

# Tribal Justice and Sex Trafficking: Implications for State Court Response

Native American women experience the highest rates of domestic violence, sexual violence and sex trafficking of any group in the United States.<sup>1</sup> Since an effective response requires interagency coordination and informed decision-making, it is imperative that state courts have a working knowledge of tribal justice and that each state court build respectful, collaborative relationships with their tribal justice system colleagues.

While some state courts are knowledgeable about and collaborate closely with nearby tribal communities, others have historically had distant or even strained relationships with their tribal counterparts. This has resulted in dangerous offenders slipping through the cracks and victims not receiving the support and justice they deserve. Native Americans have often had negative experiences with state justice systems, which may feel intimidating, unsafe, discriminatory, and unresponsive to their needs. Collaborative efforts can help ensure that the court's response is as culturally competent and effective as possible, and improve Native litigants' experience with the state court system and increase their willingness to utilize it to access safety and justice.

Tribal justice, though, can be quite complicated. Here are some important things to know:

- There are over 560 federally-recognized tribes in the United States, and scores more that are state-recognized, or have not yet been granted government recognition (unfortunately, the federal recognition process can take decades). Each tribe has its own unique culture, history, language and traditions. Although there are some values and practices that are shared by many tribes, it's important to acknowledge that there's no such thing as "Native American culture."
- Federally-recognized tribes are sovereign nations with their own governments, laws and legal systems, and the authority to make and enforce their own criminal and civil laws. The U.S. government also has a "trust relationship" with the tribes, which means that it's obligated to provide the tribes with certain protections, resources, and services, such as health care.
- Tribal justice systems are extremely diverse. Some adhere closely to Western-style structures and processes, whereas others utilize traditional tribal justice practices, such as peacemaking, elder panels, and sentencing circles. Many incorporate both Western and traditional elements. Regardless of the specifics, all tribal justice systems are working hard to serve and protect their communities, often with limited and inconsistent resources. For example, in some communities, police officers must patrol large swaths of land, causing police response to crime reports to take two or more hours. And some tribes struggle to fund the key components of their justice systems, including judges, court staff, prosecutors, and probation.
- Determining jurisdiction over tribal justice matters can be challenging, and is a frequent source of confusion and frustration for community members and providers. The variables that determine jurisdiction in a

particular case include: whether or not the crime occurred on tribal land; whether or not the offender is Native American; whether or not the victim is Native American; whether or not the neighboring state is a Public Law 280 state; and the type of crime that was committed. In P.L. 280 states, the tribe and state share criminal jurisdiction, whereas in non-P.L. 280 states, the tribe and federal government share jurisdiction. Native offenders can be prosecuted in both tribal and state or federal courts. However, tribes do not have any criminal jurisdiction over non-Native offenders. This is especially problematic in regard to violence against Native women, most of which is perpetrated by non-Native men. (For a more detailed explanation of these jurisdictional issues, see: <http://www.tribal-institute.org/lists/jurisdiction.htm>)

- A series of Supreme Court decisions imposed limitations on tribal justice systems' handling of criminal cases. The Major Crimes Act gave the federal government joint jurisdiction over certain felonies, and tribal courts were limited to imposing one year of incarceration and/or a \$5000 fine for each conviction, regardless of the severity of the offense. This is a serious barrier to holding offenders accountable for such serious offenses as domestic violence, sexual violence, and sex trafficking, and to protecting victims and communities from these offenders. The Tribal Law and Order Act of 2010 (TLOA) attempted to remedy this problem by allowing tribes to impose sentences of up to three years incarceration. However, TLOA includes numerous requirements that many tribes are unable to meet due to resource limitations, such as providing attorneys for all defendants.
- The federal Violence Against Women Act of 1994 (VAWA) awarded full faith and credit to all tribal court orders. When it was reauthorized in 2013, VAWA invited tribes to reassert jurisdiction over non-Native domestic violence offenders, again provided that the tribes meet certain practice standards. The expanded

jurisdiction only applies to intimate partner violence crimes, though some sex traffickers and their victims may actually meet the Act's definition of "intimate partners."

- Many Native communities have had profoundly negative experiences with federal and state governments and non-Native people. These interactions have included persecution, genocide, disproportionate rates of incarceration, gender-based violence, sexual exploitation, prohibitions on traditional language, religion and cultural practices, discrimination, forcible separation of children from their families, and broken promises. Native women in particular were frequently dehumanized by the colonizers; enslavement and sexual violence were used as tactics of oppression by westward settlers and the U.S. military. This history has resulted in understandable mistrust and skepticism, even today, of outsiders and U.S. government agencies and personnel. Native communities also suffer from severe intergenerational trauma, long-lasting damage to families and communities, and high rates of psychosocial problems. Tribes have demonstrated tremendous resilience in confronting these problems and engaging in individual and collective healing processes.

When crafting a court response to sex trafficking, it is critical to understand the unique history and dynamics of the trafficking of Native people in the United States. There have been few research studies on this topic, but in conjunction with the stories and experiences of survivors and advocates, they present a disturbing picture. A consensus is emerging that Native people are severely overrepresented among victims of sexual exploitation. For example, a 2011 study found that although Native women comprised 2% of the local population, 24% of those arrested for prostitution were Native.<sup>2</sup> Similarly, a research study with Native women who'd been victims of crime found that 40% had experienced prostitution, 27% were victims of sex trafficking, 50% had a friend

involved with prostitution, and 27% had a family member involved with prostitution.<sup>3</sup>

The known risk factors for sexual exploitation are especially common in Native American communities. These risk factors include high rates of poverty, homelessness, unemployment, domestic violence, child abuse and neglect, and substance abuse; low levels of educational attainment; disconnection from culture and community; and lack of prosocial activities and opportunities. In some families, there may be multigenerational cycles of abuse, exploitation and trauma. These factors make young people especially vulnerable to sexual exploitation—traffickers have been known to “recruit” at Native American schools, group homes, and youth centers, at cultural events like powwows, and at tribal government conferences. Native girls and women may be targeted because of their perceived vulnerability, because of their marketability as “exotic,” and because of the barriers to effective law enforcement on tribal lands. Victims may be transported from tribal reservation to urban area, from one tribal land to another, on “dance” and strip club circuits, or on boats, all patterns of movement which present jurisdictional challenges. Native victims of trafficking are also frequently subjected to racist abuse by their exploiters, most of whom are non-Native.

So what can state courts do to engage in mutually beneficial collaboration with tribal justice systems, and more effectively respond to sex trafficking of Native women?

**1) Identify and learn about the tribes in your area.** The following link lists all recognized tribes by state: <http://www.ncsl.org/issues-research/tribal/list-of-federal-and-state-recognized-tribes.aspx>. For each tribe, learn as much as you can about their unique history, culture, traditions, government, and legal and social service systems. Where appropriate, visit the community to observe and participate in government and cultural events.

**2) Designate a tribal liaison between your court and the tribes in your community.** This could be a judge, court clerk, court attorney, or other staff person. Reach out to each tribe and build relationships with tribal justice system staff by identifying shared goals and inviting tribal justice personnel to visit your court and participate in stakeholder meetings and training events.

**3) Participate in federal-state-tribal court forums.** A list of these forums can be found here: <http://www.walkingoncommonground.org/state.cfm?topic=6>.

**4) Honor tribal court orders by providing them with Full Faith and Credit, as required by VAWA.** Tribal court orders may include civil and criminal protective orders, sex offender registration and management conditions, criminal convictions, offender program mandates, probation, and child custody and visitation orders. Consider how to identify situations in which a defendant has cases in both tribal and state courts and develop procedures to appropriately share information that can facilitate effective criminal investigation, informed decision-making, and offender accountability by both systems.

**5) Utilize tribally-run, culturally-appropriate services for Native litigants.** Some tribes administer their own probation, batterers programs, and sex offender treatment and management programs. In addition, many tribes provide specialized victim services—culture and tradition, and reconnection to one’s community and people, can play a critical role in the physical, emotional, and spiritual healing process. Learn about the services and supports available to tribal members, and how the court can refer and mandate litigants to those services. Also, consider requiring that the community service of Native defendants be conducted within their home community.

**6) Work with technical assistance providers that are knowledgeable about both sex trafficking and tribal justice<sup>4</sup>, and learn more about the sexual exploitation of Native people.** Two highly recommended resources are the research reports “Garden of truth: The prostitution and trafficking of Native women in Minnesota” by Melissa Farley et al., and “Shattered hearts: The commercial sexual exploitation of American Indian women and girls in Minnesota” by Alexandra Pierce. Both publications are available online for free. State court staff may also wish to participate in professional training and conferences on tribal justice issues, such as the annual American Indian Justice Conference and the biannual Indian Nations Justice for Victims of Crime Conference, which includes workshops on sex trafficking.

Despite the many obstacles, it is possible for tribal and state court systems to work together effectively, for the benefit of victims and communities.

## **Author**

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## **Notes**

1. National Congress of American Indians (2013). Policy Insights Brief: Statistics on Violence against Native Women.
2. Farley, M., Matthews, N., Deer, S., Lopez, G., Stark, C. & Hudon, E. (2011). Garden of truth: The prostitution and trafficking of Native women in Minnesota. St. Paul, MN: Minnesota Indian Women’s Sexual Assault Coalition, and Prostitution Research and Education.
3. Pierce, A. (2009). Shattered hearts: The commercial sexual exploitation of American Indian women and girls in Minnesota. Minneapolis, MN: Minnesota Indian Women’s Resource Center.
4. Recommended technical assistance providers include Mending the Sacred Hoop ([www.mschoop.org](http://www.mschoop.org)), the Tribal Law and Policy Institute ([www.tribal-institute.org](http://www.tribal-institute.org)), and the Center for Court Innovation ([www.centerinnovation.org](http://www.centerinnovation.org)).