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DOMESTIC VIOLENCE AND TRIBAL PROTECTION OF INDIGENOUS WOMEN IN THE UNITED STATES

GLORIA VALENCIA-WEBER*

CHRISTINE P. ZUNI**

INTRODUCTION

The essential Navajo value is that while men and women are distinct, they relate as complementary equals. That kind of relationship creates, or should create, an environment that views violence toward women as deviant behavior. Under Navajo common law, violence toward women, or mistreatment of them in any way, is illegal.¹

A man who battered his wife was considered irrational and thus could no longer lead a war party, a hunt, or participate in either. He could not be trusted to behave properly. . . . He was thought of as contrary to Lakota law and lost many privileges of life and many roles in Lakota society and the societies within the society.²

What we do know is that in most Native American societies men's and women's roles were delineated in such a way that violence against

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This article is a collaborative product for which Professor Valencia-Weber was primarily responsible for drafting sections I and II; Professor Zuni was primarily responsible for sections III and IV.

¹ James W. Zion & Elsie B. Zion, *Hozho' Sokee'—Stay Together Nicely: Domestic Violence Under Navajo Common Law*, 25 ARIZ. ST. L. J. 407, 413 (1993) [hereinafter Zion & Zion] (discussing Navajo violence towards women).

² Debra Lynn White Plume, *The Work of Sina Waken Win Okolakiciye—Sacred Shawl Women's Society*, in CAROLYN REYER, CANTE OHITIKA WIN (BRAVE HEARTED WOMEN) IMAGES OF LAKOTA WOMEN FROM THE PINE RIDGE RESERVATION, SOUTH DAKOTA 67 (1991).

women among their own groups did not seem to be a common and regular practice.³

We were always taught that women were sacred and that everything in the home belonged to the women. Our extended families used to live together and no one would have ever thought of abusing women and children. It wasn't until families started to move into town or to move away from each other that we started to hear stories about someone beating up his wife.⁴

The physical abuse of American Indian⁵ women is a subject now emerging from the netherland of ignorance which has surrounded the lives of contemporary indigenous people in the United States.⁶ That American Indian tribes have been recognized as the first sovereign within the boundaries of the United States is not a fact consciously acknowledged by many citizens governed by the other two sovereigns: the state and the federal governments. Many presume that American Indians are just another ethnic minority within this republic.⁷ Additionally, non-Indians often assume that the popular media's depictions of contemporary Indian life are accurate.

The purpose of this article is to discuss openly the issue of the physical abuse of American Indian women in a manner that reflects the

³ Lemyra DeBruyn, Beverly Wilkins, and Karen Artichoker, *It's Not Cultural: Violence Against Native American Women* 2 (Nov. 30, 1990) (citations omitted) (unpublished paper prepared for American Anthropological Association meeting, on file with the *St. John's Law Review*) (discussing tribes before European contact); see also Lemyra M. DeBruyn, et al. *Helping Communities Address Suicide and Violence: The Special Initiatives Team of the Indian Health Service*, AMERICAN INDIAN AND ALASKA NATIVE MENTAL HEALTH RESEARCH, Mar. 1988, at 58 (indicating that domestic violence exists in Native American communities due to poverty, isolation, alcohol abuse, low self-esteem, and unique status in relation to federal government).

⁴ Charon Asetoyer, *Public Denial, Private Pain*, HEALTHWIRE, Jan. 1994, at 1 (quoting Clarence Rockboy, elder of Yankton Sioux Tribe).

⁵ The term "American Indian" shall be construed to include American Indians and Alaskan Natives for the purposes of this article. Alaskan Natives, Aleuts, Inuits, and native Hawaiians maintain distinct cultural identities, but these are not pursued for the purposes of this article. The term "tribes" is also used throughout the article; however, the indigenous nations use varied terms for their collective identity, e.g., nation, pueblo, band, community, rancheria, colony, and village. The most recent listing of "entities" which are federally recognized demonstrates the variety of self-designations used by the indigenous nations. See Notice, 60 Fed. Reg. 9250 (1995).

⁶ Although the incidence of domestic violence among American Indians is under-reported, some reports state as many as one-third of all women are physically abused during their lives. See James O. Mason, *The Dimensions of An Epidemic of Violence*, 108 PUB. HEALTH REP. 1 (1993).

⁷ See generally Sandra Guerra, Note, *Voting Rights and the Constitution: The Disenfranchisement of Non-English Speaking Citizens*, 97 YALE L.J. 1419, 1422 n.21 (1988) (listing American Indians among minorities as specified by Bureau of the Census).

authors' knowledge of how American Indian people live.⁸ This article confronts presumptions or pre-existing notions about the indigenous people of the United States that pervade popular culture.

American Indian societies generally hold a common world view that seeks to achieve balance or harmony in all relationships.⁹ The cultural principles of American Indians, reflected in this world view, do not espouse or approve of the abuse of women. While this statement encompasses the approximately 550 tribes recognized by the federal government,¹⁰ the authors' knowledge of the traditional values and beliefs of contemporary tribal people sustains the broad application. Although there are differences among the tribes, respect for the physical integrity of women is not an area where cultural values among tribes differ significantly. Individuals in any society have always attempted to use physical force to control others and American Indians are not exempt from what continues

⁸ The background for this study arises from the authors' own experiences and from the generosity of tribal people who provided tribal codes, court orders, and descriptions of intervention programs. The authors are indebted to the courts of the tribes included in this survey: Tina Gouty-Yellow, Menominee Nation; Eileen Lente-Kasero and Judge William Bluehouse Johnson of the Laguna Tribal Court; Ada Pecos Melton and Eidell Wasserman of the National Indian Justice Center; Lemyra DeBruyn and Beverly Wilkins of the Special Initiatives Team, Mental Health Services, Indian Health Service; Mark Van Norman and the Cheyenne River Sioux; Chad Smith and the Cherokee Nation of Oklahoma; Judge Carey Vicente and the Jicarilla Apache; James Zion, and the Judicial Branch of the Navajo Nation; Judge Violet Lui Frank and Demetria Valenzuela of the Pascua-Yaqui Tribal Court; Elsie B. Zion Redbird of Native Rights Advocates and Instructor, University of New Mexico; Toby Grossman at the American Indian Law Center; Evelina Z. Lucero, Instructor, University of New Mexico and UNM-Valencia Campus; Darlene Correa, Laguna Family Services, and Professor Margaret Montoya, our colleague at the UNM School of Law. The authors would also like to acknowledge the Albuquerque Women's Shelter, Women's Community Association and Connie R. Martin, Domestic Violence Commissioner, for statistical information provided on Native Americans. Additionally, the authors would like to acknowledge the legal research assistance of Sandy Gardner and Kyle Nayback.

⁹ See generally Clara Sue Kidwell, *American Indian Attitudes Towards Nature, A Bicentennial Perspective*, in CONTEMPORARY NATIVE AMERICAN ADDRESS 277 (John R. Maestas ed., 1976) (stating common tribal world views with central tenets of reciprocity or harmony with nature).

¹⁰ Approximately 550 tribal government entities are the indigenous nations of concern in this paper. Entities recognized as sovereigns and eligible for benefits and services from the United States (primarily the Bureau of Indian Affairs) include 311 tribal entities in the lower 48 states and 226 Alaskan governmental entities. See Notice, 58 Fed. Reg. 54364 (1993). Status as a sovereign nation, with the power of self-governance over communally owned territory, does not exist for some Alaskan organizations and corporations recognized by the federal government as eligible for federal programs. Additionally, there are some 230 "extant and functioning tribes" which have not been recognized by the federal government. Rachael Paschal, Comment, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process*, 66 WASH. L. REV. 209 (1991).

to be an unfortunate human behavior.¹¹ The fact that individual members of tribes, predominantly male, engage in the physical abuse of women does not mean that such behavior satisfies a culturally approved norm.

Like non-Indian jurisdictions in the United States that use various means to redress abusive situations, there are certain differences in the way tribes, as nations, protect their female members. Rather than a single Indian model, there are many; each tribe's practices derive from a blend of its cultural, historical, and contemporary experiences.

Initially, this article will examine the sovereign nature of the tribal nations within the parameters of both international law and United States jurisprudence.¹² This article will also address the way in which some international instruments relate to the rights and protection of indigenous people, including specific provisions for protecting women.¹³ Furthermore, this article will provide an overview of the American Indians' shared world view, revealing values in sharp contrast to those of the majority of American society.¹⁴ The lives of indigenous peoples are anchored upon communal values, rather than individualism, as the primary guide to behavior. Finally, this article will demonstrate how *some* tribes seek to protect their female members through codes, customary law, and intervention programs which provide services to victims, abusers, and their families.¹⁵

¹¹ Government agencies and the media sporadically report that tribal women are the victims of domestic violence. Three deaths among Navajos due to domestic violence, within a one month period in 1991, instigated the study and legislation enacted by the Navajo Nation. Mark Trahan, *Native Perspectives*, Gannett News Service, June 27, 1991, available in LEXIS, Nexis Library, GNS File. Obtaining protection is not easy for many Indian women because of jurisdictional uncertainties. Whether a state or tribal government enforcement agency can help depends on the ethnic identities of the victim and the abuser and where the conduct occurred. See, e.g., Beatrice Medicine, *North American Indigenous Women and Cultural Domination*, 17 AM. INDIAN CULTURE & RES. J., 121, 124-25 (1993); Robin Abcarian, *A County Reaches Out to Help Battered Women*, DET. FREE PRESS, May 13, 1990. Our review did not obtain national data reporting domestic violence according to ethnic identity. One county in New Mexico that collects and reports detailed data across four ethnic populations indicates that American Indians experience domestic violence as victims or abusers in proportions similar to the population as a whole. FAMILY CRISIS CENTER, INC., DOMESTIC VIOLENCE TASK FORCE SEMI-ANNUAL REPORT, SAN JUAN COUNTY 7 (1993) (noting that San Juan County Native Americans constitute 36% of population, 40% of victims and 37% of abusers in reported domestic violence incidents).

¹² See *infra* notes 16-76 and accompanying text.

¹³ See *infra* notes 41-44, 56-70 and accompanying text.

¹⁴ See *infra* notes 77-129 and accompanying text.

¹⁵ See *infra* notes 130-341 and accompanying text.

I. THE INDIGENOUS NATIONS IN INTERNATIONAL AND U.S. LAW

The powers of Indian tribes are, in general, "*inherent powers of a limited sovereignty which has never been extinguished.*" Before the coming of the Europeans, the tribes were self-governing sovereign political communities. Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws.¹⁶

American Indian tribes existed as sovereign nations before the European invasion of the North American continent.¹⁷ This sovereign status persisted through the subsequent wars and resolutions of conflicts among the European powers. Each European power dealt in practical ways with the tribal nations to maintain a competitive advantage with other nations. France and England, for instance, recognized the tribes as sovereign nations if this recognition would give them an advantage over a competitor in trade or military alliances. Similarly, the newly formed United States treated the tribes as sovereign nation-states.¹⁸ The history of the encounters among all of the sovereigns reflects pragmatic concerns, with theoretical frameworks as a delayed or collateral development.

As noted, both European colonial powers,¹⁹ and the United States

¹⁶ *United States v. Wheeler*, 435 U.S. 313, 323-24 (1978) (citations omitted) (quoting FELIX S. COHEN HANDBOOK OF FEDERAL INDIAN LAW 122 (1945)).

¹⁷ See Rachel San Kronowitz et al., Note, *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 507, 511-14 (1987) [hereinafter San Kronowitz] (describing international law status of tribes as sovereigns during colonial period in United States). Undeniably, the separate and independent quality of tribal sovereignty changed over time. Nonetheless, the Supreme Court decisions limiting tribal power affirm the continuance of tribal sovereigns. See, e.g., *Rice v. Rehner*, 463 U.S. 713, 725, 733 (1983) (holding no single notion of tribal sovereignty nor presumption of preemption precludes state power where Congress delegated to tribes and states the regulation of liquor); *Wheeler*, 435 U.S., at 323 (rejecting double jeopardy where tribes exercise the sovereignty not withdrawn by treaty, statute, or by implication as necessary result of their dependent status); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172-73 (1973) (noting that despite trend toward federal preemption, Indian tribes remain "a separate people, with the power of regulating their internal and social relation"); *Williams v. Lee*, 358 U.S. 217, 220 (1959) ("[T]he question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.").

¹⁸ See Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 679 (1989).

¹⁹ See generally FELIX S. COHEN HANDBOOK OF FEDERAL INDIAN LAW 47-58 (1982) [hereinafter COHEN, 1982] (summarizing basic tenet under law of nations in pre-Revolutionary period that American Indian nations are sovereign powers whose governments and ownership of land should be honored). In this period, Francisco de Victoria and others established the recognition of this nation-state status which was not subordinated or obliterated by European powers' claims based on divine rights or discovery. *Id.* Intense legal and religious disputes about

Constitution²⁰ originally recognized American Indian Tribes as nations. Supreme Court decisions have continued to uphold this political status.²¹ The autonomy of Native American tribes to act as discrete governments persists²² even though congressional acts and federal court decisions have limited the power of the Indian sovereigns.²³

The American Indians' status as tribal nations immediately distinguishes them from other ethnic populations within the United States. The tribal status as a sovereign is both pre-constitutional and extraconstitutional.²⁴ In jurisprudential terms, this means that the equal protection and due process doctrines do not necessarily resolve issues in Indian law.²⁵

theories on the status of the indigenous people in the New World arose in the Spanish monarchy after the initial experiences in the Americas. The basic tenets of the sovereignty which de Victoria advocated survive in contemporary American Indian law. *See also* San Kronowitz, *supra* note 17, at 509-22, 586-621; Robert A. Williams, Jr., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1 (1983) [hereinafter Williams, Jr., *Medieval and Renaissance Origins*].

²⁰ Constitutional recognition of the tribal nations is founded upon the exclusive federal authority empowering Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. Another provision excludes Indians from those persons to be counted as part of the U.S. population for purposes of determining representative districts or apportioning direct taxes. U.S. CONST. art. I, § 2, cl. 3. *Cf.* U.S. CONST. amend. XIV (restating exclusion of "Indians not taxed" while eliminating the limitation on counting slaves). Other provisions in the Constitution which provide exclusive federal power over Indian affairs include the treaty power, the war power, and the power over federal property. *See* U.S. CONST. art. I, § 8, cl. 11; U.S. CONST. art. IV, § 3, cl. 2. *See generally*, COHEN, 1982, *supra* note 19, at 58-74 (covering nation-to-nation relations and treaties between Indian tribes and emerging U.S. republic during Revolutionary War and early Constitutional periods).

²¹ The Supreme Court has maintained the status of American Indian tribes as sovereigns within the U.S. from the Marshall Court through its most recent decisions. They are "distinct [independent] political communities" whose status as sovereign governments was not lost because of a protectorate relationship with the United States. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557-59 (1832). The tribes are qualified to exercise powers of self-government due to their inherent or original tribal sovereignty, not because of a delegation of power from the federal government. *See Oklahoma Tax Comm'n v. Sac & Fox Nation*, 113 S. Ct. 1985, 1991 (1993); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 508 (1991); *United States v. Wheeler*, 425 U.S. 313, 323-24 (1978); *see also Talton v. Mayes*, 163 U.S. 376, 384 (1896) (affirming that tribal nation's powers neither arose from, nor were created by Federal Constitution, but existed prior to it).

²² *See supra* note 21; 18 U.S.C. § 1151 (1994) (defining jurisdictional territory of tribal governments to include more than reservations or federal trust lands reserved for tribes). "Indian Country" includes dependent Indian communities and land held in fee by non-Indians if within tribal boundaries. *See Sac & Fox Nation*, 113 S. Ct. at 1991 (affirming Indian Country statute).

²³ *See, e.g., infra* note 255 (discussing federal government restrictions on tribal criminal authority over non-Indians).

²⁴ CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 112 (1988).

²⁵ *Cf. Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (holding tribal sovereignty and immunity require dismissal of equal protection claim under Indian Civil Rights Act); *Morton v.*

Although a unique nation-to-nation status exists between tribes and the federal government, shifting federal policies since the formation of the United States have limited, defined, and complicated tribal autonomy. Legal complexity arises from the conflict inherent between tribal sovereignty and the concurrent doctrine of the federal government as trustee for the tribal dependent.²⁶ Unlike other U.S. citizens, American Indians as individuals have overlapping citizenship rights within three sovereigns — tribal, state, and federal. The nature and extent of tribal autonomy is a recurring legal question that complicates interactions among these three sovereigns.²⁷

The tribal sovereign's status is key to understanding how American Indian governments act to protect women. Tribes use inherent authority²⁸ and cultural means which are distinct from the authority and means used by state and federal governments. Like non-Indian jurisdictions, tribes protect women through governmental structures. Some tribal governments are similar to non-Indian governmental entities, where executive, legislative, and judicial branches are identifiable.²⁹ These descriptors, however, do not necessarily define how these branches operate in tribal governments. In some Pueblo communities, for instance, domestic disputes are resolved through traditional proceedings conducted by the Governor of the Pueblo, who is not categorically a judicial officer.³⁰

The protection of women by tribal governments stems from cultural

Mancari, 417 U.S. 535 (1974) (determining tribal political status and federal policy of Indian preference prevail over constitutional claims).

²⁶ Sharon O'Brien, *Tribes and Indians: With Whom Does the United States Maintain a Relationship?*, 66 NOTRE DAME L. REV. 1461 (1991) (describing cyclical, anomalous, and complex relationship between tribes and federal government).

²⁷ See *id.*

²⁸ *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (recognizing existence of some "inherent powers" in Indian tribes).

²⁹ See generally SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 198-200 (1989) [hereinafter O'BRIEN, TRIBAL GOVERNMENTS] (describing range and scope of subject matter jurisdiction of tribal governments).

³⁰ Ernesto Luhan, Traditional Dispute and Conflict Resolution, Conference paper presented to Indigenous Justice Conference: Justice Based on Indian Concepts 4 (Dec. 8-9, 1993) (paper on file with authors). The appeal of a trial court decision is made to the tribal council in some tribes while others reserve appeals to a separate judicial branch. The variety of tribal courts is summarized in the DIRECTORY OF TRIBAL JUDICIARIES AND COURTS OF INDIAN OFFENSES, TRIBAL GOV'T SERVS., BUREAU OF INDIAN AFFAIRS (Dec. 1993). The directory includes judicial systems established by the tribal nation pursuant to its inherent authority and the Courts of Indian Offenses established under the authority of the Secretary of Interior. The Directory includes tribal judiciaries which do not receive funding from the Bureau of Indian Affairs. For further information on tribal courts, see Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225 (1994).

values. Tribal societies retain and integrate cultural values into the contemporary responsibility of tribal governments. The goal of maintaining harmony among members of the community perpetuates traditional dispute resolution methods that employ elders, peacemakers, and designated persons (such as the Pueblo Governor) to serve as mediators and decision makers.³¹ Traditional tribal methods of dispute resolution do not fit within the adversarial model, but rather aim to restore harmonious relationships among spouses, domestic partners, family, clan, and community members.³² To be valid judgments about how women fare in these tribal communities must be based upon the legal and cultural frameworks that apply to the indigenous people of the Americas.

A. *Indigenous Peoples in International Law*

Recent attempts by the international community to address the status of the indigenous peoples of the world include an examination of Native American tribes.³³ In the countries invaded by European powers, the natives resisted the invaders' common initial practice of exterminating indigenous populations as human beings, nations, or as cultures. Historically, under international law, native populations became protected from annihilation and were allowed to assimilate into the dominant political society.³⁴ In the post-colonial period, nation-states resisted recognizing distinct ethnic and cultural groups within a country's boundaries.³⁵ Whether in the former U.S.S.R. with its multitude of ethnic populations, numerous Latin American countries with Indians, or Sweden, Norway, and Finland with the Samis, the dominant nations argued that no distinctions existed among their citizens and that all possessed only one national identity.³⁶ Later instruments, such as Convention 169, the Convention

³¹ See, e.g., Zion & Zion, *supra* note 1, at 423 (noting Navajo's use of Peacemaker Court based on traditional tribal values).

³² O'BRIEN, TRIBAL GOVERNMENTS, *supra* note 29, at 202.

³³ See generally, DAVID H. GETCHES, ET AL., FEDERAL INDIAN LAW: CASES AND MATERIALS § 15 (1993); ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW: CASES AND MATERIALS 1201-1304 (3d ed. 1991); S. James Anaya, *The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective*, in 1989 HARV. INDIAN L. SYMP. 191 (1989).

³⁴ Russel Lawrence Barsh, *An Advocate's Guide to the Convention on Indigenous and Tribal Peoples*, 15 OKLA. CITY U. L. REV. 209 (1990).

³⁵ San Kronowitz, *supra* note 17, at 593-95 (discussing "blue water" approach to protect territorial integrity of existing post-war states by limiting recognition of indigenous peoples to geographically separated peoples). See generally Douglas Sanders, *The UN Working Group on Indigenous Populations*, 11 HUM. RTS. Q. 406, 412-18 (1989).

³⁶ See, e.g., San Kronowitz, *supra* note 17, at 591-92 n.450 (discussing Latin American Nations' full political integration).

Concerning Indigenous and Tribal Peoples in Independent Countries of the International Labour Conference ("ILO"),³⁷ generated new ways of perceiving and respecting the rights of indigenous people in the collective and as individuals. International law is now wrestling with the persisting question of how to treat the distinct indigenous populations found everywhere in the world.

The emerging norms, most recently stated in the products of the U.N. Working Group on Indigenous Populations, expand the view of the indigenous peoples. Consequently, the nature of their rights is changing. Current dialogue involves the nation-states, the indigenous peoples (usually represented by nongovernmental organizations), and the international structure or forum such as the United Nations (U.N.), that mediates this dialogue.³⁸ Significant differences exist among proponents about key concepts and definitions regarding the legal status of indigenous populations and land. One of the central disputes is the indigenous populations' demand to qualify as autonomous nation-states and their resistance to a less autonomous status as "a people" or "a minority."³⁹

American Indians continue to possess the key characteristics of the sovereign state: a distinctive permanent population; a defined territory, with identifiable borders; a government exercising authority over territory and population; and the capacity to enter into relationships with other nation-states.⁴⁰ In this regard, the American Indian nations can generate models on how indigenous peoples can protect their communal interests, including the well-being of their female members.

B. Indigenous Women in International Law

The protection of women as members of indigenous communities has not been specifically addressed by international legal doctrines. Rather, women have been considered in a generic sense. All women who are

³⁷ Convention Concerning Indigenous and Tribal Peoples in Independent Countries, I.L.O. CONV. 169, I.L.O., 76th Sess., [hereinafter ILO] reprinted in 28 I.L.M. 1382 (1989); see also Barsh, *supra* note 34, at 237 (providing text of International Labour Conference Convention Concerning Indigenous and Tribal Peoples in Independent Countries (1989)). See generally INDIAN RIGHTS-HUMAN RIGHTS: HANDBOOK FOR INDIANS ON INTERNATIONAL HUMAN RIGHTS' COMPLAINT PROCEDURES (Indian Law Resource Center 1984) (providing text of major human rights instruments and procedures).

³⁸ See Sanders, *supra* note 35. See generally Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT'L L. 127 (1991).

³⁹ Barsh, *supra* note 34, at 231-34.

⁴⁰ See Montevideo Convention on the Rights and Duties of States; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 201 (Revised) (1987).

noncombatants are among those persons protected by the Geneva Accords.⁴¹ Civilized nation-states have a responsibility to honor and enforce this treaty, which protects women from deprivation of basic needs and from physical abuse during wartime. Only recently has physical abuse against women in non-combat situations become part of the international law dialogue.⁴² Additionally, specific instruments bar unequal treatment of women by nation-states.⁴³ While some instruments proscribe the abuse of women through denial of political and social rights, these provisions are directed only at the dominant nation-states. National power cannot be used to burden or disable women who are members of an indigenous population. International organizations utilize these international legal doctrines to determine whether a country discriminates against its female population. In two cases adjudicated by the U.N. Committee on Human Rights the panel concluded that laws in Mauritius and Canada violated women's rights under the International Covenant on Civil and Political Rights (the "Covenant").⁴⁴

While *Lovelace v. Canada*⁴⁵ demonstrates how international law has protected indigenous women, a factually similar U.S. case, *Santa Clara*

⁴¹ 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Part I, art. 3(1), reprinted in DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff eds., 2d ed. 1989). Article 76 explicitly addresses the protection of women, who shall be treated with "special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault." *Id.* at art. 76(1).

⁴² At the World Conference on Human Rights in Vienna in June of 1993, a Global Tribunal on Violations of Women's Human Rights heard the testimony of women on abuse directed toward them in the family, national law, and wars. The Conference ended with a recognition that women's rights are "an inalienable, integral and indivisible part of universal human rights." David B. Ottaway, *Human Rights Post Suggested for U.N.; Conference Condemns Bosnian 'Cleansing,'* WASH. POST, June 26, 1993, at A18. Subsequently the United Nations Human Rights Commission appointed Radhika Coomarasamy to the post of special rapporteur to investigate the violence against women. *UN Names Investigator on Violence Against Women*, CHI. TRIB., Apr. 26, 1994, at C2; see Steven Greenhouse, *State Dept. Finds Widespread Abuse of World's Women*, N.Y. TIMES, Feb. 3, 1994, at A1.

⁴³ *International Covenant on Civil and Political Rights*, G.A. Res. 2200(XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), [hereinafter *International Covenant*]. Article 3 prohibits inequality based on gender. Article 26 prohibits discrimination and inequality on the basis of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. See generally NATALIE KAUFMAN HEVENER, *INTERNATIONAL LAW AND THE STATUS OF WOMEN* (1983) (providing collection and analysis of international instruments).

⁴⁴ See *Lovelace v. Canada*, U.N. GAOR, 36th Sess., Supp. No. 40, Annex XVIII, at 166, U.N. Doc. A/36/40, reprinted in 2 HUM. RTS L. J. 158 (1981) [hereinafter *Lovelace* opinion]; *Aumeeruddy-Cziffra v. Mauritius*, GAOR Supp. (No. 40) (36th Session), Annex XIII, at 134, U.N. Doc. A/36/40, reprinted in 2 HUM. RTS L. J. 139 (1981).

⁴⁵ *Lovelace* opinion, *supra* note 44.

Pueblo v. Martinez,⁴⁶ illustrates how the sovereignty doctrine⁴⁷ distinctively affects the treatment of American Indian women. Both cases involved female tribal members who married non-members.⁴⁸ The women's relationships with their tribes substantively changed as a result of their marriages to non-members. Sandra Lovelace, for example, lost her membership rights and benefits.⁴⁹ In both cases, however, male members who also married outside the tribe were not subject to the same disqualifications.⁵⁰

These similar factual situations, however, did not produce the same legal conclusions. In *Lovelace*, the U.N. Committee found gender discrimination in the Canadian law based on the provisions in the Covenant.⁵¹ Thereafter, the Canadian national government stated that it would enact a statutory revision.⁵²

Martinez yielded a result opposite to *Lovelace* because of the different law used in a federal forum. The Supreme Court determined that the Santa Clara Pueblo, as a sovereign, was immune from suit and that protecting the sovereignty of the tribe precluded the federal government from interfering with the tribe's right to control qualifications for membership.⁵³ *Martinez* is based upon U.S. law and the federal policy affirming tribal sovereignty⁵⁴ as a legal doctrine. The Covenant provisions used in *Lovelace*

⁴⁶ 436 U.S. 49, 52 (1978).

⁴⁷ See *Bryan v. Itasca County*, 426 U.S. 373, 376 n. 2 (1976) (explaining Indian Sovereignty doctrine as policy of leaving Indians free from state jurisdiction and control).

⁴⁸ *Martinez* involved a Santa Clara Pueblo woman married to a non-member American Indian. *Lovelace* centered on a Maliseet Indian woman whose spouse was a non-member.

⁴⁹ *Lovelace* opinion, *supra* note 44, at para. 1. In *Martinez*, a female member of the Santa Clara Pueblo challenged the constitutionality of a tribal ordinance that denied "tribal membership to the children of female members who marry outside the tribe, but not to similarly situated children of men of that tribe." *Martinez*, 436 U.S. at 49.

⁵⁰ *Lovelace* opinion, *supra* note 44, at para. 1; *Martinez*, 436 U.S. at 49.

⁵¹ *Lovelace* opinion, *supra* note 44, at para. 17 (concluding that exclusion of Lovelace for sole reason of marriage to non-Indian violates Article 27 of International Covenant).

⁵² See Bill C-31, An Act to Amend the Indian Act, R.S.C. ch. 32 (1st Supp. 1985) (Can.) (revising Indian Act by removing gender-discriminating section).

⁵³ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 72 (1978).

Tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the Federal and State Governments. . . . [E]fforts by the federal judiciary to apply the statutory prohibitions of § 1302 in a civil context may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity.

Id. at 71-72.

⁵⁴ Federal policy on Indian sovereignty has not been consistent. *But see* Ralph W. Johnson, *Fragile Gains, Two Centuries of Canadian and United States Policy Toward Indians*, 66 WASH. L. REV. 643, 649 (1991) ("The study of Native American history teaches that the overriding, but rarely articulated, policy of Canada and the United States towards Aborigines was to get them

probably could not apply in *Martinez* to obtain a decision favoring the female plaintiff and her children; the U.S. tribes have not signed the Covenant and are thus not bound by its provisions.⁵⁵ Additionally, the Covenant favors indigenous people in their autonomy. It states that, "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."⁵⁶ It is not yet known where indigenous women as a specific class may obtain enforceable rights in the emerging picture in international law.

Indigenous women can seek the protection of their rights under international provisions that protect *all* women against rights abuses by nation-states.⁵⁷ It is, however, doubtful whether these current instruments protect indigenous women within their tribal governments. Where the Covenant applies, as in *Lovelace*, indigenous women are not distinct from *all* women with identifiable rights and potential remedies. The provisions prohibit gender discrimination, abuse of women's personal security, and loss of any rights or equality because the women are married.⁵⁸

Convention 169 of the ILO also prohibits gender-based discrimination.⁵⁹ Yet, the ILO directs its force against nation-states with indigenous peoples within their boundaries, not against indigenous peoples and their governments. The ILO also provides that "the social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected."⁶⁰ The ILO does not, however, indicate if or how the individual rights of women are to be balanced against the interests of their indigenous community.

In 1992, the Working Group on Indigenous Population⁶¹ released the Draft Declaration on the Rights of Indigenous People ["Draft Declara-

out of the way so their land could be settled and developed by whites."); *Solem v. Bartlett*, 465 U.S. 463, 466-69 (1984) (acknowledging congressional policy to terminate reservation life, force Indians to assimilate, and open Indian lands for non-Indian settlement).

⁵⁵ The authors are unaware of any tribes that have ratified this instrument.

⁵⁶ International Covenant, *supra* note 43, at art. 1 (1). Other provisions of the article provide that parties to the Covenant "shall promote the realization of the right of self-determination and respect that right" of peoples. *Id.* at art. 1 (3).

⁵⁷ See *supra* notes 41-43 and accompanying text (discussing Geneva Accords and International Covenant).

⁵⁸ International Covenant, *supra* note 43, at arts. 3, 9 (a), 23 (4), and 26.

⁵⁹ ILO, *supra* note 37, at art. 3(1).

⁶⁰ *Id.* at art. 5(a).

⁶¹ *Report of the Working Group on Indigenous Populations on its Tenth Session*, U.N. ESCOR, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 44th Sess., Annex 1, at 44-52, U.N. Doc. E/CN.4/Sub.2/1992/33 (1992) (commonly known as the Draft Declaration on the Rights of Indigenous People) [hereinafter Draft Declaration].

tion"].⁶² While the Draft Declaration addressed "peoples" and their rights, it failed to delineate rights for individuals.⁶³ The 1993 revisions to the Draft Declaration injected individual's rights into the provisions, yet the document retained its collective focus.⁶⁴ Therefore, tribal power and laws employed in *Martinez* may be valid under some provisions of the Draft Declaration. While the Working Group grounded the Draft Declaration's provisions in a communal perspective of rights, there is a potential for conflict with law and instruments based on individualistic principles of gender equality.⁶⁵ If gender equality becomes a fundamental

⁶² See Sanders, *supra* note 35, at 406; Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 4 DUKE L.J. 660, 676-704 (1990) [hereinafter Williams, *Frontiers*] (providing history of Working Group of Indigenous Population); Hurst Hannum, *New Developments in Indigenous Rights*, 28 VA. J. INT'L L. 649, 657-62 (1987) (discussing development and mandate of Working Group of Indigenous Population); see also Frank Pommersheim, *Liberation, Dreams and Hard Work: an Essay on Tribal Court Jurisprudence*, 1992 WISC. L. REV. 411, 446-47 (discussing task of Working Group and potential impact of ILO).

⁶³ See Pommersheim, *supra* note 62, at 448 (citing Williams, *Frontiers*, *supra* note 62, at 684-85). The rights discussed in the Working Group's 1987 report can be separated into 4 groups: "(1) the distinctive nature of indigenous peoples' collective rights, (2) the centrality of territorial rights to indigenous survival, (3) the recognition of indigenous peoples' right to self-determining autonomy, and (4) international legal protection of indigenous rights." *Id.* These categories remained applicable to the Working Group's 1992 report. The report focused upon the collective rights of indigenous people and did not establish individuals' rights.

⁶⁴ U.N. *Draft Declaration on the Rights of Indigenous Peoples*, U.N. ESCOR, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th Sess., U.N. Doc. E/CN.4/SUB.2/1993/29 (1993) [hereinafter 1993 Draft Declaration]. The 1993 revisions added new provisions and included indigenous individuals, along with indigenous peoples, to the class to be protected. Part I, Article 2 provides that "[i]ndigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and right, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity." *Id.* at art. 2. Individual rights were injected into ten provisions: Part II, Articles 6, 7, 8, 9, 11 (a), (c), (d); Part IV, Article 18; and Part IX, Article 43. *Id.*

⁶⁵ See 1993 Draft Declaration, *supra* note 64, at art. 2 (revising some provisions from 1992 ILO, but retaining their substance to favor collective power). Article 33 of the 1993 ILO provides "[i]ndigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards." *Id.* at art. 33. The Santa Clara Pueblo's rule on membership is supported by other articles in the 1993 ILO. See *id.* at art. 32. Article 32 provides:

Indigenous peoples have the collective right to determine their own citizenship in accordance with their customs and traditions. Indigenous citizenship does not impair the right of indigenous individuals to obtain citizenship of the states in which they live. Indigenous peoples have the right to determine the structure and to select the membership of their institutions in accordance with their own procedures.

Id.

The 1993 revisions in the ILO created the potential conflict more directly than the 1992 version. In both versions "[i]ndigenous peoples have the collective right to determine the respon-

international norm, American Indian tribes could face challenges to their customary legal practices.⁶⁶

The Convention on the Elimination of All Forms of Discrimination Against Women⁶⁷ ("Women's Convention") created another potential conflict between international legal doctrine and federal law. The Women's Convention constructed its declaration on strict equality principles, but failed to specifically address indigenous people and tribal women.⁶⁸ This Convention could prohibit a ruling similar to *Martinez* because the Convention's declaration provides that women shall have "equal rights with men with respect to the nationality of their children."⁶⁹ Similarly, the Women's Convention declared that a woman who marries an alien cannot lose her nationality, be forced to acquire her husband's nationality, or be rendered stateless.⁷⁰ Since the Women's Convention does not specifically address indigenous peoples, it is conjectural to state definitively that this equality doctrine conflicts with U.S. law.

American Indian nations with recognized sovereignty are a contrast to other peoples who lack this source of jurisprudential power.⁷¹ Despite

sibilities of individuals to their communities." Compare Draft Declaration, *supra* note 61, at art. 19 with 1993 Draft Declaration, *supra* note 64, at art. 34. The 1993 version added a new provision in Article 43: "[a]ll the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals." 1993 Draft Declaration, *supra* note 64, at art. 43.

⁶⁶ The potential conflict may occur because Native American belief generally is collective and communal in nature. Individualistic principals of gender equality will undoubtedly clash with the Native American legal practice, the foundations of which are premised upon primacy and centrality of the community as a whole. See generally Pommersheim, *supra* note 62, at 432-34 (discussing tribal court jurisprudence maintaining community); James W. Zion, *Harmony Among the People: Torts and Indian Courts*, 45 MONT. L. REV. 265 (1984) [hereinafter Zion, *Harmony*] ("[t]he legal systems of Indian peoples were based upon the idea of maintaining harmony in the family, the camp, and the community.").

⁶⁷ *Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/830 (1979), reprinted in 19 I.L.M. 33 (1980) [hereinafter *Women's Convention*]. The United States has not ratified this Convention.

⁶⁸ Article 14, which requires state parties to take "all appropriate measures to ensure the application of the provisions . . . to women in rural areas" would probably allow the inclusion of non-urban Indian women into the protected class. *Id.* at art. 14.

⁶⁹ *Id.* at art. 9.

⁷⁰ *Id.*

⁷¹ But see San Kronowitz, *supra* note 17, at 509. While the San Kronowitz comment proposed that Native American tribal sovereignty existed implicitly in the Constitution and in the early years of the United States, the sovereign status of Native American tribes has diminished. *Id.* at 510. Despite the retention of the principle of tribal sovereignty in federal law, the tribes' power and influence as sovereign states has been restricted as a result of federal policies and the Supreme Court's effort to assimilate the people into the dominant culture. *Id.* at 622. See also Pommersheim, *supra* note 62, at 413 (offering guidelines and suggestions to aid in both "decolonizing federal Indian law and building on indigenous vision of tribal sovereignty").

these contrasts, the tribes can provide some models of governance and the use of custom for contemporary indigenous peoples.⁷² Tribal governments are implementing models through their laws, courts, and intervention programs to protect their female members.⁷³ *Martinez* and the ongoing work in tribal communities to protect women are congruous. Both types of actions, defining membership and protecting members, are an exercise of the tribal sovereign's power.⁷⁴ Moreover, the use of the tribal sovereign's powers is bound to the cultural context of the American Indian world.⁷⁵ Both *Martinez* and the protective efforts of domestic violence laws are the product of important tribal values.⁷⁶ To understand the *Martinez* decision and the tribal laws, one must consider the world view which guides the indigenous people of the U.S.

II. INDIGENOUS NATIONS OF THE UNITED STATES: A CULTURAL VIEWPOINT

For each tribe of men Usen created He also made a home. In the land for any particular tribe He placed whatever would be best for the welfare of that tribe. When Usen created the Apaches He also gave them their homes in the West. He gave them such grain, fruits, and game as they needed to eat. . . . He gave them a pleasant climate and all they needed for clothing and shelter was at hand. Thus it was in the beginning: the Apaches and their homes each created for the other by Usen himself. When they are taken from these homes they sicken and die.

⁷² See Zion, *Harmony*, *supra* note 66, at 269-73 (1984) (discussing beneficial use of tribal custom in Indian courts); see also Bill Donovan, *Peacemakers Do Justice to Navajos; Alternative Court Influences Behavior with Help of Family*, ARIZ. REPUB., Apr. 5, 1993, at A1 (analyzing operation and effectiveness of Navajo court's procedure of community involvement in dispute resolution). But see Zion & Zion, *supra* note 1, at 416-22 (noting highly disproportionate rate of domestic violence, but attributing violence to disruption of traditional lifestyles and economies).

⁷³ See *infra* notes 133-339 and accompanying text.

⁷⁴ The U.S. Supreme Court first recognized an Indian nation's right to define its membership in *Roff v. Burney*, 168 U.S. 218 (1897). See COHEN 1982, *supra* note 19, at 20-23.

⁷⁵ See Pommersheim, *supra* note 62, at 424-57 (identifying Native American language, narrative, story, and justice as instruments to define and express Native American jurisprudence); see also Zion, *Harmony*, *supra* note 66, at 275-76 (indicating many Native American tribes apply own tribal customs and usages as civil law).

⁷⁶ See, e.g., Chief Justice Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 227-34 (1989) (analyzing influence of Indian values and traditions on Navajo peacemaker courts); Zion & Zion, *supra* note 1, at 413-16 (tracing Navajo values embodied in Navajo legal institutions).

Geronimo.⁷⁷

And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it; and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.

Genesis 1:28.⁷⁸

A. *A Shared Cultural Viewpoint*

A commonality of values and perceptions exists among the many indigenous peoples in the U.S., which contrasts starkly with the values and views historically asserted by the majority culture in the United States.⁷⁹ While this statement may generalize too broadly about both viewpoints, the American Indians' shared viewpoint about both their reality and the contrast is evident. A comparison of the two groups' viewpoints on community, the individual, and conflict resolution reveals the difference between the communal perspective of native peoples and the individual rights focus of Euro-Americans.⁸⁰

⁷⁷ ANGIE DEBO, *A HISTORY OF THE INDIANS OF THE UNITED STATES* 3 (1984) [hereinafter DEBO, HISTORY]. With the caveat that specific American Indians should be respected and understood for their particular culture, Debo presented their commonly held views. In the indigenous peoples' relationship with nature, they adapt and respectfully coexist with animals, plants, and the land itself. *Id.* at 3-18. The "white man sought to dominate and change the natural setting." *Id.* at 3.

⁷⁸ Compare Genesis 1:28 (King James) (stating dominance-based view of Creation) with DEBO, HISTORY, *supra* note 77, at 3 (quoting Geronimo's account of Creation which stresses coexistence with nature). See generally RICHARD ERDOES & ALFONSO ORTIZ, *AMERICAN INDIAN MYTHS AND LEGENDS* (1984) (discussing other tribe's accounts of emergence and creation based on coexistent relations rather than domination).

⁷⁹ See Robin Paul Malloy, *Letters From The Longhouse: Law, Economics and Native American Values*, 1992 WISC. L. REV. 1569 (1992) (containing letters written by members of six native nations, including Mohawk, Oneida, Onondaga, Cayuga, Seneca and Tuscaroca). It is suggested that these individual populations of several Indian authors project a similar concern for Native American values which are in conflict with those of the dominant culture in the United States. *Id.* at 1587-1620. But see *id.* at 1621 (noting that some values are consistent with dominant culture). While the authors agree with Malloy that some Native American values "seem consistent and compatible with the dominant capitalist economic structure," coincidence does not reveal the underlying force for a cultural choice. *Id.* at 1621. We emphasize that the principle for Native American values is communally based and frequently results in different approaches to the enforcement of values. For instance, capitalism focuses on the individual engaged in rational self-maximizing acquisition, ownership, and control of property. Individualistic capitalism is thus the opposite of communally-held property requiring the responsibility of stewardship, whether the tribal property (e.g., land) is used in communal ways or allocated for possessory use by an individual, family or clan.

⁸⁰ See *infra* notes 81 to 339 and accompanying text. Moreover, the difference between the values of the dominant cultures and those of Native Americans has been a historical constant and the justification for policies destructive of tribal life. Consider the statement of Senator Henry

The political philosophy of John Locke, influential in the formation of the United States government, presents communities as the basic political entity protecting individual rights.⁸¹ The drafters of the Constitution did not seek the participation of the Indian nations in the "mutuality of concession" that created the U.S. Constitution, the social contract that guides the majority culture in the United States.⁸² The preclusion of the

Dawes who sponsored the General Allotment Act of 1887, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-34, 339, 341-342, 348, 349, 381 (1994)). The Act explicitly sought to undercut the political and cultural identity of Indian nations by destroying their common ownership of land. Dawes, however, saw this system as flawed and in need of improvement:

The head chief told us that there was not a family in that whole nation that had not a home of its own. There was not a pauper in that nation, and the nation did not owe a dollar. It built its own capitol, in which we had this examination, and it built its schools and its hospitals. Yet the defect of the system was apparent. They have got as far as they can go, because they own their land in common. It is Henry George's system, and under that there is no enterprise to make your home any better than that of you neighbors. There is no selfishness, which is at the bottom of civilization. Till this people will consent to give up their lands, and divide them among their citizens so that each can own the land he cultivates, they will not make much more progress.

ANGELA DEBO, AND STILL THE WATERS RUN 21-22 (1966) (quoting BOARD OF INDIAN COMMISSIONERS, ANNUAL REPORT, H.R. Doc. No. 104, 49th Cong., 1 Sess. 90-91 (1885), *microformed* in CIS Vol. 30, Fiche 2398.). Dawes made his observation after the forced removal of the Cherokees from Georgia to Oklahoma. In Oklahoma, the Cherokees' success in rebuilding society on foreign soil failed to protect them from (or caused them to become subject to) the Allotment Acts. See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (upholding constitutionality of Allotment Act). Allotment was only one component of federal Indian policy which imposed an individual rights model of society upon tribal peoples. See DEBO, HISTORY, *supra* note 77, at 316-31 (describing impact of government regulations promulgated after Allotment acts).

⁸¹ JOHN LOCKE, TWO TREATIES OF GOVERNMENT (Peter Laslett ed. 1960); see GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 282-305 (1969) (discussing Locke's influence on American legal thought during early years of American Republic). Compare Robert W. Venables, *American Indian Influences on the America of the Founding Fathers*, in EXILED IN THE LAND OF THE FREE: DEMOCRACY, INDIAN NATIONS, AND THE U.S. CONSTITUTION 73 (John C. Mohawk & Oren R. Lyons eds., 1992) [hereinafter EXILED IN THE LAND OF THE FREE] (surveying European and Native American cultural and philosophical influences on Founding Fathers of U.S. Constitution) with JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 207 (1990) (discussing "[d]istorted [l]ens of [p]roperty" affecting formation of constitutional principles which attempted to reconcile property rights, personal rights, and republican theory of government contingent on consent of individuals).

However one treats Lockian and republican principles in federal constitutionalism, both philosophies emphasize individual rights. The communal perspective of indigenous people, as discussed in this section, is inadequately addressed by these Western philosophies.

⁸² *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 780-81 (1991). But see Venables, *supra* note 81, at 113 (1992) (discussing treaty between Confederation Congress and Delaware Indians in which parties offered to "work mutually toward the concept of an American Indian state joining the United States").

While not participants in the constitutional drafting and the predecessor Articles of the Confederation, various sources point to the Five Nations or Iroquois Confederacy, the

indigenous nations from the Constitutional Convention is not the sole explanation for the difference between indigenous and Euro-American cultures.⁸³ Both cultures value the maintenance of community through law or customary rules of conduct, but this facial resemblance between the two societies cannot mask the differences.

In establishing the function of law derived from distinct values, indigenous people and the dominant U.S. culture do differ. Native American tribes subscribe to communal values as the guiding principle for the laws that govern an individual's conduct.⁸⁴ This preference does not mean that individual interests are ignored. Native American laws strive to protect individuals, at the same time preserving the cultural beliefs and practices of the collective framework.⁸⁵ Thus, tribal societies are built on community or relational foundations.⁸⁶ The relational foundation does not mean that individual rights are inconsistent with tribal interests. The key questions are: 1) which rights and values ought to exist; and 2) how can designated rights be held by an abstract individual, independent of social context, relationships with others or historical setting?⁸⁷

For tribal people, the real-life relational framework is the key to how individuals should treat each other.⁸⁸ The Navajo Nation Peacemaker Court materials represent one example of this framework.⁸⁹ The materials state as the operating principles for those before that traditional body: "K'ei is kinship which arranges correct conduct of the individuals within a family unit. . . . Doonee is the clan group where rules of correct

Haudenosaunee, as an inspirational model for the colonists designing a new nation. See Venables, *supra* note 81, at 13-124.

⁸³ See, e.g., Williams, Jr., *Medieval and Renaissance Origins*, *supra* note 19 (examining development and origins of Western legal thought on nature and extent of Indian tribal sovereignty and rights). Western thought is of "individualistic orientation." *Id.* at 4. "Through this exploitive process, white governments hoped to transform the Indian through contact with European materialistic and individualistic value structures and to inculcate him with those values." *Id.* at 5.

⁸⁴ See Richard Heiz, Note, *Legal Protection for Indigenous Cultures: Sacred Sites and Communal Rights*, 79 VA. L. REV. 691, 699 (noting Native American perspective of social beings born into network of group relations).

⁸⁵ See Zion, *Harmony*, *supra* note 66, at 269-73 (tracing Navajo values embodied in their legal institutions); see also Donovan, *supra* note 72, at A1 (discussing role of traditional cultural values in Navajo peacemaker courts).

⁸⁶ Pommersheim, *supra* note 62, at 435-41 (building on MARTHA MINOW, MAKING ALL THE DIFFERENCE 149-52, 311, 382-83 (1990) in context of where relational structures guide proper treatment of individuals).

⁸⁷ *Id.* at 149-52.

⁸⁸ See Zion, *Harmony*, *supra* note 66, at 269-72.

⁸⁹ The Navajo Nation Peacemaker Court: An Introduction 1 (July 7, 1992) (unpublished manuscript on file with the *St. John's Law Review*).

conduct, with fellow clan groups of the same tribe, are foremost. . . . *Bahoddaatah* is the innate nature and responsibility of an individual['s] existence."⁹⁰ These concepts anchor the standards of respect and responsibility which the Peacemaker court employs to review members' conduct when conflicts must be resolved. Conflict among individuals is a universal feature of human society.⁹¹ The survival of an organized community depends on the resolution of the inevitable conflicts between the interests of individual members and the interests of the community as a whole.⁹²

The resolution of conflicts and the maintenance of a universal harmony is a primary concern for indigenous nations and their members, but the cultural guide utilized is distinct from that of predominantly Western societies.⁹³ Individual interests are considered as part of a larger perspective. The individual and the community are part of the kinship that exists among all life forms and the environmental elements. Harmony is the desired result of the relationship with all life forms, including humans, animals, and plants.⁹⁴

For tribal people, conflict arises when the individual is out of balance or in disharmony with other community members and elements in the universe.⁹⁵ Restoration of the individual's physical and mental well-being requires the involvement of others in understanding the problem and its

⁹⁰ *Id.* at 1-2.

⁹¹ See KATHERINE NEWMAN, *LAW AND ECONOMIC ORGANIZATION: A COMPARATIVE STUDY OF PREINDUSTRIAL SOCIETIES* 1-49 (1983) (surveying and summarizing theories of legal evolution).

⁹² See Zion, *Harmony*, *supra* note 66, at 272-73 (offering three examples of traditional legal principles that stress importance of community involvement in dispute resolution).

⁹³ Tso, *supra* note 76 at 233 (highlighting emphasis that Navajo courts place on people's traditional relationship with nature). The Chief Justice of the Navajo Nation Supreme Court stated:

We refer to the earth and sky as Mother Earth and Father Sky. These are not catchy titles; they represent our understanding of our place. The earth and sky are our relatives. Nature communicates with us through the wind and the water and the whispering pines. Our traditional prayers include prayers for the plants, the animals, the water and the trees. A Navajo prayer is like a plant. The stem or the backbone of the prayer is always beauty. By this beauty we mean harmony. Beauty brings peace and understanding. It brings youngsters who are mentally and physically healthy and it brings long life. Beauty is people living peacefully with each other and with nature.

Id.; see also Zion, *Harmony*, *supra* note 66 (providing introduction to value of harmony in legal systems of Indian people).

⁹⁴ DEBO, *HISTORY*, *supra* note 77, at 3; see also Malloy, *supra* note 79 at 1623 (stating that Indians "appear to see themselves as connected directly to the earth, plants and animals of their life cycle.").

⁹⁵ See Tso, *supra* note 76, at 233-34 (describing critical role played by nature and community in Navajo judicial system).

resolution.⁹⁶ Traditional forms of problem resolution include non-adversarial forums where respected elders, family, and clan members contribute to the outcome.⁹⁷ When the resolution occurs, the individual and the community can resume a life that promotes harmonious relationships.⁹⁸ Accommodation and compromise, not win-or-lose strategies, contribute to the desired traditional outcome.⁹⁹ This type of accommodation and compromise of individual interests may not be understood or appreciated by persons outside the tribe.¹⁰⁰ Internal decisionmaking and the resolution of intra-tribal conflicts have traditionally not included outsiders, including non-member Indians.¹⁰¹

B. Santa Clara Pueblo v. Martinez and Divergent Cultures

A non-Indian's lack of appreciation for tribal autonomy and its importance in Native American communities is reflected in the articles

⁹⁶ *Id.* at 231. Tso provides an example of community involvement in conflict resolution: What holds us together is a strong set of values and customs, not words on paper. I am speaking of a sense of community so strong that, before the federal government imposed its system on us, we had no need to lock up wrongdoers. If a person injured another or disrupted the peace of the community, he was talked to, and often ceremonies were performed to restore him to harmony with his world.

Id.

⁹⁷ *Id.* (describing this community involvement as Navajo "talking" session, the effects of which did not create repeat offenders); *see also* Donovan, *supra* note 72, at A1 (stating that prior to imposition of American law, "the Navajos had a very successful system that allowed people in the family and in the community to get involved and try to work out a solution that was acceptable to everyone").

⁹⁸ Michael Taylor, *Modern Practice in the Indian Courts*, 10 UNIV. PUGET SOUND L. REV. 231 (1987). Taylor contends that:

[i]n order to effectively represent an individual plaintiff with a claim for violation of civil rights against a tribal agency or official in an Indian court, a non-Indian lawyer must learn about the tribal culture, customs, and law that are the basis of the tribal concept of civil rights. This is especially important when the client is an Indian. The Indian client usually wants to remain an effective and respected part of the reservation society, whether his lawsuit is won or lost, and this result may be compromised if the goal of the lawsuit is not somewhat consistent with the tribal understanding of personal rights.

Id. at 255-56; *see also* NEWMAN, *supra* note 91, at 47 (noting that "[t]he ultimate goal of dispute settlement is to return social relationships to their normal state").

⁹⁹ *See* Taylor, *supra* note 98, at 255-56.

¹⁰⁰ *See generally id.* at 231 (intending to provide reader with basic understanding of Indian court jurisdiction and practice). Generally a tribally-identified Indian client will shy away from a win at all costs strategy to prevent any rejection by the tribe.

¹⁰¹ The exclusion of nonmembers in the resolution of intratribal conflicts emphasizes the role of the community in Indian judicial systems. *See* Donovan, *supra* note 72, at A1. The modern Navajo peacemaker courts "make every effort to get as many of a person's relatives and friends to show up as possible." *Id.*

written about *Martinez*. *Martinez* disturbed many non-Indians, especially feminists, because the Court's holding denied full tribal membership to children of a female tribal member who married outside of the tribe.¹⁰² Some commentators made an equal protection argument, which would have the effect of treating a tribe-specific rule as common to all Native American tribal nations.¹⁰³ Responses such as this overlook the unique status of

¹⁰² See Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Court*, 56 U. CHI. L. REV. 671, 725 (1989) (expressing apprehension over "ease with which the Supreme Court in *Martinez* assumed the 1939 Ordinance to be an artifact of Santa Clara sovereignty."); see also CATHERINE MACKINNON, *Whose Culture? A Case Note on Martinez v. Santa Clara Pueblo*, in FEMINISM UNMODIFIED 63 (1987) (asserting that tribal rule in *Martinez* case is result of male supremacy). But see Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 593 (1990) (criticizing Professor MacKinnon's analysis of *Martinez*). Professor Harris deemed MacKinnon's analysis "ultimately crippled" because she reached her conclusion without attempting a more thorough analysis of the history and importance of the ordinance. *Id.* at 594.

Whatever the reasons for the 1939 ordinance, it is not an "artifact" but a conscious twentieth century choice by a tribal community, an affirmative decision within the pueblo's sovereign power. Critics of *Martinez* argue about the authenticity of the 1939 ordinance based on some historical set point such as pre-contact values. See, e.g., MACKINNON, *supra*, at 66-7. Whether contact with Europeans injected patriarchal values into some tribes' social structure is certainly arguable. What is not arguable is that twentieth century tribal nations can use their sovereign's power to change laws about membership, wisely and unwisely, just as modern European nations like Switzerland and Germany have recently restricted who can obtain membership in their nations. See, e.g., Carla Christofferson, *Tribal Courts' Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act*, 101 YALE L. J. 169, 179-84 (1991) (proposing amendment to ICRA giving all Native American women equal protection within tribal lands, analogous to that enjoyed by all American citizens); see also John Marks, *A German's Lot is Still an Exclusive One*, U.S. NEWS & WORLD REPORT, Apr. 24, 1995, at 48 (discussing German citizenship requirements).

Non-Indian feminists' views should be compared with those of Indian feminists. Compare Reyna Green, *Native American Woman*, SIGNS 248 (Winter 1980) [hereinafter Green, *Native American Woman*] (Cherokee Indian contending Indian feminist writing bears very little resemblance to non-Indian feminist analysis) and PAULA GUNN ALLEN, *THE SACRED HOOP: RECOVERING THE FEMININE IN AMERICAN INDIAN TRADITION* (1986) (Laguna Pueblo/Sioux/Lebanese discussing matriarchical Indian society) with Teresa D. LaFramboise & Anneliese M. Heyle, *Changing and Diverse Role of Women in American Indian Cultures*, 22 SEX ROLES 455 (discussing role of women in Indian society). See generally Robert A. Williams, Jr., *Gendered Checks and Balances: Understanding the Legacy of White Patriarchy in an American Indian Cultural Context*, 24 GA. L. REV. 1019 (1990) [hereinafter Williams, Jr., *Gendered Checks*] (asserting that legacy of white patriarchy encumbers ability of non-Indians to comprehend distinctive aspects of Indian culture).

¹⁰³ See, e.g., Christofferson, *supra* note 102, at 170. ("[T]he Santa Clara ruling has left Native American women virtually paralyzed within a system that subordinates women."). While it is possible that Christofferson directed this comment only at Santa Clara Pueblo, she proposes a broad general remedy that would control all tribes. *Id.* at 183. Christofferson proposes that the Indian Civil Rights Act be expanded to prohibit discrimination based on gender, waive tribal sovereign immunity, and insure federal court review after exhaustion in tribal courts. *Id.* at 183-84.

American Indian tribes as sovereigns outside the usual realm of American constitutional law.¹⁰⁴ As a result, commentators ignore the repeated affirmations that issues in Indian law require a non-constitutional analysis.¹⁰⁵ These non-Indian and feminist views overlook the premise that only the essential quality of a particular tribe's sovereignty can explain outcomes similar to and different from *Martinez*.¹⁰⁶

The tribe's power to self-define by establishing the qualifications for membership is key to sovereignty and to understanding *Martinez*.¹⁰⁷ It is not clear, for instance, how critics of *Martinez* respond to the Navajo Nation's custom that empowers a matrilineal and matrilocal society, so as

¹⁰⁴ See Vine Deloria, Jr., *The Application of the Constitution to American Indians*, in EXILED IN THE LAND OF THE FREE, *supra* note 81, at 281 (analyzing how powers authorized in Constitution have been applied to Indians and conflicts among state and federal governments and Indian sovereignty); see also Laurence M. Hauptman, *Congress, Plenary Power, and the American Indian, 1870 to 1992*, in EXILED IN THE LAND OF THE FREE, *supra* note 81, at 317 (asserting that doctrine of plenary power and present federal-Indian relationship must be altered from paternalism and interventionism to self-government).

¹⁰⁵ See *Morton v. Mancari*, 417 U.S. 535, 555 (1974) (holding that employment preference for qualified Indians in Bureau of Indian Affairs provided by Indian Reorganization Act of 1934 did not violate non-Indian employees' due process rights because it is rationally related to fulfillment of Congress' "unique obligation toward the Indians"). The Court noted additional decisions upholding legislation that singled out Indians for particular and special treatment. *Id.* (citing *Board of County Comm'rs v. Seber*, 318 U.S. 705 (1943) (federally granted tax immunity) and *Williams v. Lee*, 358 U.S. 217 (1959) (tribal jurisdiction over non-Indians on reservations)).

¹⁰⁶ See Williams, Jr., *Gendered Checks*, *supra* note 102, at 1023 n. 9. Williams, a Lumbee Indian, had this reaction to the criticisms of *Martinez*:

My own opinion is that the efforts and debates among non-Indian feminists about how *Martinez* ought to be understood underscore the need to come to grips with sexism and prejudice in traditional Indian communities in terms that have meaning for the individuals who comprise those communities. As Gretchen Bataille and Kathleen Muller Sands have warned, the scholarly literature about American Indian women accepting the view that Indian women are inferior in their cultures is based on research which "ignored the power of women within tribal structures or undervalued or inadequately valued it."

Id. (citing G. BATAILLE & K.M. SANDS, *AMERICAN INDIAN WOMEN, TELLING THEIR LIVES* VIII (1984)); see also Clara Sue Kidwell, *The Power of Women in Three American Indian Societies*, 6 J. ETHNIC STUD. 113, 120 (1978) (pointing out that Indian woman "is still a bearer of culture and identity of her people, and in this role there is still power").

Cf. Beatrice Medicine, *North American Indigenous Women and Cultural Domination*, 17 AM. INDIAN CULTURE & RES. J. 121 (1993) (discussing the gender inequality resulting from "administered relationships" of patriarchy imposed on traditional cultures by the federal government and some negative effects from the *Martinez* decision). The retained cultural values that provide vitality to contemporary tribes is discussed: "Fortunately, the political and economic influence of women has grown since the 1960s. Women of the Northern Plains, in particular, have maintained a power base and prestige structure that is tied to artistic efforts, the manipulation of educational avenues, and welfare and economic enterprises, and ritual participation." *Id.* at 129.

¹⁰⁷ See Resnik, *supra* note 102, at 719-20 (discussing importance of membership in Santa Clara Pueblo).

to define important legal rights by the mother's clan.¹⁰⁸ In the Onondaga Nation, tribal males, whose rights and status are subject to the Onondaga Faithkeepers' authority, can neither vote for these leaders nor have non-member spouses reside on tribal land.¹⁰⁹ The Faithkeepers are selected and appointed by, and are accountable to, the Clan Mother.¹¹⁰ A broad brush approach demanding equality for women and men in all tribal situations would trample upon both the power of the tribal sovereigns and the values used to construct their governments.¹¹¹

Indian feminists have rejected the Western feminist approach to gender equality by retaining the cultural framework and a commitment to the tribal nations' autonomy.¹¹² Rayna Green, a Cherokee, states:

For Indian feminists, every women's issue is framed in the larger context of Native American people. The concerns which characterize debate in Indian country, tribal sovereignty and self-determination, for example, put Native American tribes on a collision path with regulations like Title 9 and with Equal Opportunity and Affirmative Action. Tribes insist that treaty-based sovereignty supersedes any other federal mandate. While many Native American women have personal difficulty with the application of tribal sovereignty to affirmative action in tribal hiring, for

¹⁰⁸ See *Navajo Nation v. Murphy*, 15 INDIAN L. RPTR. 6035 (Navajo Nation Supreme Court, 1988) (rejecting one foundation of marital privilege rule of evidence from Anglo-American law, that women have no independent legal status, because of Navajo's matrilineal society).

¹⁰⁹ See Williams, Jr., *Gendered Checks*, *supra* note 102, at 1039 (noting Iroquois, including Onondaga, for whom "the transmission of all titles, rights and property descended through the female clan line to the exclusion of the male."); see also *Winds of Change—A Matter of Promises* (PBS television broadcast, 1990) (discussing Onondaga's recent decision to exclude non-member spouses of male members from tribal lands).

¹¹⁰ Williams, Jr., *Gendered Checks*, *supra* note 102, at 1036-44.

¹¹¹ See Christofferson, *supra* note 102 at 179-85; MACKINNON, *supra* note 102, at 68 ("I want to suggest that cultural survival is as contingent upon equality between women and men as it is upon equality among peoples."); Williams, Jr., *Gendered Checks*, *supra* note 102, at 1037. Williams also acknowledges:

There are, of course, many Indian tribes and communities, and therefore many different Indian cultural contexts. Gender roles differ radically among various Indian tribes Such variability across the broad spectrum of traditional and contemporary American Indian cultural patterns makes any effort at generalizations about the positions of women in Indian societies difficult, if not impossible, to sustain beyond just a few instances.

Id. at 1037.

¹¹² See Green, *Native American Women*, *supra* note 102, at 248. A Cherokee feminist, Green contended that Indian feminist writing bears very little resemblance to non-Indian feminist analysis of women's lives. See *id.* at 264; see also RAYNA GREEN, *NATIVE AMERICAN WOMEN: A CONTEXTUAL BIBLIOGRAPHY* (1983) [hereinafter GREEN, *BIBLIOGRAPHY*] (reviewing material on Native North American women from late seventeenth century). Medicine, *supra* note 106, at 124 ("At the present time, there are many instances of legal inequities in the lives of Indians, both male and female.").

example, most agree that sovereignty is best debated without special exception.¹¹³

This statement, acknowledging that contemporary Indian women experience personal difficulties, is not that of an atypical Indian feminist.¹¹⁴ Rayna Green notes, however, that conservation and innovation continue to exist in tribal societies because Indian women insist on taking their traditional places as healers, legal specialists and tribal government leaders.¹¹⁵ The return to tradition, retraditionalization, coupled with the evolution of gender roles in American Indian society continue the complementary and mutual roles enjoyed by women and men.¹¹⁶

¹¹³ Green, *Native American Woman*, *supra* note 102, at 248, 264.

¹¹⁴ *Id.* at 264-65. We present a view different from feminists such as MacKinnon, but not because we reject the worth of equality principles. Rather, as women of ethnic identity, we know well that our admission into the law professoriate, notwithstanding our qualifications, was propelled in part by the equality movements and affirmative action. The development of multiple ways of seeing and knowing the world and the construction of jurisprudence that acknowledges the truth of various perspectives is critical in our view. See Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47, 51 (1988) ("[W]hy, when it comes to our own arguments and activities, do feminists forget the very insights that animate feminist initiatives, insights about the power of unstated reference points and points of view, the privileged position of the status quo, and the pretense that a particular is the universal?"). See generally Harris, *supra* note 102, at 588 (rejecting gender essentialism, theory of "monolithic 'women's experience' that can be described as independent of other facets of experience like race, class and sexual orientation. . ."); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness As Jurisprudential Method*, 14 WOMEN'S RTS. L. REP. 297, 300 (1992). Matsuda states, "[i]n arguing for multiple consciousness as jurisprudential method, I don't mean to swoop up and thereby diminish the power of many different outsider traditions. Our various experiences are not co-extensive." *Id.* We believe that the unique status of American Indian women as members of sovereign tribal nations cannot be separated completely from their experiences, positive and negative, as females. Further, issues affecting tribal women cannot be analyzed in isolation from the extraconstitutional doctrines of tribal sovereignty.

¹¹⁵ Green, *Native American Woman*, *supra* note 102, at 264-65 (listing female political leaders who have emerged from tribes); see also Williams, Jr., *Gendered Checks*, *supra* note 102, at 1034-35 n. 21 (discussing meaningful forms of power exercised by women in their significant roles as executives of tribes and as legislators). Of the twenty reservations in Arizona in 1989, six were led by women holding the position of tribal chairperson. *Id.* To have a comparable amount of power in U.S. politics, non-Indian women would have to gain fifteen of the fifty governorships. *Id.*

¹¹⁶ [F]or many Indian women, positions of authority and prominence are natural evolutions of their caretaking role and they see their actions as personal rather than organizational. . . . It is important to recognize that retraditionalization efforts on the part of Indian women are often inconsistent with some goals of the current majority-culture women's movement. Non-Indian feminists emphasize middle-class themes of independence and androgyny whereas Indian women often see their work in the context of their families, their nations, and Sacred Mother Earth. Preservation and restoration of their race and culture is at least as important to Indian women as are their individual goals for professional achievement and success, although many Indian women clearly have made important professional commitments and value the role of work in their

Complementary roles arise from the deepest traditional beliefs tribal people hold about how they were created and should function in the universe. One Indian feminist, Paula Gunn Allen, echoes a pervasive understanding "that primary power—the power to make and to relate—belongs to the preponderantly feminine powers of the universe."¹¹⁷ The strictly drawn gender lines of the majority culture fail to explain much in indigenous belief systems where the creative force is exclusively feminine.¹¹⁸ Although this spirit or creative force can change forms (including manifesting itself as a male if necessary), the maintenance of a complementary social structure remains essential if a tribe is to deal effectively with internal and external matters.¹¹⁹ In the complementary relational system of the tribe, membership in the tribe and who can undertake roles are key concerns.¹²⁰

lives.

LaFromboise & Heyle, *supra* note 102, at 470-71 (citations omitted).

¹¹⁷ ALLEN, *supra* note 102, at 17. "Traditional tribal lifestyles are more often gynocratic than not, and they are never patriarchal. These features make understanding tribal cultures essential to all responsible activists who seek life-affirming social change . . ." *Id.* at 2.

¹¹⁸ *See id.* at 13-16 (maintaining that quintessential spirit made earth, creatures, plants, and light, and that central to all is woman without whose blessing nothing is sacred). Thought Woman, Spider Woman, Corn Woman, Earth Woman and White Buffalo Woman are spirits said to possess this creative force.

¹¹⁹ *Id.* at 18-20; see Linda J. Lacey, *The White Man's Law and the American Indian Family in the Assimilation Era*, 40 ARK. L. REV. 325 (1987). Under the federal assimilation policies of the nineteenth and early twentieth centuries, the conversion of the Indians to be was of utmost importance if Indian families were to resemble white families. Such was the goal of the assimilation policies. Religious groups, notably the evangelical Protestants, had a sharp influence over these policies. They sought to reconstruct the American Indian family to comport with the gender restrictions of majority society, as well as to force the adoption of the concepts of individualism and property ownership. *Id.* Lacey describes some American Indian family practices, primarily those of Plains Indians, which shocked the white missionaries. For instance, tribal women did more strenuous physical labor than white women of the upper-class; some tribes allowed women to accompany men on hunting parties; and Indian women played a central role in religious ceremonies. *Id.* at 335.

¹²⁰ Outsiders historically misinterpreted the role of indigenous women, often because of ignorance or misplaced interests of the external society. See Rayna Green, *The Pocahontas Perplex: The Image of Indian Women in American Culture*, 16 MASS. REV. 698 (1975). The Pocahontas Perplex suggests that "Indian women have to be exotic, wild, collaborationist, crazy, or white to qualify for 'white' attention." Green, *Native American Women*, *supra* note 102, at 257. Green's historical review of these misconceptions is demonstrated in Medicine's account of how ethnographers interpreted the White Buffalo Calf Women as a way to validate the subjugation of women. See Beatrice Medicine, *Indian Women: Tribal Identity As Status Quo*, in WOMAN'S NATURE: RATIONALIZATIONS OF INEQUALITY 63 (Marian Lowe & Ruth Hubbard eds., 1983). Medicine contrasts one ethnographer's Oedipean analysis of White Buffalo Calf Women with the analysis of two traditional male Lakota religious leaders, who explain that this feminine creative power keeps the tribe alive and is part of the complementary roles of men and women. *Id.* at 66-68.

The tribal nation's ability to define membership, its qualifications, benefits and responsibilities is explicitly connected to the customary values of a tribe. The tribes face enormous challenges in melding traditional values with the demands of operating a contemporary government responsive to members' needs. Tribes manage this task by relying on a historically successful approach: they conserve and innovate. Through a combination of conservation and innovation in their customs and practices, the indigenous peoples of the Americas survived the injection of European populations, life forms, and ideas into their lives.¹²¹ Consequently, it is foolhardy to think that American Indians can be unchangingly defined by a historically set point. Such a view treats American Indians as living artifacts and ignores their ability to develop by reinterpreting custom. The reinterpretation of traditional beliefs and behavior has led numerous tribes to select women as the tribal nation's chief official.¹²² In sharp contrast, the United States has yet to entrust the Presidency to a woman. It is not surprising that tribes have acted to share leadership roles with women.¹²³

¹²¹ See generally Peter Iverson, *Native People and Native Histories*, in OXFORD HISTORY OF THE AMERICAN WEST 9 (Clyde A. Milner II, et al. eds., 1994) (discussing development of American Indian West); Valencia-Weber, *supra* note 30, at 225 (discussing development of American Indian law derived from custom among nations); Peter Iverson, *Taking Care of the Earth and Sky, in AMERICA: 1492: THE WORLD OF INDIAN PEOPLE BEFORE THE ARRIVAL OF COLUMBUS 85 passim* (Alvin M. Josephy, Jr. ed., 1992) [hereinafter AMERICA 1492] (discussing conservation and innovative practices of American indigenous people); Clara Sue Kidwell, *Systems of Knowledge, in AMERICA 1492, supra*, at 372 (discussing differences between Native American and European usage of observations). The transformation of native cultures because they accepted the horse demonstrates the interplay between conservation and innovation. See generally LA VERNE HARRELL CLARK, *THEY SANG FOR HORSES: THE IMPACT OF THE HORSE ON NAVAJO AND APACHE FOLKLORE* (1966) (examining impact of horse upon traditional forms of Navajo and Apache folklore during more than three hundred years of influence); JOHN C. EWERS, *THE HORSE IN BLACKFOOT INDIAN CULTURE* 374 (1955); Margot Liberty, *Hell Came With Horses: Plains Indian Women in the Equestrian Era*, WESTERN HIST., Summer, 1982 11-19. (1982) (describing Plains Indian women's role in traditional matrilineal societies and how horses permitted some women to participate in warfare).

¹²² See, e.g., WILMA MANKILLER & MICHAEL WALLIS, *MANKILLER: A CHIEF AND HER PEOPLE* (1993). Mankiller recently completed multiple terms as the Principal Chief of the Cherokee. Her occupation of this role is not unique in light of the fact that numerous tribes have, through tradition and evolution, entrusted women to lead their nation. These women include Ada Deer of the Menominees (Assistant Secretary for Indian Affairs, Department of the Interior), Juanita Learned of the Cheyenne-Arapahoe, and Verna Olguin Teller of Isleta Pueblo. See also, ALLEN, *supra* note 102, at 31, (citing 1981 report that sixty-seven American Indian women were heads of state).

¹²³ See, e.g., Zion & Zion, *supra* note 1, at 412 (discussing women's equality, the Navajo culture and women's ownership of land); Williams, Jr., *Gendered Checks*, *supra* note 102, at 1039 (commenting on women's power and property rights).

Tribes in the nineteenth century ensured women their own property rights.¹²⁴ This was long before the state or federal governments allowed women to own property or treated women as legal or political actors.¹²⁵

The contents of tribal domestic abuse codes appear to be grounded in the traditional willingness of tribes to respect women in complementary roles which promote tribal well-being. The protection of the physical security of female tribal members is considered critical for two reasons: it maintains continuity with customary values, and it meets the duties of a government to promote the well-being of all members.

Despite problems associated with poverty, unemployment, alcoholism, and inadequate education, contemporary tribes strive to return to their traditional values and beliefs. A failure to do so can only lead to increased problems, as abused individuals treat others in an abusive manner.¹²⁶ For instance, abuse of female tribal members frequently results in abuse to children, and eventually spreads throughout the tribal community.¹²⁷ Resolution, remediation, and prevention must reach beyond the individual female victims and incorporate offenders into the process. Additionally, any steps taken should preserve cultural values which honor families and clans in relational networks. Effective tribal law and intervention results in the protection of individuals and the restoration of offenders to community participation. Both outcomes are needed to strengthen a community.

In essence, tribes should strive to protect their female members through a system which preserves the cultural values of the tribe.¹²⁸

¹²⁴ See ANGIE DEBO, *THE ROAD TO DISAPPEARANCE* 124-25, 305-08 (1984); see also ANGIE DEBO, *A HISTORY OF THE INDIANS OF THE UNITED STATES* 300 (1970) (describing Indian resistance to Allotment Act scheme of allocating land to male "head of family" as alien concept in their cultural systems where women and children had property rights).

¹²⁵ See NORMAN A. GRAEBNER ET AL., *A HISTORY OF THE AMERICAN PEOPLE*, 458 (1975). As late as the early nineteenth century, women had no legal control over property and could not vote. *Id.* LOUIS B. WRIGHT ET AL., *THE DEMOCRATIC EXPERIENCE (REVISED), A SHORT AMERICAN HISTORY* 230 (1968) (noting that American women in the mid-nineteenth century did not enjoy full rights to own property, be educated, or enter many occupations).

¹²⁶ See, e.g., Navajo Nation Domestic Abuse Protection Act NAVAJO TRIB. CODE, tit. 9, § 1602 (1993) (stating that domestic abuse has long-term effects on abused individuals, entire family and clan, and Navajo Nation as whole).

¹²⁷ *Id.*

¹²⁸ It is the policy of the Navajo Nation to demonstrate respect for members of the Navajo family and clan. . . . Abuse against persons in a domestic setting has a lasting and detrimental effect on (1) the individuals who directly experience the abuse, (2) the entire family and clan, as members indirectly experience the abuse, and (3) the Navajo Nation, as the victims and abusers carry the adverse effects of domestic abuse out of the family and into society itself.

Id.; see also Zion & Zion, *supra* note 1, at 425-26.

Without culturally appropriate means to lessen the social disruption, tribal societies risk losing their identity as distinct cultures and sovereigns. A commitment to traditional relational values, such as those which stress family and clan honor, should help to alleviate problems associated with the physical and psychological abuse of female tribal members. A review of some protective models from American Indian tribes demonstrates that tribes are engaged in an earnest effort to preserve their tribal uniqueness through codes, court orders, and interventions which stress the protection of women.¹²⁹

III. CUSTOM AND TRIBAL CODES, ORDERS, AND PROGRAMS TO PROTECT WOMEN

In prereservation society, beliefs . . . were handed down by all the people to the coming generations. In order for a tiyospaye to live in unity and cooperation, it was necessary for all to live according to the same beliefs/laws/values. This resulted in unity. When people living together do not share the same beliefs/laws/values, there will be confusion. Individuals will not have a foundation from which to guide their self-conduct. Individuals will live according to different values, and the society made up of those individuals will exist in confusion as to what is considered proper behavior.¹³⁰

A. *Scope of Review*¹³¹

This portion of the article will focus on contemporary tribal activities, tribal laws, the common law of tribal courts, and tribal intervention programs in operation. This approach is distinguishable from anthropological studies, in which information is gathered by interviewing members of a society about their perceptions¹³² or reliance on Human Relations Area Files (reports compiled by anthropologists detailing their observations and

¹²⁹ See *infra* notes 138-339 (discussing codes of Indian tribes).

¹³⁰ Plume, *supra* note 2, at 71.

¹³¹ The computerized databases WESTLAW and LEXIS do not incorporate tribal court decisions and do not create specialized databases for tribal law. The *Indian Law Reporter* is published by the American Indian Lawyer Training Program. Much of the information used for this section of the article was obtained directly from tribal people. Tribal codes, court opinions, orders, and intervention programs are not available through standard legal reporting systems. The *Indian Law Reporter* serves in a limited way to publish some tribal court opinions.

¹³² See generally RUTH M. UNDERHILL, *PAPAGO WOMAN* 48 (Barbara A. Babcock ed., 1979); *PUEBLO MOTHERS AND CHILDREN: ESSAYS BY ELSIE CLEWS PARSONS 1915-1924* (Barbara A. Babcock ed., 1991).

interpretations of the societies studied).¹³³ We have reservations about how salient some of these studies are to contemporary tribal people in the United States.¹³⁴ Practices reported in some studies do not comport with what we have observed in contemporary tribal societies. Consequently, this article offers a review which is an emerging picture of how tribes protect their female members.

This review presents a discussion of the legal treatment of domestic violence by fourteen United States tribes.¹³⁵ It is not intended to be a description of the state of the law among all 537 tribes. Rather, this article is a general survey of existing tribal law on domestic violence. The selected tribal laws were not chosen to represent the way that all tribes should approach domestic violence. Instead, they serve as a starting point from which to analyze the issues that arise when tribal communities confront issues of domestic violence. The laws demonstrate the effort of tribes to ensure the physical security of women within their respective jurisdictions.

Of the tribes examined, almost all have specific laws which address domestic violence.¹³⁶ Many of these tribal codes have common provisions. The most frequently recurring provisions are those defining

¹³³ See DAVID LEVINSON, FAMILY VIOLENCE IN CROSS-CULTURAL PERSPECTIVE 7 (Frontiers of Anthropology series, No. 1, 1989).

¹³⁴ *Id.* at 34 (citing Arapaho practice of husband punishing suspected adulterous wife by cutting off tip of her nose or slashing her cheeks). While historically some tribes used mutilation to mark those who had broken tribal customs, such punishments are not contemporary practices. *Id.* Although such practices are no longer prevalent, Levinson points out that the attitudes towards them are still mixed. Additionally, the theoretical frameworks examining these practices remain useful to illustrate the repercussions of violent behavior. *Id.* The issue of cultural bias or misinterpretation concerns us, but that is beyond the purview of this article. See *supra* note 111 (discussing outsider misinterpretation of native women's status and roles). See generally Glenda Riley, *Some European (Mis) Perceptions of American Indian Women*, 59 N. M. HIST. REV. 234 (1984) (discussing inaccurate portrayal of American Indian women by reviewing and critiquing writings of eighteenth and nineteenth century European explorers, travelers, and commentators).

¹³⁵ The tribes addressed include the Fort Belknap Indian Community, Navajo Nation, Zuni Pueblo, Jicarilla Apache, Standing Rock Sioux, Pascua-Yaqui, Cherokee Nation, Menominee, Oglala Sioux, Laguna Pueblo, Rosebud Sioux, Salt River Pima-Maricopa, Blackfeet, and Crow.

¹³⁶ The Fort Belknap Indian Community, Navajo Nation, Zuni Pueblo, Jicarilla Apache, Standing Rock Sioux, Pascua-Yaqui, Cherokee Nation, Menominee, Oglala Sioux, Rosebud Sioux, and Crow have specific domestic violence code provisions. The Pueblo of Laguna and the Salt River Pima-Maricopa do not have specific code provisions which address domestic violence. Rather they utilize general criminal code provisions. These tribes will be examined as examples of how tribes without specific domestic violence provisions address the problem. The law of the Blackfeet tribe is not included in this survey of tribal law. This article only examines its domestic violence prevention program.

domestic violence and identifying the persons protected under the law.¹³⁷ While our focus is on the protection of women, these laws are framed in much broader terms. In this review, we look closely and consider these codes not only in terms of the protections they afford women, but also in terms of the protections afforded to all members of tribal society.¹³⁸ Additionally we also consider how the laws reflect and impact tribal society. A discussion of the above identified provisions will follow. Unique provisions will also be discussed in so far as they reveal the cultural perspectives that distinguish tribal societies.

B. *Terms and Definitions*

She tried finding all those words of expression
How to explain these feeling beyond depression
A true man
A true man's love
Is it too much to ask?¹³⁹

We begin with an overview of the persons protected by tribal law and the behavior proscribed by these codes. All of the tribal codes reviewed identify the persons protected and set forth what constitutes domestic violence, domestic abuse, or spousal abuse. The tribal provisions vary in that some tribes ascribe protection to a broad group of persons, while others protect a narrow group of persons. Generally, women who are spouses and family and household members are protected persons.¹⁴⁰ Tribes, however, vary in their provisions by further qualifying the definition of "spouse" and "family and household member" or by further expanding the protected class.¹⁴¹ A minority of tribes restrict the

¹³⁷ Other common provisions are those addressing reporting, arrests, holding offenders in custody, protections afforded, requirements for counseling and participation in domestic violence programs, access to property and support, and requirements for peace bonds.

¹³⁸ Several tribes clearly state in their purpose sections that protections are not limited to family members and recognize domestic abuse as a serious crime against tribal society as a whole. *See, e.g.*, Navajo Nation Domestic Abuse Protection Act, NAVAJO TRIB. CODE, tit. 9 §§ 1602-1604 (1993) (recognizing that domestic abuse affects all members of Navajo society); STANDING ROCK SIOUX CODE OF JUSTICE, tit. XXV, § 25-101 (1990) (discussing purpose and intent of code); JICARILLA APACHE TRIB. CODE, tit. 3, § (1992) (noting that domestic violence is "a serious crime against society"); STANDING ROCK SIOUX CODE OF JUSTICE tit. XXV, § 25-101 (1990) (discussing purpose and intent of code); ROSEBUD SIOUX TRIB. CODE Ch. 38 (1989) (indicating purpose section recognizes domestic abuse as "serious crime against . . . society").

¹³⁹ JOHN TRUDELL & MARK SHARK, WHAT HE'D DONE, AKA GRAFFITI MAN (Rykodisc 1992).

¹⁴⁰ *See infra* app. A (illustrating variations among tribes in their definition of "spouse" and "family or household member").

¹⁴¹ *Id.*

definition by age and marital status.¹⁴²

Most tribes broaden the definition to include relationships without reference to marital status or age. The Navajo Nation clearly identifies the protected class and uses the identification to expand the class beyond that of several state family violence protection provisions in the United States.¹⁴³ Others protect a broad class through the use of a general term such as "persons" when describing the individuals protected.¹⁴⁴

The Navajo Nation, the Jicarilla Apache tribe, and the Standing Rock Sioux have provisions which specifically identify a broad class of protected individuals.¹⁴⁵ The Navajo Nation Domestic Abuse Protection Act¹⁴⁶ specifically and unequivocally provides for the protection of a wide class of persons. Under this law, the protected class includes persons who have been directly affected by domestic abuse.¹⁴⁷ The Act specifically includes any current or former member of the abuser's household or immediate

¹⁴² See, e.g., ROSEBUD SIOUX TRIB. CODE, ch. 38, § 1 A (1989) (stating that "[f]amily member or household member shall mean a relative, spouse, former spouse, adult, or elderly person related by marriage"); CROW TRIBE OF INDIANS, CROW LAW AND ORDER CODES, DOMESTIC ABUSE CODE, (1991).

¹⁴³ NAVAJO TRIB. CODE tit. 9, § 1605(b) includes, for example, members and former members of an abuser's immediate residence area, clan members, and any person who interacts with the abuser in an employment, academic, recreational, religious, social or other setting. None of the states in which the Navajo Nation is located (Arizona, New Mexico or Utah), nor any of the states in which the other tribes lie, have comparable provisions which would clearly include these relationships. For example, the protected class under the New Mexico Family Violence Protection Act is household members. "Household member" is defined as "a spouse, former spouse, family member, including a relative, parent, present or former stepparent, present or former in-law, child or co-parent of a child, or a person with whom the petitioner has had a continuing personal relationship." Family Violence Protection Act, N.M. STAT. ANN. § 40-13-2(D) (Michie Supp. 1995).

¹⁴⁴ The Oglala Sioux tribal code and the Salt River Pima-Maricopa Dept. of Public Service Policy use the term "persons." See *infra* app. B, charts 1-5 (comparing tribal and state laws).

¹⁴⁵ The "definitions" section of the Navajo Code specifically provides that all definitions be construed liberally to protect all individuals who may be subject to domestic abuse. NAVAJO TRIB. CODE tit. 9, § 1605 (1993). Similarly, the purpose of the Jicarilla Code is that "the entire community" is to be treated with respect. JICARILLA APACHE TRIB. CODE tit. 3, § 1 (1992).

¹⁴⁶ NAVAJO TRIB. CODE tit. 9, §§ 1601 et seq. (1993). On July 28, 1993, President Peterson Zah signed into law the Navajo Nation Domestic Abuse Act, Resolution No. CJY-53-93, governing civil proceedings for domestic violence restraining orders. The Act did not affect existing criminal law or procedures developed by the court governing conditions of release and sentencing, but did have a small impact on the 1992 Rules for Domestic Violence Proceedings which required some revision. See James W. Zion, Solicitor, Navajo Nation Judicial Branch, Law Alert (Aug. 18, 1993). Domestic violence was brought to the public forum as the result of a two-day public hearing held by the Judiciary, Public Safety, and the Health and Human Services committees of the Navajo Nation Council, in cooperation with the Navajo Nation Judicial Branch in October, 1991. The testimonies at the hearings shocked the committees and left only one option: to take action. See Zion & Zion, *supra* note 1, at 407-08.

¹⁴⁷ NAVAJO TRIB. CODE tit. 9, § 1605(b) (1993).

residence area; anyone currently or previously involved in an intimate relationship with the abuser; any person who interacts with the abuser in an employment, academic, recreational, religious, social or other setting; any offspring of the abuser; any relative or clan member of the abuser; any elderly person; or any vulnerable person, including the emotionally and physically disabled.¹⁴⁸ The Rules for Domestic Violence Proceedings for the Courts of the Navajo Nation require that the definition of domestic violence, which makes reference to the protected parties, be supplemented by Navajo common law principles, such as the principle that recognizes that special reciprocal relations exist in Navajo society among spouses and family members.¹⁴⁹

A succession of violent acts resulting in the death of Navajo women at the hands of their husbands and boyfriends brought domestic violence to the center of Navajo public attention.¹⁵⁰ Witnesses presented testimony to subcommittees of the Navajo Nation Council at public hearings held in conjunction with the Navajo Nation Judicial Branch.¹⁵¹ "Jane Begay," the name used by one witness who did not wish to reveal her true identity, was one woman who offered testimony. A portion of her testimony, as related by one observer, is as follows:

He would wait until she was asleep, then violently pull her from bed to confront her about her infidelity or the illegitimacy of the older child. It got to the point where she was afraid to sleep. She once stayed up four days in a row. She would do the chores, but forget what she was doing. The last night, when she was completely exhausted, she ran from the house without her shoes. She went up into the mountains, and covered herself with pine needles so she couldn't be found The audience was still as she told her story. She told it quietly, with soft emotion and tears and people were ready to join in them. She softly told the story of being trapped by a brutal cowboy, naively tied to him by a belief she was "married" to him. She was driven from her grandparent's home by rape

¹⁴⁸ *Id.* The broad class protected by the Navajo Nation is reflective of the traditional Navajo legal system which is based on clan relationships and the two dynamic forces of traditional Navajo law: *K'e* and *K'ei*. See Philmer Bluehouse & James W. Zion, *Hozhooji Naat'aanii: The Navajo Justice and Harmony Ceremony*, 10 MEDIATION Q. 327 (1993). *K'e* includes positive values such as compassion, cooperation, friendliness, unselfishness and peacefulness which create solidarity in society. *Id.* at 329. "*K'ei* is a special kind of *k'e*: it refers to the clan system of descent relationships and groups of relatives a person is connected to, tied by the virtues of *k'e*." *Id.* (citations omitted).

¹⁴⁹ RULES FOR DOMESTIC VIOLENCE PROCEEDINGS, COURTS OF THE NAVAJO NATION, Rule 1.5.

¹⁵⁰ See Zion & Zion, *supra* note 1, at 407-08.

¹⁵¹ *Id.*

and molestation, severely treated by her parents, treated as a captive by the denying father of her children, and given more abuse by her own family when she returned to it. She painted the picture of a brutal, male world, where abuse, accusations of sexual misconduct, and attempted rape were commonplace.¹⁵²

Women on the Council, on the Navajo Nation bench, and within the government and the community were instrumental in the lengthy process involved in the passage of the Act. This involvement ranged from insisting that the issue be addressed to drafting the law and working on its passage.

The voice that "Jane Begay" found that day was heard. Perhaps she spoke because the reality of domestic violence was too important to be left to the boredom and detachment of statistics and official reports. What she related required tremendous courage. She exposed herself and her relatives to those who knew her, and her story dealt with taboo subjects: mistreatment by men and sexuality.¹⁵³ Her family's response revealed the breakdown of her "special reciprocal relations" in Navajo society that should have shielded her. Her story was filled with relatives she shared households with: grandparents, aunts, parents, and cousins. The Nation, in the resolution approving the Domestic Abuse Act, speaks of the Navajo tradition of protecting household members from violence.¹⁵⁴ Jane's story illustrates the breadth of the household.

The Jicarilla Apache Tribal Code broadly defines domestic violence as "[a]n act of abuse by a perpetrator on a family member or household member of the perpetrator."¹⁵⁵ Included within the definition of a "member" of the perpetrator's family or household are current and former spouses,¹⁵⁶ people related by blood, people related by an existing or prior

¹⁵² James W. Zion, *Jane Begay's Story* 6,7 (1991) (unpublished manuscript on file with the *St. John's Law Review*).

¹⁵³ See generally Zion & Zion, *supra* note 1, at 416-22 (discussing causes of institutionalized violence against Navajo women).

¹⁵⁴ Res. CJY-53-93(5), Navajo Nation Tribal Council (1993).

¹⁵⁵ See JICARILLA APACHE TRIB. CODE tit. 3, § 2(C) (1992).

¹⁵⁶ *Id.* § 2(E). Jicarilla's current code provisions protecting spouses contrast sharply with accounts of the prior interaction between Apache spouses. While the accuracy of such accounts is a separate inquiry (and one which concerns the authors) it must be underscored that such accounts often create the false impression that the observed or documented practice was the accepted norm. See LEVINSON, *supra* note 133, at 34 (discussing punishments used by husbands). H. Henrietta Stockel, for example, states: "An Apache woman could expect to be beaten by her husband for any infraction of his rules; a woman who committed adultery ran the risk of having her nose cut off at its tip by her enraged husband . . . if she were caught." H. HENRIETTA STOCKEL, *WOMEN OF THE APACHE NATION: VOICES OF TRUTH* 18 (1991). The modern Jicarilla Code establishes a contrary norm, which is more in line with another practice observed by the Apache. See *id.* at 15 ("When Apache women had to walk far from home or camp to find food,

marriage, people currently or formerly residing with the perpetrator, or a person with whom the perpetrator has a child in common, regardless of whether the parents of the child have been married or have lived together at any time.¹⁵⁷ Under the purpose section of the code, elders, adults, and children are identified as intended beneficiaries of the code.¹⁵⁸

The domestic abuse chapter of the Standing Rock Code¹⁵⁹ also protects a broad class of individuals under the definition of "family" or "household members."¹⁶⁰ While the Standing Rock Code protects the same parties as the Jicarilla Code, the Standing Rock Code also includes persons who are in a dating relationship¹⁶¹ and, for purposes of the issuance of a domestic violence protection order, any other person with a sufficient relationship as determined by the court.¹⁶² The purpose section of the code states that it is the intent of the Council that "criminal laws be enforced without regard to whether the persons involved are family members, are or were married, cohabitating, or involved in a relationship."¹⁶³

The above tribal codes clearly extend the protected class beyond the conventional boundaries of the nuclear family.¹⁶⁴ The persons protected by these tribal codes reflect the extensive degree of interaction in the Indian community between and among extended family members and within societal units unique to tribal society, such as clans.

Other tribes, such as the Salt River Pima-Maricopa and the Oglala Sioux, protect a broad class through use of the term "persons."¹⁶⁵

they were accompanied by certain men whose job it was to protect them from all human and animal dangers."'). To understand contemporary tribal societies, people must obtain accurate descriptions of historical and contemporary practices, differentiate anecdotal information from established norms, and properly interpret the information.

¹⁵⁷ JICARILLA APACHE TRIB. CODE tit.3, § 2(E) (1992).

¹⁵⁸ *Id.* § 1.

¹⁵⁹ STANDING ROCK SIOUX TRIB. CODE OF JUSTICE tit. XXV (1990).

¹⁶⁰ *See id.* § 25-102(C).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* § 25-101.

¹⁶⁴ *See supra* notes 144-162 (discussing broad range of protection afforded by tribal codes).

¹⁶⁵ OGLALA SIOUX TRIB. CODE Section 99.2, §§ 1-23 *passim* (1982) (using "persons" throughout code). Enacted in 1982, the Oglala Sioux Domestic Abuse Code was the first in Indian code to recognize spouse abuse as a crime. The Sacred Shawl Women's Society—*Sina Wakan Win Okolakiciye*—lobbied for its enactment by the Oglala Sioux Tribal Council. *See* Plume, *supra* note 2, at 67. The Oglala Lakota Women's Society and the *Tiwahe Gluonihanpi*, a victims' advocate group against child abuse and domestic abuse, were instrumental in getting enough resolutions passed in various districts so that the ordinance could be passed. *See* Avis Little Eagle, *Pros and Cons of Mandatory Arrest Policy at Pine Ridge*, THE LAKOTA TIMES, Dec. 4, 1990, at A10 [hereinafter Little Eagle, *Pros and Cons*] (discussing mandatory arrest code).

Although the Oglala Sioux Domestic Abuse Code does not define the protected class as clearly as other codes,¹⁶⁶ the arrest provisions of the code reveal who is to be protected. It is mandatory to arrest someone pursuant to the code for: assaulting another "person" he/she lives with or used to live with;¹⁶⁷ contacting a "victim" in violation of an order of protection; threatening with a dangerous weapon;¹⁶⁸ and placing the "victim" in immediate fear of bodily harm following a call to the police.¹⁶⁹ The terms used to refer to the protected class are "persons" and "victims."¹⁷⁰ The only restriction on the term "persons" is that the persons currently reside or formerly resided together.¹⁷¹ The term "persons" apparently encompasses both immediate and extended family members, within or without a legally recognized marriage relationship, as well as others without blood relationship. Likewise, the Salt River Pima-Maricopa Tribe's Department of Public Safety Policy (DPS) protects "persons" with whom the alleged assailant currently resides or formerly resided.¹⁷² Therefore, the Oglala Code and Salt River Policy exceed most

¹⁶⁶ The title section of the code states that the code may be cited as the domestic abuse code or the spouse abuse code. OGLALA SIOUX TRIB. CODE sec. 99.2, § 1 (1982). "Abuse" and "spouse" are then defined in § 2 but neither definition identifies the protected class. *Id.* § 2. Instead, terms such as "persons," "victim," "parties," and "family and household member" are used when referring to the protected class, but none of them are defined. *See id.* Therefore, it appears that the code could be interpreted to apply to a much broader group of persons than to those typically included under the term "spouse". Additionally, even though the term "spouse" is defined, the definition is framed in relation to the abusing party, rather than the protected party. *See id.* ("Spouse" means a person with whom the victim is currently living . . .). This provision makes it quite clear that neither marital status nor present cohabitation circumstances are to be considered when applying the law to offenders.

¹⁶⁷ OGLALA SIOUX TRIB. CODE sec. 99.2, § 3(a). The manner in which the code limits the term spouse to include only the abusing party raises some interesting issues in relation to the arrest provisions. The abusing class—as defined by the term "spouse"—is larger than the class which can be arrested for assault. Spouse is defined as the abusing party who has currently or in the past lived with a victim, or with whom the victim has had a child in common regardless of marital status or cohabitation. *Id.* § 2(b). Under the arrest provisions, a person (including the abusing spouse) can only be arrested for assault if the person assaulted is currently residing or has in the past resided with the person to be arrested. *Id.* § 3(a). Excluded from arrest is the abusing party defined under "spouse" with whom the victim has had a child, but who has not cohabitated with the victim.

¹⁶⁸ *Id.* § 3(c). No term is used to identify the protected class under the provision which provides for arrest for threat with a dangerous weapon. An assumption is made here that the protected class would be "persons" in general; whether present or former cohabitation would be required is not clear from the code provisions.

¹⁶⁹ *Id.* § 3(d).

¹⁷⁰ *Id.* §§ 3(a), (b), (d).

¹⁷¹ OGLALA SIOUX TRIB. CODE, Section 99.2, §§ 3(b), (d).

¹⁷² Salt River Pima-Maricopa, Dept. of Public Safety, General Order No. 89-25 (Mar. 23, 1988). The Department of Public Safety (the tribal police department) developed a policy

other tribal provisions in "persons protected," by using the general term "persons," to include persons without regard to age, marital status, or blood relationship. The Salt River Pima-Maricopa DPS Policy also illustrates how some tribes protect victims of domestic abuse through the use of existing criminal code provisions.¹⁷³

While the term "persons" in the Oglala Code and Salt River Pima Policy encompasses a potentially limitless class, the requirement that "persons" currently reside or formerly resided together arguably restricts protection to those individuals who typically live together, such as family members and couples. Despite this, all persons in a domestic living arrangement are essentially protected, no matter what relationship exists between the parties.

There are other tribal provisions which are narrower in comparison to the above mentioned provisions. Generally, these codes protect household members and relatives from acts of violence. While these provisions are more limited, it is important to note that the majority of these codes protect the broader relational network which exists in Indian communities. Take for example, the protections afforded under the law of the Pascua-Yaqui. The Pascua-Yaqui law specifically protects children under fifteen who are the victims of domestic violence¹⁷⁴ and for all other offenses requires that

the relationship between the victim and the defendant is one of marriage or former marriage, or of persons of the opposite sex residing or having resided in the same household, or [that] the victim and the defendant or the defendant's spouse are related to each other by consanguinity or affinity to the second degree.¹⁷⁵

Thus, the protected class would include married and divorced persons, a

regarding the handling of domestic violence incidents. The tribe does not have a domestic violence code. Instead, the enabling law used is the criminal code.

¹⁷³ Many tribes, such as Laguna Pueblo, that do not have domestic violence codes also prosecute acts of domestic violence under existing criminal codes. See Interview with Judge William Bluehouse Johnson, Laguna Pueblo Court in New Mexico (Mar. 24, 1994). In addition, the enacting resolution for the Crow Tribe's Domestic Abuse Code acknowledges that acts of domestic violence were previously punished as disorderly conduct, assault or assault and battery. Res. No. 91-16, Crow Tribal Council (Jan. 12, 1991).

¹⁷⁴ PASCUA-YAQUI TRIB. CODE ch. 11, § 1101(A) (1992). The specific crimes proscribed are second degree murder, aggravated assault resulting in serious physical injury committed by the use of a deadly weapon or dangerous instrument, sexual assault, molestation, sexual contact, sexual exploitation, child abuse, kidnapping, sexual abuse, taking a child for the purposes of prostitution, child prostitution, and involving or using minors in drug offenses. *Id.*

¹⁷⁵ *Id.* § 1102(A). The language used by the Pascua-Yaqui is similar to the language used in the Arizona statute. See ARIZ. REV. STAT. ANN. § 13-3601(a) (1986) (amended 1993). It appears that Arizona state law served as a model for the Pascua-Yaqui code in two areas: the parties protected and the acts proscribed. See *infra* app. A; app. B, chart 1.

partner or unrelated individual of the opposite sex currently or previously residing in the same household, children and stepchildren of the defendant, and other relatives of the defendant or the defendant's spouse, who are related by blood, ancestry or marriage to the second degree.

Another example can be found in the Cherokee Nation Code. The Cherokee Nation's "protected class" includes those who are most in need of protection by society: the aged, the young, and the physically challenged.¹⁷⁶ Additionally, the tribe's code covers "parents."¹⁷⁷ Parents often are targets of abuse from older teenage children, alcohol- or chemically-dependent adult children, or mentally unstable adult children. In tribal communities, it is not unusual to have extended family members live in one household. Often, adult children remain in their parents' household or parents will move in with their adult children. Households consisting of three generations are not unusual in Native American society.

A substantial number of tribal domestic violence codes, however, limit their protections to adults only. Some tribal codes are more restrictive than others. These tribes include the Rosebud,¹⁷⁸ Crow,¹⁷⁹ Fort Belknap,¹⁸⁰ Zuni,¹⁸¹ and the Menominee.¹⁸²

Rosebud and Crow domestic violence codes contain similar provisions regarding "protected parties."¹⁸³ Both codes cover family or household members. Under Rosebud law, a "family" or "household member" is "a relative, spouse, former spouse, adult or elderly person related by marriage or an adult or elderly person who resides or formerly resided in the residence."¹⁸⁴ The purpose section of the domestic abuse code indicates

¹⁷⁶ Protection From Domestic Abuse Act, CHEROKEE NATION CODE tit. 22, § 60.1(2) (1993). Cherokee Code provisions are very similar to Oklahoma law. *See infra* App. B, Chart 5.

¹⁷⁷ CHEROKEE NATION CODE tit. 22, § 60.1(2) (1993). Research on parent abuse is not as extensive as research on child, spouse, or elder abuse. U.S. DEPT. OF HEALTH AND HUMAN SERVICES, FAMILY VIOLENCE: AN OVERVIEW 16 (1991) [hereinafter FAMILY VIOLENCE]. Parents can be severely injured by children, particularly when assaulted by older youths and adolescents. *Id.* Occasionally, these assaults result in the death of a parent (parricide). Parricide may be explained as a response to parental abuse directed toward the youth, adolescent, or another family member. *Id.* Parents who are abused report that they are ashamed of their children's violent behavior and are afraid they will be blamed for its occurrence; as a result few parents seek help and few community services are available. *Id.*

¹⁷⁸ *See* ROSEBUD SIOUX TRIB. CODE ch. 38 (1989).

¹⁷⁹ *See* CROW TRIBE OF INDIANS, CROW LAW AND ORDER CODES, DOMESTIC ABUSE CODE (1991).

¹⁸⁰ *See* FORT BELKNAP INDIAN RESERVATION, DOMESTIC ABUSE (1989).

¹⁸¹ *See* ZUNI TRIBE, ORDINANCE NO. 52, DOMESTIC VIOLENCE CODE (1991).

¹⁸² *See* MENOMINEE NATION, ORDINANCE NO. 93-21, DOMESTIC VIOLENCE (1993).

¹⁸³ *See* ROSEBUD SIOUX TRIB. CODE Ch. 38 (1989); CROW TRIBE OF INDIANS, CROW LAW AND ORDER CODES, DOMESTIC ABUSE CODE (1991).

¹⁸⁴ ROSEBUD SIOUX TRIB. CODE ch. 38, § 1(A) (1989).

that the protected class includes people regardless of whether they "are family members, were or are married, cohabiting or involved in a relationship."¹⁸⁵ While the terms "relative" and "spouse" ensure the protection of minors such as teenage spouses and children, the inclusion of "adult," in reference to persons presently or formerly residing together, excludes minors who cohabit or reside in the household but are not related.

Under Crow Law, "family member" or "household member" is defined as a spouse, adult person related by marriage, or adult person who resides or formerly resided in the same residence.¹⁸⁶ Due to the use of the word "adult" and the definition of "spouse" which excludes the victim spouse, this code apparently provides no protection to minors unless they are emancipated by marriage. Its narrow protection, however, is expanded in situations where the victim has been placed in immediate fear of bodily harm.¹⁸⁷ The code allows a law enforcement officer to arrest a perpetrator when responding to a domestic violence call involving "persons (of any age) residing together or who have resided together in the past."¹⁸⁸ The protected class is small and centered around relationships created by marriage or residency. Adult status is required unless the relationship involving a minor is created by a legal marriage. The requirement of marriage or co-residency combined with adult status limits the class. Blood

¹⁸⁵ *Id.* (Purpose).

¹⁸⁶ See CROW TRIBE OF INDIANS, CROW LAW AND ORDER CODES, DOMESTIC ABUSE CODE § 3(c) (1991). "Adult" is defined as anyone age 18 or older or emancipated as husband and wife. *Id.* § 3(c)(1). "Spouse" is defined as:

a person with whom the victim is currently living or who has lived with the victim in the past, regardless of whether they are/were married, *OR*, a person with whom the victim has a child in common regardless of whether they have been married or lived together at any time.

Id. § 3(b) (emphasis added). As in the Oglala Code, "spouse" is defined so as to describe the abuser only and does not include the victimized spouse. *Id.*; see also OGLALA SIOUX TRIB. CODE sec. 99.2, § 2(b) (1982). An argument can be made that the inclusion of spouse under the Crow definition of "family member or household member" requires an interpretation of the code which includes victim spouses as protected persons. CROW TRIBE OF INDIANS, CROW LAW AND ORDER CODES, DOMESTIC ABUSE CODE § 3(c). If victims are included in the definition of "spouse," the victim is protected if the parties are currently living or have lived together in the past, regardless of marital status or cohabitation. *Id.* § 3(b). Further, the definition of "spouse" contains no requirement that the spouse be an adult. *Id.*

¹⁸⁷ CROW TRIBE OF INDIANS, CROW LAW AND ORDER CODES, DOMESTIC ABUSE CODE § 4(C) (1991).

¹⁸⁸ *Id.* Notice the similar use of the term "persons" in the Crow law and the Oglala Code. Cf. OGLALA SIOUX TRIB. CODE sec. 99.2 § 2(b) (1982). Nevertheless, a different interpretation results because the Crow code definition of abuse describes the class protected, i.e., family or household member, while the Oglala Code defines abuse but does not specifically clarify the class protected. See *id.* § 2.

relations are included only if the residency and adult requirements are met.

The Fort Belknap Code defines "abuse" without reference to the protected class.¹⁸⁹ However, the protected class can be found in the provisions for arrest. Persons can be arrested for past or future domestic abuse of a "spouse" or "family member,"¹⁹⁰ but as with both the Crow¹⁹¹ and Oglala Codes,¹⁹² it is only the abusing spouse who is included in the definition of "spouse."¹⁹³ The Fort Belknap Code defines "family members" as "a spouse, former spouse, adult person related by blood or marriage [or] any person residing in the home who is dependent upon the head of the household," including elders and children.¹⁹⁴ The Fort Belknap provision is more expansive than the Crow provision, as it includes adult blood relatives and dependents of any age that reside in the home.

The protected class is also limited under both Menominee law and Zuni law, to include a spouse or former spouse, adults residing together, adults who formerly resided together, and adults who have had a child together.¹⁹⁵ The Zuni Code also protects "persons" who have a child or had a relationship with the offender.¹⁹⁶ This provision does not require the "person" to be an adult. Otherwise, the Zuni and Menominee codes only protect those within a legal marriage or adult relationships involving cohabitation or children.

Restricting protection to adults is significant. Generally, restrictions to adults occur when describing relationships between couples. These restrictions may occur because domestic violence is typically thought of as occurring only between married couples and because marriage is generally thought of as occurring between adults. Restricting a protected category to adults excludes minors from the class.

This result has varying degrees of impact. Under codes which are not entirely restricted to adults, certain minors are protected nevertheless

¹⁸⁹ FORT BELKNAP INDIAN RESERVATION, DOMESTIC ABUSE (Definitions) (a) (1989).

¹⁹⁰ *Id.* (Mandatory Arrest Provision) (a).

¹⁹¹ See CROW TRIBE OF INDIANS, CROW LAW AND ORDER CODE, DOMESTIC ABUSE CODE § (3)(b) (1991).

¹⁹² See OGLALA SIOUX TRIB. CODE Section 99.2, § 2(b) (1982).

¹⁹³ *Id.* (Definitions) § (a); see *supra* note 186 and accompanying text (discussing interpretation of law necessary to include victim spouses in protected class).

¹⁹⁴ FORT BELKNAP INDIAN RESERVATION, DOMESTIC ABUSE (Definitions) (c) (1989).

¹⁹⁵ MENOMINEE NATION, ORDINANCE NO. 93-21, DOMESTIC VIOLENCE § III (A) (1993) (prohibiting domestic violence by adult person); ZUNI TRIBE, ORDINANCE NO. 52, DOMESTIC VIOLENCE CODE (Definition) (1991).

¹⁹⁶ ZUNI TRIB. ORDINANCE NO. 52, DOMESTIC VIOLENCE CODE (Definition) (1991).

because they fall within other categories that do not require adult status.¹⁹⁷ On the other hand, minors who cohabit or who have had a child out of wedlock are excluded in some of the aforementioned codes.¹⁹⁸ Yet abusive behavior may begin in the dating relationship of minors.¹⁹⁹ Additionally, the high rate of teen pregnancy may result in couples living together prior to attaining adult status. Thus, restricting the protected class to adults is likely to exclude minors in need of the same protections as adults. Abuse which occurs between minor siblings²⁰⁰ and against parents by minors may also be excluded in codes which apply to adults only.

The extended family plays a significant role in tribal life. Evidence of this role may be noted in the statutory presence which the extended family has in most tribal laws regarding domestic abuse.²⁰¹ Many of the tribes clarify their intent to include members of the immediate and extended family by expressly listing children, the elderly, persons related by blood, and persons related by marriage within the protected class.²⁰² Additionally, some tribes even protect persons who fall outside the extended family.²⁰³ These protections demonstrate the great emphasis certain tribes place on addressing group disharmony and maintaining proper relationships within tribal communities.

¹⁹⁷ See FORT BELKNAP INDIAN RESERVATION, DOMESTIC ABUSE (Definitions) (c) (1989) (protecting family members, including minors who "resid[e] in the home [and are] dependent upon the head of the household.").

¹⁹⁸ See MENOMINEE NATION, ORDINANCE NO. 93-21, DOMESTIC VIOLENCE § III (A) (restricting domestic violence and domestic abuse to enumerated acts "engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has created a child").

¹⁹⁹ See Asetoyer, *supra* note 4, at 2.

²⁰⁰ Although knowledge about sibling abuse is limited, there are some factors that appear to contribute to its occurrence. See FAMILY VIOLENCE, *supra* note 177, at 17. Society accepts sibling rivalry as part of family life, and it is not unusual for siblings to use violence as a means of gaining control. *Id.* When parents fail to intervene to stop the violence, they are giving tacit permission for the sibling abuse to occur and recur. *Id.* Children tend to learn about violent behavior from the mass media and, sometimes, from their parents or peers. *Id.* Children who witness or experience such violence tend to use it against their siblings. *Id.* Finally, some children and parents suffer from emotional problems or personality disorders that are manifested through sibling abuse and parental failure to protect the child victim of the abuse. FAMILY VIOLENCE, *supra* note 177, at 17.

²⁰¹ See, e.g., ROSEBUD SIOUX TRIB. CODE ch. 38, § 1(A) (1989) (stating that family member includes any adult or elderly person who resides or formerly resided in same residence).

²⁰² JICARILLA APACHE TRIB. CODE tit. 3, ch. 5, §§ 2(D), (E) (1992); STANDING ROCK SIOUX TRIB. CODE OF JUSTICE tit. XXV, § 25-102(c) (1990); FORT BELKNAP INDIAN RESERVATION, DOMESTIC ABUSE, (Definitions) (c) (1989); ROSEBUD SIOUX TRIB. CODE ch. 38, § 1(A) (1989).

²⁰³ See, e.g., OGLALA SIOUX TRIB. CODE sec. 99.2, § 3(c) (1982) (stating that officer can arrest any person who threatens another with dangerous weapons).

The charts in Appendix A reveal some similarities between tribal laws concerning "protected persons" and domestic violence statutes of the state where the particular tribes are located. To the extent tribes are interested in protecting the same relationships as do states, this influence is understandable. To the extent, however, that tribes seek to develop laws to protect relationships inherent in the particular tribe, to reflect the composition of tribal households, and to describe the households and relationships commonly occurring on the reservation in the protected class, state law may be either too narrow or too reflective of mainstream society. The unique relationships among tribal people may add parties uncommon to state law, or require different descriptors.

The importance of protecting and maintaining the relationships within the extended family is also reflected in tribal court opinions and orders.²⁰⁴ In *Moran v. Rosebud Housing Authority*,²⁰⁵ for example, the Rosebud Sioux Court of Appeals narrowed a broad injunctive order issued to protect a victim of abuse from violent behavior. The tribal court took this action to allow the defendant and her children to visit the defendant's grandmother.²⁰⁶ This decision was in accord with the important concept of *tiyospaye*, the Lakota word meaning "the relatives living together."²⁰⁷ Among Navajos, where clan and kinship relations are central and create strong duties and responsibilities, members may say of a wrongdoer, "[h]e acts as if he has no relatives."²⁰⁸ This statement is intended to describe a person who fails to act responsibly toward members of his own clan.²⁰⁹

²⁰⁴ See, e.g., *Wike v. Tarasiewicz*, 14 Indian L. Rptr. 6020, 6022 (Rosebud Sioux Tribal Ct. 1987) (refusing to grant deference to State court order granting custody to children's mother on grounds that children's welfare and interest of tribe is in maintaining father's custody which provides benefits of "extended family kinship"); see also *Arizona Pub. Serv. Co. v. Office of Navajo Labor Relations*, 17 Indian L. Rptr. 6105 (Navajo Nation Sup. Ct. 1990) (holding employer hiring policy denying jobs to "relatives by marriage" but allowing jobs to "blood relations" is discriminatory since marriage is central in Navajo custom of extended family and clan); *In re C.D.S. & C.M.H.*, 17 Indian L. Rptr. 6083 (Ct. of Indian Offenses for the Delaware Tribe of W. Okla. 1988) (determining customary belief and practice of extended family and providing visitation right for grandparent).

²⁰⁵ 19 Indian L. Rptr. 6106 (Rosebud Sioux Ct. App. 1991).

²⁰⁶ *Id.* at 6108.

²⁰⁷ Plume, *supra* note 2, at 68. *Tiyospaye* is defined in the glossary as relatives living together; a band or division of a tribe. See Pommersheim, *supra* note 62, at 438 (discussing relational fabric of tribal life and law, inseparably manifest in "legal decision whether to grant 'standing' in a custody dispute to a member of the extended family or *tiyospaye* who is neither the mother nor the father of the child").

²⁰⁸ See *Ariz. Pub. Serv. Co.*, 17 Indian L. Rptr. at 6112 (quoting popular Navajo saying to describe someone who has committed wrong against society).

²⁰⁹ James W. Zion, *The Navajo Peacemaker Court*, PERCEPTION, Fall/Winter 1991, at 48. Bluehouse & Zion, *supra* note 148, at 331.

Other tribes share in this belief and practice of respecting extended family relationships. These beliefs are reflected in enacted codes²¹⁰ or through the recognition of these beliefs and through tribal common law.²¹¹

C. *Behavior Proscribed*

It is the intent of the Jicarilla Apache Tribal Council that the official response to cases of domestic violence shall be that violent behavior is not to be tolerated or excused, whether or not the abuser is intoxicated. The elders, adults, and children of our Tribe, and of the entire community residing on the Jicarilla Apache Reservation, are to be cherished and treated with respect.²¹²

The behavior proscribed by the tribal codes varies from a broad range of behavior to certain criminal offenses against persons generally associated with domestic violence.²¹³

The Oglala Sioux Domestic Abuse Code defines abuse as "physical harm, bodily injury, assault or the infliction of fear of imminent physical harm, bodily injury or assault."²¹⁴ The Crow provisions differ slightly from the Oglala Sioux code. In addition to the acts included in the Oglala code, abuse under Crow law includes bodily "harm" or imminent bodily "harm" to any family or household member.²¹⁵ Under the Salt River Policy, an officer can arrest a person for simple assault or battery,²¹⁶ aggravated assault and battery,²¹⁷ and a violation of an order of protection restraining the person or excluding the person from the residence.²¹⁸

The Rosebud Sioux and the Menominee codes are similar in that they proscribe abusive acts committed with specific intent. The Rosebud Sioux define domestic abuse as a crime²¹⁹ and prohibit purposely or knowingly

²¹⁰ See *infra* App. B, charts 1-5.

²¹¹ See Valencia-Weber, *supra* note 30, at 250.

²¹² JICARILLA APACHE TRIB. CODE tit. 3, § 1 (1992).

²¹³ See *infra* App. B, charts 1-5 (comparing behaviors proscribed by tribes with those of states in which tribes lie).

²¹⁴ OGLALA SIOUX TRIB. CODE sec. 99.2, § 2(a) (1982). Both the Standing Rock Sioux and Fort Belknap Indian Community domestic violence laws proscribe the same acts as the Oglala. FORT BELKNAP INDIAN RESERVATION, DOMESTIC ABUSE (Definition) (a) (1989); STANDING ROCK SIOUX CODE OF JUSTICE tit. XXV, § 25-102(A) (1990) (defining "abuse" and "domestic violence," respectively, with same terms used to define "abuse" by Oglala Sioux Tribal Code).

²¹⁵ CROW TRIBE OF INDIANS, CROW LAW AND ORDER CODE, DOMESTIC ABUSE CODE § 3(a) (1991).

²¹⁶ Salt River Pima-Maricopa, Dep't. of Pub. Safety, General Order No. 89-25, ¶ 2 (citing to § 6.51 - Simple Assault or Battery).

²¹⁷ *Id.* ¶ 1 (citing to § 6.52 - Aggravated Assault and Battery).

²¹⁸ *Id.* ¶ 3 (citing to § 6.42 - Disobedience to Lawful Orders of Court).

²¹⁹ ROSEBUD SIOUX TRIB. CODE ch. 38, § 2 (1989).

causing bodily injury or apprehension of bodily injury to a family member or household member.²²⁰ Bodily injury includes physical pain, illness, or an impairment of one's physical condition.²²¹ Causing apprehension includes any physical act intended to cause another person to reasonably fear imminent serious bodily injury or death.²²² Under the Menominee - Code domestic violence is defined as intentional infliction of physical pain, physical injury or illness, intentional impairment of physical condition, or a physical act that may cause the other person to reasonably fear imminent engagement in any of the above.²²³

The Zuni Pueblo, Jicarilla Apache, and Navajo tribes broaden the behavior which is categorized as domestic violence. This is accomplished by including other types of offenses proscribed under the tribes' general criminal code. Under Zuni law, domestic violence includes any act or incident which constitutes a crime under the Zuni Tribal Code resulting in physical harm, bodily injury, or assault, or a threat which places a person in reasonable fear of imminent physical harm or bodily injury.²²⁴ The Jicarilla Apache Domestic Violence Code states that abuse includes, *but is not limited to*, assault and battery as defined in the Jicarilla Apache Tribal code.²²⁵ Navajo law incorporates criminal offenses more liberally by proscribing "domestic violence," including any conduct that constitutes an offense under Navajo law.²²⁶

The Navajo domestic violence law includes the following acts upon a victim: assault, battery, threatening, coercion, confinement, damage to property, emotional abuse, and harassment.²²⁷ In addition, any other conduct that constitutes a tort under Navajo law qualifies as domestic violence.²²⁸ Navajo law also clearly provides that domestic abuse does not include a victim's reasonable act of self-defense.²²⁹ Under the Rules for Domestic Violence Proceedings, when parties fall out of harmony, they

²²⁰ *Id.* § 2(1)-(2).

²²¹ *Id.* § 1(B).

²²² *Id.* § 1(C).

²²³ MENOMINEE NATION, ORDINANCE NO. 93-21, DOMESTIC VIOLENCE §§ III(A)(1-3) (1993).

²²⁴ ZUNI TRIBE, ORDINANCE NO. 52, DOMESTIC VIOLENCE CODE (Definitions) (1991).

²²⁵ JICARILLA APACHE TRIB. CODE tit. 3, § 2(a) (1992).

²²⁶ Navajo Nation Domestic Abuse Protection Act, NAVAJO TRIB. CODE tit. 9, § 1605(a)(1) (1993).

²²⁷ *Id.*

²²⁸ RULES FOR DOMESTIC VIOLENCE PROCEEDINGS, COURTS OF THE NAVAJO NATION Rule 1.3 (b).

²²⁹ NAVAJO TRIB. CODE tit. 9, § 1605(a)(2) (1993).

must proceed in a cautious way in their relations with each other (*hoz-hogo*), and any definition of domestic violence must be interpreted in such a way as to identify any instances of disharmony.²³⁰

The Navajo, the Jicarilla Apache, and Cherokee Nation codes also specifically include sexual offenses in their definition of abuse.²³¹ The Cherokee Nation further defines domestic abuse as causing or attempting to cause serious physical harm or threatening another with imminent serious physical harm.²³² This definition includes, but is not limited to, assault, battery, and aggravated assault and battery against family or household members.²³³

The Pascua-Yaqui Tribal Code forbids behavior by specifying acts beyond assault, physical injury, and intimidation. The code defines domestic violence as any act which is a dangerous crime against children.²³⁴ These acts range from murder to drug offenses.²³⁵ Domestic violence also includes custodial interference, unlawful imprisonment, kidnapping, criminal trespass, and disorderly conduct.²³⁶

D. Tribal Remedies and Sanctions

There was no evidence of penal systems. Only the worst lawbreakers were labelled, but remained an integral part of the community because of their important roles in defining the boundaries of appropriate and inappropriate behavior. Their actions were viewed as the result of natural human error which required corrective intervention by elders. Customary penalties were used for the purpose of helping the offender make amends and to restore self-respect and dignity. The goal was to cure and cleanse the offender of the bad thoughts causing the negative behavior. This was accomplished by having the offender apologize and be forgiven by the victim, their relatives, and village officials who were present at a *gathering*. (The terms *gathering* and *family gatherings* are translated words used to describe the traditional court process for conflict and

²³⁰ RULES FOR DOMESTIC VIOLENCE PROCEEDINGS, COURTS OF THE NAVAJO NATION Rule 1.5.

²³¹ The Jicarilla Apache Code includes sexual assault or the infliction of the fear of sexual assaults within its definition of abuse, in addition to the infliction of physical harm or bodily injury. JICARILLA APACHE TRIB. CODE tit. 3, § 2(A) (1992). The Cherokee Code includes rape within its definition of domestic abuse. Protection from Domestic Abuse Act, CHEROKEE NATION CODE tit. 22, § 60.1(1)(c) (1990). The Navajo Nation includes sexual abuse. NAVAJO TRIB. CODE tit. 9, § 1605(a)(1)(I) (1993).

²³² CHEROKEE NATION CODE tit. 22, § 60.1(1) (1990).

²³³ *Id.*

²³⁴ PASCUA-YAQUI TRIB. CODE ch. 11., § 11-1102(A) (1992).

²³⁵ *Id.* § 11-1101(A)(1-13).

²³⁶ *Id.* § 11-1102(A) (citing §§ 11-1101(H)-(L)).

dispute resolution. In this process the first level of intervention begins with the family patriarch or other related elder designated by the family). The objective of this process was not to punish the offender; rather, the focal point of customary justice and sanctions was atonement by the offender to the entire social group.

This viewpoint towards crime has continued with some variations. Criminal and civil acts have been redefined in written law and order codes adopted by most Pueblos and approved by the Secretary of Interior. Formal structures such as tribal courts and law enforcement exist in most Pueblos. Research conducted in two Pueblo communities indicate that tribal [traditional] methods for handling offenders are still being used to deal with contemporary problems.²³⁷

The majority of the tribal codes reviewed provide greater or equal protection to victims of domestic violence when compared to the states in which these tribes are located.²³⁸ This is accomplished by proscribing a wide range of acts and behavior, and by protecting the physical integrity of an expansive class. The effectiveness of these provisions obviously is contingent upon the enforcement and actual reporting of incidents, as well as the final action taken against perpetrators.

Some tribes blend methods of traditional dispute resolution into the formal judicial process. This practice is evident in the specific provisions of the Navajo Nation's Domestic Abuse Protection Act and Supreme Court Rules for Domestic Violence.²³⁹ The judges of the Navajo Nation courts

²³⁷ Ada Pecos Melton, *Traditional and Contemporary Justice in Pueblo Communities 7-8* (unpublished manuscript, on file with *St. John's Law Review*).

²³⁸ See Family Violence Protection Act, N.M. STAT. ANN. § 40-13-2(C) (Michie Supp. 1995) (defining domestic abuse as any incident resulting in physical harm, severe emotional distress, bodily injury or assault, threat causing imminent fear of bodily injury, criminal trespass, criminal damage to property, repeatedly driving by a residence or workplace, telephone harassment, stalking, harassment, or harm or threatened harm to children); see also *infra* App. A and B (illustrating charts).

²³⁹ NAVAJO TRIB. CODE tit. 9, § 1652 (1993); RULES FOR DOMESTIC VIOLENCE PROCEEDINGS, COURTS OF THE NAVAJO NATION Rule 2.3. The Supreme Court may allocate authority to the Navajo Peacemaker Court to address domestic abuse in cases in which the victim consents. NAVAJO TRIB. CODE tit. 9, § 1652 (1993). The victim does have the option of going before a peacemaker or the Family Court. *Id.* § 1652(a). Parties may initiate a proceeding in the peacemaker court. Additionally, the district and family courts may refer all or part of a domestic violence matter to a peacemaker court. RULES FOR DOMESTIC VIOLENCE PROCEEDINGS, COURTS OF THE NAVAJO NATION Rule 2.3. The peacemaker courts of the Seneca Nation in New York also acted as traditional dispute resolution institutions and served as a model for the Quakers in America. See Oren Lyons, *Land of the Free, Home of the Brave*, in *INDIAN ROOTS OF AMERICAN DEMOCRACY* 30, 33-34 (Jose Barrerro ed., 1992). Their jurisdiction was recognized since the mid-19th century and remains so under New York State Law, and their judgments are to be enforced by state courts. N.Y. INDIAN LAW Art. 4, § 46 (McKinney 1950). New York law provides for the jurisdiction of the Seneca peacemaker courts over three Indian reservations: the

established the Peacemaking system in 1982.²⁴⁰ Peacemakers work with people to help them take care of their problems on their own.²⁴¹ Peacemakers are community leaders who employ the traditional Navajo method of "talking things out" to resolve problems. The Peacemakers use traditional methods of mediation and arbitration, but it should be noted that Navajo mediation and arbitration is different from the American "mediation" and "arbitration" models.²⁴² Many counselors to victims of domestic violence feel that mediation is inappropriate between the victim and the abuser.²⁴³ The Peacemakers are tied to each of the seven district courts of the Navajo Nation.²⁴⁴

Other tribes, such as the Pueblos, accomplish this blend through the general recognition of traditional methods of dispute resolution. One example is the Pueblo of Laguna. The tribe incorporates the traditional method of dispute resolution into its formal judicial system.²⁴⁵ The Pueblo recognizes the traditional authority of village officials to assist village members in resolving disputes without resorting to the court. The person seeking relief, however, possesses the choice of utilizing the traditional method of dispute resolution or of going to court. In addition, the Pueblo has a special method of dispute resolution for married couples, involving sponsors of couples who marry in the traditional manner.²⁴⁶

Allegany, the Cattaraugus and the Tonawanda. *Id.*

²⁴⁰ Zion, *The Navajo Nation Peacemaker Court: An Introduction* 2 (July 7, 1992) (unpublished manuscript, on file with *St. John's Law Review*).

²⁴¹ *See id.* at 1.

²⁴² *See* Bluehouse & Zion, *supra* note 148, at 327 (addressing differences between Navajo mediation and arbitration and general American models of mediation and arbitration); *see also* Zion & Zion, *supra* note 1, at 423-25 (noting that Navajo process of mediation and arbitration not only involves particular families, but also includes clan); Donovan, *supra* note 72, at A1 (noting that function of peacemaker courts, mediation, and arbitration is to preserve harmony among families and Indian community).

²⁴³ *See* Zion & Zion, *supra* note 1, at 423; *see also* Family Violence Protection Act, N.M. STAT. ANN. § 40-13-3(D) (Michie Supp. 1995) ("If any other domestic action is pending between the petitioner and the respondent, the parties shall not be compelled to mediate any aspects of the case arising from the Family Violence Protection Act unless the court finds that appropriate safeguards exist to protect each of the parties and that both parties can fairly mediate with such safeguards.").

²⁴⁴ Zion & Zion, *supra* note 1, at 423.

²⁴⁵ PUEBLO OF LAGUNA CONST. art. V, § 5.

²⁴⁶ *See* Eileen Lente-Kasero, *Laguna Tribal Court, Family Mediation - Focus on Family Disputes (marriage/divorce) in the Native American Community* 2 (Dec. 2, 1991) (unpublished manuscript, on file with the *St. John's Law Review*). Lente-Kasero reports that:

[e]ach partner would have a set of sponsors/witnesses. The parents usually would make the selection because of the role which the sponsors play. They are charged with the responsibility as advisors and mediators for the newlyweds. The sponsors/witnesses are usually an older couple within the community or sometimes

The sponsors assist married couples in resolving their disputes by reminding them of their marriage vows, counseling them, and bringing the extended family into the dispute resolution process.²⁴⁷ This method is available to those couples who choose to use it. This practice is common to other New Mexico Pueblos.²⁴⁸ Sponsors, however, have now assumed more of a ceremonial role in the traditional marriage ceremony. As a result, couples are less inclined to utilize this traditional method. The Pueblo of Laguna, like several other Pueblos and tribes, does not have a specific code on domestic violence.²⁴⁹

Primarily the domestic abuse codes reviewed are divided into three basic categories. The Zuni, Pascua-Yaqui, Standing Rock, Oglala, and Jicarilla tribes have enacted provisions which combine criminal and civil sanctions and remedies.²⁵⁰ Other tribes, such as the Navajo Nation and the Cherokee Nations, have enacted codes which provide civil remedies and sanctions only.²⁵¹ While these codes refer to the criminal sanctions available, the actual prosecution for acts of domestic violence is treated separately under a tribe's criminal law. The domestic violence codes of the Rosebud Sioux, Crow, Fort Belknap, and the Menominee Nation qualify as another category. Under this category, the tribal codes are strictly criminal in nature.²⁵² Civil remedies and sanctions only are available

traditional leaders within the community.

Id.

²⁴⁷ *Id.* ("The sponsors/witnesses would be the responsible parties to bring the couple together along with their parents and elder family members.").

²⁴⁸ See generally EDWARD H. SPICER ET AL., PERSPECTIVES IN AMERICAN INDIAN CULTURE CHANGE (1961) (discussing cultural practices among nineteen New Mexican pueblo including pueblos of Taos, Picuris, San Juan, Santa Clara, Nambe, Pojoaque, San Ildefonso, Tesuque, Santo Domingo, Cochiti, San Felipe, Santa Ana, Zia, Jemez, Sandia, Isleta, Laguna, Acoma, and Zuni).

²⁴⁹ Interview with the Honorable William Bluehouse Johnson, Laguna Tribal Court Judge (Mar. 24, 1994). A Suquamish appellate court decision documents the use of the Tribe's criminal code in an incident involving domestic violence, for which the defendant was charged and convicted of assault and battery by the Tribal Court. The defendant was jailed for 15 days, fined \$120, ordered to perform 30 days of supervised community service and ordered to anger-management counseling with the Suquamish Tribal Social Services Department for one year. *Suquamish Indian Tribe v. Mills, Sr.*, 21 Indian L. Rep. 6053 (Suquamish Tribal Court of Appeals 1991).

²⁵⁰ See PASCUA-YAQUI TRIB. CODE ch.11, §§ 11-1101 to -1103 (1992); JICARILLA APACHE TRIB. CODE tit. 3, ch. 5, §§ 1-12 (1992); ZUNI TRIBE, ORDINANCE NO. 52 DOMESTIC VIOLENCE CODE (1991); STANDING ROCK SIOUX TRIB. CODE OF JUSTICE tit. XXV, §§ 25-101-25-116 (1990); OGLALA SIOUX TRIB. CODE sec. 99.2, §§ 1-23 (1982).

²⁵¹ NAVAJO TRIB. CODE tit. 9, §§ 1601-1667 (1993); Protection from Domestic Abuse Act, CHEROKEE NATION CODE tit. 22, §§ 60-60.7 (1990).

²⁵² See MENOMINEE NATION, ORDINANCE NO. 93-21, DOMESTIC VIOLENCE (1993); CROW TRIBE OF INDIANS, CROW LAW AND ORDER CODES, DOMESTIC ABUSE CODES §§ 1-10 (1991);

under the civil law of the tribe.

1. Criminal

The purpose of this Chapter is to recognize domestic abuse as a serious crime against our society and to assure the victim of domestic abuse the maximum protection from abuse which the law and those who enforce the law can provide.²⁵³

Many tribal domestic abuse provisions include criminal sanctions and provide for arrest of those persons committing certain acts of domestic abuse.²⁵⁴ Both mandatory and discretionary arrest provisions are common. Those tribes with mandatory arrest provisions for the commission of certain acts of domestic abuse or violation of orders of protection include: Oglala, Jicarilla, Crow, Fort Belknap, Salt River Pima-Maricopa, Pascua-Yaqui, Zuni, Standing Rock, Rosebud, and Menominee.²⁵⁵ Even the

FORT BELKNAP INDIAN RESERVATION, DOMESTIC ABUSE (1989); ROSEBUD SIOUX TRIB. CODE ch. 38, §§ 1-10 (1989).

²⁵³ ROSEBUD SIOUX TRIB. CODE ch. 38, (Purpose) (1989).

²⁵⁴ See, e.g., FORT BELKNAP INDIAN RESERVATION, DOMESTIC ABUSE (Mandatory Arrest Provision) (1989). The U.S. government, however, has affected tribal criminal authority over non-Indians, non-member Indians and member Indians. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). The Supreme Court ruled that the tribe did not have criminal jurisdiction to prosecute a non-Indian for a criminal act committed within the tribe's jurisdiction absent congressional delegation. *Id.* at 210. In *Duro v. Reina*, 495 U.S. 676 (1990), the Supreme Court ruled that the tribal court could not prosecute a non-member Indian for criminal acts committed on tribal land. *Id.* at 688 ("In the area of criminal enforcement, however, tribal power does not extend beyond internal relations among members."). In addition, the Federal government has assumed exclusive jurisdiction over Indians involving fourteen crimes. See Indian Major Crimes Act, 18 U.S.C. § 1153 (1994); 18 U.S.C. § 3242 (1994). Whether this jurisdiction is exclusive to the federal government has not been decided; however, several tribes exercise concurrent jurisdiction over the criminal offenses listed in the Indian Major Crimes Act. Congress restored the tribes' ability to prosecute member Indians in October 1991. See 25 U.S.C. § 1301 (1994). Tribes, however, continue to be prohibited from prosecuting non-Indians by the *Oliphant* decision. See *Oliphant*, 435 U.S. at 191. Thus, tribal criminal provisions on domestic violence are unenforceable against non-Indian offenders. See NAVAJO TRIB. CODE tit. 9, § 151(a)(5) (1993) (stating that criminal penalties apply only to those persons over which Navajo Nation has criminal jurisdiction). But see Taylor, *supra* note 98, at 247 n.80 (explaining that authority of Courts of Federal Regulations to exercise criminal jurisdiction over non-Indians is undecided issue). In addition, tribes are limited in the sanctions they may impose for criminal offenses as a result of the Indian Civil Rights Act. 25 U.S.C. § 1302 (1994). Tribes can only impose sentences of up to one year and/or a \$5000 fine for any one offense. *Id.* § 1302(7). However, the existence of both civil and criminal remedies for domestic abuse allows tribes to deal in some way with all the people in their jurisdiction.

²⁵⁵ MENOMINEE NATION, ORDINANCE NO. 93-21 DOMESTIC VIOLENCE § IV (1993); JICARILLA APACHE TRIB. CODE tit. 3, ch. 5, § 4 (1992); PASCUA-YAQUI TRIB. CODE ch. 11 § 11-1102 (1992); CROW TRIBE OF INDIANS, CROW LAW AND ORDER CODES, DOMESTIC ABUSE CODES § 4 (1991); ZUNI TRIBE, ORDINANCE NO. 52 DOMESTIC VIOLENCE (Arrest Without

Navajo Nation, which has a civil domestic abuse code, provides for the mandatory arrest of persons who violate domestic abuse protection orders.²⁵⁶

Under some of these tribal codes, a mandatory cooling-off period of 12 to 72 hours or a holding period follows the mandatory arrest.²⁵⁷ In tribal communities, mandatory arrest serves the same purpose as in other non-Indian communities: protection of the victim's safety.²⁵⁸ The plain language in many provisions makes it clear that the arrest is intended to serve as a cooling-off period.²⁵⁹ It also serves as a period during which the abuser can regain his sobriety given the high correlation between alcohol and criminal arrests on tribal lands.²⁶⁰ Nearly all tribal codes that allow for mandatory arrest also permit a police officer to file a complaint or an arrest report with the prosecutor for further action.²⁶¹ The victim is generally not required or file or to agree to the filing of a complaint.²⁶²

Warrant) (1991); STANDING ROCK SIOUX TRIB. CODE OF JUSTICE tit. XXV, § 25-104 (1990); FORT BELKNAP INDIAN RESERVATION, DOMESTIC ABUSE (Mandatory Arrest Provision) (1989); ROSEBUD SIOUX TRIB. CODE ch. 38, § 3 (1989); SALT RIVER PIMA-MARICOPA, Dep't of Pub. Safety, General Order No. 89-25 (Mar. 23, 1988); OGLALA SIOUX TRIB. CODE sec. 99.2, § 3 (1982).

²⁵⁶ NAVAJO TRIB. CODE tit. 9, § 1663(a)(2) (1993).

²⁵⁷ See, e.g., JICARILLA APACHE TRIB. CODE tit. 3, ch. 5, § 4(H) (1992) (not less than 12 hours); STANDING ROCK SIOUX TRIB. CODE OF JUSTICE tit. XXV § 25-105 (1990) (not to exceed 72 hours); see also MENOMINEE NATION, ORDINANCE NO. 93-21 DOMESTIC VIOLENCE § VI(A) (1993) (not to exceed 36 hours, excluding Saturday, Sunday and official holidays or unless held over by order of commitment). CROW TRIBE OF INDIANS, CROW LAW AND ORDER CODES, DOMESTIC ABUSE CODES § 5 (1991) (held without bail until arraignment).

²⁵⁸ See, e.g., MENOMINEE TRIB. ORDINANCE NO. 93-21, DOMESTIC VIOLENCE § VI (B) (1993) (providing for release only if jailed party agrees to apply for and comply with restraining order).

²⁵⁹ See, e.g., JICARILLA APACHE TRIB. CODE tit. 3, ch. 5, §§ 4-5 (1992).

²⁶⁰ The Tender Hearts Against Family Violence, Inc., a crisis intervention program on the Standing Rock Sioux Reservation reported the following statistics: for the period October 1, 1989 to September 30, 1990 and October 1, 1990 to September 30, 1991, 95% of all violence towards victims was alcohol-related. Tender Hearts Against Family Violence, Inc., Statistics For Tender Hearts Program 1 (1992) (on file with *St. John's Law Review*). For the period October 1, 1991 to September 30, 1992, 95% of all violence toward victims treated by the program was alcohol-related. *Id.* Tender Hearts also reported that from the time that bars on the reservation were closed in December, 1991, a decrease in violence resulted. *Id.* at 4 ¶ (A). Statistics compiled by the Networking Office of the Council on Abused Women's Services for the North Dakota State Health Department show alcohol was used by the abuser in 43% of domestic violence incidents, and by both partners in 16% of the incidents. *Id.* at 10.

²⁶¹ See, e.g., STANDING ROCK SIOUX TRIB. CODE OF JUSTICE tit. XXV, § 25-105 (1990) (providing that law enforcement officer making arrest must file complaint against offender on behalf of tribe); FORT BELKNAP INDIAN RESERVATION, DOMESTIC ABUSE (Filing a Complaint) (a) (1989) (requiring arresting officer to sign complaint on behalf of community).

²⁶² MENOMINEE TRIB. ORDINANCE NO. 93-21, DOMESTIC VIOLENCE § V (A) (1993) (police officer reports to prosecutor); JICARILLA APACHE TRIB. CODE tit. 3, ch. 5, § 4(E) (1992) (police

Mandatory arrest is not without its unique problems in tribal communities. Incarceration has never been a traditional method of punishment in Indian societies.²⁶³ In this respect, mandatory arrest and incarceration are serious measures as well as reminders of the loss or breakdown of traditional constraints on tribal societal behavior. In 1883, incarceration was introduced into tribal societies by the federal government with the advent of Courts of Indian Offenses and Indian police.²⁶⁴ While incarceration has been present in some tribes for at least one hundred years, inadequate jail facilities pose problems.²⁶⁵ Many tribes do not have jail facilities, and must utilize other tribal or state facilities, at high costs. The utilization of non-tribal jail facilities can also require distant trips for law enforcement and family members.

In addition, some tribal community activists challenge mandatory arrest provisions as violative of the rights of alleged abusers, including the

officer files complaint); CROW TRIBE OF INDIANS, CROW LAW AND ORDER CODES, DOMESTIC ABUSE CODE §§ 4(a), (d) (1981) (police officer informs police captain and prosecutor); STANDING ROCK SIOUX TRIB. CODE OF JUSTICE tit. XXV, § 25-106 (A) (1990) (law enforcement officer signs complaint); FORT BELKNAP INDIAN RESERVATION, DOMESTIC ABUSE (Filing a Complaint) (a) (1989) (indicating complaint is considered filed on behalf of community, notwithstanding victim's wishes); SALT RIVER PIMA-MARICOPA, Dep't of Pub. Safety, General Order No. 89-25, ¶ 4 (Mar. 23, 1988). Some tribes do not grant the victim discretion to withdraw the complaint by judicial or prosecutorial policy. *See, e.g.*, Telephone Interview with Chad Smith, Attorney General of the Cherokee Nation (Oklahoma) (Mar. 21, 1994) (stating that as prosecutor, he refuses to dismiss charges even if spouses have reconsidered). Attorney General Smith and Chief Judge William Bluehouse Johnson of the Laguna Pueblo Tribal Court both adopt the position that a tribal interest is at issue, requiring prosecution to follow. *See id.*; *see also* Telephone Interview with William Bluehouse Johnson, Chief Judge of the Laguna Pueblo Tribal Court (Mar. 23, 1994). Smith and Johnson both say that they do not agree to probation or remedies that simply allow the abuser to apologize and reconcile with the victim. Attorney General Smith also requires abusers to undergo mandatory counseling, especially when children have observed or experienced the abuse. Telephone Interview with Chad Smith, Attorney General of the Cherokee Nation (Oklahoma) (Mar. 21, 1994); *see also* STANDING ROCK SIOUX TRIB. CODE OF JUSTICE tit. XXV, § 25-116(B) (providing that counseling include children of both defendant and victim when there is evidence of pattern of abuse). Smith also says the Cherokee Nation and the State of Oklahoma have an agreement to enforce each other's orders so that abusers cannot seek to escape what is necessary to change future behavior. CHEROKEE NATION CODE tit. 22, § 60.7 (1990).

²⁶³ *See generally* ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW: CASES AND MATERIALS 36-37 (3d ed. 1991) (regarding CIO/CRF Courts as response to *Ex parte Crow Dog*, 109 U.S. 556 (1883)). In *Crow Dog*, the Court denied authority to try and punish an Indian for the murder of another Indian because tribes retained their self-government power absent explicit renunciation by the tribe or removal of the power by Congress. *Id.* at 572.

²⁶⁴ *See* INDIAN BUREAU, REGULATIONS OF THE INDIAN DEPARTMENT 71-88 (1884) (stating regulations of Court of Indian Offenses).

²⁶⁵ *See generally* Tim Vollman, *Criminal Jurisdiction in Indian Country*, 22 KAN. L. REV. 387 (1974) (noting that tribal governments often lack resources to punish crimes over which they have jurisdiction).

presumption of innocence until guilt is proven.²⁶⁶ As in the non-Indian world, there is concern that the mandatory arrest provision will be abused by women who employ it against their spouse without sufficient grounds.²⁶⁷ Despite these countervailing factors, a significant number of tribes include mandatory arrest provisions in their laws addressing domestic violence in their communities.²⁶⁸

Once a defendant is found guilty, the tribal code provisions generally provide for incarceration, fines, probation, or counseling.²⁶⁹ The Jicarilla and Oglala codes, for example, provide that a court may require chemical dependency evaluations if alcohol or drugs are a factor in a particular case.²⁷⁰ The Menominee, Jicarilla, and Oglala require that the defendant participate in a domestic violence program.²⁷¹ The Jicarilla and the Oglala also require the counselor, domestic violence program, or other service provider to make reports to the court; sanctions against the perpetrator are provided for failure to comply with a court order requiring counseling, treatment, or participation in a program.²⁷²

In terms of sentencing, Pascua-Yaqui law specifically allows probation for a first offense and dismissal of the charge if probation is successfully completed.²⁷³ The Pascua-Yaqui court also may require a defendant to pay restitution and undergo counseling.²⁷⁴ The Oglala Sioux allow for the

²⁶⁶ Avis Little Eagle, *Mandatory Arrest Ordinance Puts Pressure on Oglala Court Systems*, LAKOTA TIMES, Nov. 27, 1990, at A8 [hereinafter Little Eagle, *Mandatory Arrests*] (containing comment by Robert Grey Eagle, former Dakota Plains Legal Aid Attorney, concerning Oglala Sioux Tribe's Domestic Abuse Code).

²⁶⁷ See Little Eagle, *Pros and Cons*, *supra* note 165, at A10.

²⁶⁸ See *supra* note 255 and accompanying text (listing tribal laws providing mandatory arrest provisions).

²⁶⁹ See, e.g., JICARILLA APACHE TRIB. CODE tit. 3, ch. 5, § 5(D)(4) (1992) (providing court discretion to order treatment in lieu of fine); STANDING ROCK SIOUX TRIB. CODE OF JUSTICE tit. XXV, § 9 (1990) (providing for minimum sentence for first offender of ten days).

²⁷⁰ See JICARILLA APACHE TRIB. CODE tit. 3, ch. 5, § 5(C) (1992); OGLALA SIOUX TRIB. CODE Sec. 99.2, § 4(f) (1982); See also MENOMINEE NATION, ORDINANCE NO. 93-21 § VII (A) (1993) (requiring alcohol and other drug abuse assessment of all persons convicted of crime in domestic violence situation, as well as completion of Domestic Violence/Abuse Treatment Program).

²⁷¹ See MENOMINEE TRIBAL LEGISLATURE, Ord. No. 93-21, § VII(A) (requiring completion of Domestic Violence/Abuse Treatment Program).

²⁷² See JICARILLA APACHE TRIB. CODE tit. 3, ch. 5, § 5(D) (1992); OGLALA SIOUX TRIB. CODE Sec. 99.2, § 4(g) (1982).

²⁷³ PASCUA-YAQUI TRIB. CODE ch. 11, § 11-1102(G) states: "The terms and conditions of probation shall include those necessary to provide for the protection of the alleged victim and other specifically designated persons"

²⁷⁴ *Id.*

suspension of a jail sentence for a first offense.²⁷⁵

Most tribes that will provide criminal sanctions, however, set minimum jail sentences ranging from 10 days to 30 days to a maximum sentence of 6 months for a first offense.²⁷⁶ For a second offense, tribes require minimum jail sentences ranging from 10 to 90 days with a maximum of 6 months.²⁷⁷ For a third or subsequent offense, the Fort Belknap Indian Reservation requires a 6-month minimum sentence,²⁷⁸ while the Rosebud Sioux Code mandates a minimum of 30 days.²⁷⁹ Many tribes require a \$500 maximum fine, and in addition to imprisonment, provide counseling for substance abuse, anger control, and domestic relations.²⁸⁰ Also, both the Fort Belknap Indian Community and the

²⁷⁵ See OGLALA SIOUX TRIB. CODE sec. 99.2, § 4(e) (1982). Sentences are to be for 30 to 60 days. When a sentence is suspended the defendant must cooperate completely with the orders of the court requiring cooperation with the domestic violence program. *Id.*

²⁷⁶ MENOMINEE NATION, ORDINANCE No. 93-21, DOMESTIC VIOLENCE (1993) § VII (providing separate criminal penalties); PASCUA-YAQUI TRIB. CODE ch. 11, § 11-1102(F) (1992) (offenses classified in criminal code); JICARILLA APACHE TRIB. CODE tit. 3, ch. 5, § 3(A) (1992) (providing incarceration not to exceed six months but no minimum sentence); CROW TRIBE OF INDIANS, CROW LAW AND ORDER CODES, DOMESTIC ABUSE CODE § 5(c) (1991) (10 days to 180 days); ZUNI TRIBE, ORDINANCE No. 52 DOMESTIC VIOLENCE CODE (1991) (indicating domestic violence as Class C offense); STANDING ROCK SIOUX TRIB. CODE OF JUSTICE tit. XXV, § 25-116(A) (1990) (imposing sentences of 10 to 90 days); FORT BELKNAP INDIAN RESERVATION, DOMESTIC ABUSE (Penalties) (a) (1989) (30 days to 180 days); ROSEBUD SIOUX TRIB. CODE ch. 38, § 9(A) (1989) (indicating 10 to 180 days); OGLALA SIOUX TRIB. CODE sec. 99.2, § 4(e) (imposing 30 to 60 days for a first offense which can be suspended).

²⁷⁷ MENOMINEE NATION, ORDINANCE No. 93-21 DOMESTIC VIOLENCE (1993) § VII (providing separate criminal penalties); JICARILLA APACHE TRIBE CODE tit. 3, ch. 5, § 3(A) (1992) (providing incarceration not to exceed 6 months but no minimum sentence); PASCUA-YAQUI TRIB. CODE ch. 11, § 11-1102(F) (1992) (offenses classified in criminal code); CROW TRIBE OF INDIANS, CROW LAW AND ORDER CODES, DOMESTIC ABUSE CODE § 5(d) (1991) (30 days minimum); ZUNI TRIBE, ORDINANCE No. 52 DOMESTIC VIOLENCE CODE (1991) (indicating domestic violence as Class C offense); STANDING ROCK SIOUX TRIB. CODE OF JUSTICE tit. XXV, § 25-116(A) (1990) (imposing sentences of 10 to 90 days); FORT BELKNAP INDIAN RESERVATION, DOMESTIC ABUSE (Penalties) (b) (1989) (90 days to 180 days); ROSEBUD SIOUX TRIB. CODE ch. 38, § 9(A) (1989) (indicating 10 to 180 days); OGLALA SIOUX TRIB. CODE sec. 99.2, § 4(e) (imposing 30 to 60 days for a first offense which can be suspended).

²⁷⁸ FORT BELKNAP INDIAN RESERVATION, DOMESTIC ABUSE (Penalties) (c) (providing 180 days minimum and maximum sentence).

²⁷⁹ ROSEBUD SIOUX TRIB. CODE ch. 38, § 9(B) (establishing 30 days to 180 days).

²⁸⁰ JICARILLA APACHE TRIB. CODE tit. 3, ch. 5, § 3(A) (1992) (maximum \$500 fine and domestic violence treatment); PASCUA-YAQUI TRIB. CODE ch. 11, § 11-1102(G) (1992) (imposition of fine, counselling and diversionary programs in conjunction with probation); CROW TRIBE OF INDIANS, CROW LAW AND ORDER CODES, DOMESTIC ABUSE CODE §§ 5(c)-(d) (1991) (\$500 maximum fine and mandatory counseling); STANDING ROCK SIOUX TRIB. CODE OF JUSTICE tit. XXV, § 25-116 (1990) (\$500 maximum fine and mandatory counseling); FORT BELKNAP INDIAN RESERVATION, DOMESTIC ABUSE (Penalties) (a)-(c) (1989) (\$500 fine maximum and mandatory counseling); ROSEBUD SIOUX TRIB. CODE ch. 38, § 9 (1989) (maximum \$500 fine and mandatory counseling).

Rosebud Sioux Tribe provide counseling by a medicine man recognized in the community by those persons who practice traditional Indian religion.²⁸¹

The importance of allowing counseling by traditional or professionally trained counselors from within the Indian community cannot be overstated. The counselors approach issues from a cultural and traditional perspective with an understanding of the impact that contact with Western culture has had on the roles of tribal men and women. Utilizing these counselors affirms native people in their own culture and provides a basis for confronting the problem from a tribal perspective.²⁸² Putting domestic violence in the proper cultural perspective is critical in Indian communities.²⁸³ Accomplishing this goal requires a general knowledge of historical events regarding Indian people as well as specific knowledge of a tribe's history.²⁸⁴ It also necessitates a familiarity with a specific tribe's traditional concepts of male/female relations and counseling skills.²⁸⁵ Tradition and culture can play a role in modifying behavior to the extent that either traditional or trained counselors in the community can provide information to reinforce both victims and abusers with an understanding of traditional values and traditional male/female relations. Using tradition to approach contemporary issues in Indian society is what many call "retraditionalization."²⁸⁶

It is also important that the needs of both abusers and victims be

²⁸¹ FORT BELKNAP INDIAN RESERVATION, DOMESTIC ABUSE (Penalties) (a)-(c) (1989); ROSEBUD SIOUX TRIB. CODE ch. 38, § 9 (1989).

²⁸² A study conducted by the Native American Women's Health Resource Center illustrates the direct impact outside influences have had on some of the problems experienced within the Indian family. The Resource Center, located on the Yankton Sioux Reservation in Lake Andes, S.D., is an organization which works on domestic violence issues and counsels families dealing with abuse. A group of Indian families being treated at the Resource Center participated in a generation-tracking study to understand the roots of sexual assault in each family. In every one of the participating families, the first generation experienced sexual assault as a young student attending a boarding school. The perpetrator in most cases was a priest, but in one case it was a nun. Asetoyer, *supra* note 4, at 1-2.

²⁸³ See generally *Foundation Grant Leads Assault on Pine Ridge Domestic Violence*, LAKOTA TIMES, Sept. 12, 1989, at 7 [hereinafter *Assault on Pine Ridge*]. Marlin Mousseau, project coordinator of the Oglala Sioux *Cantokicignakapi* [Loving One Another] project, made the following statement: "[i]t is essential that any programs addressing issues of violence in Indian Country utilize culture as a foundation for reteaching traditional values." *Id.*

²⁸⁴ See generally *id.* (stressing strengths of reteaching traditional values through Oglala Sioux's own culture).

²⁸⁵ See generally Teresa LaFromboise et al., *Changing and Diverse Roles of Women in American Indian Cultures*, 22 SEX ROLES 455 (1990) (examining traditional and contemporary roles of American Indian women).

²⁸⁶ See *id.* at 468.

addressed because of the relational structure of Indian tribes.²⁸⁷ In tribal societies, men, women, and children are related not only to one another, but to the larger community. In this respect, tribes differ from small town and city populations. This approach is of tremendous value, whether tribes utilize peacemakers, medicine people, sponsors, or other persons to provide a traditional approach to contemporary problems.

2. Civil

Tribal codes also provide civil remedies and sanctions to curb domestic violence. The majority of tribal codes allow for the issuance of protective orders on an emergency basis, regardless of whether the codes permit only civil remedies or both criminal and civil remedies.²⁸⁸ The Jicarilla Code allows a court to issue a temporary order of protection as a condition of release of the defendant when the defendant is before the court after mandatory arrest.²⁸⁹ This court can issue the temporary orders at its own discretion, without an application to the court for a civil protection order.²⁹⁰ Under the Jicarilla Code, an order of protection can provide for the temporary exclusion of the defendant from the residence and for restricted contact with the victim.²⁹¹ The Menominee Ordinance contains an interesting provision regarding orders of protection. It provides that a jailed party can be released if the accused agrees to apply for and comply with a judge's order prohibiting any interference with the other party.²⁹²

Significantly, the Oglala Code maintains that when there is an allegation of an imminent and present danger, a standing order of protection will exist pending a full hearing.²⁹³ The order may restrain acts of domestic abuse, exclude the abusing party from a shared residence, and prohibit contact with the victim.²⁹⁴ The Jicarilla and Standing Rock Sioux Codes also permit the issuance of a temporary restraining order

²⁸⁷ See *Assault on Pine Ridge*, *supra* note 283, at 7. ("Domestic violence is not Lakota tradition. . . . We will not end violence in our communities by continuing to provide services only to victims. The situation will continue until perpetrators of violence receive treatment.").

²⁸⁸ See *infra* notes 290-99.

²⁸⁹ JICARILLA APACHE TRIB. CODE tit. 3, ch. 5, § 5(A) (1992).

²⁹⁰ *Id.*

²⁹¹ *Id.* § 6(1)-(3) (1992).

²⁹² MENOMINEE NATION, ORDINANCE NO. 93-21, DOMESTIC VIOLENCE § VI (B) (1993). A hearing before a trial judge is held within 10 days, and the restraining order is in effect until vacated or modified. A permanent restraining order may be issued for a period of time not to exceed five years. *Id.*

²⁹³ OGLALA SIOUX TRIB. CODE sec. 99.2, § 8(a)(1) (1982).

²⁹⁴ *Id.* § 8(a)(2).

under similar conditions.²⁹⁵ Most other tribes allow for the issuance of a temporary restraining order without further hearing if, upon the court's review of the pleadings and evidence, there is reasonable cause to believe that an act of domestic violence may be or has been committed.²⁹⁶

Most temporary protection orders grant limited relief to the victims of domestic violence. This relief includes: restraining the abusing party from acts of domestic abuse; excluding the abusing party from a shared residence; restraining contact with the victim; restricting proximity to the victim; awarding temporary custody; and establishing temporary visitation of minor children.²⁹⁷ Upon award of a final restraining order, some tribes provide for counseling, give temporary use and possession of property to the victim, require an accounting for all transfers made after the order is entered, mandate payment of rent and child support, and allow any other relief necessary.²⁹⁸

²⁹⁵ JICARILLA APACHE TRIB. CODE tit. 3, ch. 5, § 6(b)(2) (1992); STANDING ROCK SIOUX TRIB. CODE OF JUSTICE tit. XXV, § 25-109(A) (1990).

²⁹⁶ Navajo Nation Domestic Abuse Protection Act, NAVAJO TRIB. CODE tit. 9, § 1655 (1993) (allowing for issuance of ex parte temporary protection orders based on evidence proving emergency situation); PASCUA-YAQUI TRIB. CODE ch. 11, § 11-1103(F) (1992); CHEROKEE NATION CODE tit. 22, §§ 60.2 - 60.4 (1990) (allowing for issuance of emergency ex parte orders for good cause shown at ex parte hearing held same day petition is filed).

²⁹⁷ See NAVAJO TRIB. CODE tit. 9, § 1660(a) (1993) (restraining aggressor from acts of domestic abuse, excluding aggressor from residence, restraining aggressor's contact with victim, awarding temporary custody of children, awarding possession of personal property, providing for nondisposition of property, ordering law enforcement supervision of return to residence, and granting other relief); JICARILLA APACHE TRIB. CODE tit. 3, ch. 5, § 6(C) (1992) (providing court with power to exclude abusing party from dwelling, restrain contact with victim, restrain respondent from committing further acts of domestic violence, award temporary custody or establish temporary visitation rights, provide child support and temporary support, order temporary guardianship, award temporary use and possession of property of respondent, restrain party(ies) from affecting property, order payment of debts, supersede prior orders of court relating to domestic matters, and provide any other lawful relief deemed necessary for protection of claimed or potential victims); PASCUA-YAQUI TRIB. CODE ch. 11, § 11-1103 (1992) (restraining party from further acts of domestic violence, excluding one party from home, restricting party contact); CHEROKEE NATION CODE tit. 22, § 60.3 (1990) (excluding abusing party from dwelling, restraining abusing party from further acts of violence or interference with victim, restraining abusing party from contact with victim); STANDING ROCK SIOUX TRIB. CODE OF JUSTICE tit. XXV, § 25-109(B)(1)-(3) (1990) (restraining abusing party from acts of domestic abuse, excluding abusing party from residence, awarding temporary custody of children, restricting or supervising visitation of minor children).

²⁹⁸ In addition to the protections afforded under a standing order for protection, the Oglala domestic violence law provides temporary visitation with minor children, counseling and social services, treatment or counseling for the abusing party, temporary use of property, prevention of parties from disposing of property, and other relief necessary for protection of family and household members, including orders which direct the public safety division of the tribe. OGLALA SIOUX TRIB. CODE sec. 99.2, § 7 (1982). The Navajo Nation provides for counseling, temporary use and possession of property, prevention of both parties from affecting property,

E. Reporting

Telling

Her face is wide, innocent, clear.

She tells me things.

They are secrets. "He did this to me. He told me not to tell. I never told until now."

Her face twists for an instant,
then returns to its rightful beauty.

I listen.

She doesn't cry, but my eyes feel the familiar moisture seeping out,
dropping on my hand that holds her's. How dare these tears appear when
she — who has the courage to tell — doesn't weep.

She gives me this.

Secrets.

Beth Brant (Mohawk)²⁹⁹

Four tribes have provisions in their codes requiring mandatory reporting of possible domestic violence.³⁰⁰ All four require reporting by medical personnel, such as physicians, nurses, and community health workers.³⁰¹ Moreover, the Oglala and Crow Codes require physician assistants, hospital interns, residents, field health nurses, and dentists to file a report when they suspect domestic abuse.³⁰² Additionally, the Standing Rock and Jicarilla Codes require mental health workers to report domestic

payment of rent and mortgages, payment for alternative housing, child support, court costs and other relief including those listed as available under temporary orders. NAVAJO TRIB. CODE tit. 9, § 1660(a) (1993). The Cherokee court can award attorney's fees and court costs in a final protective order in addition to the protections available under an emergency ex parte order. CHEROKEE NATION CODE tit. 22, § 60.4(D) (1990); *see also* STANDING ROCK SIOUX TRIB. CODE OF JUSTICE tit. XXV, § 25-108(D) (1990) (allowing court to recommend or require party(ies) to obtain counseling from domestic abuse program or another agency, order support, and award temporary use of property).

²⁹⁹ RETURNING THE GIFT: POETRY & PROSE FROM THE FIRST NORTH AMERICAN NATIVE WRITERS' FESTIVAL 50 (1994).

³⁰⁰ JICARILLA APACHE TRIB. CODE tit. 3, ch. 5, § 12 (1992); CROW TRIB. OF INDIANS, CROW LAW AND ORDER CODES, DOMESTIC ABUSE CODE §§ 6-9 (1991); STANDING ROCK SIOUX TRIB. CODE OF JUSTICE tit. XXV, § 25-111 (1990); OGLALA SIOUX TRIB. CODE sec. 99.2, §§ 15-20 (1982).

³⁰¹ JICARILLA APACHE TRIB. CODE tit. 3, ch. 5, § 12(A) (1992); CROW TRIBE OF INDIANS, CROW LAW AND ORDER CODES, DOMESTIC ABUSE CODE § 7 (1991); STANDING ROCK SIOUX TRIB. CODE OF JUSTICE tit. XXV, § 25-110(A) (1990); OGLALA SIOUX TRIB. CODE Sec. 99.2, § 16 (1982).

³⁰² CROW TRIBE OF INDIANS, CROW LAW AND ORDER CODES, DOMESTIC ABUSE CODE § 6 (1991); OGLALA SIOUX TRIB. CODE sec. 99.2, § 15 (1982).

abuse.³⁰³ Outside of the medical profession, the Jicarilla Code mandates that school teachers, social workers, and probation officers report domestic abuse. The Standing Rock Code requires social workers, counselors, and personnel of domestic violence programs and shelters to report suspected situations of domestic abuse.³⁰⁴ The Oglala and Crow Codes additionally require social workers, parent aides, adult service workers, law enforcement officers, court workers, alcohol program workers, and domestic violence personnel to report domestic abuse.³⁰⁵ Under Oglala, Jicarilla, and Crow Law, the failure to report domestic abuse is a criminal offense.³⁰⁶

F. Codes Generally

We want none of your laws or customs that we have not willingly adopted for ourselves. We have adopted many. You have adopted some of ours—votes for women for instance—we are as well behaved as you and you would think so if you knew us better.

Edward Ahenakew, Cree, 1920³⁰⁷

There is often a difference between what the law provides and what is actually implemented. This is as true in Indian communities as it is in non-Indian communities. Therefore, the existence of a domestic abuse code does not necessarily mean that all aspects of the code function as the written law mandates.³⁰⁸ This is often the result of uneven enforcement and the lack of resources within a tribal community, and/or the effectiveness of those resources.³⁰⁹ This review of the domestic abuse codes of

³⁰³ JICARILLA APACHE TRIB. CODE tit. 3, ch. 5, § 12(A) (1992); STANDING ROCK SIOUX TRIB. CODE OF JUSTICE tit. XXV, § 25-110(A) (1990).

³⁰⁴ STANDING ROCK SIOUX TRIB. CODE OF JUSTICE tit. XXV, § 25-110 (1990).

³⁰⁵ JICARILLA APACHE TRIB. CODE tit. 3, ch. 5, § 12 (1992); CROW TRIB. OF INDIANS, CROW LAW AND ORDER CODES, DOMESTIC ABUSE CODE §§ 6-9 (1991); STANDING ROCK SIOUX TRIB. CODE OF JUSTICE tit. XXV, § 25-111 (1990); OGLALA SIOUX TRIB. CODE sec. 99.2, §§ 15-20 (1982).

³⁰⁶ JICARILLA APACHE TRIB. CODE tit. 3, ch. 5, § 12(E) (1992); CROW TRIB. OF INDIANS, CROW LAW AND ORDER CODES, DOMESTIC ABUSE CODE § 6 (1991); OGLALA SIOUX TRIB. CODE sec. 99.2, § 15 (1982).

³⁰⁷ WORDS OF POWER, VOICES FROM INDIAN AMERICA 36 (Norbert S. Hill, Jr. ed., 1994).

³⁰⁸ See Little Eagle, *Mandatory Arrest*, *supra* note 266, at A8. Project Medicine Wheel, a program that counsels abusers and refers victims to shelters and services, found that the Oglala Sioux Tribal courts were not following up on sentences for domestic abuse violations. Judges, in turn, charged that the code is contradictory to existing code provisions and was not provided to the court, and that the system's lack of probationary services hinders the implementation of the code. *Id.*; see also Little Eagle, *Pros and Cons*, *supra* note 165, at A10 (expressing concerns about application of Oglala code).

³⁰⁹ Little Eagle, *Pros and Cons*, *supra* note 165, at A10.

tribal communities is only a part of the picture. Another part of the picture comes from a look at the actual impact being made in these communities. It is important to reflect on what the codes themselves reveal, before we address intervention work at the community level.

In certain respects, the codes reflect the tribal influence as it is represented by the many references to the extended family, the allowances for restitution, and counseling by medicine people.³¹⁰ In other ways, the codes directly incorporate tribal thought, such as in the policy, finding, and purpose sections of the Navajo code.³¹¹

Mostly, the tribal codes evidence the incorporation and influence of western jurisprudence. Perhaps this is inevitable in light of the Indian Civil Rights Act (ICRA),³¹² and the tendency of tribes to look at both state and other tribal codes for guidance when developing their particular code.³¹³ When tribes develop laws to deal with areas of such critical social concern as domestic abuse, careful deliberation is required when outside laws and procedures are considered.³¹⁴ Equal consideration should be given to indigenous concepts of law and to traditional methods of dispute resolution when developing tribal law.³¹⁵ ICRA standards notwithstanding, tribes can infuse their law with principles and methods which reflect their values, precepts, and approaches to dispute resolution in far greater ways than present codes currently reflect.³¹⁶

G. *Implementation of Orders and Intervention*

Life goes on

³¹⁰ See, e.g. Navajo Nation Domestic Abuse Protection Act, NAVAJO TRIB. CODE tit. 9, § 1602 (1993) (outlining general policy of Navajo nation and concern for effects of violence on entire Navajo family and clan); ROSEBUD SIOUX TRIB. CODE ch. 38, § 9(a) (1989) (providing for counseling by medicine man for those practicing traditional Indian religion).

³¹¹ NAVAJO TRIB. CODE tit. 9, § 1602 (1993) (stating that Navajo policy is to demonstrate respect for Navajo family and clan). The purpose section reads, "[t]he purpose of this Act is to protect all persons; men, women, children, elders, disabled persons, and other vulnerable persons, who are within the jurisdiction of the Navajo Nation, from all forms of domestic abuse as defined by this Act and by Navajo Nation law." *Id.* § 1604.

³¹² Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341 (1994) (imposing requirements upon tribal governments to meet minimum standards of due process as imposed on state and federal government by United States Constitution's Bill of Rights).

³¹³ See Zion & Zion, *supra* note 1, at 416 (stating that Navajo domestic violence court rules are based partially upon Anglo-American common law).

³¹⁴ See *id.* at 415-16.

³¹⁵ *Id.* at 423-24.

³¹⁶ See Christine Zuni, Strengthening What Remains, Conference Paper Presented to Indigenous Justice Conference: Justice Based on Indian Concepts (Dec. 8-9, 1993) (unpublished manuscript, on file with the *St. John's Law Review*).

no matter
 no matter
 what we do
 what we do
 have to get past
 these rough waters
 she's going through³¹⁷

The stage when a court implements orders and intervention occurs is the most critical point in the entire dispute resolution process. To successfully address domestic abuse in Indian communities, the needs of both the abused and the abuser require attention. Both parties need insight into their behavior and must take action to foster change based on this insight.³¹⁸ Typically, "needs" are met as a result of intervention. Intervention may occur as the result of a court order or through informal methods, such as through a person's self-referral to a counselor or through traditional dispute resolution.

A list of grantees of federal assistance for victims of federal crimes in Indian country³¹⁹ reveals that thirty-seven tribes received funds in 1994 to provide assistance for victims of domestic violence.³²⁰ These recipients include the Native Indian Crisis Association (NICA) Domestic Abuse Shelter run by the Blackfeet of Montana. The primary purpose of this program is to provide shelter for abused victims and their children. Victims residing at the shelter are provided transportation, legal advocacy,

³¹⁷ TRUDELL & SHARK, *supra* note 139.

³¹⁸ See generally POWER & CONTROL: TACTICS OF MEN WHO BATTER 16 (Domestic Abuse Intervention Project ed.).

³¹⁹ See Victim of Crime Act of 1984, 42 U.S.C. §§ 10601-10603 (1994) (providing fund to compensate victims of crime).

³²⁰ See NATIONAL INDIAN JUSTICE CENTER, INC., ASSISTANCE FOR VICTIMS OF FEDERAL CRIME IN INDIAN COUNTRY: STATE AND SUBGRANTEE AWARD LIST (FISCAL YEAR 1993 & 1994). The grantees are: White Mountain Apache Tribal Guidance Center; Navajo Nation Victim Witness Program; Gila River Indian Community Tribal Social Services; Nez Perce Tribe Victim's Assistance Project; Shoshone/Bannock Victims of Crime Services; Kickapoo Tribe of Kansas; Lac Vieux Desert Indian Reservation; Bay Mills Indian Reservation; Mississippi Band of Choctaw Indians; Native Indian Crisis Association Domestic Abuse Shelter; Crow Victim Assistance Program; Fort Peck Tribe; Walker River Paiute Tribe; Reno-Sparks Indian Colony; Ely Shoshone Tribe; Eight Northern Indian Pueblos Council; Pueblo of Zuni; Jicarilla Apache; Pueblo of Laguna; Fort Berthold Coalition Against Domestic Violence; Turtle Mountain Band of Chippewa Indians; Tender Hearts, Inc.; Miami Tribe; Tonkawa Tribe; The Confederated Tribes of Warm Springs; Red Horse Lodge; Victims of Crime Assistance Pine Ridge Reservation/Oglala Sioux; Women's Circle Support Services; Ute Indian Tribe; Lunmi Victims of Crime; South Puget Intertribal Planning Agency (SPIPA); Menominee Indian Tribe of Wisconsin, Menominee Tribal Police Department, Crime Victims Office; American Indian Justice Center, Ft. Washakie, Wyoming.

counseling, and assistance in locating permanent safe housing. The tribe provided an alternate home for the project while the house, which opened in May of 1990, was undergoing renovation. Previously, the nearest available shelter had been located 130 miles away. A counselor staffs the program and provides group and individual counseling on education and job skills. There is also a victim advocate/house parent who provides support, advocacy, and assistance to victims.³²¹

Another example is Tender Hearts Against Family Violence, Inc., a program which began in 1988 with Victims of Crime Assistance funding. Located in Fort Yates, North Dakota, the program is seeking to set up a satellite office in McLaughlin, South Dakota, for those victims who reside on the South Dakota side of the Standing Rock Reservation. The Reservation straddles the boundaries of the two states. The Tender Hearts program is a crisis-intervention program and works in conjunction with other tribal, state, and IHS resources. The program has support groups for men and women with most of the participants attending as a result of a court-order. The program assisted in the effort to enact the Standing Rock Domestic Abuse Code. For the years 1991 and 1992, Tender Hearts found that 95% of domestic abuse victims were women.³²² A total of 211 cases of domestic violence were prosecuted through Standing Rock Tribal Court from October 1990 to September 1991.³²³

The Sacred Shawl Society is an example of an intervention program which provides a cultural context in which to deal with domestic violence. This approach is, at once, comforting and challenging to Indian people. Sacred Shawl is located in Pine Ridge Village on the Oglala Sioux reservation, with a reservation-wide network of counselors and safe-houses.³²⁴ The Society provides services such as family and victim counseling, legal assistance, emergency shelter, transportation, and limited financial assistance.³²⁵ Sacred Shawl receives no federal or tribal funds, but it receives grant assistance and benefits from grassroots fund raising.

The Society's work revealed that the general public, the court system, the abuser, the children, and the victims were living in ignorance of Lakota values regarding domestic violence.³²⁶ As a result, the Society began to provide education regarding Lakota thought and philosophy on domestic

³²¹ *Id.*

³²² Tender Hearts Against Violence, Inc., Statistics for Tender Hearts Program 1-2 (1992) (providing statistics from Oct. 1, 1989 to Sept. 30, 1992) (on file with *St. John's Law Review*).

³²³ *Id.*

³²⁴ Plume, *supra* note 2, at 67.

³²⁵ *Id.*

³²⁶ *Id.* at 72.

violence. In her article on the work of the Society, Debra White Plume describes the pre-reservation Lakota philosophy regarding spousal abuse, the role of adult men and women in pre-reservation society, and the Lakota values and social law regarding wife battering using Lakota words.³²⁷ Plume explains the concept of *tiyospaye* — relatives living together in unity and cooperation, which is based on people living together according to the same beliefs, laws, and values.³²⁸ She describes how the Lakota society has been affected by the dissolution of traditional ways.³²⁹ Traditionally, wife battering was neither accepted nor tolerated. Spousal abuse, however, emerged as the result of the disintegration of Lakota ways of life and with the introduction of alcohol into the society.³³⁰

The Sacred Shawl Society's approach to domestic violence first involves articulating the traditional concepts of Indian society relative to the relationship between men and women. Further, the present relationship between men and women in tribal society is examined against the backdrop of these traditional concepts. An important aspect appears to be an examination of the treatment of domestic violence in the society before outside influences affected the concepts. Contemporary tribal societies face problems because of the disruption of the roles of men and women, the displacement of traditional values, and the introduction of countervailing and contrary values.³³¹ This culture-oriented approach plays a role in any action taken by tribal communities to address domestic values. In tribal communities, both the abused and the abuser can gain from this knowledge.

The use of community members in intervention and counseling programs can result in the development of counseling methods which draw on the strengths of the culture. Developing a domestic abuse approach premised on the Indian value of harmony within a community ensures that the needs of the direct and indirect victims of violence, as well as the perpetrator, will be considered. Indian societies are based on different values and beliefs than other societies. Borrowing an individualistic approach focusing on the victim from *outside* tribal society only adds to the conflict.

³²⁷ *Id.* at 68-71.

³²⁸ *Id.* at 71.

³²⁹ Plume, *supra* note 2, at 72.

³³⁰ *Id.*; see also Pommersheim, *supra* note 62, at 438-39 (discussing implications of laws on tradition and culture of tribal life); cf. Zion & Zion, *supra* note 1, at 408.

³³¹ See Plume, *supra* note 2, at 72.

IV. INDIANS OUTSIDE THE TRIBAL SYSTEM

When I first came into a shelter in the city, I felt confused. I tried to explain my feelings but nobody understood. . . . I couldn't just go and do what they asked of me. . . . I didn't have a phone. I had no neighbors. Abuse on the reserve can be very hidden.³³²

We have focused on tribal laws and systems, but we must also consider the large urban Indian population.³³³ Generally, a large part of the urban Indian population maintains ties with the reservation, by moving between the reservation and urban areas. The urban centers, however, are increasingly becoming permanent homes to a large number of Indian people.

For this reason, it is important to consider the needs of the urban population. For those who maintain close ties to the reservation, tribal resources remain available. Urban Indians are no less Indian than Indian people who reside on the reservation. Thus, state judges and service providers must be aware of the need for approaches to domestic violence which consider the cultural needs of Indian people. The need for approaches to domestic violence which take culture into consideration is just as great among urban Indian families as it is at the tribal level.

Indian women and other women of color confront the same cultural insensitivity and racism at urban domestic violence shelters as they do elsewhere.³³⁴ These shelters can be unaware of the cultural resources which should be used to assist Indian victims of domestic violence.³³⁵

³³² Eva Ferguson, *Out from the Shadows: Native Women Find Haven From Abuse at New Shelter*, CALGARY HERALD, Mar. 11, 1993, at B1 (comments of Marilyn Fraser-King, vice-president of board for new shelter for native women in northwest Calgary, Alberta).

³³³ The total population of American Indian, Eskimo or Aleut persons is 2,015,143. BUREAU OF CENSUS 1990 CENSUS OF POPULATION, SOCIAL AND ECONOMIC CHARACTERISTICS, UNITED STATES tbl. 1. 768,135 Native Americans live in urban areas. *Id.* at tbl. 4.

³³⁴ Pat Prince, *Vision Becomes Reality, Shelter for Battered Indian Women to Open in St. Paul*, STAR TRIB., June 1, 1991, at 1B: "Women of color end up having to choose between going to the white community to feel safe from battering and going to their own community to be safe from racism." *Id.* (comments of Marsha Frey, director of Minnesota Coalition for Battered Women). Canadian Indian women experience problems in this area similar to those of urban Indian women in the United States. Many Indian women must leave the reservation (U.S.) or reserves (Canada) as victims of domestic violence. In the United States, some leave the reservation because their tribes do not address domestic violence, as do the tribes whose law we reviewed, or because no resources are available on the reservations. Others simply choose to leave.

³³⁵ "Other women's shelters are unable to offer the access to traditional teachings, resources and practices that can play such a powerful role in helping Indian women in crisis 'find their way home.'" *Id.* at 1B (comments of Ellie Favell, Cultural Programming Coordinator for Eagle's

Consequently, shelters which provide services specifically directed at Indian women in urban centers are greatly needed. The Eagle's Nest, in St. Paul, Minnesota, is such a program.³³⁶ The program is the result of the work of the Women of Nations, an advocacy group for battered American Indian women. The program provides shelter to native victims and uses traditional teachings, resources, and practices to overcome the damage that results from the abuse. These practices range from burning sage and cedar to calm the spirit to teaching traditional craftwork and survival skills. Participation in spiritual ways familiar to Native women is also available.³³⁷

In urban centers with large Indian populations, statistics reveal the presence of native people at shelters and within the court system.³³⁸ Just as tribes cannot successfully address tribal domestic violence by adopting the same approaches to domestic violence as the non-Indian society, neither can individual Indian people and their families be expected to completely benefit from programs operated for majority clients.³³⁹

The intertribal community is a resource which can be utilized to assist in dealing with domestic violence in the Indian urban community. Urban Indian centers, with the multi-tribal membership among service providers and recipients, are important in providing varied and culturally appropriate intervention services to Indian victims and offenders. Tribal input from local reservations, from which the urban Indian community populations come, can assist in efforts to assess the needs of the urban population.

State courts have jurisdiction when domestic violence occurs outside tribal boundaries.³⁴⁰ The state courts and human services allied in

Nest, women's shelter for Indian victims of domestic violence in St. Paul, Minnesota).

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ For a three month period, July 1 through September 30, 1993, the Women's Community Association, which operates the Women's Shelter in Albuquerque, NM, showed that it served 736 clients. Of that amount, 137 were Native American. San Juan County Domestic Violence Task Force figures for 1993 show that Native Americans made up 36% of the population, and comprised 29% of the family crisis clients, 40% of the victims and 40% of the suspects. San Juan County has three towns, Aztec, Bloomfield and Farmington, which border the nearby Navajo Nation. See FAMILY CRISIS CENTER, *supra* note 11, at 7.

³³⁹ See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1246 (1991) ("[I]ntervention strategies based solely on the experiences of women who do not share the same class or race backgrounds will be of limited help to women who because of race and class face different obstacles.").

³⁴⁰ *But see* Penobscot Nation v. Paul, 20 Indian L. Rep. 6101 (Penobscot Nation Judicial System App. Div. 1993) (holding that Tribal court retains jurisdiction over violations of protective orders regardless of whether violations occur within court's territorial limits on

domestic law proceedings can work to cooperate with the urban Indian organizations and centers as well as with local tribes. This cooperation should also include state subsidies for services, like those subsidies provided to other entities. Financially limited urban Indian organizations and centers cannot be expected to relieve the state of its responsibilities for intervention and its costs. Agreements between states and tribes are essential so that the urban and reservation Indians can obtain culturally appropriate and effective assistance to remove domestic violence from their lives.³⁴¹

CONCLUSION

You see, we *have* power. Men have to dream to get power from the spirits and they think of everything they can — songs and speeches and marching around, hoping that the spirits will notice them and give them some power. But we *have* power . . . Children. Can any warrior make a child, no matter how brave and wonderful he is?

Chona (Tohono O'Odham)³⁴²

In the instance of the Cherokees, we are fortunate to have many strong women. I have attained a leadership position because I am willing to take risks, but at the same time, I am trying to teach other women, both Cherokees and others, to take risks also. . . . Friends describe me as someone who likes to dance along the edge of the roof. I try to encourage young women to be willing to take risks, to stand up for the things they believe in, and to step up and accept the challenge of serving in leadership roles. . . .

If I am to be remembered, I want it to be because I am fortunate enough to have become my tribe's first female chief. But I also want to be remembered for emphasizing the fact that we have indigenous solutions to our problems. Cherokee values, especially those of helping one another and of our interconnections with the land, can be used to address contemporary issues.

Wilma Mankiller³⁴³

Our review of some tribal methods of protecting women from

Penobscot Indian Reservation).

³⁴¹ The Navajo Nation Code provides that foreign court orders shall be recognized and accorded comity upon a determination of the foreign court's jurisdiction, NAVAJO TRIB. CODE tit. 9, § 1666 (1993); *see also* CHEROKEE NATION CODE tit. 22, § 60.7 (1993) (providing statewide validity of tribal court orders); N.M. STAT. ANN. § 40-13-6(D) (Michie Supp. 1995) (stating "state courts shall give full faith and credit to tribal court orders of protection").

³⁴² UNDERHILL, *supra* note 132, at 92.

³⁴³ MANKILLER & WALLIS, *supra* note 122, at 250-51.

domestic violence affirms two continuing foundations in the life of indigenous people in the United States. The first of these foundations is the persisting role of the tribe as a sovereign, the first sovereign within the national boundaries of the United States. Tribes retain their sovereignty in the context of international law, especially in the law of nations relating to indigenous people. International norms and emerging instruments, however, address tribal people in the collective, as distinct groups within a larger nation-state. The status and rights of indigenous women in relation to their tribal communities have only recently been directly addressed in international law. Consequently, it is the sovereignty of tribes within the United States borders that most directly affects the way indigenous women are protected in their tribal communities.

The power of the sovereign remains integral in drafting tribal law, rendering judicial orders, and establishing intervention programs to protect women. This is in contrast to other ethnic populations in the United States who use non-governmental organizations to promote their interests. The tribe's status as a separate governmental entity allows tribes to address their concerns regarding the well being of women, families, and tribal members through enactment of tribal law. The tribe's separate status affects the relationship between tribes and the state and federal governments and it is the tribe which provides the first line of protection to women within their jurisdiction.

Second, this review addresses the societal resources which tribal governments use in resolving family, clan, and tribal disputes, as well as the use of cultural beliefs and practices in addressing domestic violence. The resulting tribal codes, court orders, and intervention programs can be distinct in multiple ways. The traditional models of tribal law and practice contrast with the Euro-American approaches within the United States borders, but some are distinct among the over 500 tribes. The use of Peacemakers by the Navajo and the Seneca is one generalized response to any relational dispute. The use of traditional marriage sponsors in Laguna Pueblo, who take on a responsibility to the couple at betrothal expecting to assist the couple if marital problems arise, is another. Each tribe's experiences, in combination with other factors, produce a model of law and practice tailored to a tribe's needs. In the aggregate, the tribes produce many models. Yet underlying the tribal variation is the common world view that is of key importance to American Indians. The indigenous peoples of the Americas have a shared belief that achieving harmony and balance are the goals of their societies.

Both men and women in a tribal society are guided by communal rather than individualistic values; the pursuit of harmony and balance

extends to the roles and responsibilities of each. Consequently, any analysis of the way that tribes respond to the needs of female victims of violence must include a concern for, and response to, the abuser, the children, and other members of the extended family, clan, and tribe. A strict gender equality model of law and practice ignores the traditional and evolving ways in which tribal societies structure complementary roles for their members. The constitutional equal-protection-based criticism of *Martinez* reveals how narrow perspectives miss much about contemporary tribal life. Besides ignoring the legal doctrine of tribal sovereignty, the gender equality viewpoint fails to recognize both the indigenous peoples' view of male/female relationships as complementary and the abilities of indigenous people to conserve and innovate in order to promote tribal interests and continuity. The approach of retraditionalization through intervention programs, which restore men and women to complementary relationships, relies on applying long-held tribal values in a contemporary context. The tribal ability to use these customary values is demonstrated when tribal nations select women as their governmental leaders and in tribal efforts to protect women from violence.

While the tribal codes reveal some similarities to state codes, several reveal an expansive view of the protected class of individuals and relationships. The non-restrictive view of protected persons reflects the belief and policy that violence reaches beyond individual victims within the immediate family and damages the extended family and others in the tribal community. The behaviors that trigger the protective measures include not only the threatened and resulting injury to victims, but also to property. Additionally, protected relationships can justify a legal response from law enforcement agents and the courts. Especially noteworthy is the protection provided by the Navajo tribe in the workplace and educational environment. If violence occurs or is threatened, the victim and others can invoke protective measures.

The tribal courts mandate a mix of temporary and permanent remedies that are both similar and dissimilar to those utilized in non-Indian jurisdictions. Mandatory jailing for short-term cooling off, sentencing, and mandatory completion of counseling and remediation programs bear some similarity to state laws. Some tribal intervention programs operate on culturally-based goals distinct from non-Indian programs; more is involved than stopping the abuse cycle. The goal of intervention programs like the Sacred Shawl Society is to restore victim and abuser to a functional and productive status within the personal and tribal network. The problems of alcoholism, drugs, poverty, inadequate housing, and high unemployment among Indians are formidable, but the culturally-based programs do not

allow these elements to excuse the abusive behavior. These contemporary aggravations make difficult the critical task facing tribal people and their government of using every resource, old and new, to promote the safety and well-being of all members.

The tribal codes, court orders, and programs in this study demonstrate the *initial* effort involved to deliver the justice promised in words. Like all other governments, the tribes will be judged by their performance; the test is whether women believe that tribal action affirmatively protects them. The indigenous nations in this study provide encouraging models for protecting women inseparable from the nations' distinct tribal sovereignty. These tribes also demonstrate that the indigenous cultures within the United States are vital contemporary societies, rather than mere historical artifacts.

APPENDIX A

TRIBAL RESPONSE/ACTION/INTERVENTION PROFILE ¹				
Tribe	A Oglala Sioux	B Rosebud Sioux	C Laguna Pueblo	D Crow Tribe
Domestic Abuse Code	§ 99.2	Chap. 38	No	Crow Res. 91-16 (1991).
Mandatory Arrest	§ 99.2, Sec. 3	* Chap. 38, Sec. 3(A)		Crow Trib. Ordinance, § 4(e) (1991).
Issuance of R.O.- Standing O. of P.	§ 99.2, Sec. 8	* Chap. 38, Sec. 7(1)		* Crow Trib. Ordinance, § 10(1) (1991).
Exclude Abusing Party	* § 99.2, Sec. 7(b), 8	* Chap. 38, Sec. 7(2)		* Crow Trib. Ordinance, § 10(2) (1991).
Award Temp. Use & Poss. of PropertyChild Support	§ 99.2, Sec. 7(f)	* Chap. 38, Sec. 7(5) (child supp)		* Crow Trib. Ordinance, § 10(3), (6) (1991).
Abuser Held Until Arraigned	§ 99.2, Sec. 4(a)	Chap. 38, Sec. 4 12-hr. hold		Crow Trib. Ordinance, § 5(a) (1991).
Mandatory Dom. Viol. Program	§ 99.2, Sec. 4(g)			

TRIBAL RESPONSE/ACTION/INTERVENTION PROFILE ¹				
Tribes	A Oglala Sioux	B Rosebud Sioux	C Laguna Pueblo	D Crow Tribe
Hosp. Reports Mandatory	§ 99.2, Sec. 15 - others req'd to report			Crow Trib. Ordinance, § 6 (1991). Others req'd to report
Educ./Counsel'g Program Mandatory	§ 99.2, Sec. 4(g)(2)	Chap. 38, Sec. 9(A)	Not mand.; utilized by judge	Crow Trib. Ordinance, §§ 5(c), (d) (1991).
Shelter	§ 99.2 Sec. 7(b)	Ch. 38, Sec 7	Yes	
Elder Abuse Code	Yes. <i>See</i> OGLALA SIOUX ELDER ABUSE CODE.	Ch. 38; <i>see</i> Intent Statement in Purpose Section.		
Crim. Code Provisions Utilized			Yes	
Comments	For Comm. Resp. to Code-See Articles		Trad. System also available Info obtained from Dir. Family Services	Victim's Rights Notice, Crow Trib. Ordinance, § 10(1) (1991).
Dom. Violence/Abuse Defined	§ 99.2, Sec. 2(a)	Ch. 38, Sec. 2 & 1		Crow Trib. Ordinance, § 3(a) (1991).

TRIBAL RESPONSE/ACTION/INTERVENTION PROFILE ¹				
Tribe	A Oglala Sioux	B Rosebud Sioux	C Laguna Pueblo	D Crow Tribe
Persons Protected	§ 99.2, Sec. 2(b) Spouse is defined "Persons" throughout code.	Ch. 38, Sec. 1		Crow Trib. Ordinance, § 3(c), (b) & (d)(1) (1991) ("family mem- ber of household mem- ber")

* Relief available under Temporary Restraining Orders/Restraining Orders.

¹ This is a comparison of some of the provisions of the tribal codes reviewed. Information on elder abuse codes and shelters is not comprehensive. It is based on code provisions or information provided to the authors.

TRIBAL RESPONSE/ACTION/INTERVENTION PROFILE ¹				
Tribe	E: Fort Belknap Ind. Comm.	F Salt River Pima	G Menominee	H Cherokee
Domestic Abuse Code	Yes. See Fort Belknap Indian Community Domestic Abuse Ordinance		Ord. No. 93-21	Cherokee Nation Code, tit. 22, § 60 et seq.
Mandatory Arrest	Fort Belknap Indian Com- munity, Domestic Abuse Ordinance, at 1.	S.R.DPS Gen. Order #89-25 p. 1 ¶ 1 & 2	Ord. No. 93-21, with some restrictions Sec. IV	
Issuance of R.O.- Standing O. of P.	Fort Belknap Indian Com- munity, Domestic Abuse Ordinance, Notice of Rights, at 3.		Ord. No. 93-21 (accused can apply for R.O. to secure re- lease), Sec. VI(B)	Cherokee Nation Code, tit. 22, § 60.2
Exclude Abusing Party	Fort Belknap Indian Com- munity, Domestic Abuse Ordinance, Notice of Rights, at 3.	p.2 ¶ 5 if no arrest		Cherokee Nation Code, tit. 22, § 60.3
Award Temp. Use & Poss. of Property/Child Support	Fort Belknap Indian Com- munity Domestic Abuse Ordinance, Notice of Rights at 3.			

TRIBAL RESPONSE/ACTION/INTERVENTION PROFILE ¹				
Tribe	E Fort Belknap Ind. Comm.	F Salt River Pima	G Menominee	H Cherokee
Abuser Held Until Arraigned	Fort Belknap Indian Community, Domestic Abuse Ordinance, 24-hr. hold		Ord. No. 93-21 (up to 36 hrs, excl. wknds & holidays), Sec. VI	
Mandatory Dom. Viol. Program			Ord. No. 93-21, Sec. VII	
Hosp. Reports Mandatory				
Educ'l/Counsel'g Program Mandatory	Fort Belknap Indian Community, Domestic Abuse Ordinance, Penalties (c), at 4.			Cherokee Nation Code tit. 22, § 60.- 6(E) (Counseling <i>not</i> mandatory)
Shelter	Fort Belknap Indian Community, Domestic Abuse Ordinance, Notice of Rights			

TRIBAL RESPONSE/ACTION/INTERVENTION PROFILE ¹					
Tribe	E Fort Belknap Ind. Comm.	F Salt River Pima	G Menominee	H Cherokee	
Elder Abuse Code				Cherokee Nation Code tit. 22, § 60.1(2) included in DV Code	
Crim. Code Provisions Utilized		Yes	Ord. No. 87-14, Harassment, Restraining Orders and Injunctions		
Comments				Cherokee Nation Code tit. 22, forms of Order incl. § 60.2(B)	
Dom. Violence/Abuse Defined	Fork Belknap Indian Community, Domestic Abuse Ordinance, Def.(a)		Ord. No. 93-21, Sec. III(A)	Cherokee Nation Code tit. 22, § 60.1.1	

TRIBAL RESPONSE/ACTION/INTERVENTION PROFILE ¹				
Tribe	E Fort Belknap Ind. Comm.	F Salt River Pima	G Menominee	H Cherokee
Persons Protected	Fort Belknap Indian Community, Domestic Abuse Ordinance, Def. (b) & (c)	P. 1 ¶ 1. ¶ 2	Ord. No. 93-21, Sec. III(A)	Cherokee Nation Code tit. 22, § 60.1.2 restricted to adults

* Relief available under Temporary Restraining Orders/Restraining Orders.

¹ This is a comparison of some of the provisions of the tribal codes reviewed. Information on elder abuse codes and shelters is not comprehensive. It is based on code provisions or information provided to the authors.

TRIBAL RESPONSE/ACTION/INTERVENTION PROFILE ¹				
Tribe	I Blackfeet Tribe	J Navajo	K Zuni	L Jicarilla
Domestic Abuse Code		+ § 1601 et. seq.	Zuni, N.M., Ord. No. 52 (Oct. 24, 1991)	JATC, tit. 3, ch. 5
Mandatory Arrest		+ For Viol. P.O. § 1663(a)(2)	For viol. of a R.O.	JATC, tit. 3, ch. 5, Sec 2(F) & Sec. 4; Sec.11(B)-Viol of a R.O.
Issuance of R.O. /Standing O. of P.		+* § 1660(1)	Zuni, N.M., Ord. No. 52 (Oct. 24, 1991)	JATC, tit. 3, ch. 5, Sec. 5(A) Sec. & (Civil)
Exclude Abusing Party		+* § 1660(2)		*JATC, tit. 3, ch. 5, Sec. 5(A), 6(C)(2)
Award Temp. Use & Poss. of Property-Child Support		+* §§ 1660(5)-(9) (11) (12)		JATC, tit. 3, ch. 5, Sec. 6(C) 4&6
Abuser Held Until Arraigned				JATC, tit. 3, ch. 5, Sec. 4(II)

TRIBAL RESPONSE/ACTION/INTERVENTION PROFILE ¹				
Tribe	I Blackfeet Tribe	J Navajo	K Zuni	L Jicarilla
Mandatory Dom. Viol. Program				JATC, tit. 3, ch. 5, Sec. 5(D)
Hosp. Reports Mandatory				JATC, tit. 3, ch. 5, Sec. 12 (others req'd to report)
Educ'l/Counsel'g Program Mandatory	Yes	+ * § 1600(13) Not Mand. - Both Parties		Yes
Shelter	Yes			
Elder Abuse Code				JATC, tit. 3, ch. 5, Sec. 1; Sec. 1(D)
Crim. Code Provisions Utilized				
Comments	Info. obtained from NIJC packet-VOCA grantees P.5 Montana	Rules for DV Proceed- ings; Broad def. of DV		Elderly included in protections of DV Code

TRIBAL RESPONSE/ACTION/INTERVENTION PROFILE ¹				
Tribe	I Blackfeet Tribe	J Navajo	K Zuni	L Jicarilla
Dom. Violence/ Abuse Defined		+ Navajo Rules for Domestic Violence Proceed., Rule 1.5-Ref. to Navajo C.L. § 1605(a) (10 acts self def. not incl.)	Zuni, N.M., Ord. No. 52 (Oct. 24, 1991)	JATC, tit. 3, ch. 5, Sec. 2(A)&(C) Sec. 3
Persons Protected		+ § 1605(b) very broad Rule 1.5	Zuni, N.M., Ord. No. 52 (Oct. 24, 1991)	JATC, tit. 3, ch. 5, Sec. 2(E)

* Relief available under Temporary Restraining Orders/Restraining Orders.

+ NAVAJO TRIB. CODE, tit. 9.

¹ This is a comparison of some of the provisions of the tribal codes reviewed. Information on elder abuse codes and shelters is not comprehensive. It is based on code provisions or information provided to the authors.

TRIBAL RESPONSE/ACTION/INTERVENTION PROFILE ¹				
Tribe	M Standing Rock Sioux Tribe	N Pascua-Yaqui Tribe		
Domestic Abuse Code	Council Res. No. 30-90; Ord. No. 133	Pascua-Yaqui Trib. Code, Domestic Vio- lence, §§ 11-1101 et seq.		
Mandatory Arrest	Standing Rock Sioux Trib. Code, tit. XXV, § 25-104 (1990).			
Issuance of R.O.- Standing O. of P.	Standing Rock Sioux Trib. Code, tit. XXV, §§ 25-108, 25-109- Temp. PO (1990).	Pascua-Yaqui Trib. Code, Domestic Vio- lence § 11-1103		
Exclude Abusing Party	Standing Rock Sioux Trib. Code, tit. XXV, §§ 25-108(D)(2), 25- 109(B)(2) (1990).	Pascua-Yaqui Trib. Code, Domestic Vio- lence, § 11-1103(D)(2) (for any relief needed to protect victim, see § 1103(D)(4))		

TRIBAL RESPONSE/ACTION/INTERVENTION PROFILE ¹				
Tribe	M Standing Rock Sioux Tribe	N Pascua-Yaqui Tribe		
Award Temp. Use & Poss. of Property/Child Support	Standing Rock Sioux Trib. Code, tit. XXC, §§ 25-108(3), 25-108(5), 25-108(6), 25-109(B)(3) (1990).			
Abuser Held Until Arraigned	Standing Rock Sioux Trib. Code, tit. XXV, § 25-105 (1990) (Mand. cooling off)			
Mandatory Dom. Viol. Program				
Hosp. Reports Mandatory	Standing Rock Sioux Trib. Code, tit. XXV, § 25-110 (1990) (Written) Others required to report			

TRIBAL RESPONSE/ACTION/INTERVENTION PROFILE ¹				
Tribes	M Standing Rock Sioux Tribe	N Pascua-Yaqui Tribe		
Educ'l/Counsel'g Program Mandatory	Standing Rock Sioux Trib. Code, tit. XXV, § 25-116(B) (1990) (3rd offense)			
Shelter	Yes			
Elder Abuse Code				
Crim. Code Provisions Utilized				
Comments	Requires keeping statistics	Pascua-Yaqui Trib. Code, Domestic Vio- lence, § 11-1102 (G) (allows for Probation of accused)		

TRIBAL RESPONSE/ACTION/INTERVENTION PROFILE ¹			
Tribe	M Standing Rock Sioux Tribe	N Pascua-Yaqui Tribe	
Dom. Violence/Abuse Defined	Standing Rock Sioux Trib. Code, tit. XXV, §§ 25-102(A),(D) & (E), 25-103 (1990)	Pascua-Yaqui Trib. Code, Domestic Vio- lence, § 11-1102(A)	
Persons Protected	Standing Rock Sioux Trib. Code, tit. XXV, § 25-102(C) (1990).	Pascua-Yaqui Trib. Code, Domestic Vio- lence, § 11-1102(A) "persons of opposite sex"	

¹ Relief available under Temporary Restraining Orders/Restraining Orders.

² This is a comparison of some of the provisions of the tribal codes reviewed. Information on elder abuse codes and shelters is not comprehensive. It is based on code provisions or information provided to the authors.

APPENDIX B

COMPARISON OF TRIBAL LAW WITH STATE LAW
"PARTIES PROTECTED"

CHART 1

	Zuni ¹	Jicarilla Apache ²	Navajo ³	New Mexico ⁴	Utah ⁵	Arizona ⁶	Pascua- Yaqui ⁷
Terms	"Adult" "Person"	"Family or Household Member"	"Victim"	"Household Member"***	"Cohabitant" ****	"Children" "Victim"	"Children" "Victim"
Former or Present Legal Mates	Adult Spouse Adult Former Spouse	Spouse Former Spouse	Member or former member of abuser's household. Anyone current- ly or previously involved in an intimate rela- tionship with abuser.*	Spouse Former Spouse	Spouse Former Spouse	Victim and defendant's relationship is one of: Marriage Former marriage	Victim and defendant's relationship is one of: Marriage Former marriage

	Zuni ¹	Jicarilla Apache ²	Navajo ³	New Mexico ⁴	Utah ⁵	Arizona ⁶	Pascua- Yaqui ⁷
Relatives by Blood or Marriage		Person related by blood. Person related by an existing or prior mar- riage.	Relative Clan member Offspring of abuser	Family Member Relative Child	Person related by blood or mar- riage. Child residing with a cohabitant.	Victim and defendant or defendant's spouse related by consan- guinity or affinity to second de- gree.	Victim and defendant or defendant's spouse relat- ed by con- sanguinity or affinity to second de- gree.
Co-Parents	Person with whom offender has a child.	Person with whom the person has a child in com- mon regard- less of mar- riage or co- habitation.	Anyone cur- rently or previ- ously involved in an intimate relationship with abuser.**	Co-parent of a child	Person who has one or more chil- dren in common with the other party.	Victim and defendant have child in common.	

	Zuni ¹	Jicarilla Apache ²	Navajo ³	New Mexico ⁴	Utah ⁵	Arizona ⁶	Pascua-Yaqui ⁷
Other	Adults formerly/ presently residing together. Person with whom offender has had a relationship.	Person who resides or formerly resided with the person.	Member/former member of abuser's household or immediate residence area. Anyone currently or previously involved in an intimate relationship with abuser.	Person with whom petitioner has had a continuing personal relationship.	Person presently or formerly living as if a spouse to the other party. Person resides or has resided in the same residence.	Persons of opposite sex residing or having resided in same household. Victim or defendant pregnant by other party. Child under age 15.	Persons of the opposite sex residing or having resided in the same household. Minor under 15 years of age.

Zuni ¹	Jicarilla Apache ²	Navajo ³	New Mexico ⁴	Utah ⁵	Arizona ⁶	Pascua-Yaqui ⁷
		Any person who interacts with abuser in an employment, academic, recreational, religious, social or other setting. Elderly person. Vulnerable person, including physically disabled and impaired.				

(Both of these broad categories would include former or present legal mates.)

** (These broad category would include co-parents of a child.)

*** (Cohabitation is not necessary.)

**** (Person must be emancipated or 16 years or older. Term does not include relationship of natural parent, adoptive parent or step-parent to a minor.)

¹ Zuni, N.M., Ordinance 52 (Oct. 24, 1991).

² JACARILLA TRIB. CODE tit. 3, ch. 5, § 2(E) (1992).

³ NAVAJO TRIB. CODE tit. 9, § 1605 (b)(1)-(7) (1993).

⁴ N.M. STAT. ANN. § 40-13-2(D) (Michie Supp. 1994).

⁵ UTAH CODE ANN. § 30-6-1 (2)(a)-(e) (1995).

⁶ ARIZ. REV. STAT. ANN. § 13-3601 (A) (West Supp. 1994).

⁷ PASCUA-YAQUI TRIB. CODE, DOMESTIC VIOLENCE, § 11-1101(A), 11-1102(A).

COMPARISON OF TRIBAL LAW WITH STATE LAW
 "PARTIES PROTECTED"
CHART 2

	Ft. Belknap Indian Comm. ⁸	Standing Rock Sioux ⁹	North Dakota ¹⁰	South Dakota ¹¹	Oglala Sioux ¹²	Rosebud Sioux ¹³
Terms	"Family Member"	"Family or Household Member"	"Family or Household Member"	"Family or Household Member"	"Person"	"Family or Household Member"
Former or Present Legal Mates	Spouse Former Spouse	Spouse Former Spouse	Spouse Former Spouse	Spouse Former Spouse	Covered by broader categories below.	Spouse Former Spouse
Relatives by Blood, Marriage or Law	Adult person related by blood or marriage.	Family member Parent Child Persons related by blood or marriage.	Family member Parent Child Persons related by blood or marriage.	Persons related by consanguinity, adoption or law.	Family member (Sec. 99.2.5(a) and Sec. 99.2.7(g) - order of protection)	Relative Adult or elderly person related by marriage.
Co-Parents		Persons who have a child in common whether they have lived together or are married.	Persons who have a child in common regardless of whether they have lived together or are/- were married.	Persons who have a child together.		

	Ft. Belknap Indian Comm. ⁸	Standing Rock Sioux ⁹	North Dakota ¹⁰	South Dakota ¹¹	Oglala Sioux ¹²	Rosebud Sioux ¹³
Other	Any person residing in the home dependent upon the head of household (elders/children).	Persons in a dating relationship. Persons who presently or formerly resided together. Any other person with a sufficient relationship as determined by court (for issuance of Dom. Violence Prot. Order)	Persons in a dating relationship. Persons who presently or formerly resided together. Any other person with a sufficient relationship as determined by court (for issuance of Dom. Prot. Order).	Persons living in same household. Persons who have lived together.	Persons residing or formerly residing together. (Sec. 99 2.3(a) & (d) - Mandatory Arrest prov.) Household Member (Sec. 99.- 2.5.(a) Sec. 99.- 2.7.(g) - Order of Protection)	Adult or elderly person residing/formerly resided in residence.

⁸ FORT BELKNAP INDIAN COMMUNITY, DOMESTIC ABUSE ORDINANCES, DEFINITIONS (c) (1989).

⁹ STANDING ROCK SIOUX TRIB. CODE tit. XXV, § 25-102 (c) (1990).

¹⁰ N.D. CENT. CODE § 14-07.1-01.4 (Michie Supp. 1995).

¹¹ S.D. CODIFIED LAWS ANN. § 25-10-1 (2) (Supp. 1989).

¹² OGLALA SIOUX, DOMESTIC ABUSE CODE §§ 99.2.3 (a), (d), 99.2.5 (a), 99.2.7 (g).

¹³ ROSEBUD SIOUX, DOMESTIC ABUSE ORDINANCE, ch. 38, § 1(A).

COMPARISON OF TRIBAL LAW WITH STATE LAW
 "PARTIES PROTECTED"
 CHART 3

	Menominee ¹⁴	Wisconsin ¹⁵ (Parties protected under criminal Dom. Abuse provisions)	Wisconsin ¹⁶ (Parties protected for purposes of Dom. Abuse restraining orders and injunctions)
Terms	Not Applicable	Not Applicable	"Adult family or household member"
Former or Present Legal Mates	Spouse Former Spouse	Spouse Former Spouse	Spouse Former Spouse
Relatives by Blood, Marriage or Law			Person related by consanguinity to another person. * Parent Child
Co-Parents	* Adult with whom the person has created a child.	Adult with whom person* has a child in common.	Adult with whom the person* has a child in common.

	Menominee ¹⁴	Wisconsin ¹⁵ (Parties protected under criminal Dom. Abuse provisions)	Wisconsin ¹⁶ (Parties protected for purposes of Dom. Abuse restraining orders and injunctions)
Other	Adult presently or formerly residing with the person.*	Adult with whom person* re- sides or formerly resided.	Person currently/formerly residing with another person.*

* person refers to adult engaged in domestic violence or domestic abuse.

¹⁴ MENOMINEE NATION, ORDINANCE NO. 93-21, DOMESTIC VIOLENCE § III A (1993).

¹⁵ WIS. STAT. ANN. § 968.075 (1)(a) (West Supp. 1994).

¹⁶ WIS. STAT. ANN. §§ 813.12 (a)-(c) (West Supp. 1994).

COMPARISON OF TRIBAL LAW WITH STATE LAW
 "PARTIES PROTECTED"

CHART 4

	Crow ¹⁷	Montana ¹⁸
Terms	"Family member or household member"	"Family member or partner"
Former or Present Legal Mates	Spouse	Spouse Former Spouse
Relatives by Blood, Marriage or Law	Adult person related by marriage.	Mother, father, children, brother, sister and other past or present family members of a household, including relationships created by adoption or remarriage regardless of age or residency in same household.
Co-Parents		
Other	Adult person who resides or formerly resided in residence.	Persons previously or currently in a dating or ongoing intimate relationship with the opposite sex.

¹⁷ CROW, DOMESTIC ABUSE CODE § 3(c) (1991).

¹⁸ MONT. CODE ANN. §§ 45-5-206 (2)(a)-(b) (1993).

COMPARISON OF TRIBAL LAW WITH STATE LAW
"PARTIES PROTECTED"
CHART 5

	Cherokee ¹⁹	Oklahoma ²⁰
Terms	"Family or household members"	"Family or household member"
Former or Present Legal Mates	Spouses Former Spouses	Spouse Ex-spouse
Relatives by Blood, Marriage or Law	Parents Children Persons otherwise related by blood or marriage.	Parents Children Person otherwise related by blood or marriage.
Co-Parents		Biological parents of the same child, regardless of marital status or whether they lived together at any time.
Other	Persons living in the same household or who formerly lived in the same household, including elderly and handicapped.	Present spouse of ex-spouse, persons living/formerly living in the same household. Elderly and handicapped.

- ¹⁹ CHEROKEE NATION TRIB. CODE tit. 22, § 60.1 (2).
²⁰ OKLA. STAT. ANN. tit. 22, § 60.1 (4) (West Supp. 1995).

APPENDIX C
COMPARISON OF TRIBAL LAW WITH STATE LAW
"BEHAVIOR PROSCRIBED"
CHART I

Zuni ¹	Jicarilla Apache ²	Navajo ³	New Mexico ⁴	Utah ⁵	Arizona ⁶	Pasqua-Yaqui ⁷
"Domestic Violence" includes:	"Abuse" includes:	"Domestic Abuse" includes:	"Domestic Abuse" includes:	"Abuse" includes:	"Domestic Violence" includes:	"Domestic Abuse" includes:
Any act or incident which is a crime under the Zuni Tribal Code and which results in physical harm,	<ul style="list-style-type: none"> - Infliction of bodily harm - bodily injury - sexual assault - Infliction of the fear of 	<ul style="list-style-type: none"> - assault - battery - threatening - coercion - confinement - damage to property 	<ul style="list-style-type: none"> - physical harm - severe emotional distress - bodily injury - bodily assault 	<ul style="list-style-type: none"> - attempting to cause or intentionally or knowingly causing physical harm 	<ul style="list-style-type: none"> - dangerous crime against children - 2nd deg. murder⁸ - agg. assault resulting in serious physical injury w/ deadly weapon or instr. 	<ul style="list-style-type: none"> - dangerous crime against children - 2nd deg. murder - agg. assault resulting in serious physical injury w/ deadly weapon or instr.

Zuni ¹	Jicarilla Apache ²	Navajo ³	New Mexico ⁴	Utah ⁵	Arizona ⁶	Pasqua-Yaqui ⁷
bodily injury, or assault, or a threat which places a person in reasonable fear of imminent physical harm or bodily injury.	<ul style="list-style-type: none"> · imminent phys. harm or · bodily injury · sexual assault <p>Includes, but not limited to the following criminal offenses under Jicarilla Apache Code</p> <ul style="list-style-type: none"> - assault - assault & battery 	<ul style="list-style-type: none"> - emotional abuse - harassment - sexual abuse - other conduct that constitutes an offence or tort under Navajo Law 	<ul style="list-style-type: none"> - threat causing imminent fear of bodily injury by any household member - criminal trespass - criminal damage to property - repeatedly driving by residence or workplace - telephone harassment 	<ul style="list-style-type: none"> - intentionally placing another in fear of imminent physical harm 	<ul style="list-style-type: none"> · sexual assault · molestation of child · sexual conduct with minor · commercial sexual exploitation · sexual exploitation of minor 	<ul style="list-style-type: none"> · sexual assault · molestation of child · sexual contact with minor · commercial sexual exploitation of a minor · sexual exploitation of a minor

Zuni ¹	Jicarilla Apache ²	Navajo ³	New Mexico ⁴	Utah ⁵	Arizona ⁶	Pasqua-Yaqui ⁷
			<ul style="list-style-type: none"> - stalking - harassment - harm or threatened harm to child 		<ul style="list-style-type: none"> · child abuse · kidnapping · sexual abuse · taking a child for prostit. · child prostit. · involving minor in drug offense · cont. sexual abuse - endangerment⁹ - threatening or intimidating 	<ul style="list-style-type: none"> · child abuse · kidnapping · sexual abuse · taking child for purp. of prostit. · child prostit. · involving or using minors in drug off. - physical injury - serious phys. inj. - threatening or intimidating

Zuni ¹	Jicarilla Apache ²	Navajo ³	New Mexico ⁴	Utah ⁵	Arizona ⁶	Pasqua-Yaqui ⁷
					<ul style="list-style-type: none">- assault- aggravated assault- custodial interference¹⁰- unlawful imprisonment- kidnapping- criminal trespass- 1st-3rd¹¹- criminal damage¹²- disorderly conduct¹³- child or vulnerable adult abuse¹⁴	<ul style="list-style-type: none">- assault- aggravated assault- custodial interference- unlawful imprisonment- kidnapping- criminal trespass- disorderly conduct

¹ Zuni, N.M., Ordinance 52 (Oct. 24, 1991).

² JICARILLA APACHE TRIB. CODE tit. 3, ch. 5, § 2(a).

³ NAVAJO TRIB. CODE tit. 9, § 1605 (a)(1)(A)-(J) (1993).

⁴ N.M. STAT. ANN. §§ 40-13-2 (c)(1)-(11) (Michie 1994).

- ⁵ UTAH CODE ANN. § 30-6-1(1) (Supp. 1995).
- ⁶ ARIZ. REV. STAT. ANN. §§ 13-3601(A), 13-604.01 (A), 13-604.01 (B) (West Supp. 1994).
- ⁷ PASCUA-YAQUI TRIB. CODE, DOMESTIC VIOLENCE, §§ 11-1101(A)-(L).
- ⁸ ARIZ. REV. STAT. ANN. § 13-604.01(A), (B) (West Supp. 1994).
- ⁹ *Id.* § 13-1201-1204(A).
- ¹⁰ *Id.* § 13-1302-1304(A).
- ¹¹ *Id.* §§ 13-1502(A), 13-1504(A).
- ¹² *Id.* § 13-1602(A).
- ¹³ ARIZ. REV. STAT. ANN. § 13-2904(A) (West Supp. 1989).
- ¹⁴ *Id.* § 13-3623 (A) (West Supp. 1994).

COMPARISON OF TRIBAL LAW WITH STATE LAW
"BEHAVIOR PROSCRIBED"

CHART 2

Ft. Belknap Indian Comm. ¹⁵	Standing Rock Sioux ¹⁶	North Dakota ¹⁷	South Dakota ¹⁸	Oglala Sioux ¹⁹	Rosebud Sioux ²⁰
"Abuse" includes:	"Domestic Violence" includes:	"Domestic Violence" includes:	"Domestic Abuse" includes:	"Abuse" includes:	"Domestic Abuse" includes:
<ul style="list-style-type: none"> - physical harm - bodily injury - assault - infliction of fear of imminent: · harm · bodily injury · assault 	<ul style="list-style-type: none"> - physical harm - bodily injury - assault - infliction of fear of imminent: · physical harm · bodily injury · assault 	<ul style="list-style-type: none"> - physical harm - bodily injury - assault - infliction of fear of imminent: · physical harm · bodily injury · assault 	<ul style="list-style-type: none"> - physical harm - bodily injury - attempts to cause: · physical harm · bodily injury - infliction of fear of imminent: · physical harm · bodily injury · assault 	<ul style="list-style-type: none"> - physical harm - bodily injury - assault - infliction of fear of imminent: · physical harm · bodily injury · assault 	<ul style="list-style-type: none"> - purposely or knowingly causes: · bodily injury · apprehension of bodily injury

¹⁵ FORT BELKNAP INDIAN COMMUNITY, DOMESTIC ABUSE ORDINANCES, DEFINITIONS (a) (1989).

¹⁶ STANDING ROCK SIOUX TRIB. CODE, tit. XXV, § 25-102(a) (1990).

¹⁷ N.D. CENT. CODE § 14-07.1-01.2 (Michie Supp. 1995).

¹⁸ S.D. CODIFIED LAWS ANN. § 25-10-1(1) (Supp. 1989).

¹⁹ OGLALA SIOUX, DOMESTIC ABUSE CODE § 99.2.2(a).

²⁰ ROSEBUD SIOUX, DOMESTIC ABUSE ORDINANCE, ch. 38, §§ 2(1), 2(2).

COMPARISON OF TRIBAL LAW WITH STATE LAW
"BEHAVIORS PROSCRIBED"

CHART 3

Menominee ²¹	Wisconsin ²²
<p style="text-align: center;">"Domestic Violence" "Domestic Abuse" include</p> <ul style="list-style-type: none"> - intentional infliction of · physical pain · physical injury · illness - intentional impairment of physical condition - physical action causing reasonable fear of imminent · physical pain · physical injury · illness - impairment of physical condition 	<p style="text-align: center;">"Domestic Abuse" includes</p> <ul style="list-style-type: none"> - intentional infliction of · physical pain · physical injury · illness - intentional impairment of physical condition - sexual assault - 1st, 2nd, 3rd degree²³ - threat to engage in intentional infliction of²⁴ · physical pain · physical injury · illness

²¹ MENOMINEE NATION, ORDINANCE NO. 93-21, DOMESTIC VIOLENCE § III(A)(1)-(3) (1993).

²² WIS. STAT. ANN. § 968.075 (1)(a)(1)-(2) (West Supp. 1994).

²³ *Id.* §§ 940.225(1), 940.225(2), 940.225(3).

²⁴ *Id.* § 968.075(1)-(4).

COMPARISON OF TRIBAL LAW WITH STATE LAW
"BEHAVIOR PROSCRIBED"

CHART 4

Crow ²⁵	Montana ²⁶
"Abuse" includes <ul style="list-style-type: none">- physical harm- bodily harm- assault- infliction of fear of imminent- physical harm- bodily harm- bodily injury- assault	"Domestic Abuse" includes <ul style="list-style-type: none">- purposely or knowingly causes bodily injury- negligently causes bodily injury with a weapon in connection with a quarrel, fight or abusive behavior- purposely or knowingly causes reas. app. of bodily injury

²⁵ CROW, DOMESTIC ABUSE CODE, § 3(a) (1991).

²⁶ MONT. CODE ANN. § 45-206(1)(a)-(c) (1993).

COMPARISON OF TRIBAL LAW WITH STATE LAW
"BEHAVIOR PROSCRIBED"
CHART 5

Cherokee	Oklahoma
<p>"Domestic Abuse" includes</p> <ul style="list-style-type: none">- causing or attempting to cause serious physical harm- threatening another with imminent serious physical harm- includes, but not limited to:<ul style="list-style-type: none">· assault· battery· aggravated assault and battery	<p>"Domestic Abuse" includes</p> <ul style="list-style-type: none">- any act of physical harm- threat of imminent physical harm