged in sexually explicit conduct.

**CHAPTER X. SECTION X.
EXPOSING GENITALS OR PUBIC AREA**

A person is guilty of exposing genitals or pubic area if he or she, for purposes of sexual arousal or sexual gratification, causes a child to expose genitals or pubic area or exposes his or her genitals or pubic area to a child.

**CHAPTER X. SECTION X.
CAUSING A CHILD TO VIEW OR
LISTEN TO SEXUAL ACTIVITY**

A person is guilty of causing a child to view or listen to sexual activity if he or she intentionally causes a child to view or listen to sexually explicit conduct if the viewing or listening is for the purpose of sexually arousing or gratifying the actor or of humiliating or degrading the child.

**CHAPTER X. SECTION X.
USE OF A COMPUTER TO
FACILITATE A CHILD SEX CRIME**

- (A) A person is guilty of use of a computer to facilitate a child sex crime if he or she uses a computerized communication system to communicate with an individual who the actor believes or has reason to believe has not attained the age of 16 years with the intent to have sexual contact or sexual intercourse with the individual in violation of the crimes of sexual abuse of a child, aggravated sexual abuse of a child, assault with intent to commit rape of a child, or rape of a child.
- (B) This section does not apply if, at the time of the communication, the actor reasonably believed that the age of the person to whom the communication was sent was no more than 24 months less than the age of the actor.
- (C) Proof that the actor did an act, other than use a computerized communication system to communicate with the individual, to effect the actors intent under subsection (a) shall be necessary to prove intent.

**CHAPTER X. SECTION X.
STATUTORY RAPE**

A person is guilty of statutory rape of a child if he or she engages in sexual intercourse with a child and where he or she is four years or more older than the child.

**CHAPTER X. SECTION X.
INCEST WITH A CHILD**

Any person who knowingly marries, cohabits, or has sexual intercourse or sexual contact with a child that he or she knows to be by blood or adoption (customary or otherwise) an ancestor or descendant, brother, sister, aunt, uncle, nephew, niece, grandson or granddaughter shall be guilty of incest.

COMMENTARY

The language in the example has been taken and modified from numerous sources.

Definitions. The definitions section in the example defines the terms that are found in each child sex crime definition. It is important to note that a “child” is a person who is under sixteen (or eighteen) years of age and who is not married. The important discussion to be had here is the desired age cut off between crimes with child victims and crimes with adult victims under the tribal law. There may be a host of special laws, rules, processes and services that a “child” victim could take advantage of that might not be available if he or she classified as an adult crime victim.

Sexual Abuse and Aggravated Sexual Abuse of a Child. These child sex crimes cover some of the same terrain as does “child molestation” and they criminalize intentional “sexual contact” or intentional touching for purposes of sexual gratification. Aggravated sexual abuse applies in cases where the perpetrator is also a person in a position of authority. “Aggravated” crimes are usually subject to increased penalties. The important discussion to be had here is what meaningful classifications of crimes with increased penalties are practical and effective given the Indian Civil Rights Act limitations of a year in jail per offense.

Assault with Intent to Commit Rape and Rape of a Child. These crimes criminalize the act of intentional sexual intercourse with a child. Assault with Intent to Commit Rape criminalizes the additional conduct of the use of threats, force or violence and/or intoxicants or drugs to do so. Note that “sexual intercourse” is broadly defined to include “genital stimulation” as opposed to requiring the narrower act of “penetration.” This definition includes genital-genital, oral-genital, anal-genital, and oral-anal contact between persons of any gender.

Continuous Sexual Abuse. This crime is designed to assist prosecutors in cases where multiple acts of intentional “sexual contact” (touching for purposes of sexual gratification) “sexual conduct” (actual or simulated sexual intercourse for sexual gratification) or “sexual intercourse” (genital stimulation) have been committed against a particular child over a three month or longer period. The crime of continuous sexual abuse may be subject to increased penalties. The important discussion to be had here is what meaningful classifications of crimes with increased penalties are practical and effective given the Indian Civil Rights Act limitations of a year in jail per offense.

Sexual Exploitation of a Child. The definition of this crime was borrowed and modified from Wisconsin's Crimes Against Children, Chapter 948, Section 948.05. It is designed to criminalize the enticement of a child to engage in sexually explicit conduct and the photographing and recording of such conduct for that person's sexual gratification. “Sexually explicit conduct” is defined to include “sexual conduct” (actual or simulated sexual intercourse), bestiality, masturbation, sadomasochistic abuse and lewd exhibition of the genitals or pubic area. The crime of sexual exploitation captures non-contact acts on the part of the perpetrator, for example where he or she merely takes pictures of a child persuaded to expose him/herself or to simulate sex acts with another person or animal.

Exposing Genitals or Pubic Area. The definition of this crime was borrowed and modified from Wisconsin's Crimes Against Children, Chapter 948, Section 948.10. This crime criminalizes the acts of exposing one's genitals or pubic area to a child and causing a child to do so, for purposes of that person's sexual gratification.

Causing a Child to View or Listen to Sexual Activity. The definition of this crime was borrowed and modified from Wisconsin's Crimes Against Children, Chapter 948, Section 948.055. This crime criminalizes the act of "causing a child to view or listen to sexual activity" for the purposes of actor's sexual gratification or where he or she seeks to humiliate or degrade the child. This is also a "no physical contact requirement" crime.

Use of a Computer to Facilitate a Child Sex Crime. The definition of this crime was borrowed and modified from Wisconsin's Crimes Against Children, Chapter 948, Section 948.075. This crime criminalizes the act of communicating with a child under sixteen years of age, via a computer, with the intent to commit a child sex crime. It is a defense that the actor reasonably believed that the child was at least sixteen years old. It is also a defense that the actor reasonably believed that he was communicating with someone near his or her same age (no more than two years younger). Note that mere proof of a communication is not enough. Prosecutors must also prove that the actor intended to commit a sex crime.

Statutory Rape. Presently all states and many tribes have laws that criminalize sexual intercourse with persons under a certain age. These laws are commonly referred to as "statutory rape" laws. However, this term is not usually found in criminal codes. Instead "rape," "sexual assault," and "unlawful sexual intercourse" are some of the more commonly used terms that include within them statutory rape provisions. The tribal and state examples below follow this pattern. A number of tribal and state jurisdictions have identified the challenge of how to avoid making consensual peer sex among teenagers a criminal offense. For this reason they have considered enacting a minimum age for the defendant or an age difference between the minor and the defendant. Note that the language in the example above applies to defendants that are four or more years older than a child age 16 (or 18).

Incest with a Child. The definition for incest criminalizes the acts of marriage, cohabitation, sexual contact (touching for purposes of sexual gratification) or sexual intercourse (genital stimulation) with a child where the actor knows that he or she is related by blood or adoption to the child under western laws or under custom or tradition. Blood relations include children/grandchildren, siblings, cousins, and others. Incest provisions should be tailored to fit the tribe's cultural beliefs. Many tribes prohibit marriage within clans and may want to incorporate this into their criminal laws. Other tribes may frown upon marriage within a clan, but not criminalize it. Also a tribe's definition of "adoption" should be considered when defining the crime of incest.

SELECTED TRIBAL CODES

EASTERN BAND OF CHEROKEE TRIBAL CRIMINAL CODE ARTICLE V. SEXUAL ASSAULT

Sec. 14-20.1. Taking indecent liberties with children.

A person shall be guilty of taking indecent liberties with children if they either:

- (1) Willfully take or attempt to take any improper or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
- (2) Willfully commit or attempt to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.
- (3) For purposes of this section, indecent liberties shall include any sexual contact of the genitalia, anus, groin, breast, inner thigh or buttocks which do or may abuse, humiliate, harass, degrade, arouse or gratify the sexual desire of any person.

(Ord. No. 117, 3-3-2000)

Sec. 14-20.2. Aggravated sexual abuse.

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

- (A) Knowingly causes another person to engage in a sexual act by using force against that other person; or
- (B) 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
- (C) Knowingly renders another person unconscious and thereby engages in a sexual act with that other person; or
- (D) 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
- (E) Engages in a sexual act with another person who has not attained the age of 13 years.

(Ord. No. 117, 3-3-2000)

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 child or a ward.

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

- (1) Engages in a sexual act with another person who has not attained the age of 16; 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)

GRAND TRAVERSE BAND CODE

TITLE 9 CRIMINAL OFFENSES

SEC. 107 (C)(5) SEXUAL ASSAULT OF A CHILD

- (A) Offense. A person commits sexual assault of a child if he/she intentionally or knowingly engages in sexual penetration or sexual contact with any person aged 16 years or younger, regardless of whether he/she has the consent of that person. Sexual contact means any fondling or manipulating of any part of the genitals, anus, or female breast.

WINNEBAGO TRIBE OF NEBRASKA

TITLE 3 - CRIMINAL CODE

ARTICLE 4 - CRIMES AGAINST THE PERSON

3-416 Sexual assault; legislative intent.

It is the intent of the Winnebago Tribe of Nebraska to enact laws dealing with sexual assault and related criminal sexual offenses which will protect the dignity of the victim at all stages of judicial process, which will insure that the alleged offender in a criminal sexual offense case have preserved the constitutionally guaranteed due process of law procedures, and which will establish a system of investigation, prosecution, punishment, and rehabilitation for the welfare and benefit of the residents of this reservation as such system is employed in the area of criminal sexual offenses. [TCR 86-79]

3-417 Sexual assault: terms defined.

As used in sections 3-416 to 3-422, unless the context otherwise requires:

1. Actor shall mean a person accused of sexual assault;
2. Intimate parts shall mean the genital area, groin, inner thighs, buttocks, or breasts;
3. Past sexual behavior shall mean sexual behavior other than the sexual behavior upon which the sexual assault is alleged;
4. Serious personal injury shall mean great bodily injury or disfigurement, extreme mental anguish or mental trauma, pregnancy, disease, or loss or impairment of a sexual or reproductive organ;
5. Sexual contact shall mean the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact shall also mean the touching by the victim of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts when such touching is intentionally caused by the actor. Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party;
6. Sexual penetration shall mean sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes. Sexual penetration shall not require emission of semen; and
7. Victim shall mean the person alleging to have been sexually assaulted.

3-418 Sexual assault; first degree; penalty.

1. Any person who subjects another person to sexual penetration; and
 - (A) Overcomes the victim by force, threat of force, express or implied, coercion, or deception;

- (B) Knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his/her conduct; or
 - (C) The actor is eighteen years of age or older and the victim is less than eighteen years of age is guilty of sexual assault in the first degree.
2. Sexual assault in the first degree is a Class I offense. The sentencing judge shall consider whether the actor shall have caused serious personal injury to the victim in reaching his/her decision on the sentence.

3-419 Sexual assault; second degree; penalty.

1. Any person who subjects another person to sexual contact; and
- a) Overcomes the victim by force, threat of force, express or implied, coercion, or deception; or
 - b) Knew or should have known that the victim was physically or mentally incapable of resisting or appraising the nature of his/her conduct is guilty of sexual assault in the second degree; or
 - c) Any person who subjects an unemancipated minor to sexual penetration guilty of sexual assault in the second degree.
 - d) Sexual assault in the second degree is a Class II offense.

3-420 Sexual assault; in camera hearing.

Upon motion to the court by either party in a prosecution in a case of sexual assault, an in camera hearing shall be conducted in the presence of the judge, under guidelines established by the judge, to determine the relevance of evidence of the victim's or the defendant's past sexual conduct.

3-421 Sexual assault; evidence of past sexual behavior; when admissible; procedure.

1. If the defendant intends to offer evidence of specific instances of the victim's past sexual behavior, notice of such intention shall be given to the tribal prosecutor and filed with the court not later than fifteen days before trial.
2. Upon motion to the court by either party in a prosecution in a case of sexual assault, an in camera hearing shall be conducted in the presence of the judge, under guidelines established by the judge, to determine the relevance of evidence of the victim's or the defendant's past sexual behavior. Evidence of a victim's past sexual behavior shall not be admissible unless such evidence is:
- (A) Evidence of past sexual behavior with persons other than the defendant, offered by the defendant upon the issue of whether the defendant was or was not, with respect to the victim, the source of any physical evidence, including but not limited to, semen, injury, blood, saliva, and hair; or
 - (B) Evidence of past sexual behavior with the defendant when such evidence is offered by the defendant on the issue of whether the victim consented to the sexual behavior upon which the sexual assault is alleged if it is first established to the court that such activity shows such a relation to the conduct involved in the case and tends to establish a pattern of conduct or behavior on the part of the victim as to be relevant to the issue of consent.

3-422 Sexual assault; evidence; when admissible.

Specific instances of prior sexual activity between the victim and any person other than the defendant shall not be admitted into evidence in prosecution under the tribal criminal code unless consent by the victim is at issue, when such evidence may be admitted if it is first established to the court at an in camera hearing that such activity shows such a relation to the conduct involved in the case and tends to establish a pattern of conduct or behavior on the part of the victim as to be relevant to the issue of consent.

3-423 Confined person; offenses against another person; penalty; sentence.

1. Any person who is legally confined in a jail and who commits:

- (A) Assault in the first or second degree, as defined in sections 3-408 to 3-409;
 - (B) Terroristic threats as defined in section 3-410;
 - (C) Kidnapping as defined in section 3-412; or
 - (D) False imprisonment in the first or second degree as defined in sections 3-413 to 3-414, against any person for the purpose of compelling or inducing the performance of any act by such person or any other person shall be guilty of a Class I offense.
2. Sentences imposed under subsection (1) of this section shall be served consecutive to any sentence or sentences imposed for violations committed prior to the violation of subsection (1) of this section and shall not include any credit for time spent in custody prior to sentencing unless the time in custody is solely related to the offense for which the sentence is being imposed under this section.

SWINOMISH TRIBE 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 to engage in sexual intercourse, as defined in Section 4-01.030(F), in any one of the following circumstances commits the crime of abusive sexual intercourse:
- (1) by using force against the other person;
 - (2) by threatening or placing the other person in fear;
 - (3) when the other person is a child under the age of sixteen (16) and not married to the defendant;
 - (4) when the other person is rendered unconscious or physically or mentally incapable of declining participation or communicating unwillingness to engage in sexual intercourse for any reason including physical handicap, mental disease, mental disability, alcohol or drug intoxication;
 - (5) 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;
 - (6) when the defendant is related to the victim as an ancestor, descendant, or sibling; or
 - (7) when the defendant is related to the victim in a familial relationship defined by tribal custom as one in which sexual intercourse is prohibited.

- (B) Abusive sexual intercourse is a Class A offense.

[History] Ord. 184 (9/30/03); Ord. 75 (4/2/91).

4-03.020 Abusive Sexual Touching.

1. Any person who knowingly engages in, causes or attempts sexual touching, as defined in Section 4-01.030(G), with or by another person in any one of the following circumstances commits the crime of abusive sexual touching:
- a. by using force against the other person;
 - b. by threatening or placing the other person in fear;
 - c. when the other person is a child under the age of sixteen (16);

- d. when the other person is rendered unconscious or physically or mentally incapable of declining participation or communicating unwillingness to engage in sexual intercourse for any reason including physical handicap, mental disease, mental disability, alcohol or drug intoxication;
- e. 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
- f. when the defendant is related to the victim as an ancestor, descendant, or sibling.

2. Abusive sexual touching is a Class A offense.

[History] Ord. 184 (9/30/03); Ord. 75 (4/2/91).

POARCH BAND OF CREEK INDIANS TRIBAL CODE

§8 CRIMINAL CODE

§8-3-7 ENTICING CHILD FOR IMMORAL PURPOSES

- a) It shall be unlawful for any person with lascivious intent to entice, allure, persuade or invite, or attempt to entice, allure, persuade or invite any child under sixteen (16) years of age to enter any vehicle, room, house, office, or any other place whether indoors or outdoors for the purpose of proposing to such child the performance of any act of sexual intercourse or an act which constitutes any sexual offense set out by Tribal Council Ordinance or for the purpose of fondling or feeling of the sexual or genital parts of such child or the breast of such child, or for the purpose of committing assault or any crime against the person of such child as set out by Tribal Council Ordinance or for the purpose of proposing that such child fondle or feel the sexual or genital parts of such person.
- b) Enticing a Child for Immoral Purposes is a Class A Misdemeanor.

YANKTON SIOUX TRIBAL CODE

TITLE III - YANKTON SIOUX TRIBE CRIMINAL CODE

CHAPTER XIII. SEX OFFENSES

Sec. 3-13-1 Rape

Rape is an act of sexual penetration accomplished with any person under any one or more of the following circumstances:

1. Through the use of force, coercion or threats of immediate and bodily harm against the victims or other persons within the victim's presence, accompanied by apparent power of execution; or
2. Where the victim is the spouse of the actor, and at the time of the act, the actor and the spouse were not cohabiting or were legally separated, and a complaint to law enforcement is made within 30 days of the act; or
3. Where the victim is incapable, because of physical or mental incapacity, of giving consent to such act; or
4. Where the victim is incapable of giving consent because of any intoxicating, narcotic or anesthetic agent or hypnosis; or
5. Where the victim is less than sixteen years of age.

Rape is a Class A misdemeanor. A charge brought pursuant to this section may be commenced at any time prior to the time the victim becomes age twenty-one or within seven years of commission of the crime, whichever is longer.

Sec. 3-13-2 Sexual Contact with a Minor

Any person, aged sixteen years or older, who knowingly engages in sexual contact with a person, other than his/her spouse, under the age of sixteen (16) years is guilty of a Class A misdemeanor.

Sec. 3-13-3 Sexual Exploitation of Children

Any person who:

1. Causes, performs or knowingly permits the photographing or filming of a minor under the age of sixteen (16) years to engage in a prohibited sexual act or in the simulation of such act; or
2. Knowingly sells, displays, exhibits, distributes or possesses any book, magazine, pamphlet, slide, photograph or film depicting a minor under the age of sixteen (16) years engaging in a prohibited sexual act or in the simulation of such act; is guilty of a Class A misdemeanor. An exception to this section exists to the selling, lending, distributing, exhibiting, showing, possessing or making of films, photographs or other materials involving only nudity, if such material is made for and has an obvious serious medical, scientific, educational, literary or artistic value.

**THE CHEROKEE CODE:
PUBLISHED BY ORDER OF THE TRIBAL COUNCIL OF THE
EASTERN BAND OF CHEROKEE INDIANS
CHAPTER 14 - CRIMINAL LAW, ARTICLES 1-8***

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.

(Ord. No. 117, 3-3-2000)

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 not attained the age of 16; 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)

POARCH BAND OF CREEK INDIANS TRIBAL CODE
§8 CRIMINAL CODE §8-3-5 SEXUAL ABUSE

(a) A person commits the crime of sexual abuse if:

- 1) the person subjects another person to sexual contact by forcible compulsion;
- 2) or the person subjects another person to sexual contact who is incapable of consent by reason of intoxication or who is under the influence of drugs, or a combination thereof, or who is physically helpless or who is mentally incapacitated; or
- 3) a person being sixteen (16) years or older subjects another person to sexual contact who is twelve (12) years old or younger; or
- 4) a person being sixteen (16) years of age or older subjects a child to sexual contact who is sixteen (16) years of age or younger but more than twelve (12) years of age; provided, however, that the actor is at least two (2) years older than the child.

(b) Sexual Abuse is a Class A Misdemeanor.

CONFEDERATED TRIBES OF SILETZ INDIANS OF OREGON
CRIMINAL CODE
OFFENSES AND PUNISHMENTS
CHAPTER 12

12.65-Incest: Class A

Marrying or having sexual intercourse or deviate sexual intercourse with an ancestor, descendent, or brother, or sister of the whole or half-blood, while knowing that they are so related, either legitimately or illegitimately so.

12.69-Endangering Welfare of Minor

- a. Knowingly inducing, causing or permitting an unmarried person under 18 to view an act of sexual conduct or sadomasochistic abuse;
- b. Knowingly permitting a person under 18 to enter or remain at a place where unlawful activity involving controlled substance is conducted or maintained; or
- c. Knowingly inducing, causing or permitting a person under 18 to participate in gambling; or
- d. Knowingly selling, or causing to be sold, tobacco in any form to a person under 18; or
- e. Knowingly selling to a person under 18 any device designed to be used for smoking tobacco, marijuana, cocaine, or any controlled substance, including pipes, carburetion tubes, bongs, cigarette rolling papers and machines, etc.

YANKTON SIOUX TRIBAL CODE
TITLE III - YANKTON SIOUX TRIBE CRIMINAL CODE
CHAPTER XIII. SEX OFFENSES

Sec. 3-13-6 Incest

Any person who knowingly engages in sexual penetration or contact with another person who is an ancestor or descendent, step-parent, step-child, brother, sister, aunt, uncle, nephew, niece or first cousin, any of which are either whole or half blood, and without regard to legitimacy or adoption. A charge brought pursuant to this section may be commenced at any time prior to the time the victim becomes age twenty-one (21) or within seven years of the commission of the offense, whichever is longer.

Incest is a Class A misdemeanor.

TULALIP TRIBES OF WASHINGTON
CODES AND REGULATIONS
ORDINANCE 49 - LAW & ORDER CODE T3.6.5 INCEST

1. A person commits the offense of incest if he or she has sexual contact as described in section 3.1.12(39) or sexual intercourse with an ancestor, a descendant, a brother or sister of the whole or half blood, or any stepson or stepdaughter.
2. Consent is a defense under this section to incest with or upon a stepson or stepdaughter, but consent is ineffective if the victim is less than 18 years old.
3. Incest is a Class E offense.

GRAND TRAVERSE BAND CODE:
STATUTES OF THE GRAND TRAVERSE BAND
OF OTTAWA AND CHIPPEWA INDIANS
TITLE 9 - CRIMINAL OFFENSES

§ 107 - Offenses

(k) Offenses Against the Family

(5) Incest

- (A) **Offense.** A person commits incest if that person knowingly engages in sexual penetration or contact with another who is a member of such person's immediate family. Sexual contact means any fondling or manipulating of any part of the genitals, anus, or female breast. For purposes of this Section, immediate family means mother, father, son, daughter, brother, or sister.
- (B) **Sentence.** A person who commits incest may be sentenced to a jail term not to exceed one (1) year or to a fine not to exceed five thousand dollars (\$5,000.00), or to both.

SELECTED FEDERAL CODES

FEDERAL CHAPTER 109A SEXUAL ABUSE (18 USC§§ 2241-2248) 18 USC§ 2241

§ 2241. Aggravated sexual abuse

- (a) **By force or threat.** 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 causes another person to engage in a sexual act--
- (1) by using force against that other person; or
 - (2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping; or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.
- (b) **By other means.** Whoever, 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) renders another person unconscious and thereby engages in a sexual act with that other person; or
 - (2) administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby--
 - (A) substantially impairs the ability of that other person to appraise or control conduct; and
 - (B) engages in a sexual act with that other person; or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.
- (c) **With children.** Whoever 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.

18 USC§ 2242

§ 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.

18 USC§ 2243

§ 2243. SEXUAL ABUSE

OF A MINOR OR WARD

- (a) **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--
 - (1) has attained the age of 12 years but has not attained the age of 16 years; and
 - (2) is at least four years younger than the person so engaging; or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.
- (b) **Of a ward.** Whoever, 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--
 - (1) in official detention; and
 - (2) under the custodial, supervisory, or disciplinary authority of the person so engaging; or attempts to do so, shall be fined under this title, imprisoned not more than 15 years or both.
- (c) **Defenses.**
 - (1) In a prosecution under subsection (a) of this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years.
 - (2) In a prosecution under this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the persons engaging in the sexual act were at that time married to each other.
- (d) **State of mind proof requirement.** In a prosecution under subsection (a) of this section, the Government need not prove that the defendant knew--
 - (1) the age of the other person engaging in the sexual act; or
 - (2) that the requisite age difference existed between the persons so engaging.

18 USC§ 2244

§ 2244. ABUSIVE SEXUAL CONTACT

- (a) **Sexual conduct in circumstances where sexual acts are punished by this chapter** [18 USC§§ 2241 et seq.]. 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 [18 USC§ 2241] 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 [18 USC§ 2242] 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 [18 USC§ 2243] 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 [18 USC§ 2243] 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 [18 USC§ 2241] 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 USC§ 2245

§ 2245. OFFENSES RESULTING IN DEATH

- (a) In general. A person who, in the course of an offense under this chapter [18 USC§§ 2241 et seq.], or section 1591, 2251, 2251A, 2260, 2421, 2422, 2423, or 2425 [18 USC§ 1591, 2251, 2251A, 2260, 2421, 2422, 2423, or 2425], murders an individual, shall be punished by death or imprisoned for any term of years or for life.

18 USC§ 2246

§ 2246. DEFINITIONS FOR CHAPTER

As used in this chapter [18 USC§§ 2241 et seq.]--

- (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.

18 USC§ 2247

§ 2247. REPEAT OFFENDERS

- (1) **Maximum term of imprisonment.** The maximum term of imprisonment for a violation of this chapter [18 USC§§ 2241 et seq.] after a prior sex offense conviction shall be twice the term otherwise provided by this chapter [18 USC§§ 2241 et seq.], unless section 3559(e) [18 USC§ 3559(e)] applies.
- (2) **Prior sex offense conviction defined.** In this section, the term “prior sex offense conviction” has the meaning given that term in section 2426(b) [18 USC§ 2426(b)].

18 USC§ 2248

§ 2248. MANDATORY RESTITUTION

- (a) **In general.** Notwithstanding section 3663 or 3663A [18 USC§ 3663 or 3663A], and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter [18 USC§§ 2241 et seq.].
- (b) **Scope and nature of order.**
 - (1) **Directions.** The order of restitution under this section shall direct the defendant to pay to the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).
 - (2) **Enforcement.** An order of restitution under this section shall be issued and enforced in accordance with section 3664 [18 USC§ 3664] in the same manner as an order under section 3663A [18 USC§ 3663A].
 - (3) **Definition.** For purposes of this subsection, the term “full amount of the victim's losses” includes any costs incurred by the victim for--
 - (A) medical services relating to physical, psychiatric, or psychological care;

- (B) physical and occupational therapy or rehabilitation;
 - (C) necessary transportation, temporary housing, and child care expenses;
 - (D) lost income;
 - (E) attorneys' fees, plus any costs incurred in obtaining a civil protection order; and
 - (F) any other losses suffered by the victim as a proximate result of the offense.
- (4) **Order mandatory.**
- (A) The issuance of a restitution order under this section is mandatory.
 - (B) A court may not decline to issue an order under this section because of--
 - (i) the economic circumstances of the defendant; or
 - (ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.
- (c) **Definition.** For purposes of this section, the term “victim” means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.

SELECTED STATE CODES

COLORADO

C.R.S. 18-3-405 (2006)

18-3-405. Sexual assault on a child

- (1) Any actor who knowingly subjects another not his or her spouse to any sexual contact commits sexual assault on a child if the victim is less than fifteen years of age and the actor is at least four years older than the victim.
- (2) Sexual assault on a child is a class 4 felony, but it is a class 3 felony if:
 - (a) The actor applies force against the victim in order to accomplish or facilitate sexual contact; or
 - (b) The actor, in order to accomplish or facilitate sexual contact, threatens imminent death, serious bodily injury, extreme pain, or kidnapping against the victim or another person, and the victim believes that the actor has the present ability to execute the threat; or
 - (c) The actor, in order to accomplish or facilitate sexual contact, threatens retaliation by causing in the future the death or serious bodily injury, extreme pain, or kidnapping against the victim or another person, and the victim believes that the actor will execute the threat; or
 - (d) The actor commits the offense as a part of a pattern of sexual abuse as described in subsection (1) of this section. No specific date or time must be alleged for the pattern of sexual abuse; except that the acts constituting the pattern of sexual abuse, whether charged in the information or indictment or committed prior to or at any time after the offense charged in the information or indictment, shall be subject to the provisions of section 16-5-401 (1) (a), C.R.S., concerning sex offenses against children. The offense charged in the information or indictment shall constitute one of the incidents of sexual contact involving a child necessary to form a pattern of sexual abuse as defined in section 18-3-401 (2.5).
- (3) If a defendant is convicted of the class 3 felony of sexual assault on a child pursuant to paragraphs (a) to (d) of subsection (2) of this section, the court shall sentence the defendant in accordance with the provisions of section 18-1.3-406.

IDAHO CODE § 18-1508

LEWD CONDUCT WITH MINOR CHILD UNDER SIXTEEN

Any person who shall commit any lewd or lascivious act or acts upon or with the body or any part or member thereof of a minor child under the age of sixteen (16) years, including but not limited to, genital-genital contact, oral-genital contact, anal-genital contact, oral-anal contact, manual-anal contact, or manual-genital contact, whether between persons of the same or opposite sex, or who shall involve such minor child in any act of bestiality or sado-masochism as defined in section 18-1507, Idaho Code, when any of such acts are done with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person, such minor child, or third party, shall be guilty of a felony and shall be imprisoned in the state prison for a term of not more than life.

WISCONSIN CRIMES AGAINST CHILDREN

CHAPTER 948

WIS. STAT. § 948.01 (2007)

948.01. DEFINITIONS

948.01 Definitions. In this chapter, the following words and phrases have the designated meanings unless the context of a specific section manifestly requires a different construction:

- (1) “Child” means a person who has not attained the age of 18 years, except that for purposes of prosecuting a person who is alleged to have violated a state or federal criminal law, “child” does not include a person who has attained the age of 17 years.
- (1d) “Exhibit,” with respect to a recording of an image that is not viewable in its recorded form, means to convert the recording of the image into a form in which the image may be viewed.
- (1g) “Joint legal custody” has the meaning given in s. 767.001 (1s).
- (1r) “Legal custody” has the meaning given in s. 767.001 (2).
- (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 a substantial and observable change in behavior, emotional response or cognition that is not within the normal range for the child's age and stage of development.
- (3) “Person responsible for the child's welfare” includes the child's parent; stepparent; guardian; foster parent; treatment foster parent; an employee of a public or private residential home, institution or agency; other person legally responsible for the child's welfare in a residential setting; or a person employed by one legally responsible for the child's welfare to exercise temporary control or care for the child.
- (3m) “Physical placement” has the meaning given in s. 767.001 (5).
- (3r) “Recording” includes the creation of a reproduction of an image or a sound or the storage of data representing an image or a sound.
- (4) “Sodomasochistic abuse” means the infliction of force, pain or violence upon a person for the purpose of sexual arousal or gratification.
- (5) “Sexual contact” means any of the following:
 - (a) Any of the following types of intentional touching, whether direct or through clothing, if that intentional touching is either for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant:
 1. Intentional touching by the defendant or, upon the defendant's instruction, by another person, by the use of any body part or object, of the complainant's intimate parts.
 2. Intentional touching by the complainant, by the use of any body part or object, of the defendant's intimate parts or, if done upon the defendant's instructions, the intimate parts of another person.
NOTE: Subd. 2. was created as par. (am) by 2005 Wis. Act 435 and renumbered by the revisor under s. 13.93 (1) (b).
 - (b) Intentional penile ejaculation of ejaculate or intentional emission of urine or feces by the defendant or, upon the defendant's instruction, by another person upon any part of the body clothed or unclothed of the complainant if that ejaculation or emission is either for the purpose of sexually degrading or sexually humiliating the complainant or for the purpose of sexually arousing or gratifying the defendant.
 - (c) For the purpose of sexually degrading or humiliating the complainant or sexually arousing or gratifying the defendant, intentionally causing the complainant to ejaculate or emit urine or feces on any part of the defendant's body, whether clothed or unclothed.

- (6) “Sexual intercourse” means vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by the defendant or upon the defendant's instruction. The emission of semen is not required.
- (7) “Sexually explicit conduct” means actual or simulated:
- (a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
 - (b) Bestiality;
 - (c) Masturbation;
 - (d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
 - (e) Lewd exhibition of intimate parts.

Wis. Stat. § 948.02 (2007)

948.02. SEXUAL ASSAULT OF A CHILD.

(1) First Degree Sexual Assault.

Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of one of the following:

- (a) If the sexual contact or sexual intercourse resulted in great bodily harm to the person, a Class A felony.
- (b) If the sexual contact or sexual intercourse did not result in great bodily harm to the person, a Class B felony.

(2) Second Degree Sexual Assault.

Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years is guilty of a Class C felony.

(3) Failure To Act.

A person responsible for the welfare of a child who has not attained the age of 16 years is guilty of a Class F felony if that person has knowledge that another person intends to have, is having or has had sexual intercourse or sexual contact with the child, is physically and emotionally capable of taking action which will prevent the intercourse or contact from taking place or being repeated, fails to take that action and the failure to act exposes the child to an unreasonable risk that intercourse or contact may occur between the child and the other person or facilitates the intercourse or contact that does occur between the child and the other person.

(4) Marriage Not A Bar To Prosecution.

A defendant shall not be presumed to be incapable of violating this section because of marriage to the complainant.

(5) Death Of Victim.

This section applies whether a victim is dead or alive at the time of the sexual contact or sexual intercourse.

Wis. STAT. § 948.025 (2007)
948.025. ENGAGING IN REPEATED ACTS
OF SEXUAL ASSAULT OF THE SAME CHILD.

- (1) Whoever commits 3 or more violations under s. 948.02 (1) or (2) within a specified period of time involving the same child is guilty of:
 - (ag) A Class A felony if at least 3 of the violations were violations of s. 948.02 (1) (a)
 - (ar) A Class B felony if fewer than 3 of the violations were violations of s. 948.02 (1) (a) but at least 3 of the violations were violations of s. 948.02 (1) (a) or (b)
 - (b) A Class C felony if fewer than 3 of the violations were violations of s. 948.02 (1)
- (2) (a) If an action under sub. (1) (ag) is tried to a jury, in order to find the defendant guilty the members of the jury must unanimously agree that at least 3 violations of s. 948.02 (1) (a) occurred within the specified period of time but need not agree on which acts constitute the requisite number.
 - (am) If an action under sub. (1) (ar) is tried to a jury, in order to find the defendant guilty the members of the jury must unanimously agree that at least 3 violations of s. 948.02 (1) (a) or (b) occurred within the specified period of time but need not agree on which acts constitute the requisite number.
 - (b) If an action under sub. (1) (b) is tried to a jury, in order to find the defendant guilty the members of the jury must unanimously agree that at least 3 violations of s. 948.02 (1) or (2) occurred within the specified period of time but need not agree on which acts constitute the requisite number and need not agree on whether a particular violation was a violation of s. 948.02 (1) or (2)
- (3) The state may not charge in the same action a defendant with a violation of this section and with a felony violation involving the same child under ch. 944 or a violation involving the same child under s. 948.02, 948.05, 948.06, 948.07, 948.075, 948.08, 948.10, 948.11, or 948.12, unless the other violation occurred outside of the time period applicable under sub. (1) This subsection does not prohibit a conviction for an included crime under s. 939.66 when the defendant is charged with a violation of this section.

Wis. STAT. § 948.05 (2007)
948.05. SEXUAL EXPLOITATION OF A CHILD.

- (1) Whoever does any of the following with knowledge of the character and content of the sexually explicit conduct involving the child may be penalized under sub. (2p):
 - (a) Employs, uses, persuades, induces, entices, or coerces any child to engage in sexually explicit conduct for the purpose of recording or displaying in any way the conduct.
 - (b) Records or displays in any way a child engaged in sexually explicit conduct.
- (1m) Whoever produces, performs in, profits from, promotes, imports into the state, reproduces, advertises, sells, distributes, or possesses with intent to sell or distribute, any recording of a child engaging in sexually explicit conduct may be penalized under sub. (2p) if the person knows the character and content of the sexually explicit conduct involving the child and if the person knows or reasonably should know that the child engaging in the sexually explicit conduct has not attained the age of 18 years.
- (2) A person responsible for a child's welfare who knowingly permits, allows or encourages the child to engage in sexually explicit conduct for a purpose proscribed in sub. (1) (a) or (b) or (1m) may be penalized under sub. (2p)
- (2p) (a) Except as provided in par. (b), a person who violates sub. (1), (1m), or (2) is guilty of a Class C felony.
 - (b) A person who violates sub. (1), (1m), or (2) is guilty of a Class F felony if the person is under 18 years of age

when the offense occurs.

- (3) It is an affirmative defense to prosecution for violation of sub. (1) (a) or (b) or (2) if the defendant had reasonable cause to believe that the child had attained the age of 18 years. A defendant who raises this affirmative defense has the burden of proving this defense by a preponderance of the evidence.

Wis. STAT. § 948.055 (2007)

948.055. CAUSING A CHILD TO VIEW OR LISTEN TO SEXUAL ACTIVITY.

- (1) Whoever intentionally causes a child who has not attained 18 years of age to view or listen to sexually explicit conduct may be penalized as provided in sub. (2) if the viewing or listening is for the purpose of sexually arousing or gratifying the actor or humiliating or degrading the child.
- (2) Whoever violates sub. (1) is guilty of:
 - (a) A Class F felony if the child has not attained the age of 13 years.
 - (b) A Class H felony if the child has attained the age of 13 years but has not attained the age of 18 years.

Wis. STAT. § 948.06 (2007)

948.06. INCEST WITH A CHILD.

Whoever does any of the following is guilty of a Class C felony:

- (1) Marries or has sexual intercourse or sexual contact with a child he or she knows is related, either by blood or adoption, and the child is related in a degree of kinship closer than 2nd cousin.
- (1m) Has sexual contact or sexual intercourse with a child if the actor is the child's stepparent.
- (2) Is a person responsible for the child's welfare and:
 - (a) Has knowledge that another person who is related to the child by blood or adoption in a degree of kinship closer than 2nd cousin or who is a child's stepparent has had or intends to have sexual intercourse or sexual contact with the child;
 - (b) Is physically and emotionally capable of taking action that will prevent the intercourse or contact from occurring or being repeated;
 - (c) Fails to take that action; and
 - (d) The failure to act exposes the child to an unreasonable risk that intercourse or contact may occur between the child and the other person or facilitates the intercourse or contact that does occur between the child and the other person.

Wis. STAT. § 948.07 (2007)

948.07. CHILD ENTICEMENT.

Whoever, with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place is guilty of a Class D felony:

- (1) Having sexual contact or sexual intercourse with the child in violation of s. 948.02, 948.085, or 948.095
- (2) Causing the child to engage in prostitution.
- (3) Exposing a sex organ to the child or causing the child to expose a sex organ in violation of s. 948.10
- (4) Recording the child engaging in sexually explicit conduct.
- (5) Causing bodily or mental harm to the child.

- (6) Giving or selling to the child a controlled substance or controlled substance analog in violation of ch. 961

Wis. STAT. § 948.075 (2007)

**948.075. USE OF A COMPUTER
TO FACILITATE A CHILD SEX CRIME.**

- (1r) Whoever uses a computerized communication system to communicate with an individual who the actor believes or has reason to believe has not attained the age of 16 years with intent to have sexual contact or sexual intercourse with the individual in violation of s. 948.02 (1) or (2) is guilty of a Class C felony.
- (2) This section does not apply if, at the time of the communication, the actor reasonably believed that the age of the person to whom the communication was sent was no more than 24 months less than the age of the actor.
- (3) Proof that the actor did an act, other than use a computerized communication system to communicate with the individual, to effect the actors intent under sub. (1) [sub. (1r)] shall be necessary to prove that intent.

Wis. STAT. § 948.085 (2007)

**948.085. SEXUAL ASSAULT OF A CHILD
PLACED IN SUBSTITUTE CARE.**

Whoever does any of the following is guilty of a Class C felony:

- (1) Has sexual contact or sexual intercourse with a child for whom the actor is a foster parent or treatment foster parent.
- (2) Has sexual contact or sexual intercourse with a child who is placed in any of the following facilities if the actor works or volunteers at the facility or is directly or indirectly responsible for managing it:
- (a) A shelter care facility licensed under s. 48.66 (1) (a)
 - (b) A group home licensed under s. 48.625 or 48.66 (1)
 - (c) A facility described in s. 940.295 (2) (m)

Wis. STAT. § 948.09 (2007)

**948.09. SEXUAL INTERCOURSE
WITH A CHILD AGE 16 OR OLDER.**

Whoever has sexual intercourse with a child who is not the defendants spouse and who has attained the age of 16 years is guilty of a Class A misdemeanor.

Wis. STAT. § 948.095 (2007)

**948.095. SEXUAL ASSAULT OF A CHILD
BY A SCHOOL STAFF PERSON OR A PERSON
WHO WORKS OR VOLUNTEERS WITH CHILDREN.**

- (1) In this section:
- (a) “School” means a public or private elementary or secondary school.
 - (b) “School staff” means any person who provides services to a school or a school board, including an employee of a school or a school board and a person who provides services to a school or a school board under a contract.
- (2) Whoever has sexual contact or sexual intercourse with a child who has attained the age of 16 years and who is not the defendants spouse is guilty of a Class H felony if all of the following apply:
- (a) The child is enrolled as a student in a school or a school district.
 - (b) The defendant is a member of the school staff of the school or school district in which the child is enrolled as a student.

- (3)(a) A person who has attained the age of 21 years and who engages in an occupation or participates in a volunteer position that requires him or her to work or interact directly with children may not have sexual contact or sexual intercourse with a child who has attained the age of 16 years, who is not the persons spouse, and with whom the person works or interacts through that occupation or volunteer position.
- (b) Whoever violates par. (a) is guilty of a Class H felony.
- (c) Paragraph (a) does not apply to an offense to which sub. (2) applies.
- (d) Evidence that a person engages in an occupation or participates in a volunteer position relating to any of the following is prima facie evidence that the occupation or position requires him or her to work or interact directly with children: teaching children, child care, youth counseling, youth organization, coaching children, parks or playground recreation, or school bus driving.

Wis. Stat. § 948.10 (2007)

948.10. EXPOSING GENITALS OR PUBIC AREA.

- (1) Whoever, for purposes of sexual arousal or sexual gratification, causes a child to expose genitals or pubic area or exposes genitals or pubic area to a child is guilty of a Class A misdemeanor.
- (2) Subsection (1) does not apply under any of the following circumstances:
 - (a) The child is the defendants spouse.
 - (b) A mothers breast-feeding of her child.

Wis. Stat. § 948.11 (2007)

948.11. EXPOSING A CHILD TO HARMFUL MATERIAL OR HARMFUL DESCRIPTIONS OR NARRATIONS.

(1) Definitions.

In this section:

- (ag) “Harmful description or narrative account” means any explicit and detailed description or narrative account of sexual excitement, sexually explicit conduct, sadomasochistic abuse, physical torture or brutality that, taken as a whole, is harmful to children.
- (ar) “Harmful material” means:
 1. Any picture, photograph, drawing, sculpture, motion picture film or similar visual representation or image of a person or portion of the human body that depicts nudity, sexually explicit conduct, sadomasochistic abuse, physical torture or brutality and that is harmful to children; or
 2. Any book, pamphlet, magazine, printed matter however reproduced or recording that contains any matter enumerated in subd. 1., or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexually explicit conduct, sadomasochistic abuse, physical torture or brutality and that, taken as a whole, is harmful to children.
- (b) “Harmful to children” means that quality of any description, narrative account or representation, in whatever form, of nudity, sexually explicit conduct, sexual excitement, sadomasochistic abuse, physical torture or brutality, when it:
 1. Predominantly appeals to the prurient, shameful or morbid interest of children;
 2. Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for children; and
 3. Lacks serious literary, artistic, political, scientific or educational value for children, when taken as a whole.

- (d) “Nudity” means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.
- (e) “Person” means any individual, partnership, firm, association, corporation or other legal entity.
- (f) “Sexual excitement” means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(2) Criminal Penalties.

- (a) Whoever, with knowledge of the character and content of the material, sells, rents, exhibits, plays, distributes, or loans to a child any harmful material, with or without monetary consideration, is guilty of a Class I felony if any of the following applies:
 1. The person knows or reasonably should know that the child has not attained the age of 18 years.
 2. The person has face-to-face contact with the child before or during the sale, rental, exhibit, playing, distribution, or loan.
- (am) Any person who has attained the age of 17 and who, with knowledge of the character and content of the description or narrative account, verbally communicates, by any means, a harmful description or narrative account to a child, with or without monetary consideration, is guilty of a Class I felony if any of the following applies:
 1. The person knows or reasonably should know that the child has not attained the age of 18 years.
 2. The person has face-to-face contact with the child before or during the communication.
- (b) Whoever, with knowledge of the character and content of the material, possesses harmful material with the intent to sell, rent, exhibit, play, distribute, or loan the material to a child is guilty of a Class A misdemeanor if any of the following applies:
 1. The person knows or reasonably should know that the child has not attained the age of 18 years.
 2. The person has face-to-face contact with the child.
- (c) It is an affirmative defense to a prosecution for a violation of pars. (a) 2., (am) 2., and (b) 2. if the defendant had reasonable cause to believe that the child had attained the age of 18 years, and the child exhibited to the defendant a draft card, drivers license, birth certificate or other official or apparently official document purporting to establish that the child had attained the age of 18 years. A defendant who raises this affirmative defense has the burden of proving this defense by a preponderance of the evidence.

(3) Extradition.

If any person is convicted under sub. (2) and cannot be found in this state, the governor or any person performing the functions of governor by authority of the law shall, unless the convicted person has appealed from the judgment of contempt or conviction and the appeal has not been finally determined, demand his or her extradition from the executive authority of the state in which the person is found.

(4) Libraries And Educational Institutions.

- (a) The legislature finds that the libraries and educational institutions under par. (b) carry out the essential purpose of making available to all citizens a current, balanced collection of books, reference materials, periodicals, sound recordings and audiovisual materials that reflect the cultural diversity and pluralistic nature of American society. The legislature further finds that it is in the interest of the state to protect the financial resources of libraries and educational institutions from being expended in litigation and to permit these resources to be used to the greatest extent possible for fulfilling the essential purpose of libraries and educational institutions.

(b) No person who is an employee, a member of the board of directors or a trustee of any of the following is liable to prosecution for violation of this section for acts or omissions while in his or her capacity as an employee, a member of the board of directors or a trustee:

1. A public elementary or secondary school.
2. A private school, as defined in s. 115.001 (3r)
3. Any school offering vocational, technical or adult education that:
 - a. Is a technical college, is a school approved by the educational approval board under s. 38.50, or is a school described in s. 38.50 (1) (e) 6., 7. or 8.; and
 - b. Is exempt from taxation under section 501 (c) (3) of the internal revenue code, as defined in s. 71.01 (6)
4. Any institution of higher education that is accredited, as described in s. 39.30 (1) (d), and is exempt from taxation under section 501 (c) (3) of the internal revenue code, as defined in s. 71.01 (6)
5. A library that receives funding from any unit of government.

(5) Severability.

The provisions of this section, including the provisions of sub. (4), are severable, as provided in s. 990.001 (11)

Wis. Stat. § 948.13 (2007)

948.13. CHILD SEX OFFENDER

WORKING WITH CHILDREN.

(1) In this section, “serious child sex offense” means any of the following:

- (a) A crime under s. 940.22 (2) or 940.225 (2) (c) or (cm), if the victim is under 18 years of age at the time of the offense, or a crime under s. 948.02 (1) or (2), 948.025 (1), 948.05 (1) or (1m), 948.06, 948.07 (1), (2), (3), or (4), 948.075, or 948.085
- (b) A crime under federal law or the law of any other state or, prior to May 7, 1996, under the law of this state that is comparable to a crime specified in par. (a)

(2) (a) Except as provided in pars. (b) and (c), whoever has been convicted of a serious child sex offense and subsequently engages in an occupation or participates in a volunteer position that requires him or her to work or interact primarily and directly with children under 16 years of age is guilty of a Class F felony.

(b) If all of the following apply, the prohibition under par. (a) does not apply to a person who has been convicted of a serious child sex offense until 90 days after the date on which the person receives actual written notice from a law enforcement agency, as defined in s. 165.77 (1) (b), of the prohibition under par. (a):

1. The only serious child sex offense for which the person has been convicted is a crime under s. 948.02 (2)
2. The person was convicted of the serious child sex offense before May 7, 2002.
3. The person is eligible to petition for an exemption from the prohibition under sub. (2m) because he or she meets the criteria specified in sub. (2m) (a) 1. and 1m.

(c) The prohibition under par. (a) does not apply to a person who is exempt under a court order issued under sub. (2m)

(2m) (a) A person who has been convicted of a crime under s. 948.02 (2), 948.025 (1), or 948.085 may petition

the court in which he or she was convicted to order that the person be exempt from sub. (2) (a) and permitted to engage in an occupation or participate in a volunteer position that requires the person to work or interact primarily and directly with children under 16 years of age. The court may grant a petition filed under this paragraph if the court finds that all of the following apply:

1. At the time of the commission of the crime under s. 948.02 (2), 948.025 (1), or 948.085 the person had not attained the age of 19 years and was not more than 4 years older or not more than 4 years younger than the child with whom the person had sexual contact or sexual intercourse.
- 1m. The child with whom the person had sexual contact or sexual intercourse had attained the age of 13 but had not attained the age of 16.
2. It is not necessary, in the interest of public protection, to require the person to comply with sub. (2) (a)
 - (b) A person filing a petition under par. (a) shall send a copy of the petition to the district attorney who prosecuted the person. The district attorney shall make a reasonable attempt to contact the victim of the crime that is the subject of the persons petition to inform the victim of his or her right to make or provide a statement under par. (d)
 - (c) A court may hold a hearing on a petition filed under par. (a) and the district attorney who prosecuted the person may appear at the hearing. Any hearing that a court decides to hold under this paragraph shall be held no later than 30 days after the petition is filed if the petition specifies that the person filing the petition is covered under sub. (2) (b), that he or she has received actual written notice from a law enforcement agency of the prohibition under sub. (2) (a), and that he or she is seeking an exemption under this subsection before the expiration of the 90-day period under sub. (2) (b)
 - (d) Before deciding a petition filed under par. (a), the court shall allow the victim of the crime that is the subject of the petition to make a statement in court at any hearing held on the petition or to submit a written statement to the court. A statement under this paragraph must be relevant to the issues specified in par. (a) 1., 1m. and 2.
 - (e)
 1. Before deciding a petition filed under par. (a), the court may request the person filing the petition to be examined by a physician, psychologist or other expert approved by the court. If the person refuses to undergo an examination requested by the court under this subdivision, the court shall deny the persons petition without prejudice.
 2. If a person is examined by a physician, psychologist or other expert under subd. 1., the physician, psychologist or other expert shall file a report of his or her examination with the court, and the court shall provide copies of the report to the person and, if he or she requests a copy, to the district attorney. The contents of the report shall be confidential until the physician, psychologist or other expert has testified at a hearing held under par. (c) The report shall contain an opinion regarding whether it would be in the interest of public protection to require the person to comply with sub. (2) (a) and the basis for that opinion.
 3. A person who is examined by a physician, psychologist or other expert under subd. 1. is responsible for paying the cost of the services provided by the physician, psychologist or other expert, except that if the person is indigent the cost of the services provided by the physician, psychologist or other expert shall be paid by the county. If the person claims or appears to be indigent, the court shall refer the person to the authority for indigency determinations under s. 977.07 (1), except that the person shall be considered indigent without another determination under s. 977.07 (1) if the person is represented by the state public defender or by a private attorney appointed under s. 977.08

(em) A court shall decide a petition no later than 45 days after the petition is filed if the petition specifies that the person filing the petition is covered under sub. (2) (b), that he or she has received actual written notice from a law enforcement agency of the prohibition under sub. (2) (a), and that he or she is seeking an exemption under this subsection before the expiration of the 90-day period under sub. (2) (b)

- (f) The person who filed the petition under par. (a) has the burden of proving by clear and convincing evidence that he or she satisfies the criteria specified in par. (a) 1., 1m. and 2. In deciding whether the person has satisfied the criterion specified in par. (a) 2., the court may consider any of the following:
1. The ages, at the time of the violation, of the person who filed the petition and the victim of the crime that is the subject of the petition.
 2. The relationship between the person who filed the petition and the victim of the crime that is the subject of the petition.
 3. Whether the crime that is the subject of the petition resulted in bodily harm to the victim.
 4. Whether the victim of the crime that is the subject of the petition suffered from a mental illness or mental deficiency that rendered him or her temporarily or permanently incapable of understanding or evaluating the consequences of his or her actions.
 5. The probability that the person who filed the petition will commit other serious child sex offenses in the future.
 6. The report of the examination conducted under par. (e)
 7. Any other factor that the court determines may be relevant to the particular case.

(3) Evidence that a person engages in an occupation or participates in a volunteer position relating to any of the following is prima facie evidence that the occupation or position requires him or her to work or interact primarily and directly with children under 16 years of age: teaching children, child care, youth counseling, youth organization, coaching children, parks or playground recreation or school bus driving.

Wis. Stat. § 948.14 (2007)

948.14. REGISTERED SEX OFFENDER AND PHOTOGRAPHING MINORS.

(1) Definitions.

In this section:

- a. “Captures a representation” has the meaning given in s. 942.09 (1) (a)
- b. “Minor” means an individual who is under 17 years of age.
- c. “Representation” has the meaning giving in s. 942.09 (1) (c)
- d. “Sex offender” means a person who is required to register under s. 301.45

(2) Prohibition.

- (a) A sex offender may not intentionally capture a representation of any minor without the written consent of the minors parent, legal custodian, or guardian. The written consent required under this paragraph shall state that the person seeking the consent is required to register as a sex offender with the department of corrections.
- (b) Paragraph (a) does not apply to a sex offender who is capturing a representation of a minor if the sex offender is the minors parent, legal custodian, or guardian.

(3) Penalty.

Whoever violates sub. (2) is guilty of a Class I felony.

EXERCISES

1. What are your tribal customs and traditions regarding sexual activity and children? How would coercing or compelling a child to act sexually with an adult be treated under your customs and traditions? Are these customs and traditions relevant to your current law drafting?

2. Which of the following crimes are currently missing from your tribal law?

- Sexual Abuse of a Minor
- Aggravated Sexual Abuse of a Minor
- Assault with Intent to Commit Rape of a Minor
- Rape of a Minor
- Continuous Sexual Molestation

3. Are there similar crimes in your tribal law? If not, which would you like to add?

4. Test your draft provision using the **OUHE** test. Is your draft provision **O**verinclusive - can you think of a person or situation that it might apply to that you did not intend? Is your draft provision **U**nderinclusive - can you think of a person or situation that you meant for it to apply to, but when you read your language it appears not to apply? Is your draft provision likely to be **H**ard to enforce? Does your provision (or another provision) include an **E**nforcement process and will it work? Discuss any difficulties you encounter and brainstorm ways of changing the language to fix them.

ADDITIONAL RESOURCES

1. Ruby Andrew, *Child Sexual Abuse and the State: Applying Critical Outsider Methodologies to Legislative Policymaking*, 39 U.C. Davis L. Rev. 1851, (2006).
2. Berliner, L. & Elliton, D.M. *Sexual Abuse of Children*. In J. Briere, L. Berliner, J.A. Bulkley, C. Jenny & T. Reid (Eds.), *The APSAC Handbook on Child Maltreatment* (pp. 21-50). Thousand Oaks, CA: Sage Publications, 1996.
3. Larry Echohawk, *Child Sexual Abuse in Indian Country: Is the Guardian Keeping in Mind the Seventh Generation?* 5 N.Y.U. J. of Legis. and Public Policy 83 (2001-2002).
4. Bass, E. & Davis, L. *Beginning to Heal: A First Book For Men And Women Who Were Sexually Abused As Children*. Harper Books (Revised 2003)
5. Bass, E. & Davis, L. *The Courage to Heal: A Guide for Women Survivors of Child Sexual Abuse* (3rd ed). New York: Harper & Row (1994).
6. Cavanagh-Johnson, T. *Behaviors Related To Sex And Sexuality In Kindergarten Through Fourth Grade Children*. Pasadena, CA. (1994).
7. Gil, E & Cavanaugh Johnson, T. *Sexualized children: Assessment And Treatment Of Sexualized Children And Children Who Molest*. Rockville, MD: Launch Press. (1993).
8. Adams, C & Fay, J. *Helping Your Child Recover from Sexual Abuse*. University of Washington Press (1992).

CRIMES AGAINST CHILDREN: PROSTITUTION

THE PURPOSE OF A CHILD PROSTITUTION CODE is not to punish the child for being forced into prostitution, but rather to punish or prohibit people from using children to gain money or anything of value from prostitution. Some tribes and states use one statute to encompass the different acts of soliciting, promoting, procurement, and pimping of a child. Others have enacted different statutes for each different act. In most state jurisdictions the crime of prostitution includes three different elements: (1) some degree of sexual activity or conduct; (2) compensation; and (3) intent to commit prostitution.¹⁴

Child prostitution (also sometimes called “trafficking”) may or may not seem to be a problem in your community. However, if there is no law prohibiting the prostitution of children, and such an incident ever happens, there will be no method by which to legally hold the perpetrator(s) accountable. For this reason tribes may want to define crimes addressing this problem. Tribes may also find situations where a parent or caregiver allows a drug dealer to have sexual contact with their child in exchange for receiving their illegal drug supply. This situation is also a form of prostitution and may also fall under the rape statute.

ILLUSTRATIVE EXAMPLE

CHAPTER X. SECTION X. DEFINITIONS

(A) Prostitution means 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;
- (2) Sexual contact; or
- (3) Sexual conduct.

(B) “House of prostitution” means a place where prostitution or promotion of prostitution is regularly carried on by one or more persons under the control, management, or supervision of another.

CHAPTER X. SECTION X. PROMOTING PROSTITUTION OF A CHILD

A person is guilty of promoting prostitution of a child if he or she willfully -

¹⁴ For a deeper understanding of these elements, see Lauren M. Davis, Criminal Law Chapter: *Prostitution*, 7 Geo. J. Gender & L. 835 (2006).

- (A) Establishes, owns, maintains, or manages a house of prostitution that uses minors;
- (B) Participates in the establishment, ownership, maintenance, or management of a house of prostitution that uses minors;
- (C) Permits any place partially or wholly owned by the person to be used as a house of prostitution that uses minors;
- (D) Solicits a patron for a minor prostitute or a house of prostitution that uses minors; or
- (E) Procures transportation for the patron or minor with the intent of assisting in the patron engaging in prostitution.

CHAPTER X. SECTION X.

PROCUREMENT OF A CHILD FOR PROSTITUTION

A person is guilty of procurement of a child for prostitution if he or she gives, transports, provides, makes available, or offers to give, transport, provide or make available, to another person a child for the purpose of prostitution of the child.

CHAPTER X. SECTION X.

AGGRAVATED PROCUREMENT OF A CHILD FOR PROSTITUTION

A person is guilty of Aggravated Procurement of a Child for Prostitution if he or she:

- (A) Persuades, entices or forcibly abducts a child from his home or custody of the child's parents;
- (B) Using promises, threats, or illegal substances to cause, induce, or persuade a minor; or
- (C) Keeps, holds, detains, restrains, or compels against the minor's will for the purposes of -
 - (1) engaging or continuing to engage in prostitution; or
 - (2) to become or remain in a house of prostitution.

COMMENTARY

The language in the example has been taken and modified from a variety of sources.

SELECTED TRIBAL CODES

EASTERN BAND OF CHEROKEE INDIANS

ARTICLE XIII

Sec. 14-80.1. Prostitution.

- (a) It shall be unlawful to:
 - (1) Be an inmate or resident of a house of prostitution or otherwise engage in sexual activity as a business or for hire;
 - (2) Loiter in or within view of a public place for the purpose of being hired to engage sexual activity;
 - (3) Engage in or offer or agree to engage in any sexual activity with another person for a fee;
 - (4) Pay or offer or agree to pay another person a fee for the purpose of engaging in an act of sexual activity;
 - (5) Enter or remain in a house of prostitution for the purpose of engaging in sexual activity;

- (6) Own, control, manage, supervise, or otherwise keep, alone or in association with another, a house of prostitution or a prostitution business;
 - (7) Solicit a person to patronize a prostitute;
 - (8) Procure or attempt to procure a prostitute for another;
 - (9) Lease or otherwise permit a place controlled by the actor, alone or in association with others, to be used for prostitution or the promotion of prostitution;
 - (10) Procure an inmate for a house of prostitution;
 - (11) Encourage, induce, or otherwise purposely cause another to become or remain a prostitute.
 - (12) Transport a person with a purpose to promote that person's engaging in prostitution or procuring or paying for transportation with that purpose;
 - (13) Share in the proceeds of a prostitute pursuant to an understanding that one is to share therein, unless one is the child or legal dependent of a prostitute;
 - (14) Own, operate, manage, or control a house of prostitution; or
 - (15) Solicit, receive, or agree to receive any benefit for doing any of the acts prohibited by this section.
- (b) Definitions:
- (1) House of prostitution means a place where prostitution or promotion of prostitution is regularly carried on by one or more persons under the control, management, or supervision of another.
 - (2) Inmate means a person who engages in prostitution in or through the agency of a house of prostitution.
 - (3) Public place means any place to which the public or a substantial group thereof has access.
 - (4) Sexual activity means intercourse or any sexual act involving the genitals of one person and the mouth or anus of another person, regardless of the gender of either participant.
- (c) On the issue of whether a place is a house of prostitution, the following shall be admissible in evidence: its general reputation; the reputation of the persons who reside in or frequent the place; the frequency, timing, and duration of visits by non-residents. Testimony of a person against his spouse shall be admissible to prove an offense under this Section.

SWINOMISH TRIBE CODE

TITLE 4 - CRIMINAL CODE

CHAPTER 3 - SEXUAL OFFENSES

4-03.060 Prostitution and Profiting from Prostitution.

- (A) Any person who engages in or agrees or offers to engage in sexual conduct with another person in return for a fee or other benefit commits the offense of prostitution. "Sexual conduct" means sexual intercourse or sexual touching as defined in Section 4-01.040.
- (B) Prostitution is a Class C offense.
- (C) Any person who encourages a child under the age of eighteen (18) to engage in prostitution commits a Class A offense.
- (D) Any person who knowingly profits from or attempts to profit from the commission of prostitution by another commits a Class B offense.

[History] Ord. 184 (9/30/03); Ord. 75 (4/2/91).

4-03.070 Sexual Exploitation of Minors.

- (A) A person is guilty of sexual exploitation of minors if the person, for the purpose of producing any visual depiction of sexually explicit conduct or for the purpose of sexual gratification:
- (1) employs, uses, persuades, induces, entices, or coerces any person under age eighteen (18) to engage in sexually explicit conduct;
 - (2) causes a person under eighteen (18) to assist any other person to engage in sexually explicit conduct; or
 - (3) in any way willfully aids a person under eighteen (18) to engage in sexually explicit conduct.
- (B) Sexual exploitation of a minor is a Class A offense.
- (C) Any person who willfully assists in the production or distribution of a visual depiction of sexually explicit conduct by a minor also commits the Class A offense of sexual exploitation of children.

[History] Ord. 184 (9/30/03); Ord. 75 (4/2/91).

4-03.070 Sexual Exploitation of Minors.

- (A) A person is guilty of sexual exploitation of minors if the person, for the purpose of producing any visual depiction of sexually explicit conduct or for the purpose of sexual gratification:
- (1) employs, uses, persuades, induces, entices, or coerces any person under age eighteen (18) to engage in sexually explicit conduct;
 - (2) causes a person under eighteen (18) to assist any other person to engage in sexually explicit conduct; or
 - (3) in any way willfully aids a person under eighteen (18) to engage in sexually explicit conduct.
- (B) Sexual exploitation of a minor is a Class A offense.
- (C) Any person who willfully assists in the production or distribution of a visual depiction of sexually explicit conduct by a minor also commits the Class A offense of sexual exploitation of children.

[History] Ord. 184 (9/30/03); Ord. 75 (4/2/91).

**LAWS OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, CODIFIED
TITLE II, CHAPTER 1 - TRIBAL OFFENSES**

2-1-702. Prostitution.

- (1) A person commits the offense of prostitution if such person knowingly engages in or agrees or offers to engage in sexual intercourse with another person, not his or her spouse, for compensation, whether such compensation is paid or to be paid.
- (2) Prostitution is a Class B offense over which the Tribes have exclusive jurisdiction.

2-1-703. Aggravated promotion of prostitution.

- (1) A person commits the offense of aggravated promotion of prostitution if he or she purposely or knowingly commits any of the following acts:
 - (a) compels another to engage in or promote prostitution;
 - (b) promotes prostitution of a child under the age of 18 years, whether or not he or she is aware of the child's age;
 - (c) promotes the prostitution of one's child, ward, or any person for whose care, protection, or support he or she is responsible.

- (2) Aggravated promotion of prostitution is a Class E offense over which the Tribes have concurrent jurisdiction with the State of Montana.

SELECTED STATE CODES

MINNESOTA

MINN. STAT. § 609.321 (2005)

609.321 PROSTITUTION; DEFINITIONS

Subdivision 1. Scope. For the purposes of sections 609.321 to 609.325, the following terms have the meanings given.

Subd. 2. Business of prostitution. “Business of prostitution” means any arrangement between or organization of two or more persons, acting other than as prostitutes or patrons, who commit acts punishable under sections 609.321 to 609.324.

Subd. 4. Patron. “Patron” means an individual who hires or offers or agrees to hire another individual to engage in sexual penetration or sexual contact.

Subd. 5. Place of prostitution. “Place of prostitution” means a house or other place where prostitution is practiced.

Subd. 7. Promotes the prostitution of an individual. “Promotes the prostitution of an individual” means any of the following wherein the person knowingly:

- (1) solicits or procures patrons for a prostitute; or
- (2) provides, leases or otherwise permits premises or facilities owned or controlled by the person to aid the prostitution of an individual; or
- (3) owns, manages, supervises, controls, keeps or operates, either alone or with others, a place of prostitution to aid the prostitution of an individual; or
- (4) owns, manages, supervises, controls, operates, institutes, aids or facilitates, either alone or with others, a business of prostitution to aid the prostitution of an individual; or
- (5) admits a patron to a place of prostitution to aid the prostitution of an individual;
- (6) transports an individual from one point within this state to another point either within or without this state, or brings an individual into this state to aid the prostitution of the individual; or
- (7) engages in the sex trafficking of an individual.

Subd. 7a. Sex trafficking. “Sex trafficking” means receiving, recruiting, enticing, harboring, providing, or obtaining by any means an individual to aid in the prostitution of the individual.

Subd. 7b. Sex trafficking victim. “Sex trafficking victim” means a person subjected to the practices in subdivision 7a.

Subd. 8. Prostitute. “Prostitute” means an individual who engages in prostitution.

Subd. 9. Prostitution. “Prostitution” means engaging or offering or agreeing to engage for hire in sexual penetration or sexual contact.

Subd. 10. Sexual contact. “Sexual contact” means any of the following acts, if the acts can reasonably be construed as being for the purpose of satisfying the actor's sexual impulses:

- (i) the intentional touching by an individual of a prostitute's intimate parts; or

(ii) the intentional touching by a prostitute of another individual's intimate parts.

Subd. 11. Sexual penetration. “Sexual penetration” means any of the following acts, if for the purpose of satisfying sexual impulses: sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion however slight into the genital or anal openings of an individual's body by any part of another individual's body or any object used for the purpose of satisfying sexual impulses. Emission of semen is not necessary.

Subd. 12. Public place. A “public place” means a public street or sidewalk, a pedestrian skyway system as defined in section 469.125, subdivision 4, a hotel, motel, or other place of public accommodation, a place licensed to sell intoxicating liquor, wine, nonintoxicating malt beverages, or food, or a motor vehicle located on a public street, alley, or parking lot ordinarily used by or available to the public though not used as a matter of right and a driveway connecting such a parking lot with a street or highway.

CALIFORNIA

CAL PEN CODE § 647 (2006)

§ 647. Disorderly conduct; Restrictions on probation

Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

- (a) Who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view.
- (b) Who solicits or who agrees to engage in or who engages in any act of prostitution. A person agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in prostitution. No agreement to engage in an act of prostitution shall constitute a violation of this subdivision unless some act, in addition to the agreement, is done within this state in furtherance of the commission of an act of prostitution by the person agreeing to engage in that act. As used in this subdivision, “prostitution” includes any lewd act between persons for money or other consideration.
- (c) Who accosts other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms.
- (d) Who loiters in or about any toilet open to the public for the purpose of engaging in or soliciting any lewd or lascivious or any unlawful act.
- (e) Who lodges in any building, structure, vehicle, or place, whether public or private, without the permission of the owner or person entitled to the possession or in control of it.
- (f) Who is found in any public place under the influence of intoxicating liquor, any drug, controlled substance, toluene, or any combination of any intoxicating liquor, drug, controlled substance, or toluene, in a condition that he or she is unable to exercise care for his or her own safety or the safety of others, or by reason of his or her being under the influence of intoxicating liquor, any drug, controlled substance, toluene, or any combination of any intoxicating liquor, drug, or toluene, interferes with or obstructs or prevents the free use of any street, sidewalk, or other public way.
- (g) When a person has violated subdivision (f), a peace officer, if he or she is reasonably able to do so, shall place the person, or cause him or her to be placed, in civil protective custody. The person shall be taken to a facility, designated pursuant to Section 5170 of the Welfare and Institutions Code, for the 72-hour treatment and evaluation of inebriates. A peace officer may place a person in civil protective custody with that kind and degree of force which would be lawful were he or she effecting an arrest for a misdemeanor without a warrant. No person who has been placed in civil protective custody shall thereafter be subject to any criminal

prosecution or juvenile court proceeding based on the facts giving rise to this placement. This subdivision shall not apply to the following persons:

- (1) Any person who is under the influence of any drug, or under the combined influence of intoxicating liquor and any drug.
 - (2) Any person who a peace officer has probable cause to believe has committed any felony, or who has committed any misdemeanor in addition to subdivision (f).
 - (3) Any person who a peace officer in good faith believes will attempt escape or will be unreasonably difficult for medical personnel to control.
- (h) Who loiters, prowls, or wanders upon the private property of another, at any time, without visible or lawful business with the owner or occupant. As used in this subdivision, “loiter” means to delay or linger without a lawful purpose for being on the property and for the purpose of committing a crime as opportunity may be discovered.
- (i) Who, while loitering, prowling, or wandering upon the private property of another, at any time, peeks in the door or window of any inhabited building or structure, without visible or lawful business with the owner or occupant.
- (j) (1) Any person who looks through a hole or opening, into, or otherwise views, by means of any instrumentality, including, but not limited to, a periscope, telescope, binoculars, camera, motion picture camera, or camcorder, the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which the occupant has a reasonable expectation of privacy, with the intent to invade the privacy of a person or persons inside. This subdivision shall not apply to those areas of a private business used to count currency or other negotiable instruments.
- (2) Any person who uses a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another, identifiable person under or through the clothing being worn by that other person, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person and invade the privacy of that other person, under circumstances in which the other person has a reasonable expectation of privacy.
- (3) (A) Any person who uses a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another, identifiable person who may be in a state of full or partial undress, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, in the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which that other person has a reasonable expectation of privacy, with the intent to invade the privacy of that other person.
- (B) Neither of the following is a defense to the crime specified in this paragraph:
- (i) The defendant was a cohabitant, landlord, tenant, cotenant, employer, employee, or business partner or associate of the victim, or an agent of any of these.
 - (ii) The victim was not in a state of full or partial undress.

- (k) In any accusatory pleading charging a violation of subdivision (b), if the defendant has been once previously convicted of a violation of that subdivision, the previous conviction shall be charged in the accusatory pleading. If the previous conviction is found to be true by the jury, upon a jury trial, or by the court, upon a court trial, or is admitted by the defendant, the defendant shall be imprisoned in a county jail for a period of not less than 45 days and shall not be eligible for release upon completion of sentence, on probation, on parole, on work furlough or work release, or on any other basis until he or she has served a period of not less than 45 days in a county jail. In all cases in which probation is granted, the court shall require as a condition thereof that the person be confined in a county jail for at least 45 days. In no event does the court have the power to absolve a person who violates this subdivision from the obligation of spending at least 45 days in confinement in a county jail.

In any accusatory pleading charging a violation of subdivision (b), if the defendant has been previously convicted two or more times of a violation of that subdivision, each of these previous convictions shall be charged in the accusatory pleading. If two or more of these previous convictions are found to be true by the jury, upon a jury trial, or by the court, upon a court trial, or are admitted by the defendant, the defendant shall be imprisoned in a county jail for a period of not less than 90 days and shall not be eligible for release upon completion of sentence, on probation, on parole, on work furlough or work release, or on any other basis until he or she has served a period of not less than 90 days in a county jail. In all cases in which probation is granted, the court shall require as a condition thereof that the person be confined in a county jail for at least 90 days. In no event does the court have the power to absolve a person who violates this subdivision from the obligation of spending at least 90 days in confinement in a county jail.

In addition to any punishment prescribed by this section, a court may suspend, for not more than 30 days, the privilege of the person to operate a motor vehicle pursuant to Section 13201.5 of the Vehicle Code for any violation of subdivision (b) that was committed within 1,000 feet of a private residence and with the use of a vehicle. In lieu of the suspension, the court may order a person's privilege to operate a motor vehicle restricted, for not more than six months, to necessary travel to and from the person's place of employment or education. If driving a motor vehicle is necessary to perform the duties of the person's employment, the court may also allow the person to drive in that person's scope of employment.

CAL PEN CODE § 266H (2006)

§ 266h. Pimping

- (a) Except as provided in subdivision (b), any person who, knowing another person is a prostitute, lives or derives support or maintenance in whole or in part from the earnings or proceeds of the person's prostitution, or from money loaned or advanced to or charged against that person by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed, or who solicits or receives compensation for soliciting for the person, is guilty of pimping, a felony, and shall be punishable by imprisonment in the state prison for three, four, or six years.
- (b) Any person who, knowing another person is a prostitute, lives or derives support or maintenance in whole or in part from the earnings or proceeds of the person's prostitution, or from money loaned or advanced to or charged against that person by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed, or who solicits or receives compensation for soliciting for the person, when the prostitute is a minor, is guilty of pimping a minor, a felony, and shall be punishable as follows:
- (1) If the person engaged in prostitution is a minor over the age of 16 years, the offense is punishable by imprisonment in the state prison for three, four, or six years.
 - (2) If the person engaged in prostitution is under 16 years of age, the offense is punishable by imprisonment in the state prison for three, six, or eight years.

EXERCISES

1. Discuss whether the acts which constitute prostitution are a problem in your community. Should soliciting sex, promoting prostitution, the procurement of sex and pimping of a child be considered a crime? Is there a concern that community members who are addicted to illegal drugs such as cocaine, heroin, OxyContin, methamphetamines, or prescription drugs may be allowing drug dealers to have sexual contact with their children in exchange for drugs? Do you have related crimes in your tribal code?

2. If you choose to define new crimes, what actions should be criminalized and what penalties should be applied?

3. Test your draft provision using the **OUHE** test. Is your draft provision **O**verinclusive - can you think of a person or situation that it might apply to that you did not intend? Is your draft provision **U**nderinclusive - can you think of a person or situation that you meant for it to apply to, but when you read your language it appears not to apply? Is your draft provision likely to be **H**ard to enforce? Does your provision (or another provision) include an **E**nforcement process and will it work? Discuss any difficulties you encounter and brainstorm ways of changing the language to fix them.

ADDITIONAL RESOURCES

1. Jennifer Cecil, *Enhanced Sentences for Child Prostitution: The Most Hidden Form of Child Abuse*, 36 McGeorge L. Rev. 815, (2005).
2. Lauren M. Davis, Criminal Law Chapter: *Prostitution*, 7 Geo. J. Gender & L. 835, (2006).
3. Pantea Javidan, *Invisible Targets: Juvenile Prostitution, Crackdown Legislation, and the Example of California*, 9 Cardozo Women's L.J. 237 (2003).
4. Susan S. Kreston, *Prostituted Children: Not an Innocent Picture*, 34-Dec Prosecution 37 (2000).
5. Paul Menair, *Prostitution: Increase Penalties for Offenses of Pimping and Pandering of a Minor*, 18 GA. ST. U. L. REV. 32 (2001).
6. *Child Exploitation: Improving Investigations and Protecting Victims*, Office for Victims of Crime, US Dept of Justice (1995).
7. Judith Ennew et al, *Children and Prostitution* (1996), available at <http://www.child-abuse.com/childhouse/childwatch/cwi/projects/indicators/prostitution>, visited 3 April 2008.
8. David Finkelhor & Richard Ormrod US Dep't of Justice, *Prostitution of Juveniles*, OJJDP Juvenile Justice Bulletin, June 2004.
9. Hofstede Committee, *Juvenile Prostitution in Minnesota* (Nov. 3, 1996), available at <http://www.ag.state.mn.us/consumer/PDF/hofstede.pdf>, visited 1 June 2008.

Chapter
10

CRIMES AGAINST CHILDREN: CHILD PORNOGRAPHY

CHILD PORNOGRAPHY CAN OCCUR for personal or commercial gain. It is beneficial to have two separate sections within the code, one section for persons who use child pornography for commercial gain and another for persons involved in non-commercial possession. The reasoning is that the tribal government may decide that persons engaged in commercial trade of child pornography should be punished more severely. The tribal government may also wish to use civil forfeiture to gain any proceeds from the offender. On the other hand, an individual who possesses but does not create or sell child pornography may be dealt with in a different manner and may also benefit from treatment.

The commercial section should criminalize the procurement of minors and the production possession, advertisement, and dissemination of pornographic materials that involve minors. Each of these stages victimizes children.

Studies have shown that a large percentage of individuals who possess and exchange child pornography on the internet have also sexually abused children.¹⁵ When a person possesses child pornography, the punishment should reflect the circumstances. For example; is the defendant a registered sex offender, what type of child pornography does the defendant possess, and how many previous convictions does he/she have? These scenarios should be discussed so the code can include the appropriate sections.

Where tribal governments lack the authority to prosecute those persons who knowingly solicit Indian children in tribal communities for pornography, but where the actual photography or taping occurs off reservation, the tribe may prosecute any on-reservation Indian involvement and impose civil penalties upon non-Indians where the tribe is in a position to seize the non-Indian property.

¹⁵ M. Taylor & E. Quayle, *Child pornography: An Internet crime*. Hove: Brunner-Routledge, (2003).

ILLUSTRATIVE EXAMPLE

CHAPTER X. SECTION X. DEFINITIONS

Visual medium includes -

- (A) Any film, photograph, videotape, negative, slide, book, magazine, other form of publication or photographic reproduction that contains or incorporates in any manner any film, photograph, videotape, negative, or slide; or
- (B) Any disk, diskette, or other physical medium that allows an image to be displayed on a computer or other video screen and any image transmitted to a computer or other video screen by telephone line, cable, satellite, transmission, or other method.

CHAPTER X. SECTION X. POSSESSION OF CHILD PORNOGRAPHY

A defendant is guilty of Possession of Child Pornography if he or she, knowing the character or content of the material or performance -

- (A) Pays, exchanges, or gives anything of value to obtain entry to a live performance containing any actual or simulated sexual contact, sexual conduct, or sexual intercourse involving a minor, or full or partial nudity of a minor;
- (B) Pays, exchanges, or gives anything of value to obtain visual or print medium containing any actual or simulated sexual contact, sexual conduct, or sexual intercourse involving a minor, or full or partial nudity of a minor; or
- (C) Possesses or exchanges any visual or print medium which depicts actual or simulated sexual contact, sexual conduct, or sexual intercourse involving a minor, or full or partial nudity of a minor.

CHAPTER X. SECTION X. COMMERCIAL SEXUAL EXPLOITATION OF A MINOR

A defendant commits commercial sexual exploitation of a minor when he or she, knowing the character or content of the material or performance, does one of the following:

- (A) Uses, employs, persuades, entices, induces or coerces a minor to engage in or assist others to engage in actual or simulated sexual contact, sexual conduct, sexual intercourse, or full or partial nudity for the purpose of producing any visual or print medium or live act depicting such conduct or implying such act for the purpose of sexual stimulation of others.
- (B) Permits a minor under the defendant's custody or control to engage in or assist others to engage in actual or simulated sexual contact, sexual conduct, sexual intercourse, or full or partial nudity for the purpose of producing any visual or print medium or live act depicting such conduct.
- (C) Transports or finances the transportation of any minor through or across the Reservation with the intent that such minor engage in actual or simulated sexual contact, sexual conduct, sexual intercourse, or full or partial nudity for the purpose of producing a visual or print medium or live act depicting such conduct or implying such act for the purpose of sexual stimulation of others.
- (D) Possesses with intent to sell any visual or print medium which depicts minors engaging in simulated or actual sexual contact, sexual conduct, sexual intercourse or full or partial nudity.
- (E) Manages, produces, sponsors, presents, exhibits, photographs, publishes, films, videotapes, or records any performance involving a minor that includes actual or simulated sexual contact, sexual conduct, sexual

intercourse, or full or partial nudity.

- (F) Disseminates, exhibits to another, or offers to disseminate or exhibit to another, or sends or brings into the Reservation for dissemination or exhibition any materials that depict actual or simulated sexual contact, sexual conduct, sexual intercourse involving a minor, or full or partial nudity of a minor.
- (G) Advertises for the sale or dissemination of any live performance, visual or print medium that depicts or describes actual or simulated sexual contact, sexual conduct, sexual intercourse involving a minor, or full or partial nudity of a minor.
- (H) Participates in the presentation of a performance that shows a minor participating or engaging actual or simulated sexual contact, sexual conduct, sexual intercourse involving a minor, in full or partial nudity of a minor.

COMMENTARY

The language in the example has been taken and modified from numerous sources. Child pornography is very damaging to communities as it demeans and puts children in danger. Tribal communities and housing developments have many families with children. Tribes will want to ensure that they are protected and viewed as sacred. If this philosophy is to continue then it is important that laws reflect those beliefs.

SELECTED TRIBAL CODES

ONEIDA INDIAN NATION (NEW YORK) CODES AND RULES PENAL CODE - CHAPTER 4H-N 769. DISSEMINATING INDECENT MATERIAL TO MINORS; DEFINITIONS OF TERMS

The following definitions are applicable to sections 770 and 771:

- (1) “Minor” means any person less than seventeen years old.
- (2) “Nudity” means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernible turgid state.
- (3) “Sexual conduct” means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.
- (4) “Sexual excitement” means the condition of human male or female genitals when in a state of sexual stimulation or arousal.
- (5) “Sado-masochistic abuse” means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.
- (6) “Harmful to minors” means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:
 - (A) Considered as a whole, appeals to the prurient interest in sex of minors; and

- (B) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
- (C) Considered as a whole, lacks serious literary, artistic, political and scientific value for minors.

770. Disseminating Indecent Material To Minors

A Native American is guilty of disseminating indecent material to minors when:

- (1) With knowledge of its character and content, he sells or loans to a minor for monetary consideration:
 - (A) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sadomasochistic abuse and which is harmful to minors; or
 - (B) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which, taken as a whole, is harmful to minors; or
- (2) Knowing the character and content of a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sadomasochistic abuse, and which is harmful to minors, he:
 - (A) Exhibits such motion picture, show or other presentation to a minor for a monetary consideration; or
 - (B) Sells to a minor an admission ticket or pass to premises whereon there is exhibited or to be exhibited such motion picture, show or other presentation; or
 - (C) Admits a minor for a monetary consideration to premises whereon there is exhibited or to be exhibited such motion picture show or other presentation.

Disseminating indecent material to minors is a class E felony.

771. Disseminating Indecent Material To Minors; Presumption And Defense

- (1) A Native American who engages in the conduct proscribed by section 629 is presumed to do so with knowledge of the character and content of the material sold or loaned, or the motion picture, show or presentation exhibited or to be exhibited.
- (2) In any prosecution for disseminating indecent material to minors, it is an affirmative defense that:
 - (A) The defendant had reasonable cause to believe that the minor involved was seventeen years old or more; and
 - (B) Such minor exhibited to the defendant a draft card, driver’s license, birth certificate or other official or apparently official document purporting to establish that such minor was seventeen years old or more.

THE CONFEDERATED TRIBES OF SILETZ INDIANS OF OREGON
TRIBAL GOVERNMENT OPERATIONS
CONFEDERATED TRIBES OF SILETZ INDIANS OF OREGON
CRIMINAL CODE
OFFENSES AND PUNISHMENTS
CHAPTER 12

12.71-Using Child in Display of Sexually Explicit Conduct: Class A

Employing, authorizing, permitting, compelling or inducing a child under 18 years of age to participate or engage in sexually explicit conduct, for any person to observe or to record in a photograph or other visual recording.

**THE CHEROKEE CODE: PUBLISHED BY ORDER
OF THE TRIBAL COUNCIL OF THE EASTERN BAND OF CHEROKEE INDIANS
CHAPTER 14 - CRIMINAL LAW, -ARTICLES 1-8***

Sec. 14-30.9. Disseminating and exhibiting harmful material or performances to minors.

It shall be unlawful for any person or business entity to knowingly exhibit, display or disseminate any material which is harmful to minors (under 21 year old) in any place of public accommodation where minors are or may be present and where minors are able to view the material.

- (1) A person or business entity commits this offense if, having custody, control or supervision of such material, he, she or it does any of the following:
 - a) Displays the material so that it is open to view by minors as part of the general public. Material is not considered “displayed” if “the material” is placed behind “blinder racks” that cover the portions of the material that is harmful to minors, is wrapped, is placed behind a counter, or is located so that the portion that is harmful to minors is not open to view by the minors;
 - b) Sells, delivers or provides or offers or agrees to sell, deliver or provide any writing, picture, record or other representation or embodiment of material considered to be harmful to minors; or
 - c) Presents or directs a play, dance or other performance which is displayed and considered to be harmful to minors or participates in that portion thereof which makes it harmful to minors; or
 - d) Publishes, exhibits or otherwise makes available to minors anything considered to be harmful; or
 - e) Allows a minor to review or peruse material that is considered to be harmful; or
 - f) Exhibits, presents, rents, sells, delivers or provides; or offers or agrees to exhibit, present, rent or to provide: any still or motion picture, film, filmstrip, or projection slide, or sound recording, sound tape, or sound track or any matter or material of whatever form which is a representation, embodiment, performance, or publication which is considered to be harmful to minors.
- (2) For purposes of this section, material considered to be harmful to minors is any material or performance that depicts sexually explicit nudity, sexual activity or sadomasochistic abuse and, taken as a whole, has the following characteristics.
 - a) The average adult person applying contemporary community standards would find that the material or performance has a predominant tendency to appeal to a prurient, shameful or morbid interest of minors; and
 - b) The average adult person applying contemporary community standards would find that the material or performance is patently offensive to prevailing standards in the adult community concerning what is suitable for minors; and
 - c) The material or performance lacks serious literary, artistic, political, or scientific value for minors.
- (3) As used in this section, “material” mean:
 - a) Pictures, drawings, video recordings, films, sculpture or image of a person or portion of the human body which depicts nudity, sexual conduct or sadomasochistic abuse; or
 - b) Any book, pamphlet, magazine, printed matter however produced, or sound recording which contains any matter enumerated in section (3)a. above, or which contains explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse; or

- c) Any performance, including any play, motion picture, dance or other exhibition performed before an audience which depicts nudity, sexual conduct or sadomasochistic abuse.”
- (4) As used in this section, “nudity” means “the showing” of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.
- (5) As used in this section, “sexual conduct” means any of the conduct described below, whether actual or simulated (i.e., conduct which gives the appearance of being sexual conduct) or whether the conduct is performed alone or between members of the same or opposite sex or between humans and animals:
 - a) Sexual intercourse, oral copulation, anal intercourse, anal oral copulation, bestiality, sexual sadism, penetration of the vagina or rectum by any object in a lewd or lascivious manner; or
 - b) Masturbation, whether done with another human or an animal;
 - c) Exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer;
 - d) Touching, in an act of apparent sexual stimulation or sexual abuse of the clothed or unclothed genitals, pubic area, or buttocks of another person or the clothed or unclothed breasts of a human female; or
 - e) Excretory functions performed in a lewd or lascivious manner.
- (6) As used in this section, “sexual excitement” means the condition of human male or female genitals when in a state of sexual stimulation or arousal.
- (7) As used in this section, “sadomasochistic abuse” means flagellation, torture, bondage, beatings, or oxygen deprivation by or upon a nude person or a person clad in undergarments, a mask, or in a revealing or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained.
- (8) Each violation of this section shall be punishable by a fine not to exceed \$5,000.00, by a term of imprisonment not to exceed one year, or both.

(Ord. No. 117, 3-3-2000; Ord. No. 369, 8-9-2000)

Sec. 14-30.10 Additional fine for certain offenses against children.

Any person who pleads guilty, nolo contendere, or is convicted of any crime described in article V (sexual assault), article VII (crimes against children), or any crime in article IX (crimes of bodily injury) applicable to a child as a victim, regardless of the form of judgment and sentence, shall be ordered by the court to pay an additional fine of \$500.00. The fine shall be paid to the Heart to Heart Child Advocacy Center and placed in the Center's budget under a separate line item. The money received from such fines shall be used to further the objectives and programs of the Center. If there is money left in this line item at the end of the fiscal year, the money shall stay within the Center's budget and not returned to the general fund.

(Ord. No. 831, 5-19-2003)

SELECTED FEDERAL CODES

TITLE V--CHILD PORNOGRAPHY PREVENTION 18 USC 2251

§ 501. FINDINGS.

Congress makes the following findings:

- (1) The effect of the intrastate production, transportation, distribution, receipt, advertising, and possession of child pornography on the interstate market in child pornography:
 - (A) The illegal production, transportation, distribution, receipt, advertising and possession of child pornography, as defined in section 2256(8) of title 18, United States Code, as well as the transfer of custody of children for the production of child pornography, is harmful to the physiological, emotional, and mental health of the children depicted in child pornography and has a substantial and detrimental effect on society as a whole.
 - (B) A substantial interstate market in child pornography exists, including not only a multimillion dollar industry, but also a nationwide network of individuals openly advertising their desire to exploit children and to traffic in child pornography. Many of these individuals distribute child pornography with the expectation of receiving other child pornography in return.
 - (C) The interstate market in child pornography is carried on to a substantial extent through the mails and other instrumentalities of interstate and foreign commerce, such as the Internet. The advent of the Internet has greatly increased the ease of transporting, distributing, receiving, and advertising child pornography in interstate commerce. The advent of digital cameras and digital video cameras, as well as videotape cameras, has greatly increased the ease of producing child pornography. The advent of inexpensive computer equipment with the capacity to store large numbers of digital images of child pornography has greatly increased the ease of possessing child pornography. Taken together, these technological advances have had the unfortunate result of greatly increasing the interstate market in child pornography.
 - (D) Intrastate incidents of production, transportation, distribution, receipt, advertising, and possession of child pornography, as well as the transfer of custody of children for the production of child pornography, have a substantial and direct effect upon interstate commerce because:
 - (i) Some persons engaged in the production, transportation, distribution, receipt, advertising, and possession of child pornography conduct such activities entirely within the boundaries of one state. These persons are unlikely to be content with the amount of child pornography they produce, transport, distribute, receive, advertise, or possess. These persons are therefore likely to enter the interstate market in child pornography in search of additional child pornography, thereby stimulating demand in the interstate market in child pornography.
 - (ii) When the persons described in subparagraph (D)(i) enter the interstate market in search of additional child pornography, they are likely to distribute the child pornography they already produce, transport, distribute, receive, advertise, or possess to persons who will distribute additional child pornography to them, thereby stimulating supply in the interstate market in child pornography.
 - (iii) Much of the child pornography that supplies the interstate market in child pornography is produced entirely within the boundaries of one state, is not traceable, and enters the interstate market

surreptitiously. This child pornography supports demand in the interstate market in child pornography and is essential to its existence.

- (E) Prohibiting the intrastate production, transportation, distribution, receipt, advertising, and possession of child pornography, as well as the intrastate transfer of custody of children for the production of child pornography, will cause some persons engaged in such intrastate activities to cease all such activities, thereby reducing both supply and demand in the interstate market for child pornography.
 - (F) Federal control of the intrastate incidents of the production, transportation, distribution, receipt, advertising, and possession of child pornography, as well as the intrastate transfer of children for the production of child pornography, is essential to the effective control of the interstate market in child pornography.
- (2) The importance of protecting children from repeat exploitation in child pornography:
- (A) The vast majority of child pornography prosecutions today involve images contained on computer hard drives, computer disks, and related media.
 - (B) Child pornography is not entitled to protection under the First Amendment and thus may be prohibited.
 - (C) The government has a compelling State interest in protecting children from those who sexually exploit them, and this interest extends to stamping out the vice of child pornography at all levels in the distribution chain.
 - (D) Every instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse.
 - (E) Child pornography constitutes prima facie contraband, and as such should not be distributed to, or copied by, child pornography defendants or their attorneys.
 - (F) It is imperative to prohibit the reproduction of child pornography in criminal cases so as to avoid repeated violation and abuse of victims, so long as the government makes reasonable accommodations for the inspection, viewing, and examination of such material for the purposes of mounting a criminal defense.

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART I. CRIMES

CHAPTER 110. SEXUAL EXPLOITATION

AND OTHER ABUSE OF CHILDREN

18 USC§ 2252A

§ 2252A. Certain activities relating to material constituting or containing child pornography

- (a) Any person who--
 - (1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any child pornography;
 - (2) knowingly receives or distributes--
 - (A) any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or
 - (B) any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;
 - (3) knowingly--

- (A) reproduces any child pornography for distribution through the mails, or in interstate or foreign commerce by any means, including by computer; or
 - (B) advertises, promotes, presents, distributes, or solicits through the mails, or in 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 [18 USC§ 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 in 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 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 [18 USC§ 1151]), knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or
 - (B) knowingly possesses 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 in 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 interstate or foreign commerce by any means, including by computer; or
- (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 in interstate or foreign commerce by any means, including by computer;
 - (B) that was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer; or
 - (C) which distribution, offer, sending, or provision is accomplished using the mails or by transmitting or causing to be transmitted any wire communication in interstate or foreign commerce, including by computer, for purposes of inducing or persuading a minor to participate in any activity that is illegal.

shall be punished as provided in subsection (b); or

- (b) (1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but, if such person has a prior conviction under this chapter, section 1591 [18 USC§ 1591], chapter 71, chapter 109A, or chapter 117 [18 USC§§ 2251 et seq., §§ 1460 et seq., 2241 et seq., or 2421 et seq.], or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.
- (2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both, but, if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117 [18 USC§§ 2251 et seq., §§ 1460 et seq., 2241 et seq., or 2421 et seq.], or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.
- (c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) that--
- (1) (A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and
- (B) each such person was an adult at the time the material was produced; or
- (2) the alleged child pornography was not produced using any actual minor or minors.

No affirmative defense under subsection (c)(2) shall be available in any prosecution that involves child pornography as described in section 2256(8)(C) [18 USC§ 2256(8)(C)]. A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) unless, within the time provided for filing pretrial motions or at such time prior to trial as the judge may direct, but in no event later than 10 days before the commencement of the trial, the defendant provides the court and the United States with notice of the intent to assert such defense and the substance of any expert or other specialized testimony or evidence upon which the defendant intends to rely. If the defendant fails to comply with this subsection, the court shall, absent a finding of extraordinary circumstances that prevented timely compliance, prohibit the defendant from asserting such defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) or presenting any evidence for which the defendant has failed to provide proper and timely notice.

- (d) **Affirmative defense.** It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant--
- (1) possessed less than three images of child pornography; and
- (2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof--
- (A) took reasonable steps to destroy each such image; or
- (B) reported the matter to a law enforcement agency and afforded that agency access to each such image.
- (e) **Admissibility of evidence.** On motion of the government, in any prosecution under this chapter [18 USC§§ 2251 et seq.] or section 1466A [18 USC§ 1466A], except for good cause shown, the name, address, social

security number, or other nonphysical identifying information, other than the age or approximate age, of any minor who is depicted in any child pornography shall not be admissible and may be redacted from any otherwise admissible evidence, and the jury shall be instructed, upon request of the United States, that it can draw no inference from the absence of such evidence in deciding whether the child pornography depicts an actual minor.

(f) **Civil remedies.**

- (1) In general. Any person aggrieved by reason of the conduct prohibited under subsection (a) or (b) or section 1466A [18 USC§ 1466A] may commence a civil action for the relief set forth in paragraph (2).
- (2) Relief. In any action commenced in accordance with paragraph (1), the court may award appropriate relief, including--
 - (A) temporary, preliminary, or permanent injunctive relief;
 - (B) compensatory and punitive damages; and
 - (C) the costs of the civil action and reasonable fees for attorneys and expert witnesses.

(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 [18 USC§ 1591], section 1201 [18 USC§ 1201] if the victim is a minor, or chapter 109A [18 USC§§ 2241 et seq.] (involving a minor victim), 110 [18 USC§§ 2251 et seq.] (except for sections 2257 and 2257A [18 USC§§ 2257 and 2257A]), or 117 [18 USC§§ 2421 et seq.] (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.

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART I. CRIMES

CHAPTER 110. SEXUAL EXPLOITATION

AND OTHER ABUSE OF CHILDREN

18 USCS 2256

§ 2256. Definitions for chapter

For the purposes of this chapter [18 USC§§ 2251 et seq.], 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 genitals or pubic area of any person;
- (B) For purposes of subsection 8(B) 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 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, and data stored on computer disk or by electronic means which is capable of conversion into a visual image;
- (6) “computer” has the meaning given that term in section 1030 of this title [18 USC§ 1030];
- (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.

SELECTED STATE CODES

LOUISIANA SEXUAL ABUSE CH. CODE ART. 603

Abuse includes any one of the following acts that seriously endanger the physical, mental, or emotional health of the child:

- The involvement of the child in any sexual act with a parent or any other person;
- The aiding or toleration by the parent or caretaker of the child's sexual involvement with any other person;
- The aiding or toleration by the parent of the child's involvement in pornographic displays;
- Any other involvement of a child in sexual activity constituting a crime under the laws of the State.

Child pornography means visual depiction of a child engaged in actual or simulated sexual intercourse, deviant sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals.

Crime against a child includes rape, sexual battery, incest, carnal knowledge of a juvenile, indecent behavior with a juvenile, pornography involving juveniles, or molestation of a juvenile.

EXERCISES

1. Are there concerns in your community about child pornography in photographs, in publications or on the computer (or in some other form)? How might your tribe reach offenders in cyber-space (think creatively)?

2. If there is a concern about non-Indian or non-member offending, is such a person likely to have property that may be seized for violating your laws?

3. Test any draft provision using the **O**U**H**E test. Is your draft provision **O**verinclusive - can you think of a person or situation that it might apply to that you did not intend? Is your draft provision **U**nderinclusive - can you think of a person or situation that you meant for it to apply to, but when you read your language it appears not to apply? Is your draft provision likely to be **H**ard to enforce? Does your provision (or another provision) include an **E**nforcement process and will it work? Discuss any difficulties you encounter and brainstorm ways of changing the language to fix them.

ADDITIONAL RESOURCES

1. Ann Wolbert Burgess & Christine A. Grant, *Children Traumatized in Sex Rings*, The National Center for Missing & Exploited Children (1988).
2. Kenneth Lanning, *Child Molesters: A Behavioral Analysis*, Fourth Edition, The National Center for Missing & Exploited Children (2001).
3. Dorothy E. Lemmey & Pamela Paradis, *Two Tragic Forms of Child Sexual Abuse: Are They Often Overlooked?* 7 J. of Child Sexual Abuse 87 (2002).
4. Vincent McCarthy, *Child Pornography in a Virtual World: The Continued Battle to Preserve the Child Pornography Prevention Act of 1996*, 23 Cardozo L. Rev. 2019 (2002).
5. Gregory A. Riede, Timothy Capron, Patrick M. Ivey, Richard Lawrence, & Carol E. Somolo, *A Texas Study of Child Sexual Abuse and Child Pornography*, Huntsville, Texas: Sam Houston State University (1979).
6. Brian G. Slocum, *Virtual Child Pornography: Does it Mean the End of the Child Pornography Exception to the First Amendment?* 14 Alb. L.J. Sci. & Tech. 637 (2004).
7. M. Taylor and E. Quayle. *Child pornography: An Internet Crime*. Hove: Brunner-Routledge, 2003.
8. Janis Wolak, David Finkelhor, and Kimberly Mitchell. *Child-Pornography Possessors Arrested in Internet-Related Crimes: Findings From the National Juvenile Online Victimization Study* (Alexandria, Virginia: National Center for Missing & Exploited Children, 2005).
9. National Center for Missing and Exploited Children, available at <http://www.missingkids.com>, visited 13 April 2008.

NOTES

CRIMES AGAINST CHILDREN: TRAFFICKING

TRAFFICKING OF CHILDREN includes the placement of children for compensation. It can include adoption or foster home placement. The purpose of the law is to prohibit persons from buying children or using compensation to keep children.

On an international level, trafficking of children is buying or selling children to use in factories, as maids or worse yet, for child prostitution. On the tribal level, this code is used for the prohibition of obtaining a child through some form of payment.

Although this provision may never be used in your community, if there is no law prohibiting the trafficking of children, if such an incident ever happens, there will be no method by which to legally hold the perpetrator(s) accountable.

ILLUSTRATIVE EXAMPLE

CHAPTER X.

SECTION X. TRAFFICKING

(A) A person is guilty of trafficking in children if he or she -

- (1) Accepts 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, except for payment of health care;
- (2) Accepts 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) Affirmative Defense. Section X (a) does not apply to attorneys or advocates licensed by the tribal court who receive reasonable fees for legal services actually rendered in the course of lawful adoption proceedings.

(C) Affirmative Defense. Section X (a) shall not apply to any licensed social worker, government employee, or an employee of a tribally approved adoption agency or domestic violence agency, receiving their normal salary and making such placements as part of their official duties.

(D) Affirmative Defense. Section X (a) shall not apply to a parent or guardian of a child who receives court

approved assistance or compensation as part of the adoption proceeding.

COMMENTARY

The language in the example has been taken and modified from the two tribal examples below (Absentee Shawnee Tribe of Oklahoma, Criminal Code §568 and Winnebago Tribe of Nebraska, Title 3, Criminal Code, Section 3-718).

SELECTED TRIBAL CODES

ABSENTEE SHAWNEE TRIBE OF OKLAHOMA CRIMINAL CODE §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 bonafide social worker or government employee receiving their normal salary and making such placements as a part of their official duties.

WINNEBAGO TRIBE OF NEBRASKA TITLE 3 CRIMINAL CODE

3-718 Trafficking in children; penalty.

1. It shall be unlawful to:
 - (A) 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
 - (B) 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
 - (C) 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.
2. “Child” means an unmarried or unemancipated person under the age of eighteen years.

3. This section does not apply to attorneys or advocates licensed by the tribal courts receiving reasonable fee for legal services actually rendered in the course of lawful adoption proceedings, nor shall subsections (1)(A) or (2)(A) apply to any bona fide social worker or government employee receiving his/her normal salary and making such placements as a part of his/her official duties.
4. Trafficking in children is a Class II offense. [TCR 86-79]

SELECTED FEDERAL CODES

PUBLIC LAW 106-386 [H.R. 3244] VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000

DEFINITIONS

22 USC§ 7102

In this division:

- (1) **Appropriate congressional committees.** The term “appropriate congressional committees” means the Committee on Foreign Relations and the Committee on the Judiciary of the Senate and the Committee on International Relations and the Committee on the Judiciary of the House of Representatives.
- (2) **Coercion.** 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 the legal process.
- (3) **Commercial sex act.** 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) **Debt bondage.** The term “debt bondage” means the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as 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.
- (5) **Involuntary servitude.** The term “involuntary servitude” includes a condition of servitude induced by means of--
 - (A) any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or
 - (B) the abuse or threatened abuse of the legal process.
- (6) **Minimum standards for the elimination of trafficking.** The term “minimum standards for the elimination of trafficking” means the standards set forth in section 108 [22 USC§ 7106].
- (7) **Nonhumanitarian, nontrade-related foreign assistance.** The term “nonhumanitarian, nontrade-related foreign assistance” means--
 - (A) any assistance under the Foreign Assistance Act of 1961, other than--

- (i) assistance under chapter 4 of part II of that Act [22 USC §§ 2346 et seq.] in support of programs of nongovernmental organizations that is made available for any program, project, or activity eligible for assistance under chapter 1 of part I of that Act [22 USC §§ 2151 et seq.];
 - (ii) assistance under chapter 8 of part I of that Act [22 USC §§ 2291 et seq.];
 - (iii) any other narcotics-related assistance under part I of that Act [22 USC §§ 2151 et seq.] or under chapter 4 or 5 [of] part II of that Act [22 USC §§ 2346 et seq. or 2347 et seq.], but any such assistance provided under this clause shall be subject to the prior notification procedures applicable to reprogrammings pursuant to section 634A of that Act [22 USC § 2394-1];
 - (iv) disaster relief assistance, including any assistance under chapter 9 of part I of that Act [22 USC §§ 2292 et seq.];
 - (v) antiterrorism assistance under chapter 8 of part II of that Act [22 USC §§ 2349aa et seq.];
 - (vi) assistance for refugees;
 - (vii) humanitarian and other development assistance in support of programs of nongovernmental organizations under chapters 1 and 10 of that Act;
 - (viii) programs under title IV of chapter 2 of part I of that Act [22 USC §§ 2191 et seq.], relating to the Overseas Private Investment Corporation; and
 - (ix) other programs involving trade-related or humanitarian assistance; and
- (B) sales, or financing on any terms, under the Arms Export Control Act, other than sales or financing provided for narcotics-related purposes following notification in accordance with the prior notification procedures applicable to reprogrammings pursuant to section 634A of the Foreign Assistance Act of 1961 [22 USC § 2394-1].
- (8) **Severe forms of trafficking in persons.** The term “severe forms of trafficking in persons” means
- (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
 - (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.
- (9) **Sex trafficking.** The term “sex trafficking” means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.
- (10) **State.** The term “State” means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and territories and possessions of the United States.
- (11) **Task force.** The term “Task Force” means the Interagency Task Force to Monitor and Combat Trafficking established under section 105 [22 USC § 7103].
- (12) **United States.** The term “United States” means the fifty States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the territories and possessions of the United States.
- (13) **Victim of a severe form of trafficking.** The term “victim of a severe form of trafficking” means a person subject to an act or practice described in paragraph (8).
- (14) **Victim of trafficking.** The term “victim of trafficking” means a person subjected to an act or practice described in paragraph (8) or (9).

EXERCISES

1. Have there been “shady” adoptions historically or presently in your community? Does your current tribal criminal code define this activity as a crime?

2. Is there a particular custom or tradition that would conflict with one or more of the example provisions above?

3. Test any existing or draft provision using the **OUHE** test. Is the provision **O**verinclusive - can you think of a person or situation that it might apply to that was not intended? Is the draft provision **U**nderinclusive - can you think of a person or situation that the drafters meant for it to apply to, but when you read the language it appears not to apply? Is the provision likely to be **H**ard to enforce? Does the provision (or another provision) include an **E**nforcement process and will it work? Discuss any difficulties you encounter and brainstorm ways of changing the language to fix them.

ADDITIONAL RESOURCES

1. Kathleen A. McKee, *Modern-Day Slavery: Framing Effective Solutions For An Age-Old Problem*, 55 Cath. U.L. Rev. 141, (2005).
2. Stop Child Abuse, a website is dedicated to the prevention of child abuse, available at <http://www.stop-abuse.org>, visited 3 May 2008.
3. Unicef Pd/Child Protection, *Guidelines On The Protection Of Child Victims Of Trafficking* (2006).
4. National Center for Missing & Exploited Children, available at <http://www.missingkids.com>, visited 26 May 2008.

CRIMES AGAINST CHILDREN: KIDNAPPING

KIDNAPPING, or the taking of a child without the permission of his or her parent or legal guardian, is considered to be a crime in almost all societies. Note that custody disputes in divorce (i.e. custodial interference) are better addressed in a civil code and are not handled in a criminal manner. The crime of kidnapping may also be applied to a parent who has temporarily lost custody through a civil tribal court child protection action (dependency case) if the parent removes the child from the designated caregiver without approval of the court.

ILLUSTRATIVE EXAMPLE

CHAPTER X.
SECTION X. KIDNAPPING

A person is guilty of kidnapping if he or she unlawfully seizes, confines, abducts, or carries away any minor not lawfully under his or her custody.

COMMENTARY

The language in the example was taken and modified from various sources. Although this is a crime covered by the Major Crimes Act at 18 U.S.C. §1201 (see below), it is important for the tribal code to address it in the event that federal prosecution is declined. In certain cases tribal communities may decide to prosecute in addition to federal prosecution.

SELECTED TRIBAL CODES

PAWNEE TRIBE OF OKLAHOMA LAW AND ORDER CODE
CHAPTER TWO - CRIMES AGAINST PERSONS
SECTION 221. KIDNAPPING

- b) It shall be unlawful to intentionally and wrongfully remove another from his or her place of residence, business, or from the vicinity where is found, or to unlawfully confine or conceal another for a substantial period, with any of the following purposes:
- 1) To hold for ransom or reward, or as a shield or hostage; or

- 2) To facilitate commission of any offense or flight thereafter; or
 - 3) To inflict bodily injury on or to terrorize the victim or another; or
 - 4) To interfere with the performance of any Tribal governmental or political function.
- c) removal, restraint, or confinement is wrongful within the meaning of this Code if it is accomplished by force, threat or deception, or, in the case of a person under the age of fourteen or incompetent, if it is accomplished without the consent of a parent, guardian or other person responsible for general supervision of his welfare.

POARCH BAND OF CREEK INDIANS TRIBAL CODE

§8 CRIMINAL CODE

§8-2-4 KIDNAPPING

- a) A person commits the crime of kidnapping if he abducts another person with intent to hold him for ransom or reward, use him as a shield or hostage, accomplice or aid the commission of any offense or flight there from, inflict physical injury upon him or to violate or abuse him sexually, terrorize him or a third person, interfere with the performance of any governmental or political function or for any reason or purpose which is contrary to or in violation of any Tribal ordinance.
- b) Kidnapping is a Class A Misdemeanor.

THE LAW AND ORDER CODE OF THE UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION

TITLE XIII - UTE INDIAN CRIMINAL CODE

3. KIDNAPPING AND RELATED OFFENSES.

§13-4-12. Kidnapping.

- (1) A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following purposes:
 - (a) to hold for ransom or reward, or as a shield or hostage; or
 - (b) to facilitate commission of any offense or flight thereafter; or
 - (c) to inflict bodily injury on or to terrorize the victim or another; or
 - (d) to interfere with the performance of any Tribal, governmental or political function.
- (2) A removal, restraint, or confinement is unlawful within the meaning of this part if it is accomplished by force, threat or deception, or, in the case of a person under the age of 14 or incompetent, if it is accomplished without the consent of a parent, guardian or other person responsible for general supervision of his welfare.
- (3) Kidnapping is a Class A offense.

§13-4-13. False Imprisonment.

- (1) A person is guilty of false imprisonment if he knowingly restrains another unlawfully so as to interfere with his liberty.
- (2) False imprisonment is a Class C offense unless the detention occurs under circumstances which expose the victim to a risk of serious bodily injury in which case it is a Class B offense.

CONFEDERATED TRIBES OF SILETZ INDIANS OF OREGON
CRIMINAL CODE
OFFENSES AND PUNISHMENTS
CHAPTER 12

12.46-Second Degree Kidnapping: Class A

With intent to interfere substantially with another's personal liberty, and without consent or legal authority:

- a. taking a person from one place to another place; or
- b. secretly confining another where he is not likely to be found.

Note: This section does not apply to child stealing by a relative when a child is under 16 years of age and the sole purpose is to assume control of the child.

12.47-First Degree Kidnapping: Class A

Violating (sec. 12.46) with purpose of:

- a. compelling someone to pay a ransom; or
- b. holding victim as shield or hostage; or
- c. causing physical injury to victim; or
- d. terrorizing victim or any other person.

**LAWS OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, CODIFIED
TITLE II, CHAPTER 1 - TRIBAL OFFENSES**

2-1-514. Kidnapping

- (1) A person commits the offense of kidnapping by knowingly or purposely, and without lawful authority, restraining another person by:
 - a) secreting or holding the person in a place of isolation; or
 - b) using or threatening to use physical force against the other person.
- (2) Kidnapping is a Class E offense over which the Tribes have concurrent jurisdiction with the State of Montana.

2-1-515. Aggravated kidnapping

- (1) A person commits the offense of aggravated kidnapping if he or she knowingly or purposely and without lawful authority restrains another person by either secreting or holding him or her in a place of isolation or by using or threatening to use physical force, with any of the following purposes:
 - a) to hold for ransom or reward or as a shield or hostage;
 - b) to facilitate commission of any felony or flight thereafter;
 - c) to inflict bodily injury on or to terrorize the victim or another; or
 - d) to interfere with the performance of any governmental or political function.
- (2) Aggravated kidnapping is a Class E offense over which the Tribes have concurrent jurisdiction with the State of Montana.

**NISQUALLY TRIBAL CODE
TITLE 10 - CRIMES AND TRAFFIC
10.07.11 KIDNAPPING**

A person is guilty of kidnapping if the person abducts another person with intent to:

- (a) hold the person as a shield or hostage; or
- (b) facilitate commission of any criminal offense; or
- (c) inflict bodily injury on the person; or
- (d) inflict extreme emotional distress on the person or a third person; or
- (e) interfere with the performance of any governmental function. Kidnapping is a Class I offense.

**MAKAH LAW AND ORDER CODE
TITLE 5: CRIMINAL CODE
CHAPTER 1
OFFENSES AGAINST THE PERSON**

§5.1.06 Abduction

Any person, whether a parent or other person, who shall willfully take away or detain another person against his will, with or without the consent of the parent or other person having lawful custody or charge of such person if such person be under the age of 18 years, shall be deemed guilty of abduction. Abduction is a Class A offense.

SELECTED FEDERAL CODES

18 USC§ 1201

§ 1201. KIDNAPPING

- a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when--
- (1) the person is willfully transported in interstate or foreign commerce, regardless of whether the person was alive when transported across a State boundary, or the offender travels in interstate or foreign commerce or uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense;
 - (2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;
 - (3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 46501 of title 49;
 - (4) the person is a foreign official, an internationally protected person, or an official guest as those terms are defined in section 1116(b) of this title [18 USC§ 1116(b)]; or
 - (5) the person is among those officers and employees described in section 1114 of this title [18 USC§ 1114] and any such act against the person is done while the person is engaged in, or on account of, the performance of official duties; shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.
- (b) With respect to subsection (a)(1), above, the failure to release the victim within twenty-four hours after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away shall create a rebuttable presumption that such person has been transported in interstate or foreign commerce. Notwithstanding the preceding sentence, the fact that the presumption under this section has not yet taken effect does not preclude a Federal investigation of a possible violation of this section before the 24-hour period has ended.
- (c) If two or more persons conspire to violate this section and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.
- (d) Whoever attempts to violate subsection (a) shall be punished by imprisonment for not more than twenty years.
- (e) If the victim of an offense under subsection (a) is an internationally protected person outside the United States, the United States may exercise jurisdiction over the offense if (1) the victim is a representative, officer, employee, or agent of the United States, (2) an offender is a national of the United States, or (3) an offender is afterwards found in the United States. As used in this subsection, the United States includes all areas under the jurisdiction of the United States including any of the places within the provisions of sections 5 and 7 of this title [18 USC§§ 5 and 7] and section 46501(2) of title 49. For purposes of this subsection, the term “national of the United States” has the meaning prescribed in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).
- (f) In the course of enforcement of subsection (a)(4) and any other sections prohibiting a conspiracy or attempt to violate subsection (a)(4), the Attorney General may request assistance from any Federal, state, or local agency, including the Army, Navy, and Air Force, any statute, rule, or regulation to the contrary notwithstanding.
- (g) Special rule for certain offenses involving children.

(1) To whom applicable. If--

(A) the victim of an offense under this section has not attained the age of eighteen years; and

(B) the offender--

(i) has attained such age; and

(ii) is not--

(I) a parent;

(II) a grandparent;

(III) a brother;

(IV) a sister;

(V) an aunt;

(VI) an uncle; or

(VII) an individual having legal custody of the victim; the sentence under this section for such offense shall include imprisonment for not less than 20 years.

(2) [Deleted]

(h) As used in this section, the term "parent" does not include a person whose parental rights with respect to the victim of an offense under this section have been terminated by a final court order.

SELECTED STATE CODES

TEXAS

TEX. PENAL CODE § 20.03 (2006)

§ 20.03. KIDNAPPING

- a) A person commits an offense if he intentionally or knowingly abducts another person.
- b) It is an affirmative defense to prosecution under this section that:
 - (1) the abduction was not coupled with intent to use or to threaten to use deadly force;
 - (2) the actor was a relative of the person abducted; and
 - (3) the actor's sole intent was to assume lawful control of the victim.
- c) An offense under this section is a felony of the third degree.

§ 20.04. Aggravated Kidnapping

- a) A person commits an offense if he intentionally or knowingly abducts another person with the intent to:
 - (1) hold him or her for ransom or reward;
 - (2) use him or her as a shield or hostage;
 - (3) facilitate the commission of a felony or the flight after the attempt or commission of a felony;
 - (4) inflict bodily injury on him or her or violate or abuse him or her sexually;
 - (5) terrorize him or her or a third person; or
 - (6) interfere with the performance of any governmental or political function.
- b) A person commits an offense if the person intentionally or knowingly abducts another person and uses or exhibits a deadly weapon during the commission of the offense.
- c) Except as provided by Subsection (d), an offense under this section is a felony of the first degree.
- d) At the punishment stage of a trial, the defendant may raise the issue as to whether he voluntarily released the victim in a safe place. If the defendant proves the issue in the affirmative by a preponderance of the evidence, the offense is a felony of the second degree.

EXERCISES

1. Have you heard of anything like kidnapping in your tribe's history or in contemporary events? Is this something your tribe should criminalize?

2. Test any draft provision using the **OUHE** test. Is your draft provision **O**verinclusive - can you think of a person or situation that it might apply to that you did not intend? Is your draft provision **U**nderinclusive - can you think of a person or situation that you meant for it to apply to, but when you read your language it appears not to apply? Is your draft provision likely to be **H**ard to enforce? Does your provision (or another provision) include an **E**nforcement process and will it work? Discuss any difficulties you encounter and brainstorm ways of changing the language to fix them.

ADDITIONAL RESOURCES

1. Karen Bartlett, Recent Development: Hines 57: *The Catchall Case To The Texas Kidnapping Statute*, 35 St. Mary's L. J. 397 (2004).
2. John L. Diamond, *Kidnapping: A Modern Definition*, 13 Am. J. Crim. L. 1 (1985).
3. Unicef Pd/Child Protection, *Guidelines On The Protection Of Child Victims Of Trafficking* (2006).

NOTES

CRIMES AGAINST CHILDREN: HOMICIDE

HOMICIDES are covered by the Major Crimes Act.¹⁶ However, there are instances in which the U.S. Attorney’s Office does not prosecute these cases. Because tribes are often not prepared for this, defendants are sometimes prosecuted in tribal courts for illegal weapons possession or assault. Tribal codes need to be revised to include homicide crimes. Although tribal courts may not have the power to incarcerate an individual for over a year on a single charge, they do have the power to invoke other penalties, such as banishment, exclusion or other traditional penalties.

Under the Indian Civil Rights Act, a tribal court may only sentence an offender to a maximum of one (1) year in jail and/or a fine of five thousand dollars (\$5,000.00).¹⁷ An offender can be prosecuted in both tribal and federal court without violating the U.S. constitutional prohibition against double jeopardy because the tribal and federal governments are separate sovereign entities.¹⁸

Child homicides should be prosecuted as such because defendants need to be accountable for their actions, and because their criminal records need to reflect the actual crimes they committed. The tribe may decide to prosecute in addition to federal prosecution especially in cases of homicide.

Although sentencing is considered in another section, the tribe needs to address traditional practices when deciding penalties. Does the community practice relevant customs or traditions? Should banishment or exclusion apply in these types of cases?

ILLUSTRATIVE EXAMPLE

CHAPTER X.

SECTION X. HOMICIDE

(A) Criminally Negligent Homicide -

Any person who with criminal negligence caused the death of a person is guilty of criminally negligent homicide.

(B) Vehicular Manslaughter In The Second Degree -

Any defendant who commits criminally negligent homicide and causes the death of a person through the

¹⁶ 18 U.S.C. §1153.

¹⁷ 25 U.S.C. §1301 et seq.

¹⁸ *United States v. Wheeler*, 435 U.S. 313 (U.S. 1978).

operation of a vehicle is guilty of Vehicular Manslaughter of a Minor in the Second Degree.

(C) Vehicular Manslaughter In The First Degree -

Any defendant who commits vehicular homicide in the second degree and commits the crime while knowing or having reason to know that his or her licenses or privilege to operate a vehicle is suspended or revoked is guilty of Vehicular Manslaughter of a Minor in the First Degree.

(D) Manslaughter In The Second Degree -

Any defendant who recklessly causes the death of a minor or causes or aids a minor to commit suicide is guilty of Manslaughter of a Minor in the Second Degree.

(E) Manslaughter In The First Degree -

A defendant is guilty of this offense when he or she, with intent to cause physical injury to a person or minor, causes the death of a minor or a third person is guilty of Manslaughter of a Minor in the First Degree.

(F) Murder -

Any defendant who, with intent to cause the death of another person or minor, causes the death of such minor or a third person is guilty of Murder.

COMMENTARY

The language in the example has been taken and modified from various sources. Sadly, children are too often killed in tribal communities. When someone has killed a child intentionally, negligently, or recklessly, it harms the entire community. A tribe will have the power to hold offenders accountable for the specific heinous behavior by adopting a homicide statute.

SELECTED TRIBAL CODES

THE CONFEDERATED TRIBES OF SILETZ INDIANS OF OREGON:

TRIBAL GOVERNMENT OPERATIONS

CRIMINAL CODE

OFFENSES AND PUNISHMENTS

CHAPTER 12

OFFENSES AGAINST PERSONS

12.33-Murder: Class A

- a) Intentionally causing the death of another human being while not under the influence of an extreme emotional disturbance.
- b) Murder is also charged if death to a non-suspect results when suspect is attempting or committing or during the immediate flight from any of the following crimes:
 - (1) 1st degree arson; or
 - (2) 1st degree criminal mischief (by means of explosive); or
 - (3) 1st degree burglary; or
 - (4) 1st degree escape; or
 - (5) 1st and 2nd. degree kidnapping; or
 - (6) 1st degree robbery; or

- (7) any offense 1st degree sexual offense; or
- (8) compelling prostitution

12.34-First Degree Manslaughter: Class A

- a) Recklessly causing death of another human being circumstances manifesting extreme indifference to the value of life.
- b) Intentionally causing death of another human being while under the influence of an extreme emotional disturbance.

12.35-Second Degree Manslaughter: Class A

- a) Recklessly causing the death of another human being.
- b) Intentionally causing or aiding another person to commit suicide.

12.36-Criminally Negligent Homicide: Class A

With criminal negligence, causing the death of another human being.

PAWNEE TRIBE OF OKLAHOMA, LAW AND ORDER CODE

TITLE VI - CRIMINAL OFFENSES

Section 211. Homicide in the First Degree

- a) It shall be unlawful to:
 - (1) Purposely, knowingly and wrongfully with the malice aforethought cause the death of another human being, or
 - (2) Cause the death of another human being due to the commission or attempted commission of a felony or an offense punishable by banishment.
- b) Homicide in the first degree shall be punishable by a fine of Five Thousand Dollars (\$5,000.00) or by a term of imprisonment in the tribal jail not to exceed one year or by banishment for a period not less than ten years nor more than life, or any combination of the above.

Section 212. Homicide in the Second Degree

- a) It shall be unlawful to
 - (1) Recklessly or negligently, with disregard of the consequences of ones conduct to cause the death of another human being; or,
 - (2) Cause the death of another human being by operating a motor vehicle in a reckless, negligent, or careless manner, or while under the influence of an alcoholic beverage, intoxicating liquor, a controlled substance, or any drug, to a degree which renders the person incapable of safely driving a vehicle.
 - (i) a blood alcohol content in excess of .10 shall create a rebuttable presumption that the person was under the influence of an alcoholic beverage.
 - (ii) for purposes of this section, a motor vehicle is any self-propelled vehicle and includes, but is not limited to, any automobile, truck, van, motorcycle, train, engine, watercraft, aircraft or snowmobile.
 - 3. Cause the death of a human being due to the commission of any criminal offense.
- b) Homicide in the second degree shall be punishable by a fine of One Thousand Dollars (\$1,000.00) or by term of imprisonment in the tribal jail not to exceed one year; or by banishment for a period not less than one year nor more than twenty years; or any combination of the above.

**GRAND TRAVERSE BAND CODE:
STATUTES OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS
TITLE 9 - CRIMINAL OFFENSES**

(n) Criminal Homicide

- (1) Offense. A person commits the offense of criminal homicide if:
 - (A) that person intentionally causes the death of another person;
 - (B) with intent to cause bodily injury to a person, that person causes the death of the intended victim or any other person;
 - (C) that person voluntarily commits or participates in the commission of, or attempts to commit, arson, robbery, burglary, kidnapping, assault, or sexual assault, and in the course of, or in furtherance of the crime that is being committed or attempted, or during flight from the scene of the crime, the death of a person is caused;
 - (D) that person recklessly or by gross negligence causes the death of another person, including the reckless operation of a motor vehicle; or
 - (E) that person, through the negligent operation of a motor vehicle, causes the death of another person.
- (2) Sentence. A person convicted of criminal homicide may be sentenced to a jail term not to exceed one (1) year or to a fine not to exceed five thousand dollars (\$5,000.00), or to both, or to the maximum penalty allowable under federal law.

SELECTED STATE CODES

COLORADO

C.R.S. 18-6-401 (2006)

(Excerpts)

18-6-401. Child Abuse

(1) (a) A person commits child abuse if such person causes an injury to a child's life or health, or permits a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health, or engages in a continued pattern of conduct that results in malnourishment, lack of proper medical care, cruel punishment, mistreatment, or an accumulation of injuries that ultimately results in the death of a child or serious bodily injury to a child.

(c) (I) A person commits child abuse if, in the presence of a child, or on the premises where a child is found, or where a child resides, or in a vehicle containing a child, the person knowingly engages in the manufacture or attempted manufacture of a controlled substance, as defined by section 18-18-102 (5), or knowingly possesses ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, with the intent to use the product as an immediate precursor in the manufacture of a controlled substance. It shall be no defense to the crime of child abuse, as described in this subparagraph (I), that the defendant did not know a child was present, a child could be found, a child resided on the premises, or that a vehicle contained a child.

(II) A parent or lawful guardian of a child or a person having the care or custody of a child who knowingly allows the child to be present at or reside at a premises or to be in a vehicle where the parent, guardian, or person having care or custody of the child knows or reasonably should know another person is engaged in the manufacture or attempted manufacture of methamphetamine commits child abuse.

(III) A parent or lawful guardian of a child or a person having the care or custody of a child who knowingly allows the child to be present at or reside at a premises or to be in a vehicle where the parent, guardian, or person having care or custody of the child knows or reasonably should know another person possesses ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, with the intent to use the product as an immediate precursor in the manufacture of methamphetamine commits child abuse.

(2) In this section, "child" means a person under the age of sixteen years.

(7) (a) Where death or injury results, the following shall apply:

(I) When a person acts knowingly or recklessly and the child abuse results in death to the child, it is a class 2 felony except as provided in paragraph (c) of this subsection (7).

(II) When a person acts with criminal negligence and the child abuse results in death to the child, it is a class 3 felony.

(c) When a person knowingly causes the death of a child who has not yet attained twelve years of age and the person committing the offense is one in a position of trust with respect to the child, such person commits the crime of murder in the first degree as described in section 18-3-102 (1) (f).

EXERCISES

1. Does your existing tribal criminal code contain crimes of “homicide” and/or “murder”? Do the existing definitions cover intentional, negligent, reckless, and drunk driving elements?

2. Is banishment or exclusion an appropriate or useful sentence for homicide and/or murder? Are there other alternatives?

3. Test any draft provision using the **OUHE** test. Is your draft provision **O**verinclusive - can you think of a person or situation that it might apply to that you did not intend? Is your draft provision **U**nderinclusive - can you think of a person or situation that you meant for it to apply to, but when you read your language it appears not to apply? Is your draft provision likely to be **H**ard to enforce? Does your provision (or another provision) include an **E**nforcement process and will it work? Discuss any difficulties you encounter and brainstorm ways of changing the language to fix them.

ADDITIONAL RESOURCES

1. *Child Abuse Crimes: Child Homicide* (2002), National District Attorneys Association, available at http://www.ndaa-apri.org/pdf/child_homicide.pdf, visited 11 April 2008.
2. Department of Justice Office of Juvenile Justice and Delinquency Prevention. Portable Guides; *Battered Child Syndrome: Investigation of Physical Abuse and Homicide* (2002).
3. Teresa F. Parnell, *Munchausen by Proxy Syndrome*, in *The APSAC Handbook on Child Maltreatment Second Edition*, 131 (John Myers eds., Sage Publications 2002).
4. Charles A. Phipps, *Responding to Child Homicide: A Statutory Proposal*, 89 *J. Crim. L. & Criminology* 535 (1999).
5. L.J. David Wallace, Alice D. Calhoun, Kenneth E. Powell, Joann O'Neil, & Stephen P. James, *Homicide and Suicide Among Native Americans 1979-1992: Violence Surveillance Summary Series, No. 2* (1996).

NOTES

INVESTIGATING CHILD SEXUAL ABUSE

TRIBAL LAW SHOULD REQUIRE that only trained, skilled professionals perform forensic medical sexual abuse/assault exams. Children can be traumatized by an inexperienced medical provider conducting such exams. General practitioners also require special training to conduct these specialized exams. In some jurisdictions, untrained medical providers decline to testify in court. Medical providers with special training in child sexual abuse examinations recognize that providing testimony is an important part of the job and can provide more competent testimony than non-specialists.

When the tribe does not have on-site forensic medical examiners or a telemedicine consultation system to work with on these exams, the tribe should work with the nearest child abuse examination facility, even if it is several hours away from the tribal community. This arrangement assures that children receive appropriate exams. In any case, additional arrangements will need to be made to assure that medical staff will be available and/or willing to testify in tribal court.

It may also be necessary for the tribe to develop a Memorandum of Understanding (“MOU”) with the local Indian Health Service to address access to specialized medical providers. In some areas, the Sexual Assault Nurse Examiners (“SANEs”) are not IHS staff, but rather public health nurses employed by the tribe. In order for the non-IHS SANE nurses to be allowed access to patients at the IHS facility, an MOU is necessary.

THE FORENSIC INTERVIEW

Statutory provisions requiring law enforcement, social services, and the tribal prosecutor’s office, to draft and implement a coordinated tribal child interviewer protocol will protect a child-victims' rights while furthering reliable fact-finding for criminal prosecutions. A forensic interview protocol should be developed from a research based approach (see language in the example below). Coordination with tribal, federal, and state investigators to schedule and conduct a forensic interview is critical to reduce multiple interviews and minimize additional system trauma for children.

Successful sexual abuse investigations involving children as victims or witnesses can present a number of challenges for law enforcement officers and social workers. The forensic interview is only one part of a complete investigation. In recent years criminal investigations involving children as witnesses have come under scrutiny and increasing attention has focused on the interviewer and the techniques employed in the child or forensic interview. A multidisciplinary team approach to the forensic interview emphasizes that the child interview is conducted to help the overall well being of the child including determining if the child needs medical or therapeutic treatment and to determine any safety or protection issues in the event that placement of the child becomes necessary.

ILLUSTRATIVE EXAMPLE

CHAPTER X. SECTION X. MANDATE FOR LAW ENFORCEMENT, SOCIAL SERVICES, AND PROSECUTOR'S OFFICE TO COORDINATE IN THE DEVELOPMENT OF A CHILD INTERVIEW PROTOCOL

- (A) Law enforcement, social services, and the tribal prosecutor's office, shall coordinate in the drafting and implementation of a Child Interview Protocol.
- (B) The following research-based issues shall be considered but are not necessarily required given local needs and resources in the coordinated drafting of a Child Interview Protocol:
- (1) Whenever possible, interviews should be conducted in a safe, neutral, and preferably child-friendly environment, such as a Child Advocacy Center;
 - (2) A multidisciplinary approach to child abuse investigations is preferable when the option is available;
 - (3) The child's age and developmental ability should be considered when choosing interviewing techniques. Open-ended questions should be used with older children when possible, while cued invitations and specific yet non-leading questions should be used with younger children. Leading and suggestive questions should always be avoided.
 - (4) Interviewer gender should be considered when scheduling appointments and training new interviewers. It may be particularly helpful to pair female interviewers with female victims.
 - (5) Forensic interviewers should possess the ability to establish rapport through warmth and friendliness, experience working with children, previous training in interviewing or counseling, training in child sexual abuse and child development, a master's level education, an objective and nonjudgmental stance toward interviews, and the ability to take feedback constructively and change accordingly.
 - (6) Structured interview protocols (i.e., NICHD investigative interview) are recommended, due to their effectiveness, ease of use, and limited training requirements. However, they should be used in combination with ongoing supervision and feedback.
 - (7) Ground rules should be outlined for the child at the onset of the interview, including what should happen if the child does not know an answer, does not understand the question, does not remember something, does not want to answer a question, or if the interviewer makes a mistake.
 - (8) Before discussing the abuse allegations, the interviewer should discuss with the child the difference between a truth and a lie, the consequences of telling a lie, and obtain the child's agreement to tell the truth.
 - (9) The Touch Survey can be used as a technique to elicit details about good and bad touches that the child has experienced, although it should be used in combination with other empirically supported techniques.
 - (10) Cognitive interviewing techniques should be used whenever possible (particularly with older children) to obtain further details about the abuse. The child's developmental level should be considered when determining which techniques may be most useful.
 - (11) Anatomically detailed dolls should be used cautiously, should be avoided with very young children, and should be introduced to obtain further details only after the child has already disclosed.
 - (12) If conducted appropriately, extended forensic evaluation appears to be a valuable option for children who do not disclose during the initial interview and should be used only when necessary.

CHAPTER X. SECTION X. SEXUAL ABUSE MEDICAL EXAMINATIONS; PROFESSIONALS

Sexual abuse medical examinations shall be performed by trained professionals. Failure to obtain an examination by a trained professional shall not be a defense to a prosecution for sexual abuse and related crimes.

CHAPTER X. SECTION X. SEXUAL ABUSE MEDICAL EXAMINATIONS; MEDICAL PROTOCOL

- (A) Medical personnel performing medical examinations of physically abused and neglected children shall be knowledgeable about –
- (1) Health professionals' responsibilities as "mandated reporters;"
 - (2) Roles of law enforcement, child protective services, counsel, tribal attorneys, crime laboratories, attorneys appointed for court dependent children, and CASA (Court Appointed Special Advocates);
 - (3) Importance of scene investigation by law enforcement, particularly in the forensic evaluation of burn injuries;
 - (4) Epidemiology and clinical presentations of common accidental injuries in children;
 - (5) Pathophysiology of traumatic injury to the cutaneous, skeletal, visceral, central nervous system, and ocular areas of children;
 - (6) Injuries to children that are highly specific for physical abuse;
 - (7) Medical conditions and accidental injuries that can mimic physical abuse injuries;
 - (8) Types of child neglect, clinical presentation, and differential diagnosis;
 - (9) Differential diagnosis of failure to thrive;
 - (10) Role of radiology in the evaluation of physically abused children;
 - (11) Role of laboratory tests in the evaluation of injuries that may represent abuse;
 - (12) Role of pediatric sub-specialists in the evaluation of children alleged to have been abused; and
 - (13) Role of the children's, juvenile and family court systems.
- (B) Medical personnel shall be able to -
- (1) Take a complete history from a parent or guardian about the circumstances of the child's injury, past medical conditions, and birth history;
 - (2) Perform a detailed and careful physical examination of an infant, child, or adolescent;
 - (3) Document cutaneous injuries clearly in writing and by proper use of photographic equipment;
 - (4) Make an assessment of the injury as to the likelihood of abuse based upon the history, physical examination, and laboratory and radiologic evaluation;
 - (5) Make an assessment of child neglect;
 - (6) Communicate clearly and in lay terms with non-medical personnel about the medical findings;
 - (7) Communicate in a non-adversarial manner with parents and/or guardian about the responsibilities of medical professionals to report suspected child abuse; and
 - (8) Testify in court as to one's objective findings and assessment of injuries.

COMMENTARY

The mandate for tribal law enforcement and agencies to coordinate to develop a child interview protocol is not a statutory setting out of the protocol itself. Rather it is a legislative mandate that these agencies: (1) coordinate to develop a separate non-statutory protocol; and (2) consider the factors listed above. The considerations that are a part of the language in the example on coordinated child interviews has been taken from *Forensic Interviewing in Child*

Sexual Abuse Cases: Current Techniques and Future Directions, Lindsay E. Cronch, Jodi L. Viljoen, and David J. Hansen at the University of Nebraska-Lincoln.

The language in the example on sexual abuse medical examinations has been taken and modified from the California Medical Protocol for Examination of Child Physical Abuse and Neglect Victims, State of California, Governor's Office of Emergency Services.

SELECTED TRIBAL CODES

WINNEBAGO TRIBE OF NEBRASKA

TITLE 4 JUVENILE PROCEDURE

ARTICLE 5 CHILD ABUSE

4-505 Evidence of Abuse

1. Any child health associate, person licensed to practice medicine, registered nurse or licensed practical nurse, hospital personnel engaged in the admission, examination, care or treatment of patients, medical examiner, coroner, social worker, or local law enforcement officer who has before him/her a child s/he reasonably believes has been abused or neglected may take or cause to be taken color photographs of the areas of trauma visible on the child. If medically indicated, such person may take or cause to be taken X-rays of the child.
2. Any color photographs or X-rays which show evidence of child abuse shall be immediately forwarded to a receiving agency. [TCR 86-79]

MASHANTUCKET PEQUOT TRIBAL LAWS

UPDATED THROUGH THE 2005 SUPPLEMENTARY PAMPHLET

TITLE V - CHILD WELFARE

SECTION 2. INTERVIEWS AND EXAMINATIONS

- a. In any case where the LES or CPS reasonably believe that the child has been subjected to neglect or abuse, officials of those agencies shall be allowed to take photographs, x-rays, medical, and psychological examinations of the child and interview the child without first obtaining the consent of the parent, guardian/custodian.
- b. All examinations and interviews of a child who may have been subjected to neglect or abuse shall be conducted under the supervision of the MDT and in a manner that minimizes additional trauma to the child.
- c. The expense of such examinations and diagnostic tests shall be paid by the parents or guardian/custodian of the child, or if they are unable to pay, by HHS, which may seek reimbursement according to tribal law.

THE CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON [ORDINANCES]

LAST AMENDED: 2003

DATE ORIGINALLY ADOPTED: 4-11-89

SUBJECT: INDIAN CHILD WELFARE

RESOLUTION NUMBER: 055-93

AMENDED: 4-11-89; 11-7-89; 7-7-93; 7-17-96, 1-15-03

- (g) **MEDICAL EXAMINATIONS:** The Court may order a medical, dental, psychological, psychiatric, or other professional examination of a child or any other party or person before the Court if it is determined pursuant to a hearing that the party's or person's medical, dental, psychological, or psychiatric health are relevant to the issues before the Court. Such examination shall be paid for by the parties if they can afford it, and if not, by the Tribe, provided; however the Tribe shall not be required to pay for such examinations and/or evaluations unless the funds have been appropriated to do so.

EXERCISES

1. Where do tribal children who are suspected of being victims of child abuse receive medical examinations? Are the medical providers trained in conducting a forensic exam specific to child sexual abuse?

2. Where are children interviewed in child abuse cases? Are investigators trained to conduct forensic interviews of tribal children in abuse cases?

4. What services are available to provide victim advocacy and support services for tribal child victims of sexual abuse? Are local mental health providers trained specifically to work with child victims of sexual abuse and severe physical abuse?

5. What coordination is already in place to assure agencies involved with the investigation, prosecution and services to child victims are victim-centered and child-friendly? Discuss any obstacles in law or policy regarding all aspects of this coordination.

6. Test any draft provision using the **OUHE** test. Is your draft provision **O**verinclusive - can you think of a person or situation that it might apply to that you did not intend? Is your draft provision **U**nderinclusive - can you think of a person or situation that you meant for it to apply to, but when you read your language it appears not to apply? Is your draft provision likely to be **H**ard to enforce? Does your provision (or another provision) include an **E**nforcement process and will it work? Discuss any difficulties you encounter and brainstorm ways of changing the language to fix them.

ADDITIONAL RESOURCES

1. Berliner, L. & Elliton, D.M. *Sexual Abuse of Children*. In J. Briere, L. Berliner, J.A. Bulkley, C. Jenny & T. Reid (Eds.), *The APSAC Handbook on Child Maltreatment* (pp. 21-50). Thousand Oaks, CA: Sage Publications (1996).
2. Larry Echohawk, *Child Sexual Abuse in Indian Country: Is the Guardian Keeping in Mind the Seventh Generation?* 5 N.Y.U. J. of Legis. and Public Policy 83 (2001-2002).
3. National Center for the Prosecution of Child Abuse, *Investigation and Prosecution of Child Abuse*, Alexandria, VA, American Prosecutor's Research Institute, National Attorney's Association (1993).
4. Diana E.H. Russell, Rebecca M. Bolen, *The Epidemic of Rape and Child Sexual Abuse in the United States*. Thousand Oaks, California: Sage Publications (2000).
2. Roe Bubar, *Basic Guidelines for Forensic Interviewers In Child Sexual Abuse Cases In Indian Country and Alaska Native Communities* (2004).
3. Roe Bubar, *Interviewing Native American Children in Child Sexual Abuse Cases*. Norman, Oklahoma: University of Oklahoma Health Services and Office for Victims of Crime (2000).
4. Office for Victims of Crime, *Improving Tribal/Federal Prosecution of Child Sexual Abuse Cases Through Agency Cooperation*, NCJ 172877 OVC Bulletin (1999).
5. Donna M. Pence, Charles A. Wilson, *Reporting and Investigating Child Sexual Abuse, the Future of Children*, Sexual Abuse of Children, Vol. 4, No. 2, Summer/Fall 1996.
6. Miriam Wolf, MS, LCSW, *Child Sexual Abuse*, California Social Work Education Center, University of California, Berkeley, School of Social Welfare, Dec. 2002.
7. Rebecca Bolen, *Child Sexual Abuse: Its Scope and Our Failure*. New York: New York, Kluwer Academic/Plenum Publishers (2001).
8. David Finkelhor, *Sourcebook on Child Sexual Abuse*, Thousand Oaks, California, Sage Publications (1986).
9. Kathleen A. Earle, *Child Abuse and Neglect among American Indian/Alaska Native Children: An Analysis of Existing Data*. Seattle, Washington: Casey Family Programs (2001).
10. Debra Whitcomb, (1994). *The Emotional Effects of Testifying on Sexually Abused Children*. Washington, D.C.: U.S. Dept. of Justice, Office of Justice, Office of Justice Programs, National Institute of Justice.
11. David Finkelhor. *Current Information on the Scope and Nature of Child Sexual Abuse*. *The Future of Children*, 4(2): 31-53.
12. Lindsay E. Cronch, Jodi L. Viljoen, and David J. Hansen, *Forensic Interviewing in Child Sexual Abuse Cases: Current Techniques and Future Directions*, University of Nebraska-Lincoln (September 2005), available at http://www.unl.edu/psypage/grad/maltreat_lab/documents/ForensicInterviewingCronchViljoenHansen2006.pdf, visited 3 April 2008.
13. Diane Payne, *Child Abuse Protocol Development Guide*, available at <http://www.tribal-institute.org/lists/cja.html>, visited 3 June 2008.

Chapter 15

CHILDREN'S AND VICTIMS' RIGHTS

VICTIMS OF CRIME are often forgotten about in the western criminal justice system. While traditional tribal justice systems often viewed the victims and their families as central to the process of justice, the Anglo-American criminal justice system has historically disregarded the impact of crime on the victim. During the past 20 years, many states have begun to acknowledge the importance of providing specific services to victims of crime, particularly victims of violent crime. All states and many tribal governments have now established a “bill of rights” for crime victims. In some cases, the establishment of crime victims’ rights is largely rhetoric. There may be no penalty for failure to provide such rights. As your tribe develops a bill of rights for children and/or crime victims, consider whether there should be any penalties for failure to protect victims’ rights. A children’s bill of rights is often more general than a victims’ bill of rights. Statements in a children’s bill of rights apply to all children within a community – not just children who have been victims of crime.

The development of a combined child-victims’ bill of rights is an excellent opportunity for multidisciplinary cooperation using “multi-disciplinary teams” (“MDTs”) and “child protection teams” (“CPTs”).

Tribes, states, and the federal government are also changing their court process to further protect child-victims from re-victimization during the investigation, prosecution, and sentencing of offenders. Many states allow the use of special courtroom procedures for child witnesses who could be traumatized if they are required to testify in open court. One common innovation is the use of closed circuit testimony. This is where the child provides testimony in a separate room and their testimony is relayed to the courtroom via closed circuit television. Most state laws require the prosecutor to demonstrate that direct testimony could cause a degree of trauma before requiring this arrangement. Another special courtroom procedure involves the use of video direct examination and cross examination of the child. Some of the reasons that judges in state courts have allowed out-of-court testimony include: (1) the child is unable to testify because of fear; (2) there is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying; (3) the child suffers a mental or other infirmity; and (4) conduct by defendant or defense counsel causes the child to be unable to continue to testify.

The federal Victims of Child Abuse Act of 1990 at 18 U.S.C. §3509, codifies special rights for children. This federal law also provided important protections for Native American children in federal court. See the language in the example and the federal law section below. These protections provide a foundation for tribal courts to establish similar provisions including:

- ❖ Alternatives to live in-court testimony, either by two-way closed circuit television at trial or by videotaped depositions taken prior to the trial;
- ❖ Presumption of children’s competency as a witness, with specific guidance for the conduct of competency examinations (including that the court must evaluate whether the child will suffer emotional trauma as a result of the examination);

- ❖ Privacy and protection from public identification (requirements to keep information about the case confidential) are applicable to all employees of the government connected with the case, employees of the court, defendant and employees of the defendant, including attorneys, and members of the jury;
- ❖ Closing the courtroom during the child’s testimony;
- ❖ Victim impact statements from children, with assistance as needed from a court-appointed guardian ad litem;
- ❖ Use of multi-disciplinary teams to provide medical and mental health services to child victims, expert testimony, cases management and training for judges, litigators, court officers and others on handling child victims and child witnesses;
- ❖ Appointment of a guardian ad litem to protect the best interests of the child and to “marshal and coordinate the delivery of resources and special services to the child”;
- ❖ Appointment of a child’s attendant to provide emotional support for the child during judicial proceedings (the court may allow the attendant to hold the child’s hand or allow the child to sit on the attendant’s lap throughout the proceeding);
- ❖ Speedy trial – the court must consider the age of the child and potential adverse impact of delay on the child’s well being when continuances are requested;
- ❖ Extension of the statute of limitations for commencing prosecution of child sexual abuse or physical abuse allegations until the child reaches the age of 25; and
- ❖ Testimony aids such as anatomical dolls, puppets, drawings or other demonstrative devices may be permitted by the court to assist the child in testifying.

ILLUSTRATIVE EXAMPLE

CHAPTER X.

SECTION X. CHILDREN'S BILL OF RIGHTS

RIGHTS OF CHILDREN -

- (A) Every child has the right to preserve his/her identity, including tribe, name and family relations as recognized by law without unlawful interference.
- (B) Every child has a right not to be separated from his or her parents or against their will, except when competent authorities subject to judicial review determine that such separation is necessary for the best interests of the child. A child temporarily or permanently deprived of his/her family environment shall be entitled to special protection and assistance provided by the tribe, which shall strive to ensure continuity in the child’s upbringing and the maintenance of ethnic, cultural, religious, and linguistic heritage.
- (C) Every child who is capable of forming his or her own opinions has the right to express those opinions freely in all matters affecting the child, the opinions of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body.
- (D) Every child has the right not to be deprived of his or her liberty unlawfully or arbitrarily. A child shall at all times be treated with humanity and respect for the inherent dignity of the human person, and in a manner

which takes into account the needs of a person of his or her age.

- (E) Every child has the right to be protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents, legal guardians or any other person who has the care and supervision of the child.
- (F) Every child has the right to enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.
- (G) Every child has the right to a standard of living adequate for the child's physical, mental, spiritual, moral, and social development.
- (H) Every child has the right to an education directed to the development of the child's personality, talents, and mental and physical abilities to their fullest potential.
- (I) Every child has the right to be represented by an advocate or a CASA volunteer in tribal court proceedings involving such child.

CHAPTER X. SECTION X. CHILD VICTIMS' AND CHILD WITNESSES' RIGHTS

I. Definitions. For purposes of this section--

- (A) the term "adult attendant" means an adult described in subsection (i) who accompanies a child throughout the judicial process for the purpose of providing emotional support;
- (B) the term "child" means a person who is under the age of 18, who is or is alleged to be--
 - (1) a victim of a crime of physical abuse, sexual abuse, or exploitation; or
 - (2) a witness to a crime committed against another person;
- (C) the term "child abuse" means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child;
- (D) the term "physical injury" includes lacerations, fractured bones, burns, internal injuries, severe bruising or serious bodily harm;
- (E) the term "mental injury" means harm to a child's psychological or intellectual functioning which may be exhibited by severe anxiety, depression, withdrawal or outward aggressive behavior, or a combination of those behaviors, which may be demonstrated by a change in behavior, emotional response, or cognition;
- (F) the term "exploitation" means child pornography or child prostitution;
- (G) the term "multidisciplinary child abuse team" means a professional unit composed of representatives from health, social service, law enforcement, and legal service agencies to coordinate the assistance needed to handle cases of child abuse;
- (H) the term "sexual abuse" includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children;
- (I) the term "sexually explicit conduct" means actual or simulated--
 - (1) sexual intercourse, including sexual contact in the manner of genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or of opposite sex; sexual contact means the intentional touching, either directly or through 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 sexual desire of any person;

- (2) bestiality;
 - (3) masturbation;
 - (4) lascivious exhibition of the genitals or pubic area of a person or animal; or
 - (5) sadistic or masochistic abuse;
- (J) the term “sex crime” means an act of sexual abuse that is a criminal act;
- (K) the term “negligent treatment” means the failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to seriously endanger the physical health of the child; and
- (L) the term “child abuse” does not include discipline administered by a parent or legal guardian to his or her child provided it is reasonable in manner and moderate in degree and otherwise does not constitute cruelty.

II. **Alternatives to live in-court testimony.**

(A) **Child's live testimony by 2-way closed circuit television.**

- (1) In a proceeding involving an alleged offense against a child, the attorney for the Tribe, the child's attorney, or a guardian ad litem appointed under subsection (h) may apply for an order that the child's testimony be taken in a room outside the courtroom and be televised by 2-way closed circuit television. The person seeking such an order shall apply for such an order at least 5 days before the trial date, unless the court finds on the record that the need for such an order was not reasonably foreseeable.
- (2) The court may order that the testimony of the child be taken by closed-circuit television as provided in subparagraph (1) 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:
 - (a) The child is unable to testify because of fear.
 - (b) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying.
 - (c) The child suffers a mental or other infirmity.
 - (d) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.
- (3) The court shall support a ruling on the child's inability to testify with findings on the record. In determining whether the impact on an individual child of one or more of the factors described in subparagraph (2) is so substantial as to justify an order under subparagraph (A), the court may question the minor in chambers, or at some other comfortable place other than the courtroom, on the record for a reasonable period of time with the child attendant, the prosecutor, the child's attorney, the guardian ad litem, and the defense counsel present.
- (4) If the court orders the taking of testimony by television, the attorney for the Tribe and the attorney for the defendant not including an attorney pro se for a party shall be present in a room outside the courtroom with the child and the child shall be subjected to direct and cross-examination. The only other persons who may be permitted in the room with the child during the child's testimony are--
 - (a) the child's attorney or guardian ad litem appointed under section (VIII);

- (b) persons necessary to operate the closed-circuit television equipment;
- (c) a judicial officer, appointed by the court; and
- (d) other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child, including an adult attendant.

The child's testimony shall be transmitted by closed circuit television into the courtroom for viewing and hearing by the defendant, jury, judge, and public. The defendant shall be provided with the means of private, contemporaneous communication with the defendant's attorney during the testimony. The closed circuit television transmission shall relay into the room in which the child is testifying the defendant's image, and the voice of the judge.

(B) Videotaped deposition of child.

- (1) In a proceeding involving an alleged offense against a child, the attorney for the Tribe, the child's attorney, the child's parent or legal guardian, or the guardian ad litem appointed under section (VIII) may apply for an order that a deposition be taken of the child's testimony and that the deposition be recorded and preserved on videotape.
- (2) Upon timely receipt of an application described in subparagraph (1), the court shall make a preliminary finding regarding whether at the time of trial the child is likely to be unable to testify in open court in the physical presence of the defendant, jury, judge, and public for any of the following reasons:
 - (a) The child will be unable to testify because of fear.
 - (b) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying in open court.
 - (c) The child suffers a mental or other infirmity.
 - (d) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.
 - (i) If the court finds that the child is likely to be unable to testify in open court for any of the reasons stated in clause (2), the court shall order that the child's deposition be taken and preserved by videotape.
 - (ii) The trial judge shall preside at the videotape deposition of a child and shall rule on all questions as if at trial. The only other persons who may be permitted to be present at the proceeding are--
 - a) the attorney for the Tribe;
 - b) the attorney for the defendant;
 - c) the child's attorney or guardian ad litem appointed under subsection (h);
 - d) persons necessary to operate the videotape equipment;
 - e) subject to clause (d), the defendant; and
 - f) other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child.

The defendant shall be afforded the rights applicable to defendants during trial, including the right to an attorney, the right to be confronted with the witness against the defendant, and the right to cross-examine the child.

- (iii) If the preliminary finding of inability under clause (2) is based on evidence that the child is

unable to testify in the physical presence of the defendant, the court may order that the defendant, including a defendant represented pro se, be excluded from the room in which the deposition is conducted. If the court orders that the defendant be excluded from the deposition room, the court shall order that 2-way closed circuit television equipment relay the defendant's image into the room in which the child is testifying, and the child's testimony into the room in which the defendant is viewing the proceeding, and that the defendant be provided with a means of private, contemporaneous communication with the defendant's attorney during the deposition.

- (iv) Handling of videotape. The complete record of the examination of the child, including the image and voices of all persons who in any way participate in the examination, shall be made and preserved on video tape in addition to being stenographically recorded. The videotape shall be transmitted to the clerk of the court in which the action is pending and shall be made available for viewing to the prosecuting attorney, the defendant, and the defendant's attorney during ordinary business hours.
- (3) If at the time of trial the court finds that the child is unable to testify as for a reason described in subparagraph (B)(2), the court may admit into evidence the child's videotaped deposition in lieu of the child's testifying at the trial. The court shall support a ruling under this subparagraph with findings on the record.
- (4) Upon timely receipt of notice that new evidence has been discovered after the original videotaping and before or during trial, the court, for good cause shown, may order an additional videotaped deposition. The testimony of the child shall be restricted to the matters specified by the court as the basis for granting the order.
- (5) In connection with the taking of a videotaped deposition under this paragraph, the court may enter a protective order for the purpose of protecting the privacy of the child.
- (6) The videotape of a deposition taken under this paragraph shall be destroyed 5 years after the date on which the trial court entered its judgment, but not before a final judgment is entered on appeal including Supreme Court review. The videotape shall become part of the court record and be kept by the court until it is destroyed.

III. Competency examinations.

- (A) **Effect of Rules of Evidence.** Nothing in this subsection shall be construed to abrogate any tribal equivalent to rule 601 of the Federal Rules of Evidence.
- (B) **Presumption.** A child is presumed to be competent.
- (C) **Requirement of written motion.** A competency examination regarding a child witness may be conducted by the court only upon written motion and offer of proof of incompetency by a party.
- (D) **Requirement of compelling reasons.** A competency examination regarding a child may be conducted only if the court determines, on the record, that compelling reasons exist. A child's age alone is not a compelling reason.
- (E) **Persons permitted to be present.** The only persons who may be permitted to be present at a competency examination are--
 - (1) the judge;

- (2) the attorney for the Tribe;
 - (3) the attorney for the defendant;
 - (4) a court reporter; and
 - (5) persons whose presence, in the opinion of the court, is necessary to the welfare and well-being of the child, including the child's attorney, guardian ad litem, or adult attendant.
- (F) **Not before jury.** A competency examination regarding a child witness shall be conducted out of the sight and hearing of a jury.
- (G) **Direct examination of child.** Examination of a child related to competency shall normally be conducted by the court on the basis of questions submitted by the attorney for the Tribe and the attorney for the defendant including a party acting as an attorney pro se. The court may permit an attorney but not a party acting as an attorney pro se to examine a child directly on competency if the court is satisfied that the child will not suffer emotional trauma as a result of the examination.
- (H) **Appropriate questions.** The questions asked at the competency examination of a child shall be appropriate to the age and developmental level of the child, shall not be related to the issues at trial, and shall focus on determining the child's ability to understand and answer simple questions.
- (I) **Psychological and psychiatric examinations.** Psychological and psychiatric examinations to assess the competency of a child witness shall not be ordered without a showing of compelling need.

IV. Privacy protection.

- (A) **Confidentiality of information.**
- (1) A person acting in a capacity described in subparagraph (2) in connection with a criminal proceeding shall--
 - (a) 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
 - (b) disclose documents described in clause (a) 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.
 - (2) Subparagraph (1) applies to--
 - (a) all employees of the Tribe 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 Tribe to provide assistance in the proceeding;
 - (b) employees of the court;
 - (c) 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
 - (d) members of the jury.
- (B) **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--

- (1) the complete paper to be kept under seal; and
 - (2) 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.
- (C) **Protective orders.**
- (1) 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.
 - (2) A protective order issued under subparagraph (1) may--
 - (a) 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
 - (b) provide for any other measures that may be necessary to protect the privacy of the child.
- (D) **Disclosure of information.** This subsection does not prohibit disclosure of the name of or other information concerning a child to the defendant, the attorney for the defendant, a multidisciplinary child abuse team, a guardian ad litem, or an adult attendant, or to anyone to whom, in the opinion of the court, disclosure is necessary to the welfare and well-being of the child.
- V. **Closing the courtroom.** When a child testifies the court may order the exclusion from the courtroom of all persons, including members of the press, who do not have a direct interest in the case. Such an order may be made if the court determines on the record that requiring the child to testify in open court would cause substantial psychological harm to the child or would result in the child's inability to effectively communicate. Such an order shall be narrowly tailored to serve the Tribe's specific compelling interest.
- VI. **Victim impact statement.** In preparing the presentence report the probation officer shall request information from the multidisciplinary child abuse team and other appropriate sources to determine the impact of the offense on the child victim and any other children who may have been affected. A guardian ad litem appointed under subsection (h) shall make every effort to obtain and report information that accurately expresses the child's and the family's views concerning the child's victimization. A guardian ad litem shall use forms that permit the child to express the child's views concerning the personal consequences of the child's victimization, at a level and in a form of communication commensurate with the child's age and ability.
- VII. **Use of multidisciplinary child abuse teams.**
- (A) **In general.** A multidisciplinary child abuse team shall be used when it is feasible to do so. The court shall work with Tribal, State and local governments that have established multidisciplinary child abuse teams designed to assist child victims and child witnesses, and the court and the attorney for the Tribe shall consult with the multidisciplinary child abuse team as appropriate.
 - (B) **Role of multidisciplinary child abuse teams.** The role of the multidisciplinary child abuse team shall be to provide for a child services that the members of the team in their professional roles are capable of providing, including--
 - (1) medical diagnoses and evaluation services, including provision or interpretation of x-rays, laboratory tests, and related services, as needed, and documentation of findings;
 - (2) telephone consultation services in emergencies and in other situations;

- (3) medical evaluations related to abuse or neglect;
- (4) psychological and psychiatric diagnoses and evaluation services for the child, parent or parents, guardian or guardians, or other caregivers, or any other individual involved in a child victim or child witness case;
- (5) expert medical, psychological, and related professional testimony;
- (6) case service coordination and assistance, including the location of services available from public and private agencies in the community; and
- (7) training services for judges, litigators, court officers and others that are involved in child victim and child witness cases, in handling child victims and child witnesses.

VIII. Guardian ad litem.

- (A) **In general.** The court may appoint, and provide reasonable compensation and payment of expenses for, a guardian ad litem for a child who was a victim of, or a witness to, a crime involving abuse or exploitation to protect the best interests of the child. In making the appointment, the court shall consider a prospective guardian's background in, and familiarity with, the judicial process, social service programs, and child abuse issues. The guardian ad litem shall not be a person who is or may be a witness in a proceeding involving the child for whom the guardian is appointed.
- (B) **Duties of guardian ad litem.** A guardian ad litem may attend all the depositions, hearings, and trial proceedings in which a child participates, and make recommendations to the court concerning the welfare of the child. The guardian ad litem may have access to all reports, evaluations and records, except attorney's work product, necessary to effectively advocate for the child. (The extent of access to grand jury materials is limited to the access routinely provided to victims and their representatives.) A guardian ad litem shall marshal and coordinate the delivery of resources and special services to the child. A guardian ad litem shall not be compelled to testify in any court action or proceeding concerning any information or opinion received from the child in the course of serving as a guardian ad litem.
- (C) **Immunities.** A guardian ad litem shall be presumed to be acting in good faith and shall be immune from civil and criminal liability for complying with the guardian's lawful duties described in paragraph (B).

IX. Adult attendant. A child testifying at or attending a judicial proceeding shall have the right to be accompanied by an adult attendant to provide emotional support to the child. The court, at its discretion, may allow the adult attendant to remain in close physical proximity to or in contact with the child while the child testifies. The court may allow the adult attendant to hold the child's hand or allow the child to sit on the adult attendant's lap throughout the course of the proceeding. An adult attendant shall not provide the child with an answer to any question directed to the child during the course of the child's testimony or otherwise prompt the child. The image of the child attendant, for the time the child is testifying or being deposed, shall be recorded on videotape.

X. Speedy trial. In a proceeding in which a child is called to give testimony, on motion by the attorney for the Tribe or a guardian ad litem, or on its own motion, the court may designate the case as being of special public importance. In cases so designated, the court shall, consistent with these rules, expedite the proceeding and ensure that it takes precedence over any other. The court shall ensure a speedy trial in order to minimize the length of time the child must endure the stress of involvement with the criminal process. When deciding whether to grant a continuance, the court shall take into consideration the age of the child and the potential adverse impact the delay may have on the child's well-being. The court shall make written findings of fact and conclusions of law when granting a continuance in cases involving a

child.

- XI. **Stay of civil action.** If, at any time that a cause of action for recovery of compensation for damage or injury to the person of a child exists, a criminal action is pending which arises out of the same occurrence and in which the child is the victim, the civil action shall be stayed until the end of all phases of the criminal action and any mention of the civil action during the criminal proceeding is prohibited. As used in this subsection, a criminal action is pending until its final adjudication in the trial court.
- XII. **Testimonial aids.** The court may permit a child to use anatomical dolls, puppets, drawings, mannequins, or any other demonstrative device the court deems appropriate for the purpose of assisting a child in testifying.
- XIII. **Prohibition on reproduction of child pornography.**
- (A) In any criminal proceeding, any property or material that constitutes child pornography shall remain in the care, custody, and control of either the Tribe or the court.
- (B)(1) Notwithstanding any tribal equivalent to Rule 16 of the Federal Rules of Criminal Procedure, a court shall deny, in any criminal proceeding, any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography, so long as the Tribe makes the property or material reasonably available to the defendant.
- (2) For the purposes of subparagraph (1), property or material shall be deemed to be reasonably available to the defendant if the Tribe provides ample opportunity for inspection, viewing, and examination at a Tribe facility of the property or material by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial.

COMMENTARY

The language in the example has been taken and modified from the Northern Cheyenne Family Code, Section 8-2-1-2, Rights and Responsibilities. There are a number of issues that can be addressed in a bill of rights, including general statements about how people should be treated, what type of services people are entitled to, the amount the participation the victim will have in the court system, and any recourse available for failure to adhere to the obligations in the bill of rights.

Many bills of rights establish basic approaches to dealing with people through statements such as:

- ❖ All children/victims deserve to be treated with respect and dignity;
- ❖ All children are gifts of the Creator and represent the future of the Tribe;
- ❖ All children/victims are valuable members of our community;
- ❖ Every member of the tribe has the right to live a life free of fear and violence.

These types of statements establish the underlying philosophy of the community, making explicit the beliefs that represent the shared values of community members.

The rights of children and victims can include:

- ❖ Right to a speedy trial;
- ❖ Right to be informed of all court proceedings (including delays and continuances);
- ❖ Right to be present and heard at court hearings;
- ❖ Right to be informed of plea negotiations;

- ❖ Right to approve all proposed plea negotiations;
- ❖ Right to be consulted before a case is dismissed;
- ❖ Right to submit a written and/or verbal impact statement;
- ❖ Right to be notified of the defendants release from prison.

SELECTED TRIBAL CODES

NORTHERN CHEYENNE FAMILY CODE

SECTION 8-2-1-2. RIGHTS AND RESPONSIBILITIES

A. Rights of Children

- (1) Every child has the right to preserve his/her identity, including tribe, name and family relations as recognized by law without unlawful interference.
- (2) Every child has a right not to be separated from his or her parents or against their will, except when competent authorities subject to judicial review determine that such separation is necessary for the best interests of the child. A child temporarily or permanently deprived of his or her family environment shall be entitled to special protection and assistance provided by the Tribe, which shall strive to ensure continuity in the child's upbringing and the maintenance of ethnic, cultural, religious, and linguistic heritage.
- (3) Every child who is capable of forming his or her own opinions has the right to express those opinions freely in all matters affecting the child, the opinions of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body.
- (4) Every child has the right not to be deprived of his liberty unlawfully or arbitrarily. A child shall at all times be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of a person of her or his age.
- (5) Every child has the right to protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents, legal guardians or any other person who has the care and supervision of the child.
- (6) Every child has the right to enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.
- (7) Every child has the right to a standard of living adequate for the child's physical, mental, spiritual, moral, and social development.
- (8) Every child has the right to an education directed to the development of the child's personality, talents and mental and physical abilities to their fullest potential.

SELECTED FEDERAL CODES

18 USC§ 3771

§ 3771. CRIME VICTIMS' RIGHTS

(a) **Rights of crime victims.** A crime victim has the following rights:

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- (5) The reasonable right to confer with the attorney for the Government in the case.
- (6) The right to full and timely restitution as provided in law.
- (7) The right to proceedings free from unreasonable delay.
- (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(b) **Rights afforded.**

- (1) **In general.** In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

(2) **Habeas corpus proceedings.**

(A) **In general.** In a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded the rights described in paragraphs (3), (4), (7), and (8) of subsection (a).

(B) **Enforcement.**

- (i) In general. These rights may be enforced by the crime victim or the crime victim's lawful representative in the manner described in paragraphs (1) and (3) of subsection (d).
- (ii) Multiple victims. In a case involving multiple victims, subsection (d)(2) shall also apply.

(C) **Limitation.** This paragraph relates to the duties of a court in relation to the rights of a crime victim in Federal habeas corpus proceedings arising out of a State conviction, and does not give rise to any obligation or requirement applicable to personnel of any agency of the Executive Branch of the Federal Government.

(D) **Definition.** For purposes of this paragraph, the term “crime victim” means the person against whom the State offense is committed or, if that person is killed or incapacitated, that person's family member or other lawful representative.

(c) **Best efforts to accord rights.**

- (1) **Government.** Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).
- (2) **Advice of attorney.** The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).
- (3) **Notice.** Notice of release otherwise required pursuant to this chapter [this section] shall not be given if such notice may endanger the safety of any person.

(d) **Enforcement and limitations.**

- (1) **Rights.** The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter [this section].
- (2) **Multiple crime victims.** In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter [this section] that does not unduly complicate or prolong the proceedings.
- (3) **Motion for relief and writ of mandamus.** The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter [this section]. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.
- (4) **Error.** In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.
- (5) **Limitation on relief.** In no case shall a failure to afford a right under this chapter [this section] provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if--
 - (A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;
 - (B) the victim petitions the court of appeals for a writ of mandamus within 10 days; and
 - (C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.

- (6) **No cause of action.** Nothing in this chapter [this section] shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter [this section] shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.
- (e) **Definitions.** For the purposes of this chapter [this section], the term “crime victim” means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter [this section], but in no event shall the defendant be named as such guardian or representative.

(f) **Procedures to promote compliance.**

- (1) **Regulations.** Not later than 1 year after the date of enactment of this chapter [enacted Oct. 30, 2004], the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.
- (2) **Contents.** The regulations promulgated under paragraph (1) shall--
 - (A) designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;
 - (B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;
 - (C) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims; and
 - (D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant.

EXERCISES

1. Does your tribal code include either a “children's bill of rights” or a “victims' bill of rights?” If not, do you have a preference for one over the other? Why?

2. What tribal court remedies should be available to a child when his or her rights are violated (more court process, damages, injunctive relief or court ordering someone to do something or stop doing something, etc.)?

3. Test any draft provision using the **OUHE** test. Is your draft provision **O**verinclusive - can you think of a person or situation that it might apply to that you did not intend? Is your draft provision **U**nderinclusive - can you think of a person or situation that you meant for it to apply to, but when you read your language it appears not to apply? Is your draft provision likely to be **H**ard to enforce? Does your provision (or another provision) include an **E**nforcement process and will it work? Discuss any difficulties you encounter and brainstorm ways of changing the language to fix them.

ADDITIONAL RESOURCES

1. Peter-Alexis Albrecht, *The Functionalization of the Victim in the Criminal Justice System*, 3 Buffalo Criminal Law Review 91 (1999).
2. Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, Utah Law Review, 289 (1999).
3. International Bureau for Children's Rights, *Guidelines on Justice for Child Victims and Witnesses of Crimes* (2003).
4. National Center for Victims of Crime, *Victims Right Resource Book – A Compilation and Comparison of Victims Rights*. Lanse (1996).
5. Saris, Anne, *The Rights of Child Victims and Witnesses of Crime – A Compilation of Selected Provisions Drawn from International and Regional Instruments* (2002).
6. Madeline Wordes & Michell Nunez, *Our Vulnerable Teenagers: Their Victimization, Its Consequences and Directions for Prevention and Intervention*. Washington, D.C.: National Center for Victims of Crime and National Council on Crime and Delinquency (2002).
7. Dean G. Kilpatrick, David Beatty, & Susan Smith Howley (December, 1998). *The Rights of Crime Victims – Does Legal Protection Make a Difference?* National Institute of Justice: Research in Brief. Washington, D.C.: U.S. Department of Justice, National Institute of Justice.

Chapter 16

EVIDENCE IN TRIBAL COURT: SPECIAL RULES IN CASES INVOLVING CHILDREN

RULES OF EVIDENCE are designed to ensure fairness in criminal court process. This section sets forth special evidentiary rules to protect child victims and child witnesses. These include rules allowing for the:

- ❖ Admission of out-of-court statements (statements made by persons who are not actually testifying in court) (a.k.a. hearsay exceptions)

In American criminal trials judges, pursuant to federal and state rules of evidence, do not allow statements offered as evidence where the person who made the statement is not testifying in person (including, for example, a child's statements made to a police officer). The concern is that the information may be unreliable (Did he or she really say this? Is it being taken out of context, etc.?). However, there are numerous exceptions under the rules of evidence where an advocate or attorney can show that the statement was reliable information, such as statements made for the purpose of medical diagnosis or treatment or information contained in copies of certified government documents.

American criminal trial judges will also disallow out-of court testimony (including statements made by a child to a police officer) that may violate the criminal defendant's 6th amendment U.S. Constitutional right to confront witnesses against him. Federal courts have extended this rule to reject a child sex abuse victim's statement on video to a forensic interviewer as evidence in the criminal trial. See *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005). However, the same court allowed the use of a child sex abuse victim's statements made to a physician seeking to give medical aid in the form of diagnosis or treatment as evidence. See *United States v. Peneaux*, 432 F.3d 882 (8th Cir. 2006). In the later case the child's statements were considered "non-testimonial."

Many tribes have either adopted or incorporated by reference the "criminal defendant's right to confront witnesses" clause from the Indian Civil Rights Act at 25 U.S.C., Section 1302(6): "No Indian tribe in exercising powers of self-government shall-- ... (6) deny to any person in a criminal proceeding the right ... to be confronted with the witnesses against him" ... The U.S. Supreme Court, in the 2005 case of *Crawford v. Washington*, 541 U.S. 36 (U.S. 2004), interpreted the analogous provision in the U.S. Constitution (6th Amendment) to require criminal court judges to reject the admission of out-of-court testimonial evidence where the declarant (the child) is not available to testify at the criminal trial and where the criminal defendant did not have the chance to cross-examine the declarant (child) when he or she made the earlier statement. The U.S. Supreme Court was concerned that any other process would not protect individuals from heated politics and shady interviews being used as evidence in criminal trials against them. Each tribe's high court will have the power to follow the U.S. Supreme Court in its interpretation (or not) unless the tribal child protection laws direct them to admit such prior child statements at a criminal trial. Tribal law drafters will have to consider and balance the procedural rights of the accused with the rights guaranteed to child victims - in light of larger political dangers.

- ❖ Testimony of young children (can a young child testify in court?)

In the Anglo-American common law, children under the age of 14 were presumed to be incompetent to testify. This made it extremely difficult to prosecute crimes against children. Only in the last 30 years have the federal and state systems changed their laws to allow young children to testify in court. In contrast, most tribal cultures have a long-standing tradition of listening to and honoring the words of children.

- ❖ Admission of a defendant's admission of prior bad acts as evidence

Generally, evidence of a person's character, or a trait of character, is not admissible. There are exceptions that apply depending on the circumstances. In addition for civil and criminal sexual offenses there are rules that allow for admission of character evidence.

- ❖ Expert testimony

Expert witnesses can be valuable in prosecuting child abuse perpetrators. Medical professionals can provide important information about physical manifestations of abuse while mental health professionals can provide testimony explaining how a child's behavior may be consistent with abuse allegations.

ILLUSTRATIVE EXAMPLE

CHAPTER X.

SECTION X. OUT OF COURT STATEMENTS

- (A) Out-of-court statements made by the child will be admitted as long as the trustworthiness of such statements can be established.
- (B) The out-of-court statements will be admissible if -
- (1) The statement is related to the offense;
 - (2) The circumstances of the statement indicate reliability;
 - (3) Additional evidence is introduced to corroborate the statement; and
 - (4) The child-declarant provides in camera testimony to the judge.

CHAPTER X.

SECTION X. PRIOR CHILD TESTIMONY

Prior statements made by the child as part of testimony offered in a civil dependency proceeding will be admitted if the parent against whom it is being offered had the opportunity to question the child in the civil dependency proceeding.

CHAPTER X.

SECTION X. COMPETENCY OF CHILDREN TO TESTIFY

Children are presumed to be competent to testify in court at the age of four (4). The judge may allow children younger than four (4) years of age to testify, if the judge feels the child will be trustworthy. The judge shall make a written finding of fact when allowing a child less than (4) years of age testify.

CHAPTER X.

SECTION X. PRIOR BAD ACTS

In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

CHAPTER X.

SECTION X. EXPERT TESTIMONY

If the tribal court deems a person an expert, then opinion testimony will be allowed in court when -

- (A) The subject matter of the testimony is outside the average person's knowledge;
- (B) When the witness qualifies as an expert on that subject matter; and
- (C) The basis of the expert's testimony is reasonably reliable.

COMMENTARY

The above rules have their origin in both the Federal Rules of Evidence and other federal and state laws.

“Direct evidence” is evidence which is based on personal knowledge or observation, such as testimony by an eyewitness to an event. An example of direct evidence is the child's testimony about what happened to her/him.

“Real” or “demonstrative evidence” usually takes the form of documents, photographs or x-rays. It is an object rather than testimony that is offered to persuade the judge of the facts in question. Ordinarily some foundation is laid that establishes the relevance and authenticity of the object. This is generally accomplished by the testimony of someone who has control over or maintained custody of the object. Long bone scans that are a part the medical record supported by the doctor's testimony are an example of demonstrative evidence in a child abuse case.

“Circumstantial evidence” is often used when little or no direct evidence is available. It is indirect evidence from which certain inferences can be drawn. This would include testimony by a neighbor who heard a child crying and then saw an adult running by with a belt. This evidence is not absolute proof of abuse or neglect, but details may create a higher probability that abuse or neglect has occurred. Circumstantial evidence is particularly useful in child abuse cases as eyewitnesses and clear physical injury are rare.

SELECTED TRIBAL CODES

MASHANTUCKET PEQUOT TRIBAL NATION TRIBAL LAWS AND RULES OF COURT EVIDENCE, RULE 802, HEARSAY RULE; CHILD'S STATEMENTS.

- b. 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.

NORTHERN CHEYENNE, RULES OF EVIDENCE, TITLE VI, RULE 36.

Expert witnesses: If specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may present opinion testimony within his field of expertise.

COQUILLE INDIAN TRIBAL CODE, CHAPTER 630 COQUILLE EVIDENCE CODE RULE 803 - HEARSAY EXCEPTION, AVAILABILITY OF DECLARANT IMMATERIAL.

25. Testimony of Child Under 10 Years of Age Concerning Sexual Conduct.

Notwithstanding the limits contained in subsection (19) of this section, in any proceeding in which a child under 12 years of age at the time of trial, or a person with developmental disabilities as described in subsection (19) of this section, may be called as a witness to testify concerning an act of child abuse, as defined in CITC 640.015(5),

or sexual conduct performed with or on the child or person with developmental disabilities by another, the testimony of the child or person with developmental disabilities taken by contemporaneous examination and cross-examination in another place under the supervision of the trial judge and communicated to the court room by closed circuit television or other audiovisual means. Testimony will be allowed as provided in this subsection only if the court finds that there is a substantial likelihood, established by expert testimony, that the child or person with developmental disabilities will suffer severe emotional or psychological harm if required to testify in open court. If the court makes such a finding, the court, on motion of a party, the child, the person with developmental disabilities or the court in a civil proceeding, or on motion of the tribal attorney or tribal prosecutor, the child or the person with developmental disabilities in a criminal or juvenile proceeding, may order that the testimony of the child or the person with developmental disabilities be taken as described in this subsection. Only the judge, the attorneys for the parties, the parties, individuals necessary to operate the equipment and any individual the court finds would contribute to the well-being of the child or person with development disabilities may be present during the testimony of the child or person with developmental disabilities.

MASHANTUCKET PEQUOT TRIBAL NATION, RULES OF COURT, RULES OF EVIDENCE
RULE 412. SEX OFFENSE CASES; RELEVANCE OF ALLEGED VICTIM’S PAST
SEXUAL BEHAVIOR OR ALLEGED SEXUAL PREDISPOSITION.

- a. **Evidence Generally Inadmissible.** The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
- (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
 - (2) Evidence offered to prove any alleged victim’s sexual predispositions.
- b. **Exceptions.**
- (1) In a criminal case, the following evidence is admissible , if otherwise admissible under these rules:
 - (a) evidence of specific instance of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;
 - (b) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution;
 - (c) evidence the exclusion of which would violate the rights of the defendant under Mashantucket Pequot tribal law or the Indian Civil Rights Act, 25 U.S.C. § 1301-1303;
 - (d) evidence tending to establish affirmative defenses which take into account the alleged victim’s physical or mental incapacity and the accused’s lack of knowledge thereof; and the past conduct of the victim and the accused regarding consensual cohabitation; and
 - (e) evidence of the adjudication of the defendant as a delinquent for the offense of sexual assault, assault and/or child abuse, when the defendant is being prosecuted as an adult in a child abuse case.
 - (2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim’s reputation is admissible only if it has been placed in controversy by the alleged victim.

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

- a. In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.
- b. In a case in which the Mashantucket Pequot Tribe intends to offer evidence under this rule, the tribal prosecutor shall disclose the evidence to the defendant, including statements or witnesses or a summary of the substance of any testimony that is expected to be offered, at least 15 days before the scheduled date of trial or at such later time as the court may allow for good cause.
- c. This rule shall not be construed to limit the admission or consideration of evidence under any other rule.
- d. For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under tribal law, Federal law or the law of a state that involved:
 - (1) any conduct proscribed by Chapter 109A of Title 18, United States Code;
 - (2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;
 - (3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;
 - (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or
 - (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

Rule 414. Evidence of Similar Crimes in Child Molestation Cases

- a. In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.
- b. In a case in which the Mashantucket Pequot Tribe intends to offer evidence under this rule, the tribal prosecutor shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 15 days before the scheduled date of trial or at such later time as the court may allow for good cause.
- c. This rule shall not be construed to limit the admission or consideration of evidence under any other rule.
- d. For purposes of this rule and Rule 415, "child" means a person below the age of 14, and "offense of child molestation" means a crime under tribal law, Federal law or the law of a state (as defined in section 5134 of Title 18, United States Code) that involved:
 - (1) any conduct proscribed by Chapter 109A of Title 18, United States Code, that was committed in relation to a child;
 - (2) any conduct proscribed by Chapter 110 of Title 18, United States Code;
 - (3) contact between any part of the defendant's body or an object and the genitals or anus of a child;
 - (4) contact between the genitals or anus of the defendant and any part of the body of a child;
 - (5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on the body of a child; or

(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

- a. In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense of offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.
- b. A party who intends to offer evidence under this rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 15 days before the scheduled date of trial or at such later time as the court may allow for good cause.
- c. This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS TRIBAL CODE

CHAPTER 39 - CHILD WELFARE CODE

30.407 Testimonial Privileges Abrogated.

The physician-patient privilege, husband and wife privileges, or any privilege except the attorney-client privilege, both as they relate to the witness and to the exclusion of confidential communications, shall not pertain in any judicial proceeding in which a child's status as an abused or abandoned child, or a child-in-need-of-care, is an issue.

EXERCISES

1. Review your tribal code and court rules for the following special evidentiary rules for criminal cases:

- _____ Out-of-court statements (hearsay exceptions)
- _____ Child competency (can a young child testify in court?)
- _____ Admission of prior bad acts of the defendant
- _____ Expert testimony

2. How do these rules assist children in criminal cases?

3. Test any draft provision using the **OUHE** test. Is your draft provision **O**verinclusive - can you think of a person or situation that it might apply to that you did not intend? Is your draft provision **U**nderinclusive - can you think of a person or situation that you meant for it to apply to, but when you read your language it appears not to apply? Is your draft provision likely to be **H**ard to enforce? Does your provision (or another provision) include an **E**nforcement process and will it work? Discuss any difficulties you encounter and brainstorm ways of changing the language to fix them.

ADDITIONAL RESOURCES

1. American Prosecutors Research Institute, *Investigation and Prosecution of Child Abuse*, Third Edition, Thousand Oaks: California, Sage Publications (2004).
2. Nicholas Bala, Janet Lee & Erin McNamara, *Children as Witnesses: Understanding Their Capacities, Needs, and Experiences*, 10 *Journal of Social Distress & the Homeless* 41 (2001).
3. Allen D. Cope, *Alabama's Child hearsay Exception*, 47 *Alabama Law Review* 215 (1995).
4. Clara Gimenez, *Vermont Rule of Evidence 404(B): Admissibility of Prior bad Acts in the "Context" of child Molestation Cases*, 27 *Vt. L. Rev.* 217 (2002).
5. Cynthia J. Hennings, *Accommodating Child Abuse Victims: Special Hearsay Exceptions in Sexual Offense Prosecutions*, 15 *Ohio Northern University Law Review* (1989).
6. I.S. Kreitzer, *Who Can Speak for the Child? Hearsay Exceptions in Child Sexual Abuse Cases*, 13 *Criminal Justice Journal* 213 (1992).
7. John E.B. Myers, *Expert Testimony Regarding Child Sexual Abuse*, 17 *Child Abuse & Neglect* 175 (1993).
8. *Myers on Child on Evidence in Child, Domestic and Elder Abuse*, Volume 1 and 2, New York, New York: Aspen Publishers, (2005).
9. Kathryn M. Turman & Kimberly L. Poyer. United States Attorney's Office, *Child Victims and Witnesses: A Handbook for Criminal Justice Professionals* 23-24 (1998).
10. Debra Whitcomb, National Institute of Justice, *When the Victim is a Child* (2nd. Edition 1992).

Chapter 17

PROTECTING A CHILD'S IDENTITY

BECAUSE OF THE SENSITIVE AND DELICATE NATURE OF CHILD ABUSE, some jurisdictions have passed statutes that forbid the prosecutor from using the victim's name in the charging documents. Most court records are public; therefore, it is important to consider the impact such public documents might have on child victims of crime.

This section will provide an initial framework for tribes to consider how to protect a child's identity and provide for the defendant's rights. It is a delicate balance that justice systems will need to create in order to provide justice for both victims and defendants.

ILLUSTRATIVE EXAMPLE

CHAPTER X.

SECTION X. CHILD VICTIM PROTECTIONS; IDENTITY

(A) **Child Victim's Address and Phone Number.**

The address of the victim shall not be in the court file or ordinary court documents unless contained in a transcript of the trial or it is used to identify the place of the crime. The phone number of the victim shall not be in the court file or ordinary court documents except as contained in the transcript of the trial.

(B) **Child Victim Records.**

The name of the child victim should be deleted if such records are made available or determined to be a public record.

(C) **Childs Testimony - Closed Hearing.**

Any portion of proceeding under this section at which a minor is required to testify concerning rape of a child, sexual abuse of a child, child abuse involving sexual abuse or any other sexual offense involving a minor may be closed to all persons except the parties and officers of the court.

CHAPTER X.

SECTION X. CHILD VICTIM PROTECTIONS; PORNOGRAPHY

(A) The importance of protecting children from repeat exploitation in child pornography: The vast majority of child pornography prosecutions today involve images contained on computer hard drives, computer disks, and related media.

(B) Child pornography is not entitled to protection as "free speech" and thus may be prohibited.

(C) The tribe has a compelling interest in protecting children from those who sexually exploit them, and this

interest extends to stamping out the vice of child pornography at all levels in the distribution chain.

- (D) Every instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse.
- (E) Child pornography constitutes prima facie contraband, and as such should not be distributed to, or copied by, child pornography defendants or their attorneys.
- (F) It is imperative to prohibit the reproduction of child pornography in criminal cases so as to avoid repeated violation and abuse of victims, so long as the tribe makes reasonable accommodations for the inspection, viewing, and examination of such material for the purposes of mounting a criminal defense.

COMMENTARY

The language in the example has been taken and modified from several sources. Some of the examples included in this chapter come from child protection or children's codes. Currently several tribal governments and state legislatures have enacted laws that protect a child's identity in the investigation, pre-trial and trial phases. For example, the law may require that the victim's name be removed and be referenced by a pseudonym; defense counsel may be prohibited from disclosing certain information; and the court may be prohibited from releasing records to the public without removing the victim's information, etc.

The language in the example dealing with child pornography has been taken from the Adam Walsh Act of 2006 (see below). The inclusion of such language in a tribal code may apply to any pornographic depiction of a child and limit the reproduction of such depiction to protect the child's privacy and to avoid re-victimization.

Special note: It will be important to balance the rights of the defendant with the rights of the child victim. A Children's Bill of Rights and a Victim's Bill of Rights will set out the rights and protections that a child victim should have. The Indian Civil Rights act sets out the rights that a criminal defendant (an alleged perpetrator until proven guilty) should have.

SELECTED TRIBAL CODES

YANKTON SIOUX TRIBAL CODE

TITLE 5, CHAPTER IX

Section 5-9-19 Minor's Testimony As To Sexual Offense Involving Child; Closed Hearing

Any portion of proceeding under this section at which a minor is required to testify concerning rape of a child, sexual abuse of a child, child abuse involving sexual abuse or any other sexual offense involving a child may be closed to all persons except the parties and officers of the court.

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS TRIBAL CODE

CHAPTER 75 - CRIME VICTIM'S RIGHTS

75.108 Confidentiality of Victim's Address.

1. 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, the prosecutor may move that the victim or any other witness not be compelled to testify at pretrial proceedings or at trial for purposes of identifying the victim as to the victim's address, place of employment or other personal identification without the victim's consent. A hearing on the motion shall be in camera.
2. The address of the victim shall not be in the Court file or ordinary Court documents unless contained in a transcript of the trial or it is used to identify the place of the crime. The phone number of the victim shall not be in the Court file or ordinary Court documents except as contained in the transcript of the trial.

GRAND TRAVERSE BAND CODE
TITLE 10 - CHILDREN, FAMILIES AND ELDERS
CHAPTERS 1-3

Section 130 - Child Protection Records

- (a) Children's Court Records. A record of all hearings under this Code shall be made and preserved. All Children's Court records shall be confidential and shall not be open to inspection to any but the following:
- (1) The child;
 - (2) The child's parent(s), guardian, or custodian;
 - (3) The prospective adoptive parent(s);
 - (4) The child's counsel or court appointed special advocate;
 - (5) The Children's Court personnel directly involved in the handling of the case; and
 - (6) Any other person by order of the Court, having legitimate interest in the particular case or the work of the Court.

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS TRIBAL CODE
CHAPTER 30 - CHILD WELFARE CODE

Section 30.425 Adjudicatory Hearing

- (1) The general public shall be excluded from the proceedings and only the parties, their counsel, witnesses, the child advocate and other persons determined necessary or useful to the proceedings by the Tribal Court shall be admitted.

NORTHERN CHEYENNE FAMILY CODE
TITLE 11 - VICTIM AND COMMUNITY PROTECTION CODE

Section 3-1-4 Notice of Scheduled Hearings

If the victim of a crime requests notice of a scheduled hearing to review or consider sentencing, parole, probation, and/or sentence commutation, the Tribal Victim Witness Advocate shall make every reasonable effort to notify the victim of the hearing at least two days before the hearing, provided the hearing has been scheduled in excess of two days. If the hearing has been scheduled within two days, the Tribal Victim Witness Advocate shall attempt to notify the victim of the hearing as soon as possible prior to the hearing.

- A. A victim who requests notice under this subsection shall maintain a current, valid mailing address, current, valid physical address, and current telephone number (if any) on file with the Tribal Victim Witness Advocate.
- B. The Tribal Victim Witness Advocate shall provide notice under this section by either telephone, in person, or by mail to the victim using the victim's last known contact information.
- C. The victim's mailing address, physical address and telephone number (if any) may not be disclosed to the defendant/prisoner or his/her attorney.
- D. The victim has the right to attend sentencing hearings, parole hearings, probation hearings, and/or sentence or commutation hearings in which the sentence of the individual convicted of the crime against that victim is officially considered and to comment, in writing or in person, on the sentence, parole, probation or commutation considered by the Court.
- E. The Court shall consider the comments of the victim in deciding what action to take.
- F. Upon request of the victim, the Tribal Victim Witness Advocate shall make every reasonable effort to notify the victim as soon as practicable in writing of the Court's decision regarding the status of the defendant/prisoner. The notice under this subsection must include the expected date of the prisoner's release,

the area in which the prisoner will reside, and other pertinent information concerning the prisoner's conditions of parole or probation that may affect the victim.

Section 3-1-5

- A. Except regarding crimes of domestic violence or sexual offenses, the Tribal Victim Witness Advocate shall make every reasonable effort to notify the victim of a prisoner's release before the prisoner's release date, only upon request for such notice by the victim. The notice under this subsection must include the expected date of the prisoner's release, the area in which the prisoner will reside, and other pertinent information concerning the prisoner's conditions of parole or probation that may
- B. Regarding crimes of domestic violence or sexual offenses, the Tribal Victim Witness Advocate shall make every reasonable effort to notify the victim of a prisoner's release before the prisoner's release date, regardless of whether the victim specifically requests such notification. The notice under this subsection must include the expected date of the prisoner's release, the area in which the prisoner will reside, and other pertinent information concerning the prisoner's conditions of parole or probation that may affect the victim.
- C. A victim who requests notice under subsection (A) shall maintain a current, valid mailing address, current, valid physical address, and current telephone number (if any) on file with the Tribal Victim Witness Advocate.
- D. The Tribal Victim Witness Advocate shall provide notice under subsections (A) and (B) by either telephone, in person, or by mail to the victim using the victim's last known contact information.
- E. The victim's mailing address, physical address and telephone number (if any) may not be disclosed to the prisoner or the prisoner's attorney.

Section 3-1-6

- A. Except regarding crimes of domestic violence or sexual offenses, the Tribal Victim Witness Advocate shall make every reasonable effort to notify the victim of a prisoner's escape as soon as possible after the escape occurs, only upon request for such notice by the victim. The notice under this subsection must include the date of the prisoner's escape and other pertinent information that may affect the victim.
- B. Regarding crimes of domestic violence or sexual offenses, the Tribal Victim Witness Advocate shall make every reasonable effort to notify the victim of a prisoner's escape, regardless of whether the victim specifically requests such notification. The notice under this subsection must include the date of the prisoner's escape and other pertinent information that may affect the victim.
- C. A victim who requests notice under subsection (A) shall maintain a current, valid mailing address, current, valid physical address, and current telephone number (if any) on file with the Tribal Victim Witness Advocate.
- D. The Tribal Victim Witness Advocate shall provide notice under subsections (A) and (B) by either telephone, in person, or by mail to the victim using the victim's last known contact information.

SELECTED FEDERAL CODES

TITLE V--CHILD PORNOGRAPHY PREVENTION 18 USC 2251 FINDINGS.

Congress makes the following findings:

1. The effect of the intrastate production, transportation, distribution, receipt, advertising, and possession of child pornography on the interstate market in child pornography:
 - (A) The illegal production, transportation, distribution, receipt, advertising and possession of child pornography, as defined in section 2256(8) of title 18, United States Code, as well as the transfer of custody of children for the production of child pornography, is harmful to the physiological, emotional, and mental health of the children depicted in child pornography and has a substantial and detrimental effect on society as a whole.
 - (B) A substantial interstate market in child pornography exists, including not only a multimillion dollar industry, but also a nationwide network of individuals openly advertising their desire to exploit children and to traffic in child pornography. Many of these individuals distribute child pornography with the expectation of receiving other child pornography in return.
 - (C) The interstate market in child pornography is carried on to a substantial extent through the mails and other instrumentalities of interstate and foreign commerce, such as the Internet. The advent of the Internet has greatly increased the ease of transporting, distributing, receiving, and advertising child pornography in interstate commerce. The advent of digital cameras and digital video cameras, as well as videotape cameras, has greatly increased the ease of producing child pornography. The advent of inexpensive computer equipment with the capacity to store large numbers of digital images of child pornography has greatly increased the ease of possessing child pornography. Taken together, these technological advances have had the unfortunate result of greatly increasing the interstate market in child pornography.
 - (D) Intrastate incidents of production, transportation, distribution, receipt, advertising, and possession of child pornography, as well as the transfer of custody of children for the production of child pornography, have a substantial and direct effect upon interstate commerce because:
 - (i) Some persons engaged in the production, transportation, distribution, receipt, advertising, and possession of child pornography conduct such activities entirely within the boundaries of one state. These persons are unlikely to be content with the amount of child pornography they produce, transport, distribute, receive, advertise, or possess. These persons are therefore likely to enter the interstate market in child pornography in search of additional child pornography, thereby stimulating demand in the interstate market in child pornography.
 - (ii) When the persons described in subparagraph (D)(i) enter the interstate market in search of additional child pornography, they are likely to distribute the child pornography they already produce, transport, distribute, receive, advertise, or possess to persons who will distribute additional child pornography to them, thereby stimulating supply in the interstate market in child pornography.
 - (iii) Much of the child pornography that supplies the interstate market in child pornography is produced entirely within the boundaries of one state, is not traceable, and enters the interstate market

- surreptitiously. This child pornography supports demand in the interstate market in child pornography and is essential to its existence.
- (E) Prohibiting the intrastate production, transportation, distribution, receipt, advertising, and possession of child pornography, as well as the intrastate transfer of custody of children for the production of child pornography, will cause some persons engaged in such intrastate activities to cease all such activities, thereby reducing both supply and demand in the interstate market for child pornography.
 - (F) Federal control of the intrastate incidents of the production, transportation, distribution, receipt, advertising, and possession of child pornography, as well as the intrastate transfer of children for the production of child pornography, is essential to the effective control of the interstate market in child pornography.

2. The importance of protecting children from repeat exploitation in child pornography:

- (A) The vast majority of child pornography prosecutions today involve images contained on computer hard drives, computer disks, and related media.
- (B) Child pornography is not entitled to protection under the First Amendment and thus may be prohibited.
- (C) The government has a compelling State interest in protecting children from those who sexually exploit them, and this interest extends to stamping out the vice of child pornography at all levels in the distribution chain.
- (D) Every instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse.
- (E) Child pornography constitutes *prima facie* contraband, and as such should not be distributed to, or copied by, child pornography defendants or their attorneys.
- (F) It is imperative to prohibit the reproduction of child pornography in criminal cases so as to avoid repeated violation and abuse of victims, so long as the government makes reasonable accommodations for the inspection, viewing, and examination of such material for the purposes of mounting a criminal defense.

EXERCISES

1. Discuss and list reasons why it is important to protect the identity of a child victim.

2. Would the community support the protection of the identity of the child? Why/why not?

3. Does your current tribal law contain a children's bill of rights, a victim's bill of rights, and/or these identity protections for children?

4. Test any draft provision using the **OUHE** test. Is your draft provision **O**verinclusive - can you think of a person or situation that it might apply to that you did not intend? Is your draft provision **U**nderinclusive - can you think of a person or situation that you meant for it to apply to, but when you read your language it appears not to apply? Is your draft provision likely to be **H**ard to enforce? Does your provision (or another provision) include an **E**nforcement process and will it work? Discuss any difficulties you encounter and brainstorm ways of changing the language to fix them.

ADDITIONAL RESOURCES

1. American Prosecutors Research Institute, *Prosecution and Investigation of Child Abuse Cases*, Third Edition, Thousand Oaks, California: Sage Publications (2004).
2. 18 U.S.C. Sec. 3509(d)
3. David Finkelhor & Charles Putnam, *Protecting the Privacy of Child Crime Victims*, 17 National Center for Prosecution of Child Abuse Update 1 (2004).
4. Janlori Goldman, Rodney M. Hudson, Zoe Hudson & Peter Sawires, *Health Principles for Protecting Victims of Domestic Violence*, San Francisco, California: Family Violence Prevention Fund, (2000).
5. Office for Victims of Crime, *New Directions from the Field: Victim's Rights and Services for the 21st Century*, Washington, D.C. Department of Justice, (2007).
6. UNICEF PD/Child Protection, *Guidelines on the Protection of Child Victims of Trafficking*, (2006).
7. Debra H Whitcomb, *When the Victim is a Child* (2nd. Ed.) National Institute of Justice; Washington, D.C., (1992).

Chapter
18

SANCTIONS AND PENALTIES FOR CRIMES AGAINST CHILDREN

THIS SECTION OF THE WORKBOOK should be completed after you have drafted the crimes themselves. You can adopt a unique sentencing law for each crime, or you can “group” the crimes into several different categories, and assign a sentencing law to each category.

When a defendant is convicted of a crime, the tribal laws should contain a legal “toolbox” filled with possible penalties that can be used in sentencing the defendant. These can include jail time, probation, treatment, traditional remedies, restraining orders, fines, and registration for sex offenders. Remember, by the time a case goes to sentencing, the defendant has either been found guilty or has pled guilty to charges of crimes against children.

Ideally you would have a multidisciplinary team that would make recommendations with respect to an individual criminal defendant’s probation, treatment, or incarceration. This team should be involved in the discussion of the possible penalties and how to implement them. If your community does not have a multidisciplinary team, then community members and service providers should have this discussion.

Tribes may want to include a treatment provision for defendants who are in jail. However, if such treatment is not available, then the law will be difficult to implement. The code development committee should include all individuals or programs that may be affected by the sanctions or penalties that are ordered. Discussions should include traditional penalties and culturally-appropriate sanctions to ensure that the laws meet the needs of the community.

For tribal governments that distribute “per capita” payments, tribes may consider a statute which allows the court to divert the defendant’s distribution until restitution, fines, and/or other costs have been paid in full. Alternatively, tribal governments may wish to permanently revoke distribution to anyone convicted of hurting a child as a form of deterrence.

Sanctions and penalties should be decided upon, by keeping in mind the safety and well being of the child victim(s). Moreover, in the process of defining sanctions and penalties it is very important to pay close attention to the capacity and resources of the tribal government.

ILLUSTRATIVE EXAMPLE

CHAPTER X.

SECTION X. SHORT SENTENCING SCHEME; INCARCERATION AND FINES

- (A) A person convicted of a Class 1 Offense shall be sentenced to imprisonment not to exceed 365 days, or a fine not to exceed \$5000, or both imprisonment and a fine.
- (B) A person convicted of a Class 2 Offense shall be sentenced to imprisonment not to exceed 180 days, or a fine not to exceed \$2500, or both imprisonment and a fine.
- (C) A person convicted of a Class 3 Offense shall be sentenced to imprisonment not to exceed 90 days, or a fine not to exceed \$1000, or both imprisonment and a fine.

CHAPTER X.

SECTION X. DEFINITIONS

- (A) Traditional restitution means any customary or traditional compensation, as determined by judicial notice, as part of a custom-law finding of a tribal judge following a custom-law finding hearing; or as directed by a formally established custom-law advisory body and certified to the sitting judge.
- (B) Victim restitution means payment of victim's documented costs for medical treatment and/or counseling.

SECTION X. LONG SENTENCING SCHEME

- (A) Upon conviction of a Class 1 Offense, the Court may sentence the defendant to any or all of the following sentences (sentences will run concurrently or consecutively at the Court's discretion) -
 - (1) Imprisonment for up to 365 days;
 - (2) A fine of up to five thousand dollars (\$5,000);
 - (3) Probation, up to 5 years in duration;
 - (4) Loss of firearms privilege;
 - (5) Banishment;
 - (6) Substance abuse treatment;
 - (7) No Contact Orders;
 - (8) Loss of business license penalty;
 - (9) Payment to a Child Advocacy Center;
 - (10) Victim restitution;
 - (11) Traditional restitution;
 - (12) Loss of hunting and fishing privileges; and/or
 - (13) Diversion of per capita payments.
- (B) Upon conviction of a Class 2 offense, the court may sentence the defendant to any or all of the following sentences (sentences will run concurrently or consecutively at the Court's discretion) -
 - (1) Imprisonment for up to 180 days;
 - (2) A fine of up to two thousand five hundred dollars (\$2,500);
 - (3) Probation, up to 4 years in duration;
 - (4) Loss of firearms privilege;
 - (5) Banishment;

- (6) Substance abuse treatment;
 - (7) No Contact Orders;
 - (8) Loss of business license penalty;
 - (9) Payment to a Child Advocacy Center;
 - (10) Victim restitution;
 - (11) Traditional restitution;
 - (12) Loss of hunting and fishing privileges; and/or
 - (13) Diversion of per capita payments.
- (C) Upon conviction of a Class 3 offense, the court may sentence the defendant to any or all of the following sentences (sentences will run concurrently or consecutively at the court's discretion) -
- (1) A fine of up to one thousand five hundred dollars (\$1,500);
 - (2) Probation, up to 3 years in duration;
 - (3) Loss of firearms privilege;
 - (4) Banishment;
 - (5) Substance abuse treatment;
 - (6) No Contact Orders;
 - (7) Loss of business license penalty;
 - (8) Payment to a Child Advocacy Center;
 - (9) Victim restitution;
 - (10) Traditional restitution;
 - (11) Loss of hunting and fishing privileges; and/or
 - (12) Diversion of per capita payments.

CHAPTER X.

SECTION X. BANISHMENT

(A) **Persons Subject to Banishment.**

All tribal citizens may be subject to banishment from the reservation or parts thereof upon conviction of a criminal offense.

(B) **Grounds for Banishment.**

In addition to any remedy or penalty, a person may be subject to banishment proceedings for conviction of any criminal offense involving a minor in tribal, state, or federal court.

- (C) The court shall consider the severity of the offense, defendant's prior history of offenses, the defendant's propensity to re-offend in the future, potential for rehabilitation, ties in the community, and the victim's and victim's families' wishes.

(D) **Proceedings.**

- (1) Subject to this section, the tribal prosecutor (or other appropriate member of the tribal government) may bring a banishment action pursuant to this chapter on behalf of the tribal government by filing a complaint in tribal court. The complaint must be served upon the defendant. The action must be filed prior to the entry of a guilty plea or 20 days prior to the commencement of a jury or bench trial.
- (2) The court, on its own motion, may consider banishment during the sentencing phase. The court must

give the defendant notice 20 days in advance of its motion to consider banishment as a criminal penalty.

CHAPTER X.

SECTION X. TREATMENT

- (A) Upon the defendant's guilty plea or conviction, where the victim is a minor, the judge shall order an assessment of the defendant by a probation officer or other qualified service provider to ascertain a correct treatment plan for the defendant.
- (B) Upon recommendation by the probation officer or other qualified assessment personnel, the court may order treatment, including but not limited to, substance abuse counseling, mental health, parenting, anger management, sexual offender treatment, or job training and make this order part of the defendant's probation or release. Failure to complete the term(s) of probation or release will constitute probation or release violation and may subject the defendant to incarceration or other sanctions.

CHAPTER X.

SECTION X. SEX OFFENDER REGISTRY

(A) Registry Requirements for Sex Offenders

- (1) **In General.**--A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.
- (2) **Initial Registration.**--The sex offender shall initially register—
 - (a) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or
 - (b) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.
- (3) **Keeping the Registration Current.**--A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.
- (4) **Initial Registration of Sex Offenders Unable to Comply.**--The Attorney General of the Tribe shall have the authority to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply.
- (5) **Penalty for Failure to Comply.**--The criminal penalty shall include a maximum term of imprisonment of 1 year for the failure of a sex offender to comply with the requirements of Chapter.

(B) Information Required in Registration

- (1) **Provided by the Offender.**--The sex offender shall provide the following information to the appropriate official for inclusion in the sex offender registry:
 - (a) The name of the sex offender (including any alias used by the individual).
 - (b) The Social Security number of the sex offender.
 - (c) The address of each residence at which the sex offender resides or will reside.
 - (d) The name and address of any place where the sex offender is an employee or will be an employee.
 - (e) The name and address of any place where the sex offender is a student or will be a student.

- (f) The license plate number and a description of any vehicle owned or operated by the sex offender.
 - (g) Any other information required by the Attorney General of the Tribe
- (2) **Provided by the Jurisdiction.**--The jurisdiction in which the sex offender registers shall ensure that the following information is included in the registry for that sex offender:
- (a) A physical description of the sex offender.
 - (b) The text of the provision of law defining the criminal offense for which the sex offender is registered.
 - (c) The criminal history of the sex offender, including the date of all arrests and convictions; the status of parole, probation, or supervised release; registration status; and the existence of any outstanding arrest warrants for the sex offender.
 - (d) A current photograph of the sex offender.
 - (e) A set of fingerprints and palm prints of the sex offender.
 - (f) A DNA sample of the sex offender.
 - (g) A photocopy of a valid driver's license or identification card issued to the sex offender by a jurisdiction.
 - (h) Any other information required by the Attorney General of the Tribe.

(C) Duration of Registration Requirement

- (1) **Full Registration Period.**--A sex offender shall keep the registration current for the full registration period (excluding any time the sex offender is in custody or civilly committed) unless the offender is allowed a reduction. The full registration period is—
- (a) 15 years, if the offender is a tier I sex offender;
 - (b) 25 years, if the offender is a tier II sex offender; and
 - (c) the life of the offender, if the offender is a tier III sex offender.
- (2) **Reduced Period for Clean Record.**—
- (a) **Clean record.**-- The full registration period shall be reduced as described in paragraph (3) for a sex offender who maintains a clean record for the period described in paragraph (2) by—
 - 1) not being convicted of any offense for which imprisonment for more than 1 year may be imposed;
 - 2) not being convicted of any sex offense;
 - 3) successfully completing any periods of supervised release, probation, and parole; and
 - 4) successfully completing of an appropriate sex offender treatment program certified by a jurisdiction or by the Attorney General of the Tribe.
 - (b) **Period.**-- In the case of--
 - 1) a tier I sex offender, the period during which the clean record shall be maintained is 10 years; and
 - 2) a tier III sex offender adjudicated delinquent for the offense which required registration in a sex registry under this title, the period during which the clean record shall be maintained is 25 years.
- (3) **Reduction.**-- In the case of—
- (a) a tier I sex offender, the reduction is 5 years;
 - (b) a tier III sex offender adjudicated delinquent, the reduction is from life to that period for which the clean record under paragraph (2) is maintained.

(D) Periodic In-Person Verification

A sex offender shall appear in person, allow the jurisdiction to take a current photograph, and verify the information in each registry in which that offender is required to be registered not less frequently than--

- (1) each year, if the offender is a tier I sex offender;
- (2) every 6 months, if the offender is a tier II sex offender; and
- (3) every 3 months, if the offender is a tier III sex offender.

(E) Duty to Notify Sex Offenders of Registration Requirements and to Register

- (1) In General.--An appropriate official shall, shortly before release of the sex offender from custody, or, if the sex offender is not in custody, immediately after the sentencing of the sex offender, for the offense giving rise to the duty to register—
 - a) inform the sex offender of the duties of a sex offender under this title and explain those duties;
 - b) require the sex offender to read and sign a form stating that the duty to register has been explained and that the sex offender understands the registration requirement; and
 - c) ensure that the sex offender is registered.
- (2) Notification of Sex Offenders Who Cannot Comply--The Attorney General of the Tribe shall prescribe rules for the notification of sex offenders who cannot be registered.

COMMENTARY

The short and long sentencing schemes have been taken and modified from various sources. They are designed to allow a judge to impose increasing sanctions based on different levels of criminal conduct. Class 1 includes the most serious offenses and Class 3 the least serious. If a tribe chooses to use a similar classification scheme, it will then need to go back to each of the crimes and assign them to a particular class. For example, Aggravated Sexual Abuse is a more serious crime than Endangering the Welfare of a Child.

The sex offender registration provisions have been taken and modified from the Adam Walsh Act of 2006. (See relevant portions of the law below). Under the Act, Non PL 280 tribes that did not pass a tribal resolution by July 27, 2007, automatically delegated the registry function to the state. States will manage registries in PL 280 states. The outcome of the tribal policy choice will affect the scope and structure of any tribal registry.

THE ADAM WALSH ACT: IMPACT ON INDIAN TRIBES¹⁹

Notice: Non PL 280 tribes that do not pass a tribal resolution by July 27, 2007 will automatically delegate jurisdiction over sex offender registration to the state.

The Adam Walsh Child Protection and Safety Act of 2006 (PL 109-248) (“SORNA”) was signed into law on the 25 anniversary of the abduction and murder of Adam Walsh (son of John Walsh of America’s Most Wanted) on July 27, 2006.

The Act expands the National Sex Offender Registry. It requires that all states and tribes that decided to “opt in” participate in an integrated, uniform registry system. All law enforcement will have access to the same information across the United States, helping prevent sex offenders from evading detection by moving from state to state or reservation to state. The U.S. Attorney General’s Office is required to develop the software for the system.

Certain information from the Registry will be available to the public on an internet site.

¹⁹ Excerpt from the Tribal Court Clearinghouse.

The Sex Offender Registration and Notification Act (SORNA) provides tough mandatory minimum penalties for most serious crimes against children and increases penalties for crimes such as sex trafficking of children and child prostitution.

It is a felony for a sex offender to fail to register.

Sex offenders must register more frequently and in person.

It provides grants to help institutionalize sex offenders who have shown they cannot change their behavior and are about to be released from prison.

It authorizes new regional Internet Crimes Against Children Taskforces that will provide funding and training to help State and local law enforcement combat crimes involving the sexual exploitation of minors on the Internet.

It creates a new National Child Abuse Registry and requires investigators to do background checks of adoptive and foster parents before they are approved to take custody of a child.

Non-Public Law 280 tribes must pass a resolution or other enactment indicating their intention and desire to participate in the national system and meet the requirements of SORNA. Even if a tribe already has its own sex offender registry, it must pass this resolution if it wants to participate. If it does not pass a resolution within that time, it will be taken as a delegation of the responsibility to manage a sex offender registry to the state, and the state will be granted access to the tribal territory to implement the law. A tribe electing to function as a Registry may enter into cooperative agreements with the state to share responsibilities.

If the tribe is affected by PL 280, the state is automatically responsible for the implementation of Sex Offender Registration on the reservation (regardless of whether the tribe may have already implemented registry) and the tribe must provide the access and cooperate with the state.

Funds and software will be made available.

The Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking (“SMART”) office was created to administer national standards for sex offender registration and notification.

Action Needed

Every non-PL 280 tribe that wants to manage its own sex offender registry and notification system must pass a resolution or other enactment indicating its intention to implement a sex offender registration system which complies with the Adam Walsh Act (SORNA) before July 27, 2007.

The Tribe must send a copy of the resolution or other enactment via certified mail to the SMART Office c/o Leslie A. Hagen. Her address is: Leslie Hagen, SMART Office, Office of Justice Programs, Department of Justice, 810 7th Street, NW, Suite 8241, Washington DC 20531.

A Tribe electing to participate in the system has until July 27, 2009 to fully comply with all the requirements of the law, but must make its election before July 27, 2007.

Special Note: It is important to bear in mind that fines and imprisonment are just a part of the defendant’s accountability/rehabilitation process. Treatment is also necessary. Treatment is especially crucial when the offender is a member of the community and will likely remain a member of the community for his or her lifetime. Without treatment, the defendant has a higher likelihood of re-offending. Problems like alcohol/substance abuse, unemployment, poor parenting skills, and/or mental health issues need to be assessed and addressed. Sex offender treatment is problematic as there is debate about the efficacy of the different models. Different modes of treatment include: group therapy, individual counseling, dyadic treatment, family counseling, etc. At a minimum the objective should be to have the offender understand the effects of the abuse on the individual, family and community (develop empathy) in order to decrease the risk of re-offense. The various models and modes of therapy should be thoroughly researched and tailored to tribal needs and values to maximize their effectiveness

SELECTED TRIBAL CODES

COLVILLE TRIBAL LAW AND ORDER CODE

TITLE 2 - RULES OF PROCEDURE

SECTION 2-2-174 PER CAPITA PAYMENTS/DIVIDENDS

- a) Unless otherwise provided by the Business Council, the Tribal Court and all the judges thereof shall have the authority and power to order that all per capita payments/dividends of judgment debtors, as authorized by 25 U.S.C.A. §117b, be available for execution of judgment and to order appropriate tribal or federal officials to seize all per capita payments/dividends of judgment debtors which may arise in the present or future, as much of said payments/dividends as appears necessary to satisfy any judgment of the Tribal Court where the Confederated Tribes of the Colville Reservation, as party plaintiff, was awarded money damages or money judgment for payment on contracted obligations, contracted indebtedness, or otherwise.

SKOKOMISH TRIBAL CODE

SECTION 9.11.020 SENTENCING GUIDELINES

Factors that the court shall take into consideration when determining the character and duration of a convicted offender's sentence are: whether the offender has previously appeared before the court as a criminal defendant, and if so, whether the offender appears to the court to be establishing a pattern of criminal conduct; whether the offender has previously been found guilty of a criminal offense before a court of any other jurisdiction; whether the immediate offense was of a willful or malicious nature; whether the offender has attempted to make amends, and if so, the extent of the offender's resources and the needs of his or her dependents, if any, and the needs of any victims.

For offenders that have previously been found guilty of the same or like offense, the sentence the court imposes shall be more severe than the last sentence ordered for that person.

The penalties set forth below are ranges that set the maximum and minimum penalties for each class of offense.

CLASS "A":

- Maximum Penalty:
- 1 year jail time and/or \$5,000.00 fine and/or community service.
- Minimum Penalty:
- 6 months jail time and/or \$2,500.00 fine and/or community service.

CLASS "B":

- Maximum Penalty:
- 6 months jail time and/or \$2,500.00 fine and/or community service.
- Minimum Penalty:
- 30 days jail time and/or \$1,000.00 fine and/or community service.

CLASS "C":

- Maximum Penalty:
- 30 days jail time and/or \$1,000.00 fine and/or community service.
- Minimum Penalty:
- 3 days in jail and/or \$500.00 fine and/or community service.

CLASS “D”:

- Maximum Penalty:
- 3 days jail time and/or \$500.00 fine and/or community service.
- Minimum Penalty:
- \$50.00 fine and community service.

Restitution to be paid through the payment of money damages, the surrender of property, or the performance of any other act for the benefit of the injured party, may be ordered by the court and shall be considered to be in addition to any other penalty based on the class of offense committed and handed down by the court. Up to fifty percent (50%) of a fine may be paid through community service work.

POARCH BAND OF CREEK INDIANS TRIBAL CODE
[INCLUDES AMENDMENTS AND ADDITIONS DATED THROUGH 2004]
TITLE 8 CRIMINAL CODE

Section §8-1-1 Misdemeanor Offenses

- a) All offenses enumerated here shall be misdemeanor offenses. A misdemeanor offense is hereby defined as an offense for which a sentence to a term of imprisonment not in excess of twelve (12) months and/or a fine not to exceed Five Thousand Dollars (\$5,000.00) may be imposed.

Section §8-1-2 Classification of Offenses

- a) Misdemeanor offenses are classified according to the relative seriousness of the offense into three (3) categories:
- 1) Class A Misdemeanor
 - 2) Class B Misdemeanor
 - 3) Class C Misdemeanor

Section §8-1-3 Range of Sentences of Imprisonment for Misdemeanors

- a) Sentences for misdemeanors shall be a definite term of imprisonment in an incarceration facility located within Escambia County, Alabama, which the Poarch Band of Creek Indians has approved and entered into a contract with, or to hard labor or community service for the Poarch Band of Creek Indians within the following limitations:
- 1) For Class A Misdemeanor, not more than twelve (12) months;
 - 2) For Class B Misdemeanor, not more than six (6) months;
 - 3) For Class C Misdemeanor, not more than three (3) months.

Section §8-1-4 Range of Fines for Misdemeanors

- (a) Sentences to pay fines for misdemeanors shall be for a definite amount, fixed by the Tribal Court, within the following limitations:
- 1) For a Class A Misdemeanor, not more than Five Thousand Dollars (\$5,000.00);
 - 2) For a Class B Misdemeanor, not more than Two Thousand Five Hundred Dollars (\$2,500);
 - 3) For a Class C Misdemeanor, not more than One Thousand Dollars (\$1,000.00).

SWINOMISH TRIBAL CODE
TITLE 4 - CRIMINAL CODE

Section 4-12.010 General Conditions.

- (A) Any person who has been convicted by the Tribal Court of a violation of a provision of this Title for which a penalty may be imposed, may be fined and/or sentenced by the court to serve time in jail and/or sentenced to work for the benefit of the community.
- (B) No fine or time served shall exceed the maximum period set for the offense in this Title or elsewhere in the Swinomish Tribal Code.
- (C) Any work done for the benefit of the community shall be done under the supervision of an authorized agent of the Tribe.

[History] Ord. 184 (9/30/03); Ord. 75 (4/2/91).

Section 4-12.020 Classes of Offenses.

- (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.

Section 4-12.010 General Conditions.

4-01.070 Custom/Other Law.

- (A) Customs and usages of the Swinomish Indian Tribal Community.
- (B) As to any matters that are not covered by the codes, ordinances and resolutions of the Tribe, or by the traditional customs and usages of the Tribe, the Tribal Court may be guided by common law as developed by other tribal, state or federal courts.

[History] Ord. 184 (9/30/03); Ord. 75 (4/2/91).

SELECTED FEDERAL CODES

ADAM WALSH ACT

42 USC § 16913 REGISTRY REQUIREMENTS FOR SEX OFFENDERS.

- (a) **In General.**--A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.
- (b) **Initial Registration.**--The sex offender shall initially register—
 - (1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or
 - (2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.
- (c) **Keeping the Registration Current.**--A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.
- (d) **Initial Registration of Sex Offenders Unable To Comply With Subsection (b).**--The Attorney General shall have the authority to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).
- (e) **State Penalty for Failure To Comply.**--Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this title.

42 USC § 16914 Information Required In Registration.

- (a) **Provided by the Offender.**--The sex offender shall provide the following information to the appropriate official for inclusion in the sex offender registry:
 - (1) The name of the sex offender (including any alias used by the individual).
 - (2) The Social Security number of the sex offender.
 - (3) The address of each residence at which the sex offender resides or will reside.
 - (4) The name and address of any place where the sex offender is an employee or will be an employee.
 - (5) The name and address of any place where the sex offender is a student or will be a student.
 - (6) The license plate number and a description of any vehicle owned or operated by the sex offender.
 - (7) Any other information required by the Attorney General.
- (b) **Provided by the Jurisdiction.**--The jurisdiction in which the sex offender registers shall ensure that the following information is included in the registry for that sex offender:
 - (1) A physical description of the sex offender.
 - (2) The text of the provision of law defining the criminal offense for which the sex offender is registered.
 - (3) The criminal history of the sex offender, including the date of all arrests and convictions; the status of parole, probation, or supervised release; registration status; and the existence of any outstanding arrest warrants for the sex offender.
 - (4) A current photograph of the sex offender.
 - (5) A set of fingerprints and palm prints of the sex offender.
 - (6) A DNA sample of the sex offender
 - (7) A photocopy of a valid driver's license or identification card issued to the sex offender by a jurisdiction.

- (8) Any other information required by the Attorney General.

42 USC § 16915 Duration Of Registration Requirement.

- a) **Full Registration Period.**--A sex offender shall keep the registration current for the full registration period (excluding any time the sex offender is in custody or civilly committed) unless the offender is allowed a reduction under subsection (b). The full registration period is--

- (1) 15 years, if the offender is a tier I sex offender;
- (2) 25 years, if the offender is a tier II sex offender; and
- (3) the life of the offender, if the offender is a tier III sex offender.

- (b) **Reduced Period for Clean Record.**--

- (1) **Clean record.**-- The full registration period shall be reduced as described in paragraph (3) for a sex offender who maintains a clean record for the period described in paragraph (2) by—
 - (A) not being convicted of any offense for which imprisonment for more than 1 year may be imposed;
 - (B) not being convicted of any sex offense;
 - (C) successfully completing any periods of supervised release, probation, and parole; and
 - (D) successfully completing of an appropriate sex offender treatment program certified by a jurisdiction or by the Attorney General.

- (2) **Period.**-- In the case of--

- (A) a tier I sex offender, the period during which the clean record shall be maintained is 10 years; and
- (B) a tier III sex offender adjudicated delinquent for the offense which required registration in a sex registry under this title, the period during which the clean record shall be maintained is 25 years.

- (3) **Reduction.**-- In the case of--

- (A) a tier I sex offender, the reduction is 5 years;
- (B) a tier III sex offender adjudicated delinquent, the reduction is from life to that period for which the clean record under paragraph (2) is maintained.

42 USC § 16916 Periodic In Person Verification.

A sex offender shall appear in person, allow the jurisdiction to take a current photograph, and verify the information in each registry in which that offender is required to be registered not less frequently than--

- (1) each year, if the offender is a tier I sex offender;
- (2) every 6 months, if the offender is a tier II sex offender; and
- (3) every 3 months, if the offender is a tier III sex offender.

42 USC § 16917 Duty To Notify Sex Offenders Of Registration Requirements And To Register.

- a) **In General.**--An appropriate official shall, shortly before release of the sex offender from custody, or, if the sex offender is not in custody, immediately after the sentencing of the sex offender, for the offense giving rise to the duty to register—

- (1) inform the sex offender of the duties of a sex offender under this title and explain those duties;
- (2) require the sex offender to read and sign a form stating that the duty to register has been explained and that the sex offender understands the registration requirement; and
- (3) ensure that the sex offender is registered.

- b) **Notification of Sex Offenders Who Cannot Comply With Subsection (a).**--The Attorney General shall prescribe rules for the notification of sex offenders who cannot be registered in accordance with subsection (a).

SELECTED STATE CODES

FLORIDA STATE CODE SECTION § 921.001.

SENTENCING COMMISSION AND SENTENCING GUIDELINES GENERALLY

(The first part of this section sets out how to establish a Commission which would determine sentencing policy.)

- (1) The provision of criminal penalties and of limitations upon the application of such penalties is a matter of predominantly substantive law and, as such, is a matter properly addressed by the Legislature. The Legislature, in the exercise of its authority and responsibility to establish sentencing criteria, to provide for the imposition of criminal penalties, and to make the best use of state prisons so that violent criminal offenders are appropriately incarcerated, has determined that it is in the best interest of the state to develop, implement, and revise a uniform sentencing policy in cooperation with the Supreme Court. In furtherance of this cooperative effort, the Legislature created a Sentencing Commission, responsible for the initial development of a statewide system of sentencing guidelines, evaluating these guidelines periodically, and recommending on a continuing basis changes necessary to ensure incarceration of:
 - a) Violent criminal offenders; and
 - b) Nonviolent criminal offenders who commit repeated acts of criminal behavior and who have demonstrated an inability to comply with less restrictive penalties previously imposed for nonviolent criminal acts.
- (2)
 - a) The commission is composed of 17 members, consisting of: 2 members of the Senate appointed by the President of the Senate; 2 members of the House of Representatives appointed by the Speaker of the House of Representatives; the Chief Justice of the Supreme Court or a member of the Supreme Court designated by the Chief Justice; 3 circuit court judges, 1 county court judge, and 1 representative of the victim advocacy profession, appointed by the Chief Justice of the Supreme Court; the Attorney General or her or his designee; and the secretary of the Department of Corrections or her or his designee. The following members are appointed by the Governor: one state attorney recommended by the Florida Prosecuting Attorneys Association; one public defender recommended by the Public Defenders Association; one private attorney recommended by the President of The Florida Bar; and two persons of the Governor's choice. The membership of the commission shall reflect the geographic and ethnic diversity of the state. The Chief Justice or the member of the Supreme Court designated by the Chief Justice serves as chair of the commission.
 - b) The members of the commission appointed by the Governor and the members from the Senate and the House of Representatives serve 2-year terms. The members appointed by the Chief Justice of the Supreme Court serve at her or his pleasure.
 - c) Membership on the commission does not disqualify a member from holding any other public office or from being employed by a public entity. The Legislature finds and declares that the commission serves a state, county, and municipal purpose and that service on the commission is consistent with a member's principal service in a public office or in public employment.
 - d) Members of the commission serve without compensation but are entitled to be reimbursed for per diem and travel expenses as provided for in s. 112.061.
 - e) The office of the State Courts Administrator shall act as staff for the commission and shall provide all necessary data collection, analysis, and research, and support services.
- (3)
 - a) The commission shall meet annually or at the call of the chair to review sentencing practices and recommend modifications to the guidelines. In recommending modifications to the sentencing guidelines, the commission shall take into consideration the existing sentencing and release practices and correctional resources, including the capacities of local and state correctional facilities, in addition to other relevant factors.

- b) For the purpose of assisting the commission in recommending modifications to the sentencing guidelines, the Department of Corrections is authorized to collect and evaluate data on sentencing practices in the state from each of the judicial circuits and provide technical assistance to the commission upon request. The Department of Corrections shall, no later than October 1 of each year, provide the commission with a yearly report detailing the rate of compliance of each judicial circuit in providing score sheets to the department.
- (4) The purpose of the sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge in the sentence decision-making process. The guidelines represent a synthesis of current sentencing theory, historical sentencing practices, and a rational approach to managing correctional resources. The sentencing guidelines are intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense-related and offender-related criteria and in defining the relative importance of those criteria in the sentencing decision.
- (a) The sentencing guidelines embody the principles that:
1. Sentencing is neutral with respect to race, gender, and social and economic status.
 2. The primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment.
 3. The penalty imposed is commensurate with the severity of the primary offense and the circumstances surrounding the primary offense.
 4. The severity of the sentence increases with the length and nature of the offender's prior record.
 5. The sentence imposed by the sentencing judge reflects the length of actual time to be served, shortened only by the application of incentive and meritorious gain-time.
 6. Departures from the recommended sentences established in the guidelines are articulated in writing and made only when circumstances or factors reasonably justify the aggravation or mitigation of the sentence. The level of proof necessary to establish facts that support a departure from the sentencing guidelines is a preponderance of the evidence.
 7. Use of incarcerative sanctions is prioritized toward offenders convicted of serious offenses and certain offenders who have long prior records, in order to maximize the finite capacities of state and local correctional facilities.

COLORADO REVISED STATUTES

TITLE 18. CRIMINAL CODE

ARTICLE 1.3. SENTENCING IN CRIMINAL CASES

PART 4. SENTENCES TO IMPRISONMENT

Section 18-1.3-401. Felonies Classified - Presumptive Penalties

- (I) As to any person sentenced for a felony committed after July 1, 1979, and before July 1, 1984, felonies are divided into five classes which are distinguished from one another by the following presumptive ranges of penalties which are authorized upon conviction: Class Presumptive Range
1. Life imprisonment or death
 2. Eight to twelve years plus one year of parole
 3. Four to eight years plus one year of parole
 4. Two to four years plus one year of parole
 5. One to two years plus one year of parole
- (II) As to any person sentenced for a felony committed on or after July 1, 1984, and before July 1, 1985, felonies are divided into five classes which are distinguished from one another by the following presumptive ranges of penalties which are authorized upon conviction: Class Presumptive Range
1. Life imprisonment or death
 2. Eight to twelve years
 3. Four to eight years
 4. Two to four years
 5. One to two years
- (III) (A) As to any person sentenced for a felony committed on or after July 1, 1985, except as otherwise provided in sub-subparagraph (E) of this subparagraph (III), in addition to, or in lieu of, any sentence to imprisonment, probation, community corrections, or work release, a fine within the following presumptive ranges may be imposed for the specified classes of felonies: Class Minimum Sentence Maximum Sentence
1. No fine No fine
 2. Five thousand dollars One million dollars
 3. Three thousand dollars Seven hundred fifty thousand dollars
 4. Two thousand dollars Five hundred thousand dollars
 5. One thousand dollars One hundred thousand dollars
 6. One thousand dollars One hundred thousand dollars
- (B) Notwithstanding any provision of law to the contrary, any person who attempts to commit, conspires to commit, or commits against an elderly person any felony set forth in part 4 of article 4 of this title, in part 1, 2, 3, or 5 of article 5 of this title, article 5.5 of this title, or section 11-51-603, C.R.S., shall be required to pay a mandatory and substantial fine within the limits permitted by law. However, all moneys collected from the offender shall be applied in the following order: Costs for crime victims' compensation fund pursuant to section 24-4.1-119, C.R.S.; surcharges for victims and witnesses assistance and law enforcement fund pursuant to section 24-4.2-104, C.R.S.; restitution; time payment fee; late fees; and any other fines, fees, or surcharges. For purposes of this sub-subparagraph (A.5), an "elderly person" or "elderly victim" means a person sixty years of age or older.

- (C) Failure to pay a fine imposed pursuant to this subparagraph (III) is grounds for revocation of probation or revocation of a sentence to community corrections, assuming the defendant's ability to pay. If such a revocation occurs, the court may impose the maximum sentence allowable in the given sentencing ranges.
- (D) Each judicial district shall have at least one clerk who shall collect and administer the fines imposed under this subparagraph (III) and under section 18-1.3-501 in accordance with the provisions of subparagraph (D) of this subparagraph (III).
- (E) All fines collected pursuant to this subparagraph (III) shall be deposited in the fines collection cash fund, which fund is hereby created. The general assembly shall make annual appropriations out of such fund for administrative and personnel costs incurred in the collection and administration of said fines. All unexpended balances shall revert to the general fund at the end of each fiscal year.
- (F) Notwithstanding the provisions of sub-subparagraph (A) of this subparagraph (III), a person who has been twice convicted of a felony under the laws of this state, any other state, or the United States prior to the conviction for which he or she is being sentenced shall not be eligible to receive a fine in lieu of any sentence to imprisonment, community corrections, or work release but shall be sentenced to at least the minimum sentence specified in subparagraph (V) of this paragraph (a) and may receive a fine in addition to said sentence.

EXERCISES

1. In the following list, check any of the penalties which you think should be available to a tribal judge when sentencing someone who has been convicted of victimizing a child.

- Fines
- Community Service
- Restraining/Protection Orders
- Probation
- Jail Time
- Exclusion (Banishment)
- Loss of "Per Capita" Payments
- Loss of Hunting/Fishing Privileges
- Loss of Firearm Privileges
- Suspension of Business License
- Other

2. Check any of the following treatments which you think your tribal judges should be able to require for someone who has been convicted of victimizing a child.

- General Counseling
- Sex Offender Treatment
- Alcohol/Drug Treatment
- Family Group Counseling
- Other

3. Check any of the following victim restitution which you think your tribal judges should be able to order for someone who has been convicted of victimizing a child.

- Payment for Victim Counseling
- Ceremonial/Traditional Healing
- Public Apology
- CAC or CASA Program
- Payment to Tribal Victim Services
- Programs
- Other

4. Do you have a tribal jail in your community? Do you contract with another jurisdiction for jail beds? Does your community need to consider the cost of beds/day in setting the length of sentences?

5. Are there any traditional and/or customary remedies that should be included?

6. Test any draft provision using the **OUHE** test. Is your draft provision **O**verinclusive - can you think of a person or situation that it might apply to that you did not intend? Is your draft provision **U**nderinclusive - can you think of a person or situation that you meant for it to apply to, but when you read your language it appears not to apply? Is your draft provision likely to be **H**ard to enforce? Does your provision (or another provision) include an **E**nforcement process and will it work? Discuss any difficulties you encounter and brainstorm ways of changing the language to fix them.

ADDITIONAL RESOURCES

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2. Matthew D. Borrelli, *Banishment: The Constitutional and Public Policy Arguments Against This Revived Ancient Punishment*, 36 Suffolk U. L. Rev. 469, (2003).
3. Mark Chaffin, Elizabeth Letourneau, & Jane F. Silovsky, *Adults, Adolescents, and Children Who Sexually Abuse Children* in John Myers Eds. *The APSAC Handbook on Child Maltreatment Second Edition*, 2002.
4. Chamberlain, P., & Reid, J.B. (1998). *Comparison of Two Community Alternatives to Incarceration for Chronic Juvenile Offenders*. *Journal of Consulting & Clinical Psychology*, 66, 624-633.
2. Geer, T.M., Becker, J.V., Gray, S., Krauss, J.D. (2001) *Predictors of Treatment Completion in a Correctional Sex Offender Treatment Program*. *International Journal of Offender Therapy and Comparative Criminology*, 45(3), 302-313.
3. Clare E. Lyon, *Alternative Methods for Sentencing Youthful Offenders: Using Traditional Tribal Methods as a Model*, 4 Ave Maria L. Rev. 211, (2006).
4. Nicolas N. Groth, F.W. Hobson, & S.T. Gary, *The Child Molester: Clinical Observations. Social Work and Human Sexuality*, 1, 129-144 (1982).
5. Vernon Quinsey, *Assessment of Sex Offenders Against Children* Second Edition, APSAC Study Guides, Thousand Oaks, California: Sage Publications (2001).
6. Debra Todd, *Sentencing of Adult Offenders in Cases Involving Sexual Abuse of Children: Too Little, Too Late? A View from the Pennsylvania Bench*, 109 Penn St. L. Rev. 487, (2004).
7. Todd Taylor, *The Cultural Defense and its Irrelevancy in Child Protection Law*, 17 B.C. Third World L.J. 331, (1997).
8. United States Sentencing Commission, *Federal Guidelines Manual* 2006, available at <http://www.ussc.Gov/2006guid/TABCON06.Htm>, visited 11 April 2008.
9. Alabama Sentencing Commission, *Initial Voluntary Sentencing Standards & Worksheets*, available at <http://sentencingcommission.alacourt.Gov>, visited 3 April 2008.

NOTES

Chapter 19

VICTIM IMPACT STATEMENTS

ALLOWING THE CHILD TO SPEAK about the impact of the crime can be very significant for the resolution of the crime and the healing of the child. The Victim Impact Statement which describes what has happened to them as a result of the offense can be a written, verbal, or taped statement. The Child Protection Act of 1990 allows children to submit Victim Impact Statements, consistent with their age and cognitive development, in federal courts. This means that children can submit drawings, models, a story, or whichever they prefer. In addition, the Federal Crime Act of 1994 gave crime victims the right to speak at sentencing. Every state allows some form of the Victim Impact Statement at sentencing. Each state decides whether it can be written or oral. The Victim Impact Statement is consistent with many tribal traditions which focus on the rights of the victim. Tribes will need to decide whether the Victim Impact Statement right should be incorporated into the tribal legal system.

In many situations, those who are providing support to the child victim also have insight into how the crime has impacted the child. All those who are close to the child victims and thus affected by the harm done to the child, should have an opportunity to make victim impact statements to the court. These statements may also impact sentencing as well as probation conditions and post-release requirements so it is important to offer a mechanism for the court to hear how the crime against a child has impacted not only the child, but the child's family and even the community.

ILLUSTRATIVE EXAMPLE

CHAPTER X SECTION X

The victim has the right to submit or make a written or oral impact statement to the court for use in preparing a pre-sentence investigation report. The victim impact statement may include but is not limited to the following: an explanation of the nature and extent of any physical, psychological, or emotional harm or trauma suffered by the victim, any economic loss, an opinion about the need for restitution, and the victim's recommendation on sentencing.

COMMENTARY

The language in the example has been taken and modified from various sources. Your tribe should determine how the process will work. Who should be responsible for the notification to the victim? Where should the victim take the statement? Should the statement be written or can the statement be oral? Should there be a separate provision in the sentencing code protecting the victim's right to make the statement?

SELECTED TRIBAL CODES

STATUTES OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS

TITLE 9 - CRIMINAL OFFENSES

Section § 106 – Sentencing

- (a) Victim's Impact Statement. Prior to sentencing, the Court shall inform the victim(s) of their right to submit a written statement to the Court detailing the physical, material, and emotional damages that they suffered as a result of the offender's actions. The judge, in his/her discretion, may allow oral testimony to be taken regarding such damages, in addition to, or in lieu of, the written statement.

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS TRIBAL CODE

CHAPTER 75: CRIME VICTIM'S RIGHTS

Section § 75.114 Impact Statement for Sentencing

The victim has the right to submit or make a written or oral impact statement to the probation officer for use by that officer in preparing a presentence investigation report concerning the defendant. A victim's written statement shall, upon the victim's request, be included in the presentence investigation report.

Section § 75.115 Right to Make Statement at Sentencing

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

SELECTED FEDERAL AND STATE CODES

FEDERAL RULES OF CRIMINAL PROCEDURE

RULE 32. SENTENCING AND JUDGMENT

(i) Sentencing.

(4) Opportunity to Speak.

(B) By a Victim.

Before imposing sentence, the court must address any victim of a crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about the sentence. Whether or not the victim is present, a victim's right to address the court may be exercised by the following persons if present:

- (i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or
 - (ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated.
- (C) In Camera Proceedings.

Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

ILLINOIS COMPILED STATUTES ANNOTATED

CHAPTER 725 ILCS 120

SECTION 6. RIGHTS TO PRESENT VICTIM IMPACT STATEMENT

Sec. 6. Rights to present victim impact statement.

- a. In any case where a defendant has been convicted of a violent crime or a juvenile has been adjudicated a delinquent for a violent crime and a victim of the violent crime or the victim's spouse, guardian, parent, grandparent, or other immediate family or household member is present in the courtroom at the time of the sentencing or the disposition hearing, the victim or his or her representative shall have the right and the victim's spouse, guardian, parent, grandparent, and other immediate family or household member upon his, her, or their request may be permitted by the court to address the court regarding the impact that the defendant's criminal conduct or the juvenile's delinquent conduct has had upon them and the victim. The court has discretion to determine the number of oral presentations of victim impact statements. Any impact

statement must have been prepared in writing in conjunction with the Office of the State's Attorney prior to the initial hearing or sentencing, before it can be presented orally or in writing at the sentencing hearing. In conjunction with the Office of the State's Attorney, a victim impact statement that is presented orally may be done so by the victim or the victim's spouse, guardian, parent, grandparent, or other immediate family or household member or his, her, or their representative. At the sentencing hearing, the prosecution may introduce that evidence either in its case in chief or in rebuttal. The court shall consider any impact statement admitted along with all other appropriate factors in determining the sentence of the defendant or disposition of such juvenile.

- b. The crime victim has the right to prepare a victim impact statement and present it to the Office of the State's Attorney at any time during the proceedings. (Any written victim impact statement submitted to the Office of the State's Attorney shall be considered by the court during its consideration of aggravation and mitigation in plea proceedings under Supreme Court Rule 402).
- c. This Section shall apply to any victims of a violent crime during any dispositional hearing under Section 5-705 of the Juvenile Court Act of 1987 [705 ILCS 405/5-705] which takes place pursuant to an adjudication of delinquency for any such offense.

EXERCISES

1. Does your tribal code contain a provision for victim impact statements? Who may submit a victim impact statement? Is there a provision for child advocates to do this on behalf of the child? For the child's family members to do it?

2. What should be included in the Victim Impact Statement? (Example: The statements usually include descriptions of the harm done to the individual and family, the financial, physical, psychological and emotional impact. It also includes restitution and it may include his/her opinion about the appropriate sentence.)

3. Test any draft provision using the **OUHE** test. Is your draft provision **O**verinclusive - can you think of a person or situation that it might apply to that you did not intend? Is your draft provision **U**nderinclusive - can you think of a person or situation that you meant for it to apply to, but when you read your language it appears not to apply? Is your draft provision likely to be **H**ard to enforce? Does your provision (or another provision) include an **E**nforcement process and will it work? Discuss any difficulties you encounter and brainstorm ways of changing the language to fix them.

ADDITIONAL RESOURCES

1. Ellen Alexandra and Janice Harris Lord, *Impact Statements: A Victims Right to Speak... A Nations Responsibility to Listen*, National Center for Victims of Crime (1994).
2. Larry Echohawk, *Child Sexual Abuse in Indian Country: Is the Guardian Keeping in Mind the Seventh Generation* (2001).
3. National Center for Victims of Crime, *Special Provisions for Children in the Criminal Justice System*, Get Help Series, Arlington, VA (1996).