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Addressing Stalking in Native American Communities

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While more than one million women in the United States are stalked each year, American Indian/Alaska Native women are stalked at a rate at least twice that of any other race. Statistics established by the 1998 National Violence Against Women Survey reflect that 17 percent of American Indian and Alaska Native women are stalked in their lifetime, compared to 8.2 percent of white women, 6.5 percent of African-American women, and 4.5 percent of Asian/Pacific Islander women.

Although there is a tendency to view these findings with skepticism due to a variety of reasons, including the small number of American Indian/Alaska Native women participating in the survey (88 out of 8,000), the statistics are consistent with other studies showing that Native Americans are at a significantly greater risk of violence than other Americans. In fact, American Indians are sexually assaulted at a rate 3.5 times higher than that for all races, and approximately 75 percent of the violence perpetrated involves offenders of a different race.

In recognition of these and other issues, the Violence Against Women Office funded a Technical Assistance initiative in late 2001 to specifically assist tribal nations in developing effective interventions, services, and coordinated community responses to stalking crimes perpetrated on Indian women. The project involves a collaborative effort between the Stalking Resource Center and Native American Circle, Ltd., a nonprofit, victim advocacy, technical assistance and training organization.

The District of Columbia, Puerto Rico, the Virgin Islands, and Guam, as well as all fifty states, have enacted antistalking laws. Formal programs to enforce the laws and support stalking victims have been or are being developed in jurisdictions across the country. However, despite these efforts nationwide, few tribes, as sovereign tribal governments, have legal code in place to address stalking and even fewer have developed formal criminal justice protocol to effectively and appropriately respond to those crimes. In fact, few tribes possess arrest records substantiating arrests for stalking, and even fewer possess prosecution case summaries.

The reasons for these problems are many and are as uniquely varied as the cultures, customs and traditions of the more than 500 federally-recognized American Indian and Alaska Native tribes. The result of complex relationships that have historically existed between tribes and federal and state governments, public policy dating back to the 1830s has over time created substantial jurisdictional issues that directly impact the type and quality of victim response programs in Indian country.

The concept of tribal sovereignty-the power and right of Tribal Nations to self-governance-was first recognized by Chief Justice John Marshall of the U.S. Supreme Court in 1832 when he wrote that Indian tribes are "distinct, independent, political communities." In November 2000, President Clinton re-affirmed the power of Indian Nations to self-government when he signed an executive order that included the goal of ensuring "that all executive departments and agencies

consult with Indian tribes and respect tribal sovereignty as they develop policy on issues that impact Indian communities."

While it is generally recognized that Indian Nations have authority to form their own government, establish leadership, create and enforce their own laws, and punish criminal activity on reservation or Indian trust land (except where a non-Indian or a federal crime is involved), various U. S. Supreme Court decisions and Congressional Acts since 1832 have had the overall effect of blurring jurisdictional lines and limiting the punitive powers of tribes over their own citizens.

For example, the Major Crimes Act, 18 U.S.C.S. 1153, enacted in 1885, authorized federal jurisdiction over certain defined "major offenses" committed by Indians on Indian land, including murder, kidnapping, maiming, and sexual abuse. But since the Act did not directly address the issue of tribal authority over the same offenses, tribal courts retain concurrent jurisdiction over the same crimes (See e.g., *Westit v. Stafne*, 44 F3d 823, (9th Cir., 1995)). Also, as tribal courts possess sole, exclusive jurisdiction over all other offenses not listed in the Major Crimes Act, it can be generally presumed that domestic violence and stalking-related offenses perpetrated by one Indian against another Indian on Indian land are crimes that fall within the jurisdiction of the tribe.

Further complicating matters was Public Law 83-280, Chapter 505, H.R. 1063 (cited as 67 U.S. Statutes at Large, Chapter 505, pp. 588-590) "Indians-Criminal Offenses and Civil Causes-State Jurisdiction," enacted by Congress in 1953. Enacted during a period in federal Indian policy known as the "Termination Era", Public Law 83-280 transferred to certain states criminal and civil jurisdiction over Indian persons in Indian country within those states without tribal consent, thereby negating the power of self-government by the tribes in these "mandated" states and superceding both tribal and federal authority.

Although P. L. 83-280 initially affected only six states (California, Minnesota, Nebraska, Oregon, and Wisconsin, with Alaska becoming the sixth upon statehood), the Act also authorized "nonmandatory" states to "assume jurisdiction" over tribal nations within their state boundaries by taking "affirmative legislative action" and without tribal consent. As a consequence, several more states subsequently assumed jurisdiction, either in whole or in part, over Indian country within their borders.

In 1968, when Congress enacted the Indian Civil Rights Act (ICRA) (82 Stat. 77, 25 U.S.C.S. 1301, et seq.), P.L. 83-280 was amended to require tribal consent of subsequent transfers of jurisdictions to states. The tribal consent requirement is not retroactive, however. As a consequence, the amendment did not apply to transfers of tribal jurisdiction to states that had already taken place prior to 1968. Title 25, U.S.C.S. 1323 then authorized a retrocession of jurisdiction by any state to the federal government of "all or any measure of the criminal or civil jurisdiction, or both, acquired by such State" by virtue of Public Law 83-280. Tribes within states affected by P.L. 83-280 effectively retain concurrent jurisdiction with the state in both investigation and prosecution matters, which can be an additional burden to Tribal Nations' criminal justice response teams.

Additionally, the Indian Civil Rights Act, enacted in 1968, limited the sentencing authority of tribal courts to a maximum of a \$5,000 fine and/or a one year jail term. This particular policy poses special concerns for tribes which have taken on the arduous task of developing and

adopting tribal legal code that effectively addresses stalking crimes since the limited sentencing authority imposed by the ICRA leaves little leeway for establishing graduated sanctions as punitive measures against stalkers that re-offend.

Lack of financial resources adds further difficulties to the already confusing mix of what some feel amounts to "opposing" public policy, at both a state and federal level. Many Indian Nations that are committed to providing safety and legal protection to stalking victims do not possess the financial resources necessary to develop tribal court systems or tribal police forces. Tribes that rely on Bureau of Indian Affairs law enforcement personnel to respond to stalking crimes may find that BIA budget constraints result in officer staff shortages in the field, which in turn, result in longer officer response times to reports of stalking crimes. (Wakeling, Stewart et al, "Policing on Indian Reservations", National Institute of Justice Journal, January 2001, p. 4.: "Existing data suggest that tribes have between 55 percent and 75 percent of the resource base available to non-Indian communities.")

Native American Circle, Ltd. and the Stalking Resource Center have defined project objectives and goals as:

- Assist tribal nations in developing tribal legal codes that effectively and appropriately address stalking crimes against American Indian/Alaska Native women;
- Provide educational materials and training programs to educate victim advocates, police officers, prosecutors, and other criminal justice professionals serving tribal nations in identifying and managing stalking cases in American Indian/Alaska Native communities;
- Develop model protocol for use by
- tribal nations to implement coordinated, multidisciplinary responses to stalking crimes in Indian country;
- Assist in forming dedicated teams of police officers, prosecutors, court personnel, and parole and probation officers from existing domestic violence units to investigate, monitor, arrest, and aggressively prosecute stalkers;
- Identify promising practices to prevent and reduce stalking in domestic violence cases;
- Provide technical assistance and training in the use of federal laws regarding interstate stalking, as defined by VAWA 2000.

Even Indian Nations that do possess strong tribal court systems and police forces will have a difficult time holding offenders accountable if the tribe has not successfully designed and adopted tribal legal code that effectively addresses stalking crimes -particularly as "stand-alone" crimes, independent of domestic violence-related offenses.

But what happens when the Native stalking victim seeks protection from a non-Native stalker in Indian country? In these cases, there may be no recourse under the law for the victim, either at a tribal or state level. The U.S. Supreme Court decision in *Oliphant vs. Suquamish* (435 U.S. 191 (1978)) makes it clear that tribal governments have no criminal jurisdiction over non-Indians for any violation of tribal law, and since non-P.L. 83-280 states do not have jurisdiction over crimes committed in Indian country against Indian persons, the Native victim of stalking may have nowhere to turn to seek either justice or protection.

This circumstance is further aggravated by policies that do not allow for prosecution of misdemeanor domestic violence and stalking offenses in a federal court unless the crime committed involves either "serious bodily injury or death."

The standard definition for "serious bodily injury," per 18 U.S.C.S. 1365(g)(3), is "bodily injury which involves – (A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty." It is a high price for a victim to pay before getting justice in the federal system.

The overall effect of these combined factors is that Native victims of domestic violence and stalking may justifiably feel that "equal protection under the law" has been denied them as a direct consequence of race and ethnicity.

The Violence Against Women Act II (VAWA II), signed into law effective November 1, 2000, clarifies some of the confusion that has resulted from public policy, particularly around the authority of tribal courts to enforce civil protection orders against non-Indians. However, a number of barriers still prevent Native stalking victims in Indian country from seeking the safety and justice they deserve. Indian Nation governments that design, develop, and implement their own culturally-specific legal code to address domestic violence and stalking crimes will further their sovereignty by protecting their citizens, empowering victims of stalking, and holding perpetrators of these crimes accountable.

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